DATED FROM July 66 FILE No. 20-3-1-6

TO Dec 31, 67 VOLUME No. 3

CLOSED VOLUME

DO NOT PLACE ANY CORRESPONDENCE ON THIS FILE

FOR SUBSEQUENT CORRESPONDENCE SEE:

FILE No. 20-3-1-6 VOLUME No. 4

PLEASE KEEP ATTACHED TO TOP OF FILE

CGSB 6-GP-31 PP&S CAT. NO. 3607

5179

DIARY
DIV. DIARY
FILE
TEL FILE

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
DEC. 28 1967	20-3-1-6	UNCLASS

FM/DE EXTERNAL OTT

TO/A	NO	PRECEDENCE
VIENNA	L-1218	ROUTINE
INFO COPENHAGEN		

REF

SUB/SUJ UN CONFERENCE ON THE LAW OF TREATIES

THE UN CONFERENCE ON LAW OF TREATIES IS TO TAKE PLACE IN VIENNA FROM MARCH 26 TO MAY 25, 1968. ALTHOUGH SIZE AND COMPOSITION OF UN DELEGATION HAVE NOT YET BEEN SUBMITTED FOR CABINET APPROVAL, IT IS ANTICIPATED THAT DELEGATION WILL CONSIST OF MR. M.H. WERSHOF AS HEAD AND TWO OR THREE OTHERS.

2. IN VIEW OF LIKELIHOOD OF CONSIDERABLE DEMAND FOR HOTEL ACCOMMODATION IN VIENNA DURING PERIOD IN QUESTION, GRATEFUL IF YOU COULD RESERVE ONE SUITE PLUS THREE SINGLE ROOMS FOR PERIOD MARCH 24 TO MAY 26 FOR USE OF DELEGATION.

DISTRIBUTION
LOCAL/LOCALE

NO STANDARD DONE IN DIV. FINANCE DIV.

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. J.S. STANFORD/JJ	LEGAL	2-5406	SIG. J.S. STANFORD

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

001085

Diary
Div. Diary
File

Legal Division/D.M. Stanford/jl

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: Finance Division

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: U.N. Conference on the Law of Treaties

SECURITY / Sécurité: UNCLASSIFIED

DATE: December 28, 1967

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	28

ENCLOSURES / Annexes

DISTRIBUTION

The 22nd Session of the U.N. General Assembly decided that the first session of an international conference on the law of treaties is to take place in Vienna from March 26 to May 25, 1968. We are now in the process of preparing a recommendation to Cabinet concerning the size and composition of the delegation. It is anticipated that the delegation will consist of Mr. M.H. Wershof, Canadian Ambassador to Denmark as Head of Delegation, plus two or three others. One of the other members may be Professor Hugh Lawford of Queen's University, Kingston, Ontario. The other member or members of the delegation will be officers of this Department and may be assigned from Ottawa or New York.

2. The second session of the conference, which will probably be of equal duration, is tentatively scheduled for the early part of 1969. You may wish to consider whether a per diem rate should be established for persons attending the conference.

3. We shall inform you as soon as Cabinet has approved the size and composition of the Canadian delegation.

D.S. STANFORD

Legal Division

Ext. 407D/ Bll.
[redacted]
(Admin. Services Div.)

001086

DIARY
DIV. DIARY
FILE
TEL FILE

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
DEC. 28 1967	20-3-1-6	UNCLASS

FM/DE EXTERNL OTT

	NO	PRECEDENCE
TO/A VIENNA	L-1218	ROUTINE
INFO COPENHAGEN		

REF

SUB/SUJ UN CONFERENCE ON THE LAW OF TREATIES

THE UN CONFERENCE ON LAW OF TREATIES IS TO TAKE PLACE IN VIENNA FROM MARCH 26 TO MAY 25, 1968. ALTHOUGH SIZE AND COMPOSITION OF CDN DELEGATION HAVE NOT YET BEEN SUBMITTED FOR CABINET APPROVAL, IT IS ANTICIPATED THAT DELEGATION WILL CONSIST OF MR. M.H. WERSHOF AS HEAD AND TWO OR THREE OTHERS.

2. IN VIEW OF LIKELIHOOD OF CONSIDERABLE DEMAND FOR HOTEL ACCOMMODATION IN VIENNA DURING PERIOD IN QUESTION, GRATEFUL IF YOU COULD RESERVE ONE SUITE PLUS THREE SINGLE ROOMS FOR PERIOD MARCH 24 TO MAY 26 FOR USE OF DELEGATION.

DISTRIBUTION
LOCAL/LOCALE NO STANDARD DOME IN DIV. FINANCE DIV.

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG. J.S. STANFORD/JI	LEGAL	2-5406	SIG. J.S. STANFORD

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

ACTION COPY

Mr. Stanford

20-3-1-6
28 | 27

FM COPEN DEC27/67 RESTR

TO TT EXTER 618 DE HAGUE

FOR GOTLIEB AND LEGAL DIV DE WERSHOF

LAW OF TREATIES CONFERENCE,VIENA MAR26-MAY25

JUST RECEIVED USSEAS LET DEC14 AND WILL BE DELIGHTED TO HEAD CANDEL IF CABINET APPROVES.PLEASE INFORM USSEA.

2.WILL PLAN TO ATTEND PRELIMINARY MTGS LDN JAN26-29 AND STRASBOURG FEB5-6.ADVISE IN DUE COURSE WHETHER ANY OTHER MEMBER OF CANDEL WILL ATTEND THESE.HAVING ACCEPTED INVITATION TO GALA GIVEN BY KING OF DENMARK JAN25 IN HONOUR OF DAUGHTERS WEDDING,I TRUST THAT IT WILL BE ACCEPTABLE FOR ME TO FLY LDN EARLY AM JAN26.

3.FROM MY VIENA EXPERIENCE I SUGGEST YOU IMMEDLY INSTRUCT EMB TO MAKE HOTEL RESERVATIONS.DESPITE SMALL SIZE OF CANDEL AND ECONOMY DRIVE I HOPE YOU CAN AUTHORIZE A SUITE SO THAT SITTING ROOM MAY BE AVAILABLE FOR CANDEL MTGS AND CONSULTATIONS''' OK

Mr. McCord
2-9339-
Finance Div

001088

Diary
Div. Diary
File √

20-3-1-6
28

OTTAWA, December 27, 1967.

Dear Hugh,

Further to my letter of December 21, I enclose a copy of the Report of the I.L.C. on the second part of its seventeenth session and on its eighteenth session.

Yours sincerely,

J. S. STANFORD

J.S. Stanford

Professor Hugh Lawford,
Faculty of Law,
Queen's University,
Kingston, Ontario.

Diary
Div. Diary
File

Legal Division/J. A. Stanford/41

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary
(through the Legal Adviser)

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Canadian Delegation to the Law of Treaties Conference

SECURITY / Sécurité: Restr.

DATE: December 22, 1967

NUMBER / Numéro:

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 28

ENCLOSURES / Annexes: ---

DISTRIBUTION

Attached are copies of CANDEL New York telegrams 4064 of December 16 and ~~4063~~ 4073 of December 21 from which it appears that the majority of countries in a position comparable to that of Canada who will be represented at the Conference on the Law of Treaties will be sending delegations of four persons, occasionally more.

2. If you agree, therefore, we shall prepare a memorandum to Cabinet, for signature by the Minister, recommending a Canadian delegation consisting of Mr. Wershof as Head of Delegation, plus three additional persons. These would be either three officers of the Department or two officers and Professor Lawford.

J. A. BEESLEY

Legal Division

Ext. 407D/ BII.

(Admin. Services Div.)

001090

Mr. Appleby
Mr. Stanford

FM CANDELNY DEC21/67 RESTR

TO EXTER 4173 PRIORITY

INFO HAGUE

TT COPEN DE HAGUE

REFOURTEL 4064 DEC15

LAW OF TREATIES CONFERENCE

IN FURTHER INFORMAL ENQUIRIES AS TO POSSIBLE COMPOSITION OF DELS TO VIENA CONFERENCE WE HAVE LEARNED THAT NETHERLANDS EXPECTS TO SEND A DEL OF FOUR HEADED BY RIPHAGEN LEGAL ADVISER TO MINISTRY WITH PROFESSOR STUYT HEAD OF TREATIES SECTION ONE OTHER FROM LEGAL DEPT AND PROBABLY HOUBEN OF MISSION IN NY.

2. COMPOSITION OF DANISH DEL IS NOT RPT NOT CERTAIN BUT IT IS EXPECTED THEY WILL SEND FOUR OR FIVE OFFICERS.

3. WE HAVE ALSO LEARNED THAT FRENCH DEL WILL BE HEADED BY PROFESSOR BRESSON AND WILL LIKELY CONSIST OF FOUR INCLUDING DANIEL HADOT OF MINISTRY.

20-3-1-6

FM CANDELNY DEC15/67 RESTR

TO EXTER 4064

INFO TT COPEN DE HAGUE

REF OURTEL4029

LAW OF TREATIES CONFERENCE

WE HAVE MADE INFORMAL INQUIRIES AMONG SELECTED OTHER MISSIONS IN NY AS TO POSSIBLE COMPOSITION OF THEIR COUNTRIES DELS TO VIENA CONFERENCE ON LAW OF TREATIES. MAJORITY ARE NOT RPT NOT YET INFORMED EITHER BTECAUSE INFO HAS NOT RPT NOT REACHED THEM OR BECAUSE DECISIOS HAVE YET TO BE TAKEN IN CAPITALS. IN FOLLOWING INFO SIZE REFERS IN ALL CASES TO OFFICER STAFF(INCLUDING SENIOR OFFICIALS FROM OTHER GOVT DEPTS AS WELL AS FOREIGN MINISTRIES AND ALSO ACADEMICS)AND NOT RPT NOT TO SUPPORTING PERS SUCH AS STENOS ETC.

2. USA DEL WILL BE LED BY AMBASSADOR RICHARD KEARNEY AND WILL CONSIST OF TOTAL OF TEN.

3. FRENCH DEL WILL PROBABLY CONSIST OF FOUR BUT NO RPT NO FINAL DECISION HAS BEEN TAKEN.

4. SWEDISH DEL WILL CONSIST OF AT LEAST FOUR LED BY HANS BLIX AND INCLUDING ONE SENIOR ACADEMIC AND ONE SENIOR LAWYER FROM DEPT OF JUSTICE AND PROBABLY A YOUNG LAWYER FROM FOREIGN MINISTRY.

5. UK DEL WILL PROBABLY CONSIST OF FOUR LED BY SIR FRANCIS VALLAT AND INCLUDING A SENIOR COUNSELLOR(SINCLAIR-DARWIN RANK)A FIRST SECRETARY(DAVID ANDERSON)AND PROBABLY ONE SPECIALIST FROM THEIR TREATY SECTION.

6. INDIAN DEL WILL CONSIST OF THREE OFFICERS FROM DELHI(KHRISHNA RAO MAY GO BUT DOES NOT RPT NOT WISH TO)AND A FIRST AND A SECOND

...2

SECRETARY FROM THEIR MISSION IN VIENA OR ELSEWHERE IN EUROPE.

7. SEVERAL AFRICAN COUNTRIES SUCH AS GHANA AND CAMEROUN EXPECT TO SEND DELS OF A MINIMUM OF THREE BUT PREFERABLY FOUR.

8. ISRAEL(BECAUSE OF AN ACUTE SHORTAGE OF LEGAL PERS)MAY ONLY BE ABLE TO FIELD TWO OFFICERS.

9. AUSTRALIA AND NZ HAVE NO RPT NO IDEA AT LOCAL LEVEL OF SIZE AND COMPOSITION OF THEIR DELS. JPNSE MAY BE LED BY THEIR PERMREP AMB-ASSADOR TSUGUOKA BUT THIS AND FINAL SIZE STILL UNCERTAIN.

10. CONSENSUS OF THOSE CONCERNED WITH SUBJ HERE IS THAT IN VIEW OF NUMBER OF CTTEES AND PROBABILITY OF WORKING GROUPS IT WOULD BE DIFFICULT TO FUNCTION EFFECTIVELY WITH A DEL OF LESS THAN FOUR. WE WOULD HAZARD GUESS THAT WITH EXCEPTION OF AUSTRIA(WHICH INTENDS TO PROVIDE AN EXTREMELY LARGE DEL FOR OBVIOUS REASONS)AVERAGE DEL FROM MORE ADVANCED COUNTRIES WILL BE FOUR OR FIVE OFFICERS.

Legal Division/J.S. Stanford/jl

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary (through the Legal Adviser)

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Canadian Delegation to the Law of Treaties Conference

SECURITY / Sécurité: RESTRICTED

DATE: December 22, 1967

NUMBER / Numéro:

FILE / DOSSIER — OTTAWA: 20-3-1-6 — MISSION: 28

ENCLOSURES / Annexes: --

DISTRIBUTION

Attached are copies of CANDEL New York telegrams 4064 of December 15 and 4173 of December 21 from which it appears that the majority of countries in a position comparable to that of Canada who will be represented at the Conference on the Law of Treaties will be sending delegations of four persons, occasionally more.

2. If you agree, therefore, we shall prepare a memorandum to Cabinet, for signature by the Minister, recommending a Canadian delegation consisting of Mr. Bershof as Head of Delegation, plus three additional persons. These would be either three officers of the Department or two officers and Professor Lawford.

Alan Beesley
Legal Division

Mr. Codrieux.

I doubt if we can function on less than 3 officers, or 3 individuals.

A.S.S.

Ext. 407A/Bil.

22.12.36(us)

ACTION COPY

Jul 22/12 re treaty codification

Mr. Stanford

FM CANDELNY DEC21/67 RESTR

TO EXTER 4173 PRIORITY

INFO HAGUE

TT COPEN DE HAGUE

REFOURTEL 4064 DEC15

20-3-1-6
28 | 44

LAW OF TREATIES CONFERENCE

IN FURTHER INFORMAL ENQUIRIES AS TO POSSIBLE COMPOSITION OF DELS TO VIENA CONFERENCE WE HAVE LEARNED THAT NETHERLANDS EXPECTS TO SEND A DEL OF FOUR HEADED BY RIPHAGEN LEGAL ADVISER TO MINISTRY WITH PROFESSOR STUYT HEAD OF TREATIES SECTION ONE OTHER FROM LEGAL DEPT AND PROBABLY HOUBEN OF MISSION IN NY.

2. COMPOSITION OF DANISH DEL IS NOT RPT NOT CERTAIN BUT IT IS EXPECTED THEY WILL SEND FOUR OR FIVE OFFICERS.

3. WE HAVE ALSO LEARNED THAT FRENCH DEL WILL BE HEADED BYPROFESSOR BRESSON AND WILL LIKELY CONSIST OF FOUR INCLUDING DANIEL HADOT OF MINISTRY.

ACTION COPY

22/12 ILC treaty codification

Mr. Beesley
Mr. Stanford

FM CANDELNY DEC15/67 RESTR

TO EXTER 4064

INFO TT COPEN DE HAGUE

REF OURTEL4029

LAW OF TREATIES CONFERENCE

WE HAVE MADE INFORMAL INQUIRIES AMONG SELECTED OTHER MISSIONS IN NY AS TO POSSIBLE COMPOSITION OF THEIR COUNTRIES DELS TO VIENA CONFERENCE ON LAW OF TREATIES.MAJORITY ARE NOT RPT NOT YET INFORMED EITHER BTECAUSE INFO HAS NOT RPT NOT REACHED THEM OR BECAUSE DECISIOS HAVE YET TO BE TAKEN IN CAPITALS.IN FOLLOWING INFO SIZE REFERS IN ALL CASES TO OFFICER STAFF(INCLUDING SENIOR OFFICIALS FROM OTHER GOVT DEPTS AS WELL AS FOREIGN MINISTRIES AND ALSO ACADEMICS)AND NOT RPT NOT TO SUPPORTING PERS SUCH AS STENOS ETC.

2.USA DEL WILL BE LED BY AMBASSADOR RICHARD KEARNEY AND WILL CONSIST OF TOTAL OF TEN.

3.FRENCH DEL WILL PROBABLY CONSIST OF FOUR BUT NO RPT NO FINAL DEC-ISION HAS BEEN TAKEN.

4.SWEDISH DEL WILL CONSIST OF AT LEAST FOUR LED BY HANS BLIX AND INCLUDING ONE SENIOR ACADEMIC AND ONE SENIOR LAWYER FROM DEPT OF JUSTICE AND PROBABLY A YOUNG LAWYER FROM FOREIGN MINISTRY.

5.UK DEL WILL PROBABLY CONSIST OF FOUR LED BY SIR FRANCIS VALLAT AND INCLUDING A SENIOR COUNSELLOR(SINCLAIR-DARWIN RANK)A FIRST SECRETARY(DAVID ANDERSON)AND PROBABLY ONE SPECIALIST FROM THEIR TREATY SECTION.

6.INDIAN DEL WILL CONSIST OF THREE OFFICERS FROM DELHI(KHRISHNA RAO MAY GO BUT DOES NOT RPT NOT WISH TO)AND A FIRST AND A SECOND

...2

SECRETARY FROM THEIR MISSION IN VIENA OR ELSEWHERE IN EUROPE.

7. SEVERAL AFRICAN COUNTRIES SUCH AS GHANA AND CAMEROUN EXPECT TO SEND DELS OF A MINIMUM OF THREE BUT PREFERABLY FOUR.

8. ISRAEL(BECAUSE OF AN ACUTE SHORTAGE OF LEGAL PERS)MAY ONLY BE ABLE TO FIELD TWO OFFICERS.

9. AUSTRALIA AND NZ HAVE NO RPT NO IDEA AT LOCAL LEVEL OF SIZE AND COMPOSITION OF THEIR DELS. JPNSE MAY BE LED BY THEIR PERMREP AMB-ASSADOR TSUGUOKA BUT THIS AND FINAL SIZE STILL UNCERTAIN.

1Ø. CONSENSUS OF THOSE CONCERNED WITH SUBJ HERE IS THAT IN VIEW OF NUMBER OF CTTEES AND PROBABILITY OF WORKING GROUPS IT WOULD BE DIFFICULT TO FUNCTION EFFECTIVELY WITH A DEL OF LESS THAN FOUR. WE WOULD HAZARD GUESS THAT WITH EXCEPTION OF AUSTRIA(WHICH INTENDS TO PROVIDE AN EXTREMELY LARGE DEL FOR OBVIOUS REASONS)AVERAGE DEL FROM MORE ADVANCED COUNTRIES WILL BE FOUR OR FIVE OFFICERS.

File
Diary
Div.Diary

Legal Div./J.S.Stanford/pdg

CONFIDENTIAL - BY AIR BAG

Ottawa, December 18, 1967

Dear Mr. Wershof,

Enclosed is the material referred to in Mr. Cadieux's letter of December 14 concerning the Law of Treaties conference. The material includes the ILC draft and commentary, written comments submitted by governments and international organizations and the record of the discussion in the Sixth Committee.

If there is any additional material you would like to have, please let me know and I shall send it along. Future material issued by the Secretariat as well as all future communications from New York and elsewhere on this subject will, of course, be referred to you as a matter of routine.

Yours sincerely,

J. S. STANFORD

J.S. Stanford

Max H. Wershof, Q.C., Esq.,
Ambassador,
Canadian Embassy,
Copenhagen, Denmark.

December 11, 1967.

NOTE TO MR. BEESLEY

Memorandum to Cabinet on the Treaty Conference Delegation

This morning I told you that the Memorandum to the Minister had gone forward on Friday and you informed Mr. Gotlieb accordingly. I now find that the memorandum was being retyped on Friday and did not go forward as I indicated. I have informed Mr. Gotlieb that the memorandum is still in the Division and that the information which you gave to him was based on wrong information which I gave to you.

Mr. Gotlieb has suggested that the memorandum to the Minister and memorandum to Cabinet be held in the Division until the letter to Mr. Wershof had been prepared and that the whole package could go up on Friday for Mr. Cadieux's attention when he returns. I attach a memorandum to Cabinet and Memorandum to the Minister which are revised for your approval. If you find this material in order, could you please return this material to me and I will hold it pending preparation of the letter from Mr. Cadieux to Mr. Wershof which I am now drafting.

J.S.S.

Re last sentence of memo to Cabinet - Is not too clear whether it's a total of 2 or 3 advisers which is envisaged

Redraft last sentence

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CONF.39/1
20 December 1967

ORIGINAL: ENGLISH

UNITED NATIONS CONFERENCE ON
THE LAW OF TREATIES

PROVISIONAL AGENDA

First session (1968)

1. Opening of the Conference by the Secretary-General
2. Election of the President
3. Adoption of the agenda
4. Adoption of the rules of procedure
5. Election of Vice-Presidents
6. Election of the Chairman of the Committee of the Whole
7. Election of the Chairman of the Drafting Committee
8. Appointment of the Credentials Committee
9. Appointment of other members of the Drafting Committee
10. Organization of work
11. (a) Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966

Second session (1969)

11. (b) Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966: reports of the first session of the Conference
12. Adoption of a convention and other instruments deemed appropriate, and of the Final Act of the Conference
13. Signature of the Final Act and of the convention and other instruments

---

67-31791

Diary
Div. Diary
File

Legal Division/J. S. Stanford/jl

20-3-1-6
28

OTTAWA, December 21, 1967.

Dear Hugh,

Enclosed is a copy of the Year Book of the I.L.C. for 1966. I believe you asked for Volume 2 of this report; however, I am informed that there is no Volume 2 but simply Part 2 of Volume 1. That is the document I am sending with this letter.

You asked for two additional documents, the report of the I.L.C. on the second part of its 17th Session and on its 18th Session and the publication "Laws and Practices of the U.N. Regarding the Conclusion of Treaties". I am told that both these documents are out of stock in New York at present. I have asked that copies be obtained for you as soon as they become available but I have no indication of when that is likely to be.

You indicated that you would like to come to Ottawa next week to discuss the preparation of the commentary with Alan Beesley and me. Alan will be away from the office next week and has therefore suggested that you come up the following week. I should be grateful therefore if you could let me know what day during the first week in January would be convenient for your trip to Ottawa.

As you requested, I have asked that a cheque for $500 be issued to you and mailed in time to reach you before December 31.

Best wishes for Christmas and the New Year.

Yours sincerely,

J.S. STANFORD

J.S. Stanford

Professor Hugh Lawford,
Faculty of Law,
Queen's University,
Kingston, Ontario.

Sonderabdruck aus *Reprinted from*

MAX-PLANCK-INSTITUT
FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT

ZEITSCHRIFT
FÜR AUSLÄNDISCHES
ÖFFENTLICHES RECHT
UND VÖLKERRECHT

Vol. 27 no. 3: Oct. 1967 - Special Number

LAW OF TREATIES

Comments on the ILC's 1966 Draft Articles

KOHLHAMMER

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Redaktion: 69 Heidelberg · Berliner Straße 48

Manuskriptsendungen (möglichst doppelt) und Besprechungsexemplare für die Zeitschrift werden an die Redaktion erbeten

Die Aufnahme von Beiträgen und Besprechungen geschieht unter der selbstverständlichen Voraussetzung, daß der Verfasser nicht denselben Gegenstand in einer anderen Veröffentlichung behandelt

Zitierweise: ZaöRV

Bezugsbedingungen für Bände 13 (1950) und folgende:

(wegen der Bände 1–12/1 wende man sich an Verlag W. de Gruyter, Berlin 30)

Abonnementspreis für den jeweils erscheinenden Band (vier Hefte und Registerheft): 88 DM. Noch lieferbare Einzelhefte aus zurückliegenden Bänden: 25 DM; Registerhefte: 10 DM; Nachdrucke vergriffener Hefte*): 32 DM. Abonnenten erhalten noch lieferbare Originalhefte zu einem um 20 % ermäßigten Preis.

Prix d'abonnement pour chaque volume à paraître (quatre cahiers et répertoire): 88 DM. Pour chaque cahier des années passées jusqu'à épuisement du stock: 25 DM; répertoires: 10 DM; réédition de cahiers épuisés*): 32 DM. Les abonnés ont droit à un prix réduit de 20 p. c. pour les cahiers originaux encore livrables.

Subscription price for the current volume (four issues and index): 88 DM. Single issues from old volumes still available: 25 DM; indexes: 10 DM; reprints of sold out issues*): 32 DM. Subscribers are granted a 20 % discount for available original copies.

El precio de suscripción para los corrientes volúmenes publicados (cuatro números e registros): 88 DM. Números sueltos atrasados: 25 DM; registros: 10 DM; reimpresiones de números agotados*): 32 DM. Los suscriptores obtendrán un precio reducido en un 20 % en ediciones originales todavia entregables.

*) 13/1; 14/1–2; 14/4; 15/1–3, 16/1; 16/3–4; 17/1; 17/2; 18/3; 19/1–3; 20/1–2; 21/1; 21/3.

VERLAG W. KOHLHAMMER GMBH STUTTGART

Name and address:

.....

.....

.....

.....

.....

.....

postcard

To
W. Kohlhammer Verlag
Postfach 747

7000 Stuttgart / Germany

Date: .....

Signature: .....

MAX-PLANCK-INSTITUT
FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Special number
vol. 27 nr. 3. October 1967

ZaöRV

LAW OF TREATIES

Critical studies (in English) on the 1966 draft articles adopted by the International Law Commission of the United Nations, with regard to the forthcoming Diplomatic Conference in 1968 and 1969

Contents of the Special number

W. Kohlhammer Verlag GmbH Stuttgart / Germany Postfach 747

ZaöRV

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Order

☐ Herewith I (we) subscribe to the ZaöRV beginning with vol . . .

☐ Volume 27 (1967) no. 3 (LAW OF TREATIES): .....

☐ Volumes – single numbers: .....

☐ Indexes to volumes: .....

☐ Reprints of volumes: .....

☐ Index to volumes 1–20 (1929–1960): .....

Being a subscriber: ☐ yes ☐ no

ZaöRV

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

1. Contains articles and documents published in the German, English or French languages and occasionally in Spanish or Italian.

2. Starting with volume 26 (1966) English summaries of about two pages each are published for articles written in German, the contents of which can be summarized.

3. All volumes or issues out of print are reprinted (see below para. 6).

4. A general index in German, both systematic and alphabetical, to volumes 1–20 (1929–1960) was issued 1965, including a survey of all publications of the Institute since its establishment (1924–1964).

5. Subscription price for the current volume (four issues and index): DM 88.– (22.– $); Single volumes (index included) DM 110.– (27.50 $). Single issues from old volumes still available: DM 25.– (6.25 $); indexes: DM 10.– (2.50 $). Subscribers are granted a 20% discount for available original copies.

6. Reprints of sold out issues (beginning with vol. 13 [1950]: 13/1; 14/1–2; 14/4; 15/1–3; 16/1; 16/2; 16/3–4; 17/1; 17/2; 18/3; 19/1–3; 20/1–2; 21/1; 21/3): DM 32.– (8.– $) Reprints of vols. 1–2 no. 1/ (1929–1944) are available in cloth bound volumes through W. de Gruyter Verlag, Berlin 30.

7. Index to volumes 1–20 (1929–1960): DM 14.– (3.50 $); for subscribers: DM 12.– (3.– $) cloth bound.

Please order „ZaöRV 27/3" at the price of DM 25.– or 6.25 $ through Your Bookseller or directly through

W. Kohlhammer Verlag GmbH **Stuttgart / Germany**

The Conclusion of Treaties in Violation of the Internal Law of a Party

Comments on Arts. 6 and 43 of the ILC's 1966 Draft Articles on the Law of Treaties

*Wilhelm Karl Geck**)

The security of international treaty relations requires that once a State has declared its consent to a treaty it should not subsequently try to renege on that consent. The following paper examines the ILC draft articles on the question as to the validity of a treaty under international law if that treaty was consented to in violation of the internal law of a party. Certain weaknesses of the ILC draft are pointed out and a simplified provision is proposed which seeks to minimise the extent of any dependence of international treaties on internal law.

In Part II "Conclusion and Entry into Force of Treaties" of the draft articles on the law of treaties adopted on 18 July 1966[1]) arts. 6 *et seq.* read:

"*Article 6*

Full powers to represent the State in the conclusion of treaties

1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if:

(a) He produces appropriate full powers; or

(b) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

---

*) Professor of Law, University of the Saarland, Saarbrücken/Germany. For several years Dr. Geck was a research fellow of the Max-Planck-Institute for Comparative Public Law and International Law in Heidelberg; he also served as an official of the Federal Ministry of Justice, specialising in international law.

[1]) AJIL vol. 61 (1967), p. 263 *et seq.* and in Reports of the International Law Commission on the second part of its seventeenth session (3–28 January 1966) and on its eighteenth session (4 May – 19 Juli 1966) [General Assembly – Official Records: 21st Sess., Suppl. No. 9 (A/6309/Rev. 1); 1966] p. 10 *et seq.*

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the adoption of the text of a treaty in that conference or organ.

Article 7

Subsequent confirmation of an act performed without authority

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 6 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State".

In Part V "Invalidity, Termination and Suspension of the Operation of Treaties" art. 39 reads:

"*Validity and continuance in force of treaties*

1. The validity of a treaty may be impeached only through the application of the present articles. A treaty the invalidity of which is established under the present articles is void.

2. . . .".

Art. 43 reads:

"*Provisions of internal law regarding competence to conclude a treaty*

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest".

In this paper, it is proposed (see IV) that arts. 6 and 43 of the ILC Draft should be replaced by the following art. x:

1. The following persons are considered as authorised to express the consent of a State to be bound by a treaty:

(a) Heads of State;

(b) Heads of Government and Ministers of Foreign Affairs if they

(i) either produce appropriate full powers from the Head of State

(ii) or are authorised under the internal law of their State to express the consent to the treaty in question without the authorisation of the Head of State;

(c) any other person producing appropriate full powers from a person authorised in terms of letters (a) or (b).

2. If the consent to be bound by a treaty has been expressed by a person authorised under para. 1, a State may not invoke the fact that

a) its consent or

b) the content of the treaty

violates a provision of its internal law.

I. Preliminary remarks

The following remarks analyse draft arts. 6, 7, 39 and 43 in only one regard: Is the validity of a treaty[2]) affected under international law if it has been concluded in violation of the internal law of a party, and, if so, how? Thus the mere authentication or adoption of a text in contrast to the binding consent is not our concern, although these questions are included in art. 6[3]). As to the question of whether the validity of a treaty under international law concluded according to the rules of internal law is affected by the fact that the execution of this treaty is impossible without violation of the internal law, art. 43 clearly implies the negative answer of the ILC. This conclusion corresponds with international law and needs no further elaboration[4]). Lack of space prevents an analysis of the procedure to be followed when a party claims that a treaty is invalid owing to violation of its internal law and of the consequences of an invali-

---

[2]) Throughout this paper the term "treaty" has the same meaning as in art. 2 para. 1 (a) of the ILC draft, 1966. The term "full powers" refers to those full powers in art. 2 para. 1 (c) designating a person to represent a State for expressing consent to be bound by a treaty.

[3]) Authentication and adoption are not of paramount importance. Should the international approach preferred by the Commission's majority and emphasised throughout this paper prevail at the Vienna Conference 1968, it would not be difficult to add an appropriate paragraph to the draft proposed in this paper.

[4]) See Geck, Die völkerrechtlichen Wirkungen verfassungswidriger Verträge. Zugleich ein Beitrag zum Vertragsschluß im Verfassungsrecht der Staatenwelt (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 38) 1963, pp. 37, 229 *et seq.*; cf. also p. 25 *et seq.*

dation[5]). It may, however, be noted here that the relevant provisions, namely arts. 62–65 and art. 39 of the draft are affected neither by the criticism of arts. 6 and 43 in part III of this paper, nor by the suggestion in part IV for a re-draft. The same applies to art. 7 of the draft.

II. Legal history of arts. 6 and 43

In the deliberations of the ILC our problem has frequently been referred to as one of the most important in the whole draft[6]). Undoubtedly few provisions, if any, have undergone so many and such far-reaching changes. The four reporters who went into this question were all eminent British lawyers of similar experience. Yet each reached a different conclusion.

(1) Under art. 4 of the first Brierly draft, the treaty-making power of a State was to be exercised by whichever organ the constitution provided[7]). The then predominant opinion in the ILC supported this view[8]). On the basis of the second Brierly draft the ILC tentatively adopted an art. 2 to the effect that a treaty becomes binding only when the will of the State is expressed in accordance with its constitutional law and practice through an organ competent for that purpose[9]).

(2) The second reporter, (later Sir) Hersch Lauterpacht, disagreed with the conclusion that unconstitutional treaties should be invalid. Arts. 4 and 11 of his first draft made, in principle, the assumption of treaty obligations dependent on the expression of the will of a competent State organ in accordance with the constitutional provisions and practice. Art. 11, however, modified the effect of constitutional limitations on the validity of treaties under international law to a considerable extent:

a) An unconstitutional treaty is not void, but only voidable, and then only by the State whose constitution has been violated.

b) This State, however, may be deemed to have waived its right to assert the invalidity of an unconstitutional treaty under certain circumstances, namely if for a prolonged period it has failed to invoke the invalidity or if it has acted upon or obtained an advantage from the treaty.

---

[5]) See the Commission's Commentary on the articles in question.

[6]) See, *e. g.*, YBILC 1963, vol. I, p. 4 no. 19 and p. 204 no. 13.

[7]) YBILC 1950, vol. II, p. 222 *et seq.* See the application of the same principle in arts. 4 and 9 of the second Brierly draft: YBILC 1951, vol. II, p. 72 *et seq.* and in art. 4 of the third draft: YBILC 1952, vol. II, p. 51 with comment.

[8]) Cf. YBILC 1951, vol. I, pp. 14 *et seq.*, 20 *et seq.*, 29 *et seq.* and the dissent of J. P. A. François, *ibid.*, pp. 31 and 47.

[9]) YBILC 1951, vol. II, p. 73 *et seq.* The same text appeared in the third Brierly draft: YBILC 1952, vol. II, p. 51 (with commentary).

c) The State asserting the invalidity of a treaty is liable to the other party for any damage if that party cannot properly be assumed to have been aware of the constitutional limitation.

d) The State asserting the invalidity of a treaty is bound, in case of disagreement, to submit this question or the question of damages to the International Court of Justice or to another international tribunal [10]).

The reporter regarded his draft partly as a rule *de lege ferenda.* In his comprehensive commentary to these articles, Lauterpacht emphasised the ambiguities in the constitutional law and practice of numerous States, of which a contracting party could not possibly be aware; in order to safeguard legal certainty in treaty relations, he considered it necessary at least to protect the good faith of the other party [11]). The Lauterpacht draft was not discussed by the ILC.

(3) In his very comprehensive draft for a Code – instead of a Treaty – the third reporter, (now Sir) Gerald Fitzmaurice, drew on his long experience as Legal Adviser to the British Foreign Office. According to him, a treaty should, under international law, as far as possible be independent of the rules of constitutional law. In arts. 9 and 22 of his first report, treaty-making is on the international plane an executive act: All treaties are valid if they have been made by a person either having "inherent capacity to bind the State by virtue of his position or office as Head of State, Prime Minister or Minister of Foreign Affairs" or by a person having full powers. The lack of legislative assent required by constitutional law is irrelevant on the international plane [12]). In the other relevant articles of his first report, as well as in his second and third reports, Fitzmaurice applied the same principles [13]). In his commentary to art. 10 of his third report he referred to the numerous possible discrepancies between international and constitutional law and to the dangers to treaty relations resulting from a dependency on constitutional and other internal law [14]). Fitzmaurice considered the greater part of his reports as a draft *de lege lata,* although a provisional one.

The Commission discussed only some parts of his reports. Perhaps in part because of a change in the Commission's membership hardly any objections were raised against the main suggestions of the reporter although

[10]) YBILC 1953, vol. II, pp. 106 *et seq.*, 141 *et seq.*

[11]) See especially YBILC 1953, vol. II, p. 142 *et seq.* Lauterpacht stated that the recognition of a right to void treaties on account of non-compliance with constitutional limitations might encourage allegations of this kind and endanger the stability of international relations: *ibid.*, p. 142 no. 2.

[12]) YBILC 1956, vol. II, p. 108 *et seq.*

[13]) Cf. *ibid.* and YBILC 1957, vol. II, p. 34; 1958, vol. II, pp. 25, 33 *et seq.*

[14]) YBILC 1958, vol. II, p. 33 *et seq.*

there had been opportunity for objections at the initial discussion of art. 9 of the first draft[15]). There were some reservations[16]) against the assumption of general authority of a Prime Minister or a Minister of Foreign Affairs to conclude treaties without authorisation from the Head of State. The ILC, however, adopted an art. 15 assuming the treaty-making power *ex officio* of these three State organs[17]).

It is interesting to note the striking contrast between the Brierly and the Fitzmaurice draft. This contrast has a parallel in the monographs of Paul De Visscher on the one hand[18]), and the most recent ones of Blix[19]) (who corresponds most closely to Fitzmaurice) and Geck[20]) on the other hand.

(4) Art. 4 of (now Sir) Humphrey Waldock's first report considered Heads of State, Heads of Government and Foreign Ministers as authorised *ex officio* to conclude treaties; other persons were considered authorised only if they produced full powers[21]).

Art. 5 of the second Waldock report, concerning the essential validity of treaties, was based on the Commission's discussions. The invalidity of a treaty entered into by a representative considered authorised under art. 4 of the first report could be asserted only if the violation of constitutional law was known to the other party or manifest to any representative of a foreign State dealing with the matter in good faith. Waldock considered the notion that a distinction can readily be made between notorious and non-notorious constitutional limitations "to a large extent an illusion"[22]).

The discussion revealed an overwhelming majority against the suggestion that a known or manifest violation of constitutional law should be a reason for invalidating a treaty concluded by a person considered authorised to declare the will of the State[23]). There was particular emphasis on the dangers to legal certainty in treaty relations that would result from the many

---

[15]) YBILC 1959, vol. I, pp. 11 and 15.

[16]) *E.g.*, YBILC 1959, vol. I, p. 97.

[17]) YBILC 1959, vol. I, p. 190 = AJIL vol. 54 (1960), p. 266.

[18]) De la conclusion des traités internationaux (1943).

[19]) Treaty-Making Power (1960).

[20]) *Supra* note 4.

[21]) YBILC 1962, vol. II, p. 38 *et seq.* For the text of art. 4 as adopted by the ILC see YBILC 1962, vol. I, p. 243 *et seq.* or AJIL vol. 57 (1963), p. 205 *et seq.* (with commentary).

[22]) YBILC 1963, vol. II, p. 41 *et seq.*, quotation from p. 42 no. 7.

[23]) It is worthwhile to read the significant comments in YBILC 1963, vol. I, by Mr. Cadieux, p. 5 no. 23; Mr. Ago, p. 5 no. 24 and 28, p. 13 no. 53; Mr. Briggs, p. 9 no. 9; Mr. Gros, p. 9 no. 15, p. 10 no. 18 *et seq.*; Mr. Tsuruoka, p. 10 no. 22; Mr. de Luna, p. 12 no. 41; Mr. Pal, p. 13 no. 62; (chairman) Mr. Jiménez de Aréchaga, p. 18 no. 52; Mr. Pessou, p. 19 no. 63 *et seq.*; Mr. Castrén,

ambiguous provisions in constitutions, not to speak of other internal law[24]). In the light of this discussion it seemed perfectly safe to expect that the drafting committee would eliminate even known or manifest violation of constitutional law as a reason for invalidating a treaty. The drafting committee accordingly suggested that the consent of a State, expressed by a representative authorised under art. 4 of the first report, could not be invalidated; however, the committee made an exception to this rule, namely, when the violation of the internal law was "absolutely manifest"[25]). The reporter again justified this most surprising exception as a compromise between two otherwise irreconcilable opinions[26]). In spite of strong reservations on the part of some members[27]), the outcome of the discussion was the Commission's draft of the then art. 31: If the consent of a State is given by a representative, regarded as authorised under art. 4 of part I (*i.e.* the first draft), a violation of internal law regarding competence to enter into treaties shall not invalidate the consent unless the violation was manifest[28]). The word "absolutely" before "manifest" was deleted as superfluous. The whole discussion up to this point clearly revealed that the majority of the Commission had submitted to this compromise with the sole object of reaching a conclusion without any dissenting votes, which were otherwise to be expected from a small but insistent minority[29]).

---

p. 19 no. 66 and especially the remarks of the reporter himself, p. 20 no. 73 and 76. Mr. Waldock explained that the reason for the deletion of the exception to the rule "seemed to him cogent" and that he had suggested this exception only in order to reconcile opposing views without expecting the strong criticism of that exception by the Commission. Mr. Elias also doubted the wisdom of the exception, but referred *expressis verbis* only to its consequences for multilateral treaties: *ibid.*, p. 7 no. 55. – The view of the small minority was expressed by Mr. Yasseen, p. 6 no. 42; Mr. Paredes, p. 11 no. 32 (emphasising the democratic principle) and Mr. Tabibi, p. 9 no. 11 (emphasising the need to protect small and inexperienced States against instability in their own internal law). See also the comment by Mr. Tunkin, p. 15 no. 16 *et seq.*

[24]) Cf. especially the forceful comments by Mr. Ago, Mr. Briggs, Mr. Gros and Mr. Jiménez de Aréchaga mentioned in note 23 *supra*. Mr. Cadieux stated that his country's constitution was so complex that one could always invoke some constitutional provision in order to elude treaty obligations: *ibid.*, p. 5 no. 23. Mr. Verdross gave the example of American constitutional law which did not clearly distinguish between treaties and executive agreements: *ibid.*, p. 3 no. 7.

[25]) YBILC 1963, vol. I, p. 203 *et seq.*

[26]) *Ibid.*, p. 204 no. 14.

[27]) See especially the comment of (the chairman) Mr. Jiménez de Aréchaga (*ibid.*, p. 204 no. 29) that the division of opinion in the Commission did not justify the exception to the rule, and that of Mr. Briggs supporting this view (p. 206 no. 50 *et seq.*) as well as the comment of Mr. de Luna (p. 205 no. 32 *et seq.*).

[28]) Adopted with 18 against 0 votes and 3 abstentions: YBILC 1963, vol. I, p. 207 = AJIL vol. 58 (1964), p. 246 (with commentary).

[29]) Thus the discussion throughout, see especially the comment of the chairman *supra* note 27.

(5) The draft of the ILC was submitted to governments through the Secretary-General of the United Nations for their observation. By 1 March 1965 there were replies from 31 governments, the majority of which contained proposals with regard to one or more draft articles. It is impossible even to summarise the governmental comments here[30]). In the light of the nine comments to art. 4, Waldock submitted to the ILC a re-draft to the effect that a Head of State, Head of Government and a Foreign Minister may be considered authorised to sign a treaty unless the lack of authority was manifest in the particular case. Other persons may be considered authorised only if they produced full powers or if it appeared from the circumstances that the States concerned wanted to dispense with full powers[31]). The discussion in the ILC revealed uncertainty regarding the relation between arts. 4 and 31. The matter was twice referred to the drafting committee, but without clear instructions[32]).

Art. 4 was finally adopted by 16 votes to none. It provided that a person is considered authorised to express the consent of a State if he produces appropriate full powers or if it appears from the circumstances that the intention of the States concerned was to dispense with full powers. Heads of State or of Government and Ministers of Foreign Affairs, however, are considered as representing their State in virtue of their function[33]). Thus the provision concerning the manifest lack of authority was eliminated from art. 4.

More important than the governmental suggestions on art. 4 are those on art. 31[34]). The reporter summarised them to the effect that 17 of the governmental comments expressed themselves in favour of the rule proposed by the Commission, while suggesting improvements in its formulation[35]). As I see it, there was criticism of the word "manifest" by Bulgaria, Great Britain, Iran, the Netherlands, the Philippines, Romania and Thailand; Cyprus and Spain wanted to have the word "manifest" eliminated entirely. On the other hand, Iraq, Italy, Uganda, the United Arab Republic and Yugoslavia favoured the constitutional approach. Seven governments agreed with the substance of the draft, while the rest did not express an opinion on this matter[36]).

---

30) Cf. YBILC 1965, vol. II, p. 18 *et seq.*
31) *Ibid.*, p. 21 and YBILC 1965, vol. I, p. 32.
32) YBILC 1965, vol. I, pp. 32 *et seq.*; 39; 253 *et seq.*; 255.
33) *Ibid.*, p. 281; also in AJIL vol. 60 (1966), p. 165.
34) Cf. YBILC 1965, vol. II, p. 67 *et seq.*
35) *Ibid.*, p. 70.
36) Cf. YBILC 1965, vol. II, p. 67 *et seq.*

The result was the reporter's re-draft of art. 31, providing that a violation of the internal law in the conclusion of a treaty could invalidate the consent only if the violation "was known to the other States concerned or was so evident that they must be considered as having notice of it" [37]). The main change was a concession to the recurring governmental criticism regarding the obscurity of the word "manifest" [38]). After only a very brief discussion art. 31 was submitted to the drafting committee [39]) and finally accepted in its present form (now art. 43) with 16 votes to none, but with two abstentions [40]). Mr. Briggs and Mr. Ruda, who abstained, explained that they opposed the relevance even of manifest violation of the internal law [41]).

One alteration to Sir Humphrey Waldock's last report should be underlined: the ILC restricted the reference to the relevant internal law by again inserting the words "regarding competence to conclude treaties" which had been deleted in the reporter's last draft [42]). Again by the insistence of a small minority, the view that a manifest violation of the internal law regarding competence to conclude treaties could justify the invalidation of the treaty had prevailed; the reporter's last attempt at least to lessen the departure from the general rule had been in vain.

III. Analysis and criticism of arts. 6 and 43

(1) We must examine arts. 6 and 43 against the background, firstly, of the constitutions of various States, relevant clauses in international treaties and international practice [43]), and secondly, of the deliberations of the ILC, particularly in regard to Sir Humphrey Waldock's draft. One is then led to conclude that the articles reflect the law as it is at present, in that they seek to divorce the question of validity of treaties under international law from internal law. Compared to Brierly's first drafts, the present proposal constitutes a substantial degree of progress. By decreasing the dependence of international treaties on internal law, the draft adds to the security of international treaty relations (*Rechtssicherheit*).

---

[37]) YBILC 1966, vol. I part I, p. 10.

[38]) *Ibid.*, no. 83. Further, the cross-reference to art. 4 and the words "regarding competence to enter into treaties" defining the relevant internal law had been eliminated.

[39]) YBILC 1966, vol. I part I, p. 11.

[40]) *Ibid.*, p. 124. The text is printed at the beginning of this paper, (with commentary) in AJIL vol. 61 (1967), p. 394 *et seq.* and in the UN Document referred to *supra* note 1.

[41]) YBILC 1966, vol. I part I, p. 125 nos. 55 and 56.

[42]) Cf. YBILC 1966, vol. I part I, p. 10 no. 80 and YBILC 1965, vol. II, p. 18.

[43]) Cf. Geck, *op. cit.* (*supra* note 4) chapters 2–5, and Blix, *op. cit.* (*supra* note 19) sections XV–XXII.

Contributing to this is the fact that only a manifest violation of internal law regarding competence to conclude treaties constitutes a ground for invalidating a treaty. Thus internal law is relevant only in so far as procedural provisions regarding the treaty-making power are concerned and not in regard to substantive provisions. For example, infringements of human rights, of rules concerning the necessity for budgetary authorisation or of constitutional provisions on national frontiers are irrelevant, on the international plane, to the validity of an international treaty[44]). In view of the countless rules of substantive internal law which otherwise might become relevant to the conclusion of a treaty, this limitation of the relevance of internal law is entirely correct; it corresponds to prevailing theory and practice[45]). Any other rule would be a substantial step backwards, and would destroy the security of international treaty relations.

Although the evident desire of the ILC to limit the relevance of internal law in regard to the validity of international treaties is to be welcomed, the best solution has, I submit, still not been reached. The principle that internal law should affect the validity of a treaty under international law as little as possible is, in my view, unnecessarily weakened by making manifest violations of internal law regarding competence to conclude treaties relevant in international law. This qualification is a rule *de lege ferenda,* not one *de lege lata*[46]). There are, in particular, strong reservations of legal policy against this, which are outlined below[47]).

---

[44]) Cf. Geck, *op. cit.,* p. 219 *et seq.* In regard to federal questions, see Helmut Steinberger, Constitutional Subdivisions of States or Unions and their Capacity to conclude Treaties, *supra* p. 411.

[45]) Sir Humphrey Waldock, did, it is true, on one occasion say in connection with the official opinions of Luxembourg and Panama that violations of internal law regarding competence to conclude treaties include not only violations of procedural provisions regarding the exercise of treaty-making power but also provisions of substantive law entrenched in the constitutions: YBILC 1965, vol. II, p. 71 no. 6. This view is, however, not supported by the deliberations of the ILC. The whole trend of the discussions favours the view that only procedural provisions regarding the exercise of treaty-making authority should be relevant in international law – and not all the countless rules of substantive internal law. Cf. in this regard particularly Mr. Briggs, YBILC 1966, vol. I part I, p. 10 no. 90 *et seq.;* Mr. Verdross, *ibid.,* p. 124 no. 44; Mr. Castrén, *ibid.* no. 46; Mr. Bedjaoui, *ibid.* no. 48; Mr. de Luna, ibid. no. 52. See also the Commission's Commentary to art. 43: AJIL vol. 61 (1967), p. 394 *et seq.* and Geck, *op. cit.* (*supra* note 4), p. 219 *et seq.*

[46]) Cf. *supra* notes 23 and 27. See also Geck, *op. cit., passim,* especially pp. 174, 385 *et seq.*

[47]) Lack of space compels me to make frequent reference to my monograph mentioned above in note 4, which appeared shortly after the 1963 session of the ILC, by which time the discussion in point had been concluded. A survey of the views of the various authors

(2) Art. 6 of the draft does not say clearly whether the persons named therein are entitled to express the consent of a State to a treaty, which consent cannot subsequently be contested. It is true that art. 7 says expressions of consent made by persons, who, under art. 6, cannot be considered as representing their State in the conclusion of a treaty, are without effect until confirmed by a "competent authority". But it is not clear whether an expression of consent by a person considered as representing his State under art. 6, can be contested. One might indeed gain the impression from art. 7 (*argumentum e contrario*) that an expression of consent to a treaty made by a person considered as representing his State under art. 6 should be binding in international law; the other party to such a treaty could then rely on a declaration made in accordance with art. 6. It would thus be inadmissible subsequently to invalidate the consent under art. 43. This interpretation is further supported in the Commentary on art. 6 by the fourth sentence of section 1 and, in particular, by section 4[48]). The relationship between art. 6 and art. 43 has, however, not been made entirely clear by the ILC. The majority was inclined to allow a treaty to be invalidated under art. 43, where the organ expressing consent to a treaty was, in terms of art. 6, considered as representing the State[49]). This view appears correct, as the wording of art. 43 allows no exceptions and would seem to presuppose proper consent to a treaty in terms of art. 6. It is thus assumed that any expression of consent to a treaty by any person considered as representing a State under art. 6 may be contested, but only if expressed in manifest violation of a provision of the internal law regarding competence to conclude treaties. As a result, good faith is protected neither in the case of an expression of consent by the Head of State, nor by the Head of Government or Minister of Foreign Affairs.

This seems to me to be regrettable. A satisfactory solution can, I believe, be reached only by distinguishing the rules of internal law on the authority to express consent (*Erklärungsbefugnis*) from those on internal formation of will (*Willensbildung*). These latter internal rules are those which require the participation in the treaty-making process of State organs other than the one actually expressing consent, especially approval by parliament, or by a council of state or ministers, or by the people, or ministerial countersignature. This distinction will be followed below; section (3) deals with rules on the authority to express consent (*Er-*

---

on the subject can be found there (p. 20 *et seq.*) and in Blix, *op. cit.* (*supra* note 19), p. 370 *et seq.*

[48]) AJIL vol. 61 (1967), p. 297 *et seq.*

[49]) See especially YBILC 1965, vol. I, pp. 32 *et seq.*, 36 *et seq.*

klärungsbefugnis), section (4) with those on formation of will (*Willensbildung*).

(3) According to art. 43 of the draft, an expression of consent to a treaty by a Head of State can be invalidated if he were obviously unauthorised by internal law, that is, in effect, constitutional law, to express such consent. Instances of this nature will hardly occur, as the authority of the Head of State to express binding consent to treaties is established in almost all constitutions[50]). Many authors even regard it as a general rule of international law[51]). The actual acceptance in international law of a rule that a Head of State has general authority to express consent to a treaty, is to be recommended *de lege ferenda*, if one accepts that, till now, in the absence of *opinio iuris sive necessitatis*, no such general rule of international law exists.

In terms of art. 43 of the draft, an expression of consent to a treaty by a Head of Government or a Minister of Foreign Affairs may be contested if

a) such persons are not constitutionally empowered to express consent to treaties, because the authority to express such consent lies exclusively with the Head of State and if

b) in such instances the Head of State has not granted authority to express consent and if, finally,

c) the violation of internal law regarding authority to conclude treaties is manifest.

The dependence of international law on the internal law of the parties as regards the authority to express consent, and therefore the possibility that the consent to a treaty expressed by a Head of Government or Minister of Foreign Affairs be contested on the grounds of lack of authority is the result of two factors. Firstly, there is no general rule of international law which grants Heads of Government and Ministers of Foreign Affairs an authority to express consent independently of the Head of State. Secondly, many constitutions, especially those establishing a presidential system, impede the development of such a rule in international law[52]). The *Ihlen*

---

[50]) Cf. Geck, *op. cit.* (*supra* note 4), pp. 60 *et seq.*, 79. Cf. in regard to the new African States P. F. Gonidec, Note sur le droit des conventions internationales en Afrique. Annuaire Français de Droit International, vol. 11 (1965), pp. 866 *et seq.* (especially 868 and 873).

[51]) Cf. the opinions given by the reporters, in particular by Sir Gerald Fitzmaurice, the relevant discussions in the ILC, and for writing on the subject, Blix, *op. cit.* (*supra* note 19), pp. 388 *et seq.*, 392 (theory of apparent authority).

[52]) Cf. Geck, *op. cit.* (*supra* note 4), p. 79 *et seq.*, critically in regard to the theory of apparent authority in Blix (*op. cit. supra* note 19, *passim*) and Fitzmaurice

judgment by the Permanent Court of International Justice is often cited in support of the contention that a Minister of Foreign Affairs may, regardless of his authority under the constitution, express a binding consent. On closer examination, however, the case does not justify this conclusion[53]). Some authors contend that the Head of Government has power to consent to treaties independently of the Head of State, but they fail to adduce adequate support from either national constitutions or international practice. It is clear that other persons have no independent authority to express binding consent to a treaty, either according to the constitutional law of most States, or according to international law. Where such other persons are concerned, a direct or possibly an indirect authorisation given by either the Head of State, or a Head of Government or Minister of Foreign Affairs directly endowed with treaty-making power by the constitution, is as a rule indispensable.

The dangers which may arise for the security of international treaty relations if one has to refer to internal law (*i.e.* in effect constitutional law) to ascertain whether authority to express consent to a treaty exists independently of the Head of State, are limited and tolerable. Problems are conceivable where a Head of Government or a Minister of Foreign Affairs is, independently of the Head of State, empowered to express consent. However, internal law can and usually will prevent Heads of Government and Ministers of Foreign Affairs from expressing consent to a treaty unless authorised by the Head of State or directly by the constitution. It is a common feature of modern internal law that Heads of Government and Ministers of Foreign Affairs can be held legally and politically responsible for their unconstitutional acts. This has a constraining effect on those officials, which is reflected also on the international plane. In addition, the other party to the treaty may usually ask for full powers from the Head of State. This request is customary in international relations and – in contrast to a question as to whether there has been constitutionally prescribed approval by parliament or countersignature – does not constitute an interference in the internal affairs of that party. Possible difficulties are therefore limited to those instances where a Head of Government or Minister of Foreign Affairs lays claim to constitutional authority to express consent independently of the Head of State. This type of difficulty would

---

(cf. *supra* II, (3)). My conclusions are based on an examination of the constitutions of some 100 States.

[53]) Cf. Geck, *op. cit.* (*supra* note 4), p. 362 *et seq.* on the one hand and Blix, *op. cit.* (*supra* note 19), pp. 34 *et seq.*, 368 on the other.

not yet appear to have arisen in international disputes[54]). The same applies where consent to a treaty has been expressed by other persons[55]).

All this leads to the following conclusion: On the basis of almost universally uniform constitutional law, and indeed perhaps even on the basis of a rule of international law, a Head of State is empowered to express binding consent to a treaty. There has not been a single instance in the international disputes which have become known so far, where the Head of State was not authorised to express binding consent to a treaty (*Erklärungsbefugnis*). In this regard no danger to the security of international treaty relations has come to my knowledge[56]). One should always be able to rely on the fact that Heads of State and, in consequence, all persons holding full powers from them, have authority to express binding consent.

It is, however, at present both necessary and sensible to refer to constitutional law for the answer as to whether other representatives of a State are authorised to express consent independently of any authorisation by the Head of State. Nor will any substantial danger to the security of international treaty relations arise here. One need not even require in this respect that violations of internal law regarding competence to conclude treaties should be manifest in order to be relevant in international law (see *infra* IV).

(4) The situation is entirely different in regard to internal formation of will (*Willensbildung*). Here we are concerned with the question as to whether State organs other than the organ authorised to express consent are required by internal law to participate in the treaty-making process. The ILC has variously grappled with the distinction between internal rules on the authority to express consent to a treaty and those on the internal formation of will, *i.e.* the participation of State organs other than the one which expresses consent[57]). But it reached no final conclusion. This constitutes, I submit, an important weakness in the draft, which the re-draft seeks to avoid[58]).

a) In practice constitutions often require approval by parliament, or sometimes by only one chamber, or by a council of state or ministers, or else the participation of the whole electorate or of specific groups or, in

---

[54]) Cf. Geck, *op. cit.*, p. 383 *et seq.* and Blix, *op. cit.*, p. 393.

[55]) Geck, *ibid.* The cases mentioned at pp. 325 *et seq.* and 330 *et seq.* do not conflict with the view expressed here.

[56]) Cf. *ibid.*, p. 380 *et seq.*

[57]) Cf., *e. g.*, the observations of Mr. Verdross and Mr. Ago: YBILC 1963, vol. I, p. 8 no. 5 *et seq.*, respectively p. 5 no. 24 and p. 12 no. 42.

[58]) *Infra* IV.

the case of a treaty consented to by a Head of State, a ministerial countersignature. The literature on the subject, as well as the ILC's work in this connection, have too narrowly accentuated only parliamentary participation. But even here the problems are greater than they appear at first glance. For further details I must refer to my monograph. Lack of space permits me to mention here only that under many constitutions the most varied types of treaties require parliamentary approval. Political or especially important treaties, treaties which impair national sovereignty or relate to international organisations, as well as treaties which impose a financial burden on the State or which concern matters which are the subject of legislation, all give rise to most difficult problems[59]). A mere indication of these problems of interpretation must suffice here; they have largely been underestimated by earlier writers[60]). These problems cannot be solved by declaring only manifest violations of the constitution relevant in international law, for even then disputes may arise – the question frequently then becoming one of interpreting the word "manifest". This is particularly so if one were to regard internal law other than constitutional law (a problem of which mere mention is made herein; till 1963 the ILC limited its

---

[59]) Cf. Geck, *op. cit.* (*supra* note 4), pp. 119 *et seq.* (political treaties); 132 *et seq.* (treaties of major importance); 136 *et seq.* (treaties bearing on sovereignty or effecting a change in a State's territory); 139 *et seq.* (treaties concerning international organisations); 148 *et seq.* (treaties imposing a financial burden on the State or the people); 152 *et seq.* (treaties falling within the domain of legislation). These are some of the important, though by no means all the types of treaties, which require consent. Even within the individual categories there is a considerable difference in language and content. This often means that they can be interpreted only in the light of case law and practice, which in consequence frequently leads to an inconclusive result. Cf. in this regard the difficulties of delimiting treaties and executive agreements in the USA, as in The Restatement of the Law – Second. Foreign Relations Law of the United States (1965) part III, especially p. 370 *et seq.* published by the American Law Institute, and Byrd, Treaties and Executive Agreements in the United States – Their separate roles and limitations (1960). See for the problems arising from political treaties and treaties concerning matters of legislation in the Federal Republic of Germany, Reichel, Die auswärtige Gewalt nach dem Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (1967), especially pp. 98 *et seq.*, 106 *et seq.* Even where constitutions in principle require that treaties be consented to, but then allow exceptions, extensive difficulties of interpretation can arise. Cf. art. 60 *et seq.* of the Dutch constitution. For an English translation, see H. F. van Panhuys in AJIL vol. 58 (1964), p. 88 *et seq.* (107).

[60]) A correct view was taken by Blix, (*op. cit. supra* note 19), Lauterpacht, Fitzmaurice, Waldock, most members of the ILC and a number of States which submitted official opinions (cf. *supra passim*, especially notes 11, 14, 23, 27, 29 and the text before note 36). The UN Document Laws and Practice Concerning the Conclusion of Treaties (U.N. Legislative Series ST/LEG/Ser. B/3 – 1952 [1953]) which received such frequent mention in the ILC was always incomplete and has now been completely superseded. Cf. in its stead Geck, *op. cit.* (*supra* note 4) chapter 2.

discussions to constitutional law) as relevant, in international law, to the question of competence to conclude treaties[61]).

The uncertainty becomes greater in that some national constitutions require all or specific treaties to be approved by a council of state or ministers or by the electorate, or part of it[62]). If a constitution requires that a consent to a treaty expressed by the Head of State should be countersigned by a responsible minister, it is sometimes difficult to establish how far this requirement goes and which minister is competent for that purpose. Furthermore, it is often impossible to ascertain whether countersigning has taken place – in some countries it need not even be in writing[63]). It would constitute an interference in the internal affairs of a party to a treaty, if its Head of State were asked whether his country's constitutional requirements in regard to countersigning had been complied with. The same would apply to an inquiry as to whether other constitutional requirements regarding internal formation of will (*e.g.* parliamentary approval) or rules of law subsidiary to the constitution have been observed. States have rightly never concerned themselves with the other party's internal law in this regard[64]).

The reasons set out above all bear against making a manifest violation of internal law regarding competence to conclude treaties a ground for invalidating a treaty concluded in accordance with art. 6.

Mention should be made of some additional difficulties arising from the word "manifest". Section 11 of the Commission's Commentary on art. 43 states that a violation of internal law regarding competence to conclude treaties is manifest if it would be "objectively evident to any state dealing with the matter normally and in good faith"[65]). Thus the criterion is not whether and the extent to which the violation is evident to a party to the treaty. Nonetheless the ILC has failed to create an objective test with the word "manifest". Is a violation of the constitution manifest if its wording is contravened? On this basis, one could say the executive agreements concluded by the USA are manifest violations of its constitution. Or should one include customary constitutional law, or constitutional practice (which is so often not clear)[66])?

---

[61]) Cf. Geck, *op. cit.*, pp. 222 *et seq.*, 227 *et seq.*

[62]) *Ibid.*, pp. 204 *et seq.* and – respectively – 210 *et seq.*

[63]) Cf., in this regard *ibid.*, pp. 186 *et seq.*, 200 *et seq.*

[64]) Cf. Blix, *op. cit.* (*supra* note 19), p. 260 *et seq.* and Geck, *op. cit.* (*supra* note 4), especially p. 201 with, in addition, references to "summit conferences". – The theory of apparent authority as postulated by Blix and Fitzmaurice's whole concept (*supra* II (3)) rest on this fact.

[65]) AJIL vol. 61 (1967), p. 399 (italics in original).

[66]) In the Federal Republic of Germany, for instance, many uncertainties existed

To what extent should one consult case law and literature? The majority in the ILC saw clearly that the question is only cast in another form if "manifest" becomes the criterion; the view taken by some States reflects the same apprehension[67]). The uncertainties in art. 43 are clearly illustrated in the case of multilateral treaties, the number and importance of which are steadily increasing. These difficulties are particularly evident in regard to quasi-universal open treaties. What State could or would want to go beyond the authority to express consent to a treaty – usually evidenced by full powers from the Head of State – and concern itself with the internal law of the other participants in a conference of some 100 States? Where an open treaty is acceded to subsequently, should the depositary investigate whether the declaration of accession by the Head of State has been countersigned and/or whether there was a manifest lack of parliamentary approval possibly required by the constitution? To put the question is by implication to answer it.

It may be recalled here that the first reporter who introduced the element of knowledge of a constitutional violation into the Commission's deliberations was fully aware of its inherent dangers. Sir Hersch Lauterpacht therefore proposed a compulsory submission of such a question to the International Court of Justice or to another international tribunal[68]). But as it was realised that Lauterpacht's suggestion would not find acceptance, the Commission contented itself with a reference to the means indicated in art. 33 of the United Nations Charter for the solution of disputes (see art. 62 para. 3 of the 1966 draft).

It is not surprising that, in the disputes which have arisen in international practice, the States which have asserted the invalidity of a treaty on the grounds of a violation of their constitutional law, have done so mostly not out of an abstract concern for the protection of their laws, but rather because of a concrete political or economic interest to be rid of a treaty obligation which has become inconvenient to them[69]). Nor

---

in relation to treaties requiring parliamentary approval; some of these problems were subsequently cleared up by decisions of the Federal Constitutional Court – see in this connection: Entscheidungen des Bundesverfassungsgerichts – especially BVerfGE 1, 351; 1, 372; 4, 157. Much, however, remains uncertain; cf. Reichel, *op. cit.* (*supra* note 59), pp. 98 *et seq.*, 106 *et seq.* and Geck, *op. cit.* (*supra* note 4) chapter 2 *passim*, especially pp. 174 *et seq.*, 385 *et seq.*

[67]) Cf. especially *supra* notes 23, 24 and 27 and – respectively – the text before note 36. See also the decisions of the (German) Federal Constitutional Court in: BVerfGE 16, 220 (227) and 1, 396 (412 *et seq.*).

[68]) Cf. *supra* II (2).

[69]) Cf. Geck, *op. cit.* (*supra* note 4) chapter 5, especially p. 389 *et seq.* In no international dispute was the State which relied on a violation of its own constitution

can one rely on the argument that international disputes of this nature have not been very numerous. The number of international treaties has grown enormously with the increase in the number of States (the United Nations Treaty Series contains at the moment some 8600 treaties in 548 volumes). The constitutional and political situation in many countries is neither clear nor stable. In a world where national sovereignty is sometimes regarded as a justification for evading political or economic treaty obligations, there is a danger that States will, by relying on their national law, seek to rid themselves of treaty bonds which no longer suit them.

Finally it runs against the realities of the modern world and against the role of international law to make constitutional law, merely for its own sake, internationally more relevant than is absolutely necessary. In various countries on all four great continents constitutional law is characterised by instability or is even subject to manipulation. The press daily provides evidence of this. Furthermore the western democracies' interest in upholding the constitutions of the peoples' democracies is no greater than the interest of the latter in upholding the constitutions of the former. Neither is there in the international community as a whole a general interest in maintaining an abstract concept of constitutional order. At present the values expressed in the various constitutions are simply too varied. This is true even for human rights, where one would most expect to find common standards.

States are even less interested in enforcing foreign legal norms which are subsidiary to constitutional law. The problems arising in connection with international cooperation in legal matters exemplify this. Collaboration even in criminal matters, where there is surely a common interest, has found but partial regulation in international treaties. In the limited number of extradition treaties in force, extradition is usually not provided for in the case of political and military offences, and often not in the case of fiscal offences. One of the underlying reasons for this is that it is regarded as undesirable to support foreign legal systems, the values of which are possibly diametrically opposed to one's own values. This consideration leads States to accept that they themselves may not demand extradition in such matters.

But on the other hand, all States have an undeniable common interest in the security of international treaty relations. It is up to each State itself to ensure that its internal law, especially constitutional law, is observed when it assumes international obligations. On grounds of legal policy it

compelled to do so by a judgment of one of its courts. Cf. in general David R. Deener, Treaties, Constitutions and Judicial Review. Virginia Journal of International Law, vol. 4 (1964), p. 7 *et seq.*

would appear most unfortunate to carry internal difficulties of this nature over into the sphere of international law, and so shift the risk of a constitutional violation on to the other party to the treaty, more than absolutely necessary[70]). This point was emphasised as clearly as possible, both by the overwhelming majority of the ILC members and in the official opinions submitted by some States[71]). As was stated by an eminent Dutch authority as early as 1934: "If anyone is to become the victim of the disregard of rules of constitutional law, this must be the State whose constitutional organs do not function properly, not the opposite party"[72]).

b) The following further arguments can be advanced against making internal law on internal formation of will (*Willensbildung*) relevant, even in the weakened form of art. 43.

A closer examination shows that the authors of present-day constitutions have seldom had a clear idea of the relevance of internal law to the validity of international treaties. Nowhere is a distinction drawn between the consequences of manifest and of non-manifest violations of internal law[73]). In fact, this distinction is entirely immaterial in relation to the maintenance of a State's legal order. The same is true in regard to the implementation of the treaty. If its implementation is forbidden by internal law, it remains forbidden if the violation of internal law is not manifest[74]).

A detailed examination of the approximately 4900 international treaties published in volumes 1–300 of the United Nations Treaty Series revealed that only about 5% of those treaties refer, in regard to their coming into force, to the internal law of one, both or all parties. Even here it could in many instances not be assumed that the parties wanted to make the validity of the treaty dependent on its compliance with internal law. This would seem to indicate that most States do not consider it expedient to link international treaty validity to internal law. Insofar as some treaty clauses seem by way of exception to favour the relevance of constitutional law, they of course draw no distinction between manifest and non-manifest violations[75]).

---

[70]) That is to say, other than in regard to *Erklärungsbefugnis;* cf. Geck, *op.cit.* (*supra* note 4), p. 412 *et seq.*

[71]) See especially *supra* note 67.

[72]) As in J. H. W. Verzijl, The Jurisprudence of the World Court, vol. 1 (1965), p. 366.

[73]) See Blix, *op.cit.* (*supra* note 19) section XV and Geck, *op.cit.* (*supra* note 4) chapter 2, especially p. 180 *et seq.*

[74]) See Geck, *ibid.*, especially p. 227 *et seq.*

[75]) Cf. Geck, *op.cit.* chapter 3, especially p. 257 *et seq.* A similar conclusion is reached by Blix, *op.cit.* (*supra* note 19), p. 277 *et seq.*

The same tendency is to be seen in the international disputes which have arisen to date though, however, one may hesitate to draw a final conclusion from these. The distinction between manifest and other violations of the constitution certainly played no part in the solution of these disputes[76]). Furthermore, in over a third (!) of these international disputes it is most difficult to determine whether the constitutional violation concerned was manifest or not[77]).

Finally it should be mentioned that a distinction between manifest and non-manifest violations of internal law is dogmatically inconsistent[78]). One cannot counter this by pointing out that it has been maintained above (III (3)) that one should refer to internal law (in effect constitutional law) to ascertain whether an authority to consent to a treaty exists independently of the Head of State. In that case the dependence of international law on internal law is unavoidable so long as international law itself has not evolved generally binding rules on authority to express consent to a treaty (*Erklärungsbefugnis*); here, in regard to internal formation of will (*Willensbildung*), the dependence of international law on internal law can easily be avoided[79]).

IV. Suggestions for a re-draft of articles 6 and 43

The above remarks can, perhaps, in spite of their brevity, provide the basis for the following suggestion:

Art. x (substitute for arts. 6 and 43 in the International Law Commission's Draft of 18 July 1966)

1. The following persons are considered as authorised to express the consent of a State to be bound by a treaty:
   (a) Heads of State;
   (b) Heads of Government and Ministers of Foreign Affairs if they
      (i) either produce appropriate full powers from the Head of State
      (ii) or are authorised under the internal law of their State to express the consent to the treaty in question without the authorisation of the Head of State;

---

[76]) See Geck, *op. cit.*, p. 385 *et seq.* Cf. also Blix, *op. cit.* (*supra* note 19), sections XX and XXII.

[77]) See Geck, *op. cit.*, p. 387.

[78]) *Ibid.* chapter 2, especially p. 227 *et seq.*

[79]) Cf. the relevant observations in the ILC, especially by Mr. Ago and Mr. Verdross, *supra* note 57 and Geck, *op. cit.* (*supra* note 4), pp. 232 *et seq.*, 413.

(c) any other person producing appropriate full powers from a person authorised in terms of letters (a) or (b).

2. If the consent to be bound by a treaty has been expressed by a person authorised under para. 1, a State may not invoke the fact that

(a) its consent or

(b) the content of the treaty

violates a provision of its internal law.

This suggestion closely follows the intentions of the majority in the Commission and – as far as style is concerned – the 1966 draft. It does not affect arts. 39, 62 *et seq.* at all. Neither does it affect art. 7. Provisions on the authentication and adoption of the text of a treaty can easily be inserted should the Conference in 1968 consider this necessary.

The re-draft refers to the constitutional law of the parties to the treaty only so far as is unavoidable. It sets out from the almost universally recognised authority of the Head of State to express consent and distinguishes clearly between the internal rules on authority to express consent independently of the Head of State, on the one hand, and all other internal norms on the other. The re-draft thus solves a problem with which the ILC has variously but unsuccessfully contended[80]).

The re-draft protects good faith in regard to the consent to a treaty expressed by a Head of State and all persons who produce appropriate full powers from him. It requires an inquiry into internal law only when a Head of Government or Minister of Foreign Affairs claims constitutional authority to express consent independently of the Head of State. Cases of this sort should present no great difficulty. Where such a person had no constitutional authority, his expression of consent can be confirmed by the competent authority as provided for in art. 7 of the ILC draft.

In all other cases, the re-draft suggested above fully eliminates dependence of treaties on internal law, which dependence is particularly dangerous from the viewpoint of security of international treaty relations. The problems of interpretation of art. 6 para. 1 (b) of the ILC draft, which have not been considered here, but which should not be underestimated, also fall away. The suggested re-draft does not violate democratic principles, however they may be understood[81]). It does not release the State organ expressing consent from its constitutional duties, and in particular does not affect

---

[80]) Cf. *supra* note 57.

[81]) In regard to western democracies, see Hans D. Treviranus, Außenpolitik im demokratischen Rechtsstaat (1966) und Luzius Wildhaber, Rechtsvergleichende Bemerkungen zur sogenannten vertragschließenden Gewalt. Zeitschrift für Schweizerisches Recht N. F. vol. 86 (1967), p. 33 *et seq.*

the legal relationship of the executive to the legislature. Thus constitutional law operates within its proper bounds and the other party to the treaty is not burdened by any violation of constitutional or other internal law.

It should be mentioned once more that the re-draft reflects international practice and the tendency in modern writing on the subject, as well as the clearly predominant opinion in the ILC and the real aim of its last reporter, Sir Humphrey Waldock. This view might already have been accepted by a majority of States if the ILC, influenced by a small but vocal minority, had not chosen to compromise by accepting the word "manifest". The considerations set out above may still win acceptance at the 1968 Conference. This hope finds support in the fact that several States have objected to the word "manifest" and that most States have expressed either no opinion or no clear opinion, on this problem, – including, among others, Argentina, Brazil, China, France, the Federal Republic of Germany, Mexico, the USSR and the USA.

When a final decision is reached on the relevant provisions of the draft on the law of treaties, the States should take into account that the amendment suggested here, of course, does not prevent them from refusing to implement treaties which conflict with their internal law. The question is one of whether there is an obligation in international law to carry out a treaty or, where applicable, to pay damages. It is essentially a question of applying the basis of the whole law of treaties, *i. e.* the maxim *pacta sunt servanda* properly. In reaching their decision the States should not set out from the idea that they may one day want to invalidate their consent to a treaty. A State should rather rely on the fact that it can and will restrain its Head of State and, where consent to a treaty is expressed independently of the Head of State, its Head of Government and Minister of Foreign Affairs from entering into treaties which conflict with its law on the conclusion of treaties. A State should always bear in mind that a treaty which it regards as important may be disputed by the other party on the grounds that this party's organs have violated its law on the conclusion of treaties. It is, after all, in the real interest of all States to have the validity of international treaties not depend on internal law any more than is unavoidable in international law's present stage of development[82]).

---

[82]) Concluded on 1 July 1967. It was impossible for me to consider Luigi Ferrari Bravo's recent monograph: Diritto internazionale e diritto interno nella stipulazione dei trattati.

Dr. J.K. G e c k, M.A.
Professor of Law

66 Saarbrücken 15, December 1967
Universität
Seminar für Völkerrecht

20-3-1-6
28

Department of External Affairs
Legal Division

O t t a w a
East Block

C A N A D A

Gentlemen:

As you are aware, the international conference for the codification of the Law of Treaties is to meet in Vienna in the spring of 1968 on the invitation of the United Nations. The discussions at this conference will be based on the 1966-draft of the International Law Commission and on the observations submitted to the United Nations by various governments. From the first draft in 1950 on, probably no problem has been more controversial in the International Law Commission's discussions than the question whether and how a violation of the internal law of a party concluding a treaty affects the validity of this treaty under international law. Each of the four eminent reporters came to a different conclusion. The observations submitted by governments on the work of the International Law Commission indicate that this problem will remain controversial at the Vienna Conference.

The answer to the question whether and how a violation of the internal law in the conclusion of a treaty affects this treaty's international validity is of the utmost consequence for legal security in international treaty relations. For this reason I have examined the relevant articles 6, 7 and 43 of the International Law Commission's 1966-draft. My paper traces the legal history of these articles, analyses their significance and practical consequences and concludes its critical examination with a proposed redraft. This redraft corresponds in the main to the opinion which was clearly predominant in the last sessions of the International Law Commission and was only superseded at the last moment by the 1966-draft's compromise solution, which I consider dangerous for the legal security in international treaty relations.

I take the liberty of enclosing a reprint of my paper. I would be happy if it would find your interest and perhaps be of some use in your preparations for the 1968 conference in Vienna.

Very truly yours,

M. K. [illegible]

ACTION COPY

20-3-1-6
28 | 44

Mr. Bayley
Mr. Stanford

cc to Washington
Phoned Commerce
outgoing tels 81/2
they will repeat
to Copenhagen

FM PRMNY DEC14/67 RESR

TO EXTER 4029

LAW OF TREATIES CONFERENCE

FURTHER MTG ON FORTHCOMING LAW OF TREATIES CONFERENCE NOW UNLIKELY TO HELD THIS WEEK IN NS.

2.BRIT HAVE HOWEVER INFORMED US THAT THEY HAVE INVESTIGATED POSSIBILITIES OF HOLDING CONTINUED OLD COMWEL USA AND COUNCIL OF EUROPE CONSULTATIONS AND IT APPEARS THAT THIS MTG WILL PROBABLY BE HELD IN PARIS UNDER COUNCIL OF EUROPE AUSPICES ON FEB5 6 AND(IF NECESSARY)7TH.

Diary
Div. Diary
File

Legal Div./J.S. Stanford/mb

ILC Treaty Codification

, December 14, 1967

20-3-1-6
28

Dear Mr. Wershof,

As you know, the First Session of the International Conference of Plenipotentiaries on the Law of Treaties is to be held in Vienna from March 26 to May 25, 1968. Recommendation as to the size and composition of the Canadian delegation to the Conference is now being submitted to the Minister and to Cabinet. I have recommended, and the Minister has concurred, that you head the Canadian delegation, and this recommendation will be going forward to Cabinet shortly.

Because of budgetary restrictions that have been imposed recently, it is unlikely that we shall be able to send a large delegation to Vienna. At present we are hoping to obtain Cabinet approval for a delegation which, in addition to yourself, would include two advisers, one of whom may be Professor Hugh Lawford of Queen's University, who has been engaged on contract to prepare a commentary for the use of the Canadian delegation to the Vienna Conference. The other adviser will be a legal officer of the Department, drawn either from Legal Division or from one of our missions.

There are two preliminary meetings already scheduled to discuss "western" strategy at the Conference. The first is a meeting of Old Commonwealth and the U.S. presently scheduled for London, January 26 - 29. The second is a meeting of the W.E.O. group scheduled for Strasbourg on the 5 and 6 of February. It is anticipated that participating governments will be sending senior representatives to these meetings and I should be grateful if you would make preliminary arrangements to attend them both on behalf of Canada.

In order that you may be brought up to date on recent developments in connection with this Conference, I am arranging to have sent to you copies of the telegrams on this subject which have come from New York during the current session of the General Assembly. I have also asked that a copy of the report of the I.L.C. containing the draft articles and commentary be sent to you.

...2

Mr. Max Wershof,
Canadian Ambassador,
Canadian Embassy,
Copenhagen, Denmark.

15.19.5(US)

I shall let you know as soon as we have received Cabinet confirmation of your nomination as head of delegation and approval of the size of the delegation.

Yours sincerely,

M. CADIEUX
Under-Secretary

ACTION COPY

L

Mr. Bayne Cty
Mr. Stanford
shared Committee
outgoing tels 18/12
they will report to
Copenhagen

20.3-1-6
28 | 44

FM PRMNY DEC8/67 RESTR

TO EXTER 3889

INFO GNEVA

TT VIENA DE PARIS

REFOURTEL 3676 NOV30

SIXTH CTTEE WESTERN GROUP MTG-LAW OF TREATIES CONFERENCE

A MTG TO DISCUSS MODALITIES OF FORTHCOMING LAW OF TREATIES CONFERENCE WAS HELD AT USA MISSION WED AFTERNOON DEC6.

2. USA(AMBASSADOR RICHARD KEARNEY)SPOKE FIRST. HE EXPLAINED THAT IT IS USA POINT OF VIEW THAT AT THIS STAGE IN PRELIMINARY CONSULTATIONS IT WOULD PROBABLY BE EASIER TO DISCUSS AND TO EXAMINE WHAT SHOULD BE SUBJ OF SUCH CONSULTATIONS RATHER THAN GO INTO MATTERS OF SUBSTANCE. NEVERTHELESS IT WAS CLEAR THAT CERTAIN OF DRAFT ARTICLES WERE CAUSE FOR CONCERN AND COULD IF ADOPTED BECOME A SOURCE OF ILLFOUNDED CLAIMS OF INVALIDITY PARTICULARLY SINCE CHAPTER V IS LIKELY TO HAVE SOLID EASTERN EUROPEAN AND SOME AFROASIAN AND LATINAMERICAN SUPPORT. ON BEHALF OF HIS GOVT HE INDICATED WHAT SORT OF QUESTIONS MIGHT BE RESOLVED DURING PRELIMINARY CONSULTATIONS. (I)WHETHER ARTICLES IN CHAPTER V SHOULD BE OPPOSED IN TOTO OR SELECTIVELY OR BY PROFERRING SPECIFIC AMENDMENTS TO THEM?(II)HOW MUCH DETAILED ADVANCE COORDINATION WOULD BE POSSIBLE AND DESIRABLE BETWEEN WESTERN STATES?(III)SHOULD SUCH COORDINATION BE AIMED AT SECURING MINIMAL ESSENTIAL CHANGES TO PRESENT DRAFT AND IF SO SHOULD AGREEMENT BE REACHED IN ADVANCE TO REFUSE TO ACCEPT A CONVENTION IN ABSENCE OF SUCH CHANGES

...2

(USA BELIEVED IT WOULD BE DIFFICULT TO ACHIEVE AGREEMENT ON THIS)? (IV)SHOULD THERE INSTEAD BE AN OVERALL REVIEW OF ALL ARTICLES AND OF GOVTS ATTITUDES TO THEM AND THEN EFFORTS MADE WITHIN GROUP TO REDUCE DIFFERENCES?

3. AFTER SAYING THAT USA CONSIDERED ADVANCE COORDINATION AT LEAST ON METHODOLOGY TO BE EXTREMELY IMPORTANT KEARNEY WENT ON TO OFFER MORE DETAILED USA VIEWS ON THOSE AREAS ON WHICH THEY BELIEVE ADVANCE DISCUSSION MOST VITAL CHIEF AMONG THEM WAS ARTICLE 62 (PROCEDURES FOR SETTLEMENT OF DISPUTES). THIS POSES QUESTION SUCH AS: (I)SHOULD SOME SORT OF COMPULSORY ADJUDICATION OR PROVISION FOR THIRD PARTY SETTLEMENT BE INCORPORATED: IF SO WHAT OTHER STATES MIGHT FAVOUR SUCH AN IDEA(USA CONSIDERED CEYLON INDIA PAK AND NIGERIA AMONG AFROASIANS WOULD SUPPORT SUCH AN APPROACH)?(II)WHAT SORT OF DISPUTES SHOULD BE COVERED: ALL OR POSSIBLY ONLY THOSE ON INVALIDITY(ARTICLES 43-50 57-59 AND 61)?(III)WOULD REF TO INTER-NATL COURT OF JUSTICE BE ACCEPTABLE TO AFROASIANS OR SHOULD ALTERNATIVE OF RESORT TO ARBRITATION BE PROVIDED?WHAT ABOUT OTHER TYPES OF SETTLEMENT SUCH AS CONCILIATION OR FACT FINDING?(IV) WHAT SHOULD BE DONE ABOUT ARTICLE 57(BREACH): SHOULD INJURED STATES BE FREE TO ACT UNILATERALLY AT LEAST ON TEMPORARY BASIS WHILE WAI-TING A FINAL DECISION?

4. ALSO IMPORTANT IN USA VIEW WAS QUESTION OF TIME ELEMENT ARISING FROM AND STATED IN TREATY. (I)TO WHAT OTHER TREATIES WOULD THIS TREATY APPLY RETROACTIVELY?USA CONSIDER ARTICLE 24 TO BE AMBIGUOUS

...3

PARTICULARLY PHRASE QUOTE CEASE TO EXIST UNQUOTE.POSSIBLE SOLUTION COULD INCLUDE(A)THAT TREATY WOULD NOT RPT NOT APPLY TO ANY OTHER TREATY THAT HAD BEEN ENTERED INTO BEFORE A SPECIFIC PAST DATE(BY AMENDING ARTICLE 1 TO PROVIDE A CUT OFF DATE FOR APPLICATION WHICH MIGHT BE FOR EXAMPLE THAT ON WHICH UN CHARTER WAS SIGNED)(B)ALTERNATIVELY REF TO SITUATIONS CEASING TO EXIST MIGHT BE DELETED FROM ARTICLE 24.(II)SHOULD THERE BE SOME SORT OF PRESCRIPTION ON CLAIMS THAT A TREATY IS INVALID?ARTICLE 42 MIGHT BE AMENDED BY ADDING A NEW SUBPARA(C)TO EFFECT THAT A STATE INVOKING INVALIDITY UNDER ARTICLES 43-48 SHOULD BE CONSIDERED TO HAVE ACQUIESCED IF IT HAD NOT RPT NOT ACTED WITHIN TEN YEARS OF EXPRESSING ITS CONSENT TO BE BOUND.PERHAPS THERE SHOULD EVEN BE A SAVING CLAUSE CONCERNING USE OF FORCE HAVING PREVENTED EARLIER ALLEGATIONS OF INVALIDITY.IN ANY EVENT SUCH A PRESCRIPTIVE PROVISION WOULD LEAD TO ADDITIONAL STABILITY IN TREATY RELATIONSHIPS.(III) MIGHT THERE NOT RPT NOT ALSO BE A SHORTER PRESCRIPTION OF ONE OR TWO YEARS FOLLOWING DATE OF DISCOVERING A PARTICULAR GROUND FOR CLAIMING INVALIDITY WITHIN WHICH SUCH A CLAIM SHOULD BE ADVANCED? (IV)OUGHT THEIR PERHAPS TO BE A SPECIFIC RETROACTIVE TIME LIMIT IN ARTICLE 49(SHOULD ARTICLE 1 NOT RPT NOT BE AMENDED)TO(SAY)DATE OF CHARTER.GENERAL FEELING OF USA AUHORITIES IS THAT SUCH TIME LIMITS WOULD ASSIST IN AVOIDING OR REDUCING INTERSTATE DISPUTES.

5.LATER IN MTG KEARNEY MADE ADDITIONAL POINTS REGARDING AMENDMENTS:(A)SHOULD THEY BE TECHNICAL OR ONLY SUBSTANTIVE;(B)WOULD

...4

IT BE USEFUL IF THEY WERE SUBMITTED BEFORE FEB15 DEADLINE;(C) SHOULD EACH GOVT PUT IN ITS OWN OR SHOULD SELECTIVE STATES PUT IN AMENDMENTS ON BEHALF OF GROUP?

6. IN ENSUING DISCUSSION SWEDEN(BLIX)EXPRESSED VIEW THAT THERE WILL NOT RPT NOT BE TIME FOR DETAILED CONSULTATIONS OTHERWISE DESIRABLE BUT THAT STATES SHOULD AT LEAST POINT OUT THOSE ESSENTIAL AREAS IN DRAFT ON WHICH THEY BELIEVE ADVANCE CONSULTATION WOULD BE HELPFUL. HE FORESAW POSSIBLE DOCTRINAL CONTROVERSY AT CONFERENCE ARISING OVER ARTICLES SUCH AS THOSE DEALING WITH CONSTITUTIONAL MATTERS(ARTICLE 5 ARTICLE 7 ARTICLES 10 AND 11).

7. UK(DARWIN)INDICATED GOVT WOULD LIKE FURTHER INTRA GROUP CONSULTATIONS AND EXCHANGES OF VIEWS BEFORE THEY TAKE UP FINAL POSITIONS ON SOME POINTS. HE MENTIONNED THAT ARTICLE 4 AND RELATIONSHIP OF TREATY WITH INTERNATL ORGANIZATIONS WAS REGARDED AS REQUIRING PARTICULAR ATTN.

8. IN DISCUSSION OF SUBSTANTIVE MATTERS SWEDEN POINTED OUT THAT ONE SOLUTION TO ARTICLE 62 PROBLEM MIGHT BE TO APPROACH IT BY INCORPORATION OF A CLAUSE PROVIDING FOR POSSIBILITY OF RESERVATIONS TO ACCEPTANCE EXCEPT ON A RECIPROCAL BASIS. ALSO REFERRED TO APPROACH OF HARVARD DRAFT AND LAUTERPACHT IN WHICH THERE WAS NO RPT NO OMNIBUS CLAUSE ON PROCEDURES FOR SETTLEMENT AND INSTEAD THIS WAS DEALT WITH IN INDIVIDUAL ARTICLES. NZ SUGGESTED ALTERNATIVE APPROACH UNDER WHICH AN OMNIBUS CLAUSE WOULD PRECLUDE STATES FROM

...5

INVOKING CERTAIN ARTICLES UNLESS THEY WERE PREPARED TO GO TO ADJUDICATION OR ACCEPT OTHER SPECIFIED PROVISIONS FOR IMPARTIAL RESLN OF DISPUTES.

9. FURTHER TO ARTICLE 24 THERE WAS A DISCUSSION OVER USE OF PHRASE QUOTE ENTERING INTO FORCE UNQUOTE BY ILC. SWEDEN EXPRESSED VIEW (BASED ON CAREFUL STUDY OF ILC DRAFTS) THAT COMMISSION HAD CONSISTENTLY USE THESE WORDS NOT RPT NOT TO INDICATE TIME AT WHICH NEXUS AROSE (IE WHEN A STATE WAS IRREVOCABLY BOUND) BUT INSTEAD TO INDICATE MOMENT WHEN PERFORMANCE MUST BEGIN).

10. WITH REGARDS TO IMMED FUTURE CONSULTATIONS OF AN INFORMAL NATURE IT WAS AGREED THAT MEMBER STATES OF GROUP SHOULD EXCHANGE INFO WHICH WOULD AT LEAST OUTLINE THOSE POINTS ON WHICH THEY CONSIDER ADDITIONAL DETAILED CONSULTATIONS ESSENTIAL. WE SUGGESTED THAT IN THIS CONNECTION IT WOULD BE HELPFUL TO HAVE A QUOTE POST BOX UNQUOTE IN NY (AFTER UNGA) THROUGH WHICH SUCH EXCHANGES COULD BE EFFECTED. USA MISSION VOLUNTEERED TO PROVIDE THIS SERVICE IF NECESSARY.

11. REGARDING TIME TABLE FOR FUTURE CONSULTATIONS (PARAS 12 AND E REFTEL) CONSENSUS APPEARS TO BE THAT WESTERN GROUP SHOULD MEET (FOLLOWING COUNCIL OF EUROPE MTG IN STRASBOURG) ON MON AND TUE FEB5 AND 6. UK WILL ASCERTAIN WHETHER FACILITIES FOR SUCH MTG ARE AVAILABLE IN STRASBOURG ITSELF OR IF NOT RPT NOT WHERE ELSE MTG COULD BE HELD. AS TO OLD COMWEL MTG AUSTRALIA NZ AND UK WOULD NOW

...6

PREFER THIS TO TAKE PLACE IN LDN(BECAUSE VALLAT IS UNABLE TO LE-
AVE LDN AT RELEVANT TIME)PERHAPS A WEEK BEFORE STRASBOURG MTG.
(IE AROUND JAN25 AND 26 OR POSSIBLY 29 AND 30).
12. OTHER POINTS DISCUSSED WERE(I)QUESTION OF TWO VICECHAIRMANSHIPS
FOR CTTEE OF WHOLE. GROUP AGREED THAT IF THERE WERE TO BE TWO SUCH
CHAIRMAN ONLY ONE SHOULD GO TO EAST EUROPEANS. (II)FINLAND ON
INSTRUCTIONS INDICATED THEY WISH CASTREN SHOULD BE ON GENERAL CTTEE.
13. MTG CLOSED ON UNDERSTANDING THAT A FURTHER MTG COULD TAKE PLACE
THUR DEC14(KEARNEY WILL BE IN NY)SHOULD THERE BE ADDITIONAL
MATTERS OF SUBSTANCE READY FOR DISCUSSIONS. PLEASE LET US KNOW IF
THERE ARE VIEWS YOU WOULD LIKE US TO PUT TO GROUP.

Pete Dickens

circ.
diary
file
Ottawa with cc of inc. note

Mr Begley
A.E. Robertson/ch
Mr Stanford

20-3-1-6
28

16

The Permanent Mission of Canada to the United Nations presents its compliments to the Permanent Mission of Iraq to the United Nations and has the honour to refer to Note CAND./1-A/172 of November 27, 1967 in which the Permanent Mission of Canada is informed of the intention of Iraq to stand for election to the Chairmanship of the Drafting Committee of the Conference on the Law of Treaties whose first Session will be held next March in Vienna Austria.

This information has been forwarded to the appropriate authorities in the Canadian Government where it will be given careful consideration.

The Permanent Mission of Canada avails itself of this opportunity to renew to the Permanent Mission of Iraq, the assurances of its highest consideration.

New York, December 5, 1967.

Received
DEC 7 1967
In Legal Division
Department of External Affairs

TO: TREATY SECTION
FROM REGISTRY
DEC 7 1967
L
FILE CHARGED OUT
TO: MR STANFORD

Nov 29 10 03 A

PERMANENT MISSION OF IRAQ
TO THE UNITED NATIONS
14 EAST 79TH STREET
NEW YORK, N. Y. 10021

NO. CAND./1-A/172

The Permanent Mission of Iraq to the United Nations presents its compliments to the Permanent Missions to the United Nations and has the honour to inform them that the Iraqi Government has decided to present the candidature of H.E. Professor Mustafa Kamil Yasseen for election to the Chairmanship of the Drafting Committee of the Conference on the Law of Treaties whose first Session will be held next March in Vienna Austria.

H.E. Professor Yasseen who is at present Ambassador and Permanent Representative of Iraq to the United Nations Office in Geneva, is former Head of the International Law Department of the Faculty of Laws of the University of Baghdad. He is an associate of the Institute of International Law and a member of the Curatorium of the Hague Academy ofInternational Law. Professor Yasseen is a member of the International Law Commission since 1960 and former Chairman of that Commission during 1966.

The Permanent Mission of Iraq to the United Nations hopes that the candidature of Professor Yasseen will receive the valuable support of the member States.

The Permanent Mission of Iraq avails itself of this opportunity to renew to the Permanent Missions the assurances of its highest consideration.

New York, 27 November 1967

ACTION COPY

FM PRMNY NOV30/67 RESTR

TO EXTER 3676 IMMED

INFO GNEVA

TT VIENA DE OTT

REFOURTEL 3675 NOV30(OTT ONLY)

LAW OF TREATIES:1968 VIENA CONFERENCE

AT MTG OF WESTERN GROUP OF SIXTH CTTEE WHICH TOOK PLACE WED AFTERNOON NOV29 SEVERAL HOURS WERE DEVOTED TO DISCUSSING FORTHCOMING CONFERENCE ON LAW OF TREATIES.

2.DISCUSSION DEALT FIRST WITH QUESTION OF ORGANIZATION OF CONFERENCE AND VARIOUS SLATES OF OFFICIALS WHICH WILL FUNCTION AT IT AND THEN WITH QUESTION OF CONSULTATIONS IN ADVANCE OF CONFERENCE AMONG WESTERN STATES ON MORE SUBSTANTIVE MATTERS.

3.FROM DISCUSSIONS ON STRUCTURE OF CONFERENCE BASED ON CONSULTATIONS BETWEEN VARIOUS MEMBERS OF WESTERN GROUP AND REPS OF SECRETARIAT FOLLOWING POINTS EMERGED.AT CONFERENCE(NATURALLY IN ADDITION TO PLENARY)THERE WILL ONLY BE ONE MAIN CTTEE.THIS CTTEE WHICH WE WILL REFER TO HEREINAFTER AS CTTEE OF WHOLE WILL IN FACT IN CONFERENCE DOCUS PROBABLY BE DESCRIBED AS QUOTE THE CTTEE UNQUOTE OR QUOTE LE COMMISSION UNQUOTE.IN ADDITION THERE WILL BE A GENERAL CTTEE(IN FRENCH PROBABLY QUOTE LE BUREAU UNQUOTE)A DRAFTING CTTEE AND A CREDENTIALS CTTEE.

4.CHAIRMAN OF CONFERENCE WILL NOW PROBABLY BE PROFESSOR AGO OF ITALY.ITALIANS ARE WE UNDERSTAND ASKING SOVIET UNION TO SUPPORT AGO AND WE FURTHER UNDERSTAND THAT THIS SUPPORT IS LIKELY TO BE GIVEN

...2

BEFORE CONFERENCE OPENS.IN THIS CONNECTION AUSTRIA POINTED OUT THAT IT IS NOT RPT NOT SEEKING OFFICE AT CHAIRMANSHIP LEVEL.

5.AS TO CTTEE OF WHOLE ELIAS(NIGERIA)HAS AGREED TO ACCEPT THIS CHAIRMANSHIP AND IT IS PROBABLE THAT HE WILL RECEIVE GENERAL SUPPORT. ARECHAGA(URUGUAY)WILL PROBABLY BE RAPPORTEUR OF CTTEE OF WHOLE AND HE TOO WILL PROBABLY RECEIVE GENERAL SUPPORT.GIVEN THAT THEY TOO WISH REPRESENTATION EASTERN EUROPEAN COUNTRIES WOULD APPARENTLY LIKE THERE TO BE TWO VICECHAIRMEN OF CTTEE OF WHOLE BOTH POSITIONS WHICH THEY HOPE TO FILL.WHETHER THERE WILL IN FACT BE ONE OR TWO VICE CHAIRMEN IS NOT YET SETTLED BUT IF HE ATTENDS AS REP OF CZECH PECHOTA WILL PROBABLY BE AN AGREED EASTERN EUROPEAN CANDIDATE FOR VICECHAIRMANSHIP OF CTTEE OF WHOLE.

6.AS TO DRAFTING CTTEE IT IS UNDERSTOOD THAT AREA COMPOSITION AND SIZE WILL BE SAME AS THAT IN SECURITY COUNCIL EXCEPT THAT QUOTE CHINESE UNQUOTE SEAT WOULD PROBABLY GO TO ANOTHER ASIAN COUNTRY. PROFESSOR YASSEEN(IRAQ)IS GENERALLY AGREED CANDIDATE FOR CHAIRMANSHIP OF DRAFTING CTTEE.(WE HAVE TODAY RECEIVED A NOTE FROM IRAQ PERMIS SEEKING SUPPORT FOR HIS CANDIDATURE TO WHICH WE ARE REPLYING IN USUAL NONCOMMITAL WAY.)

7.GENERAL CTTEE WILL CONSIST OF 3 CONFERENCE OFFICERS(IE CHAIRMAN OF PLENARY CHAIRMAN OF CTT OF WHOLE AND CHAIRMAN OF CREDENTIALS CTTEE)WITH ENOUGH ADDITIONAL VICEPRESIDENTS TO BRING IT UP TO SAME MEMBERSHIP AS GENERAL CTTE OF UNGA(IE TOTAL OF 25 MEMBERS).COMPOS-ITION(BASED ON GENERAL CTTEE OF UNGA)WOULD BE IN ADDITION TO 3 CHAIRMEN,REPS OF 5 PERM MEMBER COUNTRIES ON SECURITY COUNCIL,8

AFRO ASIANS,2 EASTERN EUROPEANS AND EITHER 4 LATINAMERICANS AND 3 WEO OR 5 LATINAMERICANS AND 2 WEO.(THUS OVER TWO YEARS OF CONFERENCE ONE SEAT ON GENERAL CTTEE WILL HAVE TO BE SPLIT BETWEEN LATIN AMERICAN AND WEO GROUPS.)THIS COMPOSITION IS BASED ON RESLN1990 (XVIII)AND FOOTNOTE TO RULE 31 OF RULES OF PROCEDURE OF UNGA.FUNCTION OF GENERAL CTTEE TO WHICH APPARENTLY ONLY PRECEDENT IS FIRST VIENA CONFERENCE ON DIPLO PRIVILEGES AND IMMUNITIES WOULD BE TO ACT AS CTTEE WHICH WOULD DEAL WITH ESSENTIALLY PROCEDURAL MATTERS BRINGING MORAL PERSUASION TO BEAR(GIVEN THAT MEMBERSHIP WILL PROBABLY BE DRAWN FROM MORE RENOWNED DELS)ON OTHER CTTEES SHOULD THEY FIND THEMSELVES IN DIFFICULTIES OF ONE SORT OR ANOTHER.CREDENTIALS CTTEE IS TO BE SAME IN NUMBER AND IN GEOGRAPHICAL DISTRIBUTION AS THAT OF UNGA(USSR HAS ALREADY AGREED TO THIS.)

8.ALTHOUGH THERE IS NATURALLY NO RPT NO FIRM AGREEMENT EVEN WITHIN WESTERN GROUP AS A WHOLE ON ABOVE OUTLINED MATTERS IT WOULD APPEAR THAT PLANNING OF SECRETARIAT,AUSTRIAN GOVT AND CERTAIN STATES SEEKING OFFICE IS ALREADY CONSIDERABLY ADVANCED.WESTERN GROUP REPS HAVE BEEN ASKED TO TRY TO INDICATE THEIR SUPPORT IN PRINCIPLE FOR THESE PROPOSALS IF POSSIBLE BY END OF NEXT WEEK AT LATEST.

9.AUSTRIA INDICATED ON INSTRUCTIONS THAT IT IS SEEKING ONE VICE PRESIDENCY AND A SEAT ON DRAFTING CTTEE.NETHERLANDS ALSO WISH A SEAT ON DRAFTING CTTEE.

10.IN COURSE OF GENERAL DISCUSSIONS PROBABLE COMPOSITION OF CERTAIN DELS BECAME CLEARER.AUSTRIAN DEL WILL BE LED BY VEROSTA WHOM THEY WISH AS VICE PRESIDENT AND MR K ZEMANEK(ONE OF THEIR SIXH CTTEE

...4

REPS)WILL ALSO BE MEMBER OF DEL.NETHERLANDS DEL WILL BE LED BY THEIR LEGAL ADVISOR RIPHAGEN.BRIT DEL WILL PROBABLY BE LED BY SIR FRANCIS VALLAT.FRENCH DEL PERHAPS BY N.DE BRESSON.FIN DEL BY MR ERIC CASTREN AND USA DEL BY AMBASSADOR RICHARD KEARNEY.

11.RE MATTERS OF SUBSTANCE:GIVEN THAT MANY OF THOSE IN ATTENDANCE AT UNGA WILL SOON BE RETURNING TO THEIR CAPITALS USA WOULD LIKE PRELIMINARY ADVANCE CONSULTATIONS WITH OTHER WESTERN STATES AS SOON AS POSSIBLE.THEY HAVE THEREFORE CALLED MTG FOR 11AM WED DEC6 AT USA PERMIS.AT THIS MTG THEY WILL PUT FORWARD THEIR OWN VIEWS ON POSSIBLE AMENDMENTS TO DRAFT ARTICLES AND RELATED MATTERS AND WOULD WELCOME PRELIMINARY VIEWS OF WHATEVER OTHER WESTERN STATES ARE IN A POSITION TO PROVIDE THEM.IF YOU HAVE ALREADY DECIDED ON COMPOSITION OF CDN DEL TO TREATIESU CONFERENCE IT WOULD PROBABLY BE HELPFULL IF ONE OF PERSONS WHO IS TO REP CDA IN VIENA WERE TO ATTEND THIS MTG.ROBERTSON WILL PLAN TO BE PRESENT IN ANY EVENT.ANY POINTS YOU WISH MADE SHOULD REACH US BY THAT DATE.

12.AFTER EASTERN MTG UK CHAIRMAN(DARWIN)ACTING ON INSTRUCTIONS ASKED AUSTRALIA USA AND OURSELVES WHETHER WE WOULD CONSIDER MTG OF ALL COMWEL AND USA IN LDN DURING JAN3 TO 5 TO DISCUSS PRIMARILY PART 5 OF LAW OF TREATIES.WE INDICATED WE WOULD REFER MATTER TO YOU AND BRIS SAID IF AGREEABLE THEY WOULD DRAW UP AN AGENDA AND CIRCULATE IT SOMETIME IN DEC.BOTH AUSTRALIAN REP AND USA REP(NZ WAS ABSENT)INDICATED INITIALLY THAT LDN MTG ABOUT THAT TIME WOULD SEEM TO BE DESIRABLE.

13.EUROPEAN MEMBERS OF WESTERN GROUP HOPE TO MEET FOR ADVANCE CONSULTATIONS(IN COUNCIL OF EUROPE CONTEXT)ON EUROPEAN CTTEE OF LEGAL COOPERATION.THIS MTG WILL PROBABLY TAKE PLACE IN STRASBOURG FROM WED JAN31 TO FRI FEB2 INCLUSIVE.SCANDINAVIANS WILL PROBABLY MEET

...5

ABOUT A WEEK IN ADVANCE OF THIS MTG IN HELSINKI TO COORDINATE THEIR VIEWS. IT IS BEING SUGGESTED THAT STRASBOURG GROUP HOLD FURTHER MTGS IMMED FOLLOWING CONCLUSION OF THEIR COUNCIL OF EUROPE MTGS EITHER CONTINUING IN STRASBOURG OR MOVING TO ANOTHER EUROPEAN CITY. THIS MTG WOULD BE FOR PURPOSE OF FURTHER CONSULTATIONS ON A BROADER BASIS AND WOULD HOPEFULLY BE ATTENDED BY REPS OF AUSTRALIA CDA NZ AND USA.

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: THE UNDER-SECRETARY

FROM / De: A.E. GOTLIEB

REFERENCE / Référence:

SUBJECT / Sujet: Conference on the Law of Treaties

SECURITY / Sécurité: CONFIDENTIAL

DATE: November 3, 1967

NUMBER / Numéro:

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 28

ENCLOSURES / Annexes

DISTRIBUTION

Legal

It has been decided by the Sixth Committee that the Conference is to take place at the end of March next year. It will last for three months.

2. As you know, Mr. Wershof has been anxious to lead the delegation. Do you think the time is ripe for a memorandum to be sent to the Minister raising the question of who should lead the delegation, or would you prefer to wait.

A.E. GOTLIEB

A.E.Gotlieb

Ext. 407D/Bil.
(Admin. Services Div.)

Mr. Beesley to see & return
30/11

file 20-3-1-6 11/18/12

copy sent to U.N. Documents 30/11
with request for documents
30/11

QUEEN'S UNIVERSITY
KINGSTON, ONTARIO

FACULTY OF LAW

November 28, 1967.

Mr. J. Stanford,
Head of Treaty Section,
Legal Division,
External Affairs Dept.,
Daly Bldg.,
Ottawa, Ontario.

Dear Joe:

Here is the list of UN Documents of which I should like to obtain copies:

UN. General Assembly. First session, second part (1946)

- Document A/138. (Article 102 of the Charter) (Draft Regulations submitted by the Secretary-General) [Mimeographed.]

UN. General Assembly. Fifth session (1950)

- Document A/1408: Report of the Secretary-General [Official Records of the General Assembly, Fifth Session, Annexes, agenda item 54].
- Document A/1372: Report of the Secretary-General [Official Records of the General Assembly, Fifth Session, Annexes, agenda item 56].
- Documents A/C.6/L.122 and Add. 1: Note by the Secretary-General (List of multilateral agreements, excluding the Convention on the Prevention and Punishment of the Crime of Genocide, of which the Secretary-General is the depositary and which have not yet entered into force) [Official Records of the General Assembly, Fifth Session, Annexes, agenda item 56].

UN. General Assembly. Sixth session (1951-52)

- Document A/1874: Note by the Secretary-General transmitting the advisory opinion of the International Court of Justice. [Mimeographed.]

...2

UN. General Assembly. Fourteenth session (1959)

- Document A/4253: Report of the Sixth Committee [Official Records of the General Assembly, Fourteenth Session, agenda item 55].
- Document A/4235: Report of the Secretary-General [Official Records of the General Assembly, Fourteenth Session, Annexes, agenda item 55].
- Document A/4311: Report of the Sixth Committee [Official Records of the General Assembly, Fourteenth Session, Annexes, agenda item 65].

UN. General Assembly. Seventeenth session (1962)

- Summary records of the Sixth Committee. 734th to 752nd meetings.
- Document A/C.6/L.498: List of multilateral agreements concluded under the auspices of the League of Nations in respect to which the Secretary-General of the United Nations acts as depositary and which are not open to new States by virtue of their terms or of the demise of the League: working paper presented to the Secretariat [Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 76].
- Document A/5287: Report of the Sixth Committee [Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 76].

UN. General Assembly. Eighteenth session (1963)

- Document A/5601: Report of the Sixth Committee [Official Records of the General Assembly, Eighteenth Session, Annexes, agenda item 69].
- Document A/5602: Report of the Sixth Committee [Official Records of the General Assembly, Eighteenth Session, Annexes, agenda item 70].

UN. General Assembly. Twenty-first session (1966)

- Verbatim records of the plenary meetings 1484th meeting.

UN. International Law Commission. Seventeenth session, Second Part (1966)

- Document A/6309/Rev.1: Reports of the International Law Commission on the second part of its seventeenth session Monaco 3-28 January 1966, and on its eighteenth session, Geneva 4 May - 19 July 1966. Part I: Report of the International Law Commission on the work of the second part of its seventeenth session. Section E, Law of Treaties.

UN. International Law Commission. Eighteenth session (1966)

- Yearbook of the International Law Commission, 1966, vol. II.

...3

UN. Secretariat.

- Document A/1372: Report of the Secretary-General on reservations to multilateral conventions [Official Records of the General Assembly, Fifth Session, Annexes, agenda item 56] (1950)
- Document A/1408: Report of the Secretary-General (Registration and publication of treaties and international agreements) [Official Records of the General Assembly, Fifth Session, Annexes, agenda item 54] (1950)
- Document A/CN. 4/1/Rev. 1: Survey of International Law in relation to the work of Codification of the International Law Commission [United Nations publication, Sales No.: 1948.V.1 (1)]
- Document ST/LEG/1, (1951) Handbook of Final Clauses.
- Document ST/LEG/6, (1957) Handbook of Final Clauses.
- Document ST/LEG/SER.B/3 [United Nations publication, Sales No.: 1952.V.4] Laws and Practices concerning the Conclusion of Treaties.

I believe we have at Queen's all of the other UN documents referred to in the Guide to the Draft Articles on the Law of Treaties. (Doc. A/C.6/376).

Incidentally, I'd be grateful if you could try to obtain originals or xeroxed copies rather than thermofax copies, since I hope to recopy many of the documents myself to enable excerpts to be included in the material for the conference.

Best regards.

Yours sincerely,

Hugh Lawford,
Professor.

HL/am

O/USSEA/A.E.GOTLIEB/dc

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: THE UNDER-SECRETARY

FROM / De: A.E. GOTLIEB

REFERENCE / Référence:

SUBJECT / Sujet: Conference on the Law of Treaties

SECURITY / Sécurité: CONFIDENTIAL

DATE: November 3, 1967

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	
MISSION	

ENCLOSURES / Annexes

DISTRIBUTION

Legal

It has been decided by the Sixth Committee that the Conference is to take place at the end of March next year. It will last for three months.

2. As you know, Mr. Wershof has been anxious to lead the delegation. Do you think the time is ripe for a memorandum to be sent to the Minister raising the question of who should lead the delegation, or would you prefer to wait?

A.E.Gotlieb

001150

Ext. 407A/Bil. (Admin. Services Div.)

3.11.19(05)

Mr. Bayley

UNITED NATIONS NATIONS UNIES

NEW YORK

CABLE ADDRESS · UNATIONS NEWYORK · ADRESSE TELEGRAPHIQUE

Copies to
European Div
OLA Div
U.N. Div
Done Dec. 1/67
J.S.

REFERENCE LE 130(1)

20-3-1-6

COPIE

The enclosed translation of a communication dated ..... 16 November 1967 is transmitted to the Permanent Missions of the States Members of the United Nations at the request of the Permanent Representative of the Union of Soviet Socialist Republics to the United Nations.

20 November 1967

BK

Translated from Russian

STATEMENT OF POSITION BY THE GOVERNMENT OF THE GERMAN DEMOCRATIC REPUBLIC ON THE DRAFT ARTICLES ON THE LAW OF TREATIES, ADDRESSED TO THE SECRETARY-GENERAL OF THE UNITED NATIONS

The Government of the German Democratic Republic has followed with interest the work of the United Nations International Law Commission on the law of treaties and has studied the draft articles on the law of treaties approved by the General Assembly in resolution 2166 (XXI) of 5 December 1966.

The Government of the German Democratic Republic is of the opinion that it is of exceptional importance to codify the law of treaties, in order to establish reliable safeguards against the danger of new wars being unleashed, to develop lasting peaceful relations and peaceful coexistence among all States, regardless of their state and social system, and to expand peaceful economic and cultural co-operation among them. The Government of the German Democratic Republic therefore welcomes the efforts undertaken by the United Nations to codify the law of treaties and considers the draft articles that have been put forward a suitable basis for bringing this important matter to a positive conclusion.

The Government of the German Democratic Republic welcomes in particular the provision in the draft convention to the effect that the contents of treaties must accord with the peremptory norms of modern international law (jus cogens), which is of decisive importance if international treaties are to be effective and the fact that it establishes that treaties which have been concluded through the use of illegal means or the content of which is at variance with the basic principles underlying the maintenance of peace are void or terminable. The Government of the German Democratic Republic sees this as an important confirmation of the fact that to eliminate the sources of danger in international affairs and ensure lasting peace

throughout the world is possible only by means of agreements which are concluded on the basis of strict observance of the peremptory norms of respect for the sovereignty, territorial inviolability and equality of all States and the prohibition of any interference in, aggression against or annexation of the territory of others.

If, moreover, treaties imposed by the imperialist Powers on weaker peoples by means of coercive methods are not to be recognized as valid, this will fully accord with the ideas of law held by all peace-loving and democratic forces. The convention, however, should take into account the fact that the former colonial Powers in particular are often only willing to conclude agreements in international law with the peoples of newly independent States if at the same time they can lay down one-sided conditions which violate jus cogens. The possibility that such treaties are at least partly invalid should therefore not be excluded.

The Government of the German Democratic Republic considers it important that the convention on the law of treaties should provide for all States to participate on an equal footing in the development of international co-operation. It therefore welcomes, in particular, the categorical confirmation of the capacity of all States to conclude international treaties, which is in accordance with the principle of equality and sovereignty. It is especially important in this connexion to ensure that all States can participate in general international treaties and treaties which are of universal significance for the maintenance of peace or the development of international law and which therefore cannot be made effective unless as many States as possible participate in them. From the standpoint of ensuring peaceful relations among all States, regardless of their state or social system, it is essential that the provisions on this matter should be restored to the convention, as was proposed at the seventeenth session of the International Law Commission. It should also be borne in mind in this connexion that the right of a State to participate in such treaties cannot be made dependent on its recognition by all other States Parties. It is clear from

international practice, e.g. the conclusion of the treaties on the cessation of nuclear tests and on the peaceful uses of outer space, that only thus is it possible to deal with the question of the maintenance of peace in a manner which includes all States.

The Government of the German Democratic Republic welcomes the fact that the convention on the law of treaties provides for a reliable and precise procedure for the preparation, entry into force and conclusion of international treaties and takes into account the need to simplify and speed up the conclusion of international treaties. If the proposed procedure for the signature of treaties were improved by the inclusion of provisions such as those contained in the draft articles submitted to the International Law Commission at its seventeenth session, it would further the cause of safeguarding international law. Finally, adoption of the basic principle that the legal force of international treaties is not affected by provisions of internal law which are at variance with them, would also help to strengthen the guarantees of international law.

Furthermore, the conclusion of treaties would be facilitated by a procedure for extending the opportunity to accede to multilateral treaties to States whose accession to such treaties was originally barred. This method, which was proposed at the seventeenth session of the International Law Commission, could do much to ensure that there was a guarantee of the application of reliable procedures in the various fields of peaceful international co-operation without renegotiation of the treaties in question on a regional or world-wide basis.

The Government of the German Democratic Republic, in accordance with its policy of seeking to preserve peace throughout the world and develop friendly relations among all States, has already given all the support and assistance it can to all efforts by the United Nations to achieve this end.

Although only States Members of the United Nations are participating in the preparation of the convention on the law of

treaties at the present time, the Government of the German Democratic Republic is of the opinion that the codification of the law of treaties is a matter which is of the greatest interest to all States. All States, therefore, should be given an opportunity to take part in the proposed conferences on the preparation of the convention on the law of treaties.

The Government of the German Democratic Republic hopes that this statement will be a contribution to the preparation of the work of the Conference.

ПОСТОЯННЫЙ ПРЕДСТАВИТЕЛЬ
СОЮЗА СОВЕТСКИХ СОЦИАЛИСТИЧЕСКИХ
РЕСПУБЛИК
ПРИ ОРГАНИЗАЦИИ ОБ'ЕДИНЕННЫХ НАЦИЙ

PERMANENT REPRESENTATIVE OF THE
UNION OF SOVIET SOCIALIST REPUBLICS
TO THE UNITED NATIONS
136 East 67th Street
New York 21, N. Y.

November 16, 1967.
n 530

Esteemed Mr. Secretary-General,

I have the honour to submit a statement of the Government of the German Democratic Republic relating to the question of the Law of Treaties.

The above-mentioned statement is directly connected with item 86 of the agenda of the 22nd regular session of the General Assembly.

I would like to ask you Mr. Secretary-General to circulate my letter and the enclosed statement to all Members of the United Nations.

Respectfully,

N. FEDORENKO

His Excellency, U THANT,
Secretary-General of the
United Nations
New York, N.Y.

Traduit de l'anglais

Le Représentant permanent de l'Union des Républiques socialistes soviétiques auprès de l'Organisation des Nations Unies

No 530

New York, le 16 novembre 1967

Monsieur le Secrétaire général,

J'ai l'honneur de vous communiquer une déclaration du Gouvernement de la République démocratique allemande relative à la question du droit des traités.

Cette déclaration est directement liée au point 86 de l'ordre du jour de la vingt-deuxième session ordinaire de l'Assemblée générale.

Je vous prie de bien vouloir faire distribuer ma lettre et la ..... déclaration jointe à tous les Etats Membres de l'Organisation des Nations Unies.

Veuillez agréer, Monsieur le Secrétaire général, les assurances de ma très haute considération.

(Signé) N. FEDORENKO

Son Excellence
U Thant
Secrétaire général de l'Organisation
des Nations Unies
New York

UNITED NATIONS NATIONS UNIES

NEW YORK

CABLE ADDRESS - UNATIONS NEWYORK - ADRESSE TELEGRAPHIQUE

REFERENCE: LE 130(1)

La traduction ci-jointe d'une communication, en date du ..... 16 novembre 1967, est transmise aux Missions permanentes des Etats Membres de l'Organisation des Nations Unies à la demande du Représentant permanent de l'Union des Républiques socialistes soviétiques auprès de l'Organisation.

Le 20 novembre 1967

BK

Traduit du russe

POSITION DU GOUVERNEMENT DE LA REPUBLIQUE DEMOCRATIQUE ALLEMANDE EN CE QUI CONCERNE LE PROJET D'ARTICLES SUR LE DROIT DES TRAITES, EXPOSEE AU SECRETAIRE GENERAL DE L'ORGANISATION DES NATIONS UNIES

Le Gouvernement de la République démocratique allemande a suivi avec intérêt les travaux de la Commission du droit international de l'Organisation des Nations Unies dans le domaine du droit international des traités et a pris connaissance du projet d'articles sur le droit des traités approuvé par l'Assemblée générale dans sa résolution 2166 (XXI) du 5 décembre 1966.

Le Gouvernement de la République démocratique allemande estime que la codification du droit international des traités a une importance exceptionnelle pour créer des garanties sûres contre le danger de déclenchement de nouvelles guerres, pour développer des relations pacifiques solides et la coexistence pacifique de tous les Etats, indépendamment de leur régime politique et social et, enfin, pour élargir leur coopération pacifique sur les plans économique et culturel. Le Gouvernement de la République démocratique allemande salue donc les efforts entrepris par l'Organisation des Nations Unies pour codifier le droit international des traités et estime que le projet d'articles présenté constitue une base convenable pour régler cette question importante d'une façon positive.

Le Gouvernement de la République démocratique allemande se félicite tout particulièrement de ce que le projet de convention confirme que le contenu des traités doit concorder avec les normes impératives du droit international contemporain (jus cogens), ce qui a une importance décisive sur l'efficacité des traités internationaux, et de ce qu'il établit la nullité ou la révocabilité des traités qui auraient été conclus par suite de l'utilisation de moyens illégaux ou dont le contenu serait en contradiction avec les principes fondamentaux du maintien de la paix. Le Gouvernement de la République démocratique allemande voit là une confirmation importante du fait que l'élimination des foyers de danger dans l'arène internationale et l'établissement

d'une paix solide dans le monde entier ne peuvent être obtenus qu'au moyen de traités conclus sur la base d'un respect rigoureux des normes impératives du respect de la souveraineté, de l'inviolabilité territoriale et de l'égalité de tous les Etats, ainsi que de l'interdiction de toute ingérence, agression ou annexion visant des territoires étrangers.

En outre, si l'on ne reconnaît pas comme valides les traités que les puissances impérialistes imposent par la contrainte à des peuples plus faibles, une telle attitude correspondra parfaitement à l'idée du droit que se font tous les pays pacifiques et démocratiques. Cependant, la Convention devrait tenir compte du fait particulier que les anciennes puissances coloniales concluent souvent des accords internationaux avec les peuples de jeunes Etats indépendants au prix de leur acceptation de conditions léonines contraires au jus cogens. La possibilité de la nullité, du moins partielle, de ces traités ne doit donc pas être exclue.

Le Gouvernement de la République démocratique allemande estime qu'il importe que la convention sur le droit des traités permette a tous les Etats de participer sur un pied d'égalité au développement de la coopération internationale. C'est pourquoi il note avec satisfaction, en particulier, la confirmation catégorique de la capacité de tous les Etats de conclure des traités internationaux, ce qui est conforme aux principes de l'égalité et de la souveraineté. Il importe tout spécialement, à cet égard, de faire en sorte que tous les Etats puissent participer aux traités relevant du droit international général ainsi qu'aux traités qui ont une portée universelle pour le maintien de la paix ou le développement du droit international et qui, par conséquent, ne peuvent être efficaces que si, dans la mesure du possible, tous les Etats y participent. Afin d'assurer l'établissement de relations pacifiques entre tous les Etats, quel que soit leur système politique et social, il est indispensable de réincorporer les dispositions pertinentes dans la convention, comme cela a été proposé à la dix-septième session de la Commission du droit international. Il convient de faire observer à ce sujet que le droit d'un Etat de participer à ces traités ne peut être soumis à la condition qu'il soit

reconnu par les autres Etats parties. Comme le montre la pratique internationale, par exemple la conclusion des traités relatifs à la cessation des essais nucléaires et aux utilisations pacifiques de l'espace extra-atmosphérique, ce n'est qu'ainsi qu'il est possible de régler la question du maintien de la paix d'une façon qui engage tous les Etats.

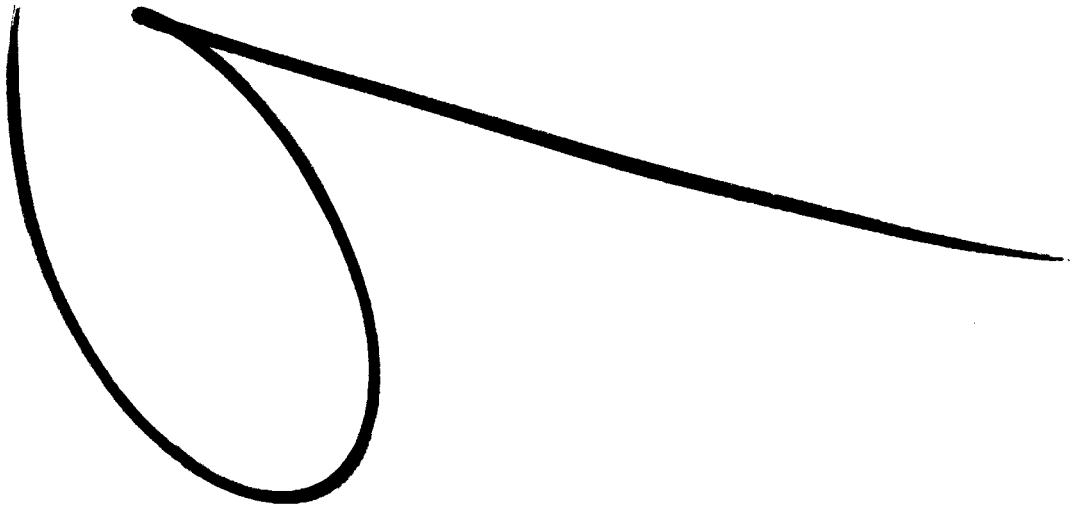
Le Gouvernement de la République démocratique allemande note avec satisfaction que la convention sur le droit des traités prévoit une procédure ferme et précise pour la préparation, l'entrée en vigueur et l'application des traités internationaux et qu'elle tient compte de la nécessité de simplifier et de hâter la conclusion des traités internationaux. Si la procédure proposée pour la signature des traités était améliorée par l'inclusion de dispositions telles que celles que contenaient les projets d'articles soumis à la Commission du droit international à sa dix-septième session, le droit international en serait renforcé. Enfin, l'adoption du principe fondamental selon lequel les effets juridiques des traités internationaux ne sont pas affectés par les dispositions de droit interne qui iraient à l'encontre de ces traités consoliderait également les garanties du droit international.

D'autre part, on peut considérer que la conclusion des traités serait facilitée par une procédure en vertu de laquelle la possibilité d'adhérer aux traités multilatéraux serait donnée aux Etats qui en étaient initialement exclus. Cette méthode, qui a été proposée à la dix-septième session de la Commission du droit international, pourrait contribuer considérablement à établir une garantie de l'application de procédures fermes dans les divers domaines de la coopération pacifique internationale sans qu'il soit besoin d'entamer de nouvelles négociations sur la reconclusion des traités en question sur le plan régional ou mondial.

Le Gouvernement de la République démocratique allemande, poursuivant sa politique qui vise à sauvegarder la paix dans le monde entier et à favoriser l'établissement de relations amicales entre tous les Etats, a déjà donné tout l'appui et toute l'assistance possibles à tous les efforts déployés à cette fin par l'Organisation des Nations Unies.

Bien qu'à l'heure actuelle seuls les Etats Membres de l'Organisation des Nations Unies participent à l'élaboration de la convention sur le droit des traités, le Gouvernement de la République démocratique allemande estime que la codification du droit des traités est une entreprise qui présente le plus grand intérêt pour tous les Etats. Par conséquent, la possibilité de participer aux conférences prévues pour l'élaboration de la convention sur le droit des traités devrait être donnée à tous les Etats.

Le Gouvernement de la République démocratique allemande espère que la présente déclaration contribuera à la préparation des travaux de la conférence.



cc Miller 30/10 Done
cc sent to Wershof

ACTION COPY

Stanford

FM CANDELNY OCT28/67 RESTR

TO EXTER 3033 PRIORITY

REF OURTELS2972 AND 2973 OCT25

UNGA XXII:SIXTH CTTEE:AGENDA ITEM86:LAW OF TREATIES

DEBATE CONCLUDED THUR OCT27 ON LAW OF TREATIES(ITEM86).DAHOMEY INTRODUCED A FURTHER MODIFICATION TO DRAFT RESLN AS DOCUA/C.6/L.623 REV.2 WHICH ADDED CYPRUS THAILAND AND CAR AS COSPONSORS AND CHANGED OPERATIVE PARA1 TO READ QUOTE DECIDES THAT FIRST SESSION OF INTERNATL CONFERENCE OF PLENIPOTENTIARIES ON LAW OF TREATIES REFERRED TO IN RESLN2166(XXI)OF DEC5/66 TO BE HELD IN 1968 SHALL BE CONVENED AT VIENA IN MAR 1968 UNQUOTE THIS CHANGE FOLLOWED CONSULTATIONS WITH STRAVROPOLOS WHO OBJECTED TO WORDING IN ORIGINAL DRAFT WHICH (HE THOUGHT)COULD BE TAKEN TO IMPLY A NEW DECISION TO CONVENE CONFERENCE SOMETHING WHICH HAD ALREADY BEEN DECIDED IN RESLN2166(XXI) DEC5/66.

2.AS IT WAS APPARENT THAT AFRICANS WOULD NOT RPT NOT ACCEPT OUR SUGGESTED CHANGE IN WORDING OF OPERATIVE PARA2(REF OURTELS2972 AND 2973 OCT25)RATHER THAN DELAY VOTE FURTHER WE SPOKE ON OUR OWN BEHALF AND THAT OF FINLAND AND OTHERS IN EXPLANATION OF OUR AFFIRMATIVE VOTE INDICATING THAT WE WOULD HAVE PREFERRED INCLUSION OF QUOTE IF POSSIBLE UNQUOTE IN OPERATIVE PARA2(OUR REFTEL2972).VOTING WAS 92(CDA)-0-WITH ONE ABSTENTION(FRANCE).IN SPEAKING IN EXPLANATION OF VOTE SYRIA SUDAN CZECHOSLOVAKIA USSR UAR SOMALIA AND BULGARIA ALL SPOKE ON QUOTE ALL STATES UNQUOTE ISSUE FOR WHICH CZECHOSLOVAKIA HAD LOBBIED UNSUCCESSFULLY.

3.IN ANSWER TO A QUESTION BY SWEDEN REGARDING FACILITIES FOR

...2

CONFERENCE SECRETARIAT EXPLAINED THAT IT WOULD BE IMPOSSIBLE TO HAVE FACILITIES FOR TWO CTTEES BUT THAT ARRANGEMENTS MIGHT BE MADE FOR STAFFING A WORKING GROUP AT LEAST PART TIME.

ACTION COPY

file 20-3-1-6

FM CANDELNY OCT25/67 RESTR

TO EXTER 2972 PRIORITY

REFOURTEL2944 OCT24 AND ROBERTSON/BEESLEY TELECON OCT25

UNGA XXII:SIXTH CTTEE:AGENDA ITEM86:LAW OF TREATIES

OUR FOLLOWING TEL SETS OUT REVISED TEXT OF L/623 ISSUED TODAY AS L/623 REV 1 IN WHICH PREAMBULAR SECTION HAS BEEN MODIFIED AND IN WHICH ORIGINAL COSPONSORS HAVE BEEN JOINED BY SEVERAL SOVIET BLOC STATES(CZECHOSLOVAKIA MONGOLIA AND POLAND).THERE ARE HOWEVER NO RPT NO CHANGES TO OPERATIVE PARAS.SINCE QUESTION OF OUR COSPONSORING THIS REVISED DRAFT WHICH WAS INTRODUCED BY DAHOMEY WED AM THEREFORE DOES NOT RPT NOT ARISE WE HAVE INSTEAD AGREED WITH FINLAND TO CONSIDER COSPONSORING AMENDMENT TO OPERATIVE PARA2 TO MEET WESTERN WISHES.AS ALREADY INDICATED THIS WOULD INSERT WORDS QUOTE IF POSSIBLE UNQUOTE BETWEEN QUOTE SECGEN UNQUOTE AND QUOTE NOT RPT NOT LATER THAN UNQUOTE SO THAT PHRASE WOULD READ QUOTE INVITES PARTICIPATING STATES TO SUBMIT TO SECGEN IF POSSIBLE NOT RPT NOT LATER THAN FEB15...ETC UNQUOTE.WE WOULD ONLY DECIDE TO DO THIS THUR IF BY THEN IT IS NOT RPT NOT ONLY CLEAR THAT COSPONSORS THEMSELVES WILL NOT RPT NOT MAKE CHANGE VOLUNTARILY BUT THAT IF WE PROPOSE SUCH AMENDMENT IT WOULD HAVE SOME CHANCE OF BEING ACCEPTED.NON ALIGNED IN SIXTH CTTEE MEET TONIGHT FOR FURTHER TALKS.

2.CZECHOSLOVAKIA IS MEANWHILE LOBBYING HARD TO MAKE DIFFERENT CHANGE TO OPERATIVE PARA2 WHICH WOULD REPLACE PHRASE QUOTE INVITES PARTICIPATING STATES UNQUOTE BY QUOTE INVITES INTERESTED STATES UNQUOTE.IF THIS NEW VERSION OF OLD PROBLEM OF QUOTE ALL STATES

...2

UNQUOTE SHOULD SUCCEED WE WOULD WISH TO VOTE AGAINST OPERATIVE PARA2 AND ABSTAIN ON RESLN AS WHOLE.FRANCE AND NORWAY INTEND TO ABSTAIN ON L/623 REV 1 EVEN IN ITS PRESENT FORM AND WOULD VOTE AGAINST ANY RESLN CONTAINING CZECHOSLOVAKIAN PHRASEOLOGY.

file 20-3-1-6

ACTION COPY

FM CANDELNY OCT25/67 RESTR

TO EXTER 2973 PRIORITY

REFOURTEL2972 OCT25

UNGA XXII:SIXTH CTTEE:AGENDA ITEM86:LAW OF TREATIES

FOLLOWING IS TEXT OF L/623 REV 1 OF OCT25 ON LAW OF TREATIES:TEXT BEGINS QUOTE

UNGA,

RECALLING THAT BY ITS RESLN2166(XXI)OF DEC5/66 IT DECIDED THAT AN INTERNATL CONFERENCE OF PLENIPOTENTIARIES SHALL BE CONVENED AT GNEVA OR AT ANY OTHER SUITABLE PLACE FIRST SESSION EARLY IN 1968 AND SECOND SESSION EARLY IN 1969 TO CONSIDER LAW OF TREATIES AND TO EMBODY RESULTS OF ITS WORK IN AN INTERNATL CONVENTION AND SUCH OTHER INSTRUMENTS AS IT MAY DEEM APPROPRIATE

RECALLING ALSO ITS REQUEST THAT SECGEN CONVOKE THIS CONFERENCE

RECALLING FURTHER THAT IT REFERRED TO THAT CONFERENCE DRAFT ARTICLES CONTAINED IN CHAPTER II OF REPORT OF INTERNATL LAW COMMISSION ON WORK OF ITS EIGHTEENTH SESSION AS BASIC PROPOSAL FOR CONSIDERATION BY THAT CONFERENCE

HAVING CONSIDERED ITEM ENTITLED QUOTE LAW OF TREATIES UNQUOTE AT ITS TWENTYSECOND SESSION

RECOGNIZING THAT EXCHANGE OF VIEWS AND WRITTEN COMMENTS OF GOVTS ON DRAFT ARTICLES ON LAW OF TREATIES PREPARED BY INTERNATL LAW COMMISSION AT ITS EIGHTEENTH SESSION MAY FACILITATE WORK AT INTERNATL CONFERENCE OF PLENIPOTENTIARIES

NOTING THAT AN INVITATION HAS BEEN EXTENDED BY AUSTRIAN GOVT TO

...2

HOLD IN VIENA BOTH SESSIONS OF CONFERENCE ON LAW OF TREATIES CONVENED BY RESLN2166(XXI)OF DEC5/66

1.DECIDES THAT FIRST SESSION OF AN INTERNATL CONFERENCE OF PLENIPOTENTIARIES SHALL BE CONVENED AT VIENA IN MAR/68;

2.INVITES PARTICIPATING STATES TO SUBMIT TO SECGEN NOT RPT NOT LATER THAN FEB15/68 FOR CIRCULATION TO GOVTS ANY ADDITIONAL COMMENTS AND DRAFT AMENDMENTS WHICH THEY MAY WISH TO PROPOSE IN ADVANCE OF CONFERENCE TO DRAFT ARTICLES PREPARED BY INTERNATL LAW COMMISSION;

3.REQUESTS SECGEN TO TRANSMIT TO INTERNATL CONFERENCE OF PLENIPOTENTIARIES ON LAW OF TREATIES SUMMARY RECORDS RELATING TO CONSIDERATION OF THIS ITEM AT TWENTYSECOND SESSION OF UNGA AND ALL OTHER RELEVANT DOCU.UNQUOTE TEXT ENDS.

VUSEM

Stanford 25/10

File Note:
I confirmed by telephone at 9:50 a.m. today & Robertson that we can co sponsor if western group agrees.

ACTION COPY

20-3-1-6

FM PRMNY OCT24/67 RESTR

TO EXTER 2944 IMMED

XXII UNGA 6TH CTTEE-AGENDA ITEM86:LAW OF TREATIES

FOLLOWING ARE OPERATIVE PARAS OF RESLN A/C.6/L.823 OCT23 SPONSORED BY MOST AFRICAN GROUP INCLUDING MOROCCO(ONLY ARAB).QUOTE PARA1 DECIDES THAT FIRST SESSION OF AN INTERNATL CONFERENCE OF PLENIPOTENTIARIES SHALL BE CONVENED AT VIENA IN MAR68;PARA2 INVITES PARTICIPATING STATES TO SUBMIT TO SECGEN NOT RPT NOT LATER THAN FEB15/68 FOR CIRCULATION TO GOVTS ANY ADDITIONAL COMMENTS AND DRAFT AMENDMENTS WHICH THEY MAY WISH TO PROPOSE IN ADVANCE OF CONFERENCE TO DRAFT ARTICLES PREPARED BY INTERNATL LAW COMMISSION;PARA3 REQUESTS SECGEN TO TRANSMIT TO INTERNATL CONFERENCE OF PLENIPOTENTIARIES ON LAW OF TREATIES SUMMARY RECORDS RELATING TO CONSIDERATION OF THIS ITEM AT TWENTYSECOND SESSION OF UNGA AND ALL OTHER RELEVANT DOCU.UNQUOTE.

2.THIS RESLN WAS SUPPOSED TO BE INTRODUCED TUE MORNING OCT24 BUT THIS DID NOT RPT NOT HAPPEN BECAUSE COSPONSOR ASSIGNED TO THIS TASK (DAHOMEY)WAS NOT RPT NOT PRESENT.NEVERTHELESS IN SPEAKING TO LAW OF TREATIES IN GENERAL DEBATE INDIA REFERRED TO DRAFT RESLN.ITS COMMENT WAS TO EFFECT THAT SINCE UNGA HAD ALREADY BY ITS RESLN2166 (XXI)DEC5/66 DECIDED THAT FIRST SESSION OF A PLENIPOTENTIARY CONFERENCE TO CONSIDER LAW OF TREATIES SHOULD BE CONVENED IN 68 OPERATIVE PARA1 OF L623 WHICH IN PART DUPLICATES EARLIER DECISION MIGHT GIVE RISE TO CERTAIN QUESTION IN INTERNATL LAW REGARDING CONTINUING EFFECT OF EARLIER RESLN.

3.WESTERN GROUP HAD ALREADY HAD A BRIEF MTG MON OCT23 AND DECIDED

...2

THAT IN ANY EVENT IT WOULD BE UNDESIRABLE IN A RESLN ON THIS ITEM TO ESTABLISH A FIRM DEADLINE FOR SUBMISSION OF COMMENTS OR AMENDMENTS.

4.WE AND NZ THEREFORE DISCUSSED L623 WITH CAMEROUN AND MOROCCO AT END OF TODAYS SIXTH CTTEE MTG AND SUGGESTED TWO POSSIBLE CHANGES OF WORDING WHICH MIGHT MEET BOTH INDIAN POINT AND WESTERN WISHES RE DEADLINE.CHANGES WERE AS FOLLOWS(A)TO REDRAFT OPERATIVE PARA1 MORE OR LESS ALONG FOLLOWING LINES QUOTE REAFFIRMS DECISION TO HOLD A FIRST SESSION OF INTERNATL CONFERENCE OF PLENIPOTENTIARIES AND DECIDES THAT IT SHALL BE CONVENED AT VIENA IN MAR68 UNQUOTE.(B) TO REDRAFT OPERATIVE PARA2 AS FOLLOWS QUOTE INVITES PARTICIPATING STATES TO SUBMIT TO SECGEN PREFERABLY NOT RPT NOT LATER THAN FEB15/68 ETC.UNQUOTE.

5.MOROCCO THEN ASKED WHETHER IF COSPONSOR WERE TO AGREE TO SUGGESTED CHANGES CDA AND NZ WOULD BE PREPARED TO JOIN AS COSPONSORS.WE ~~SAID~~ A' WE WOULD LOOK INTO POSSIBILITY.

6.WE INTEND TO SEEK VIEWS OF WESTERN GROUP SCHEDULED TO MEET LATE TUE AFTERNOON AS TO THETHER SUCH COSPONSORSHIP WOULD BE AN ACCEPTABLE PRICE TO PAY FOR SECURING DESIRED CHANGES.IF WESTERN GROUP AGREES WE WOULD PROPOSE TO COSPONSOR UNLESS YOU HAVE ANY OBJECTIONS WHICH SHOULD REACH US NO RPT NO LATER THAN 10AM WED OCT25.

7.INDIA IN ITS STATEMENT CAME OUT IN FAVOUR OF TWO CTTEES AT CONFERENCE WESTERN GROUP ON WHOLE FAVOURS SUCH AN APPROACH BUT DOUBTS WHETHER IT WOULD PROVE ACCEPTABLE TO MAJORITY OF CTTEE.IF INDIA CAN SELL THEIR SUGGESTION FURTHER AMENDMENTS TO L623 MAY BE FORTHCOMING AND WOULD PRESUMABLY RECEIVE WESTERN ENDORSEMENT.

Diary
Div. Diary
File

Legal Division/J. A. Stanford/ai

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary
(through the Legal Adviser)

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: U.N. Sixth Committee
Canadian Statement on the Law of Treaties

SECURITY / Sécurité:

DATE: October 23, 1967

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA 20-3-1-6	
MISSION 28	

ENCLOSURES / Annexes

DISTRIBUTION

It was originally proposed that the Canadian statement in the Sixth Committee discussion on the Law of Treaties be confined to procedural matters and general statements of principle. In the light of statements made by other governments, however, it appeared desirable to include in our statement remarks concerning certain matters of substance. As a result, the Canadian statement on Friday morning, October 20, made reference to a number of the draft articles, including a brief reference to Article 5 dealing with the capacity of members of a federal state to conclude treaties.

2. Our comment on Article 5 was confined to remarking that it failed to take account of factors such as recognition and State responsibility and that, in referring to members of a federal union as "States" it was using that term in a manner inconsistent with its use elsewhere in the draft articles.

3. Written comments on behalf of Canada are now being prepared for submission to the Secretary General. These will, of course, be submitted to you and, as you have instructed, to the Minister before being transmitted to the U.N.

J. A. BEESLEY

Legal Division

Ext. 407D/Bil.
[redacted]
(Admin. Services Div.)

001172

Legal Division/J.S. Stanford/jl

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary (through the Legal Adviser)

FROM / De: Legal Division

REFERENCE / Référence:

SECURITY / Sécurité: 18/10/67

DATE: October 23, 1967

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	

SUBJECT / Sujet: U.N. Sixth Committee
Canadian Statement on the Law of Treaties

ENCLOSURES / Annexes:

DISTRIBUTION:

It was originally proposed that the Canadian statement in the Sixth Committee discussion on the Law of Treaties be confined to procedural matters and general statements of principle. In the light of statements made by other governments, however, it appeared desirable to include in our statement remarks concerning certain matters of substance. As a result, the Canadian statement on Friday morning, October 20, made reference to a number of the draft articles, including a brief reference to Article 5 dealing with the capacity of members of a federal state to conclude treaties.

2. Our comment on Article 5 was confined to remarking that it failed to take account of factors such as recognition and State responsibility and that, in referring to members of a federal union as "States" it was using that term in a manner inconsistent with its use elsewhere in the draft articles.

3. Written comments on behalf of Canada are now being prepared for submission to the Secretary General. These will, of course, be submitted to you and, as you have instructed, to the Minister before being transmitted to the U.N.

Jean Beesley
Legal Division

Ext. 407A/Bil.

23.10.30(US)

001173

Mr J.A. Beesley,
Head of Legal Division,
Department of External Affairs,
OTTAWA.

WITH THE COMPLIMENTS
OF THE
NEW ZEALAND HIGH COMMISSION

SUITE 804
COMMONWEALTH BLDG.,
77 METCALFE ST.
OTTAWA 4

001174

24.10.67.

70223

file 20-3-1-6

(ROUTINE)

CONFIDENTIAL 21 OCTOBER 67

FROM NEW YORK

TO RR WELLINGTON 542

REPTD RR LONDON 254 OTTAWA 210 WASHINGTON 228 CANBERRA 227

CONFERENCE ON THE LAW OF TREATIES.

THE BRITISH, ALTHOUGH THEY HESITATE TO SAY SO DIRECTLY, HAVE VIRTUALLY ABANDONED THEIR EFFORTS TO HAVE THE CONFERENCE POSTPONED. THE SOVIET BLOC HAS COME OUT FIRMLY AGAINST POSTPONEMENT AND THE RESPONSE OF THE AFRO-ASIANS AND LATINS HAS BEEN QUITE DISCOURAGING.

2.. THE UNITED STATES (KEARNEY) TOLD WEO GROUP MEETING TOWARDS THE END OF THE WEEK THAT IT WAS SERIOUSLY CONSIDERING MAKING AN ATTEMPT TO REVERSE THE DECISION TAKEN LAST YEAR IN FAVOUR OF ONE MAIN COMMITTEE OF THE CONFERENCE ON THE GROUND THAT, UNLESS THIS IS DONE, THE CONFERENCE WILL SIMPLY NOT REPT NOT HAVE TIME TO GIVE THE 75 DRAFT ARTICLES THE ATTENTION THEY DESERVE. KEARNEY YESTERDAY SPOKE IN THE COMMITTEE IN THIS SENSE.

3.. THE DUTCH HAVE CONSISTENTLY ARGUED IN FAVOUR OF ONE COMMITTEE. THEY FEEL THAT THE DRAFT ARTICLES ARE NOT REPT NOT SUSCEPTIBLE O A RATIONAL DIVISION AND HENCE THAT THE COORDINATION OF THE WORK OF TWO MAIN COMMITTEES WOULD BE EXCEPTIONALLY DIFFICULT. THEY ALSO BELIEVE THAT THE DIFFICULTIES FACED BY SMALL COUNTRIES IN MANNING A TWO-COMMITTEE CONFERENCE ARE REAL - A VIEW WHICH YOU NO REPT NO DOUBT SHARE. ALMOST ALL OTHER WESTERN DELEGATIONS WOULD WELCOME A REVERSAL OF LAST YEAR'S DECISION BUT THEY ARE AS SCEPTICAL AS WE ARE THAT THIS CAN BE ACHIEVED. THERE WAS GENERAL AGREEMENT AT THE MEETING WITH THE BRITISH COMMENT THAT THE MOST THAT CAN BE HOPED FOR IS THAT AT THE CONFERENCE ITSELF A MAJORITY WILL BE WILLING TO SEE SOME ~~(UNDERLINED)~~ ARRANGEMENT MADE TO PERMIT CAREFUL AND DETAILED WORK ON THE DRAFT ARTICLES, E.G. THE EXTENSIVE USE OF WORKING PARTIES OR SUBCOMMITTEES OR A GENERAL DEBATE IN PLENARY ON, SAY, PART V RUNNING CONCURRENTLY WITH COMMITTEE WORK ON THE REMAINDER OF THE ARTICLES.

N

IN FACT THIS IS STILL EXPECTING TOO MUCH. THE SECRETARIAT HAS TOLD US THAT THE PRESENT BUDGET FOR THE CONFERENCE AND A SHORTAGE OF PERSONNEL LEAVE VERY LITTLE ROOM INDEED FOR FLEXIBILITY IN THE ORGANISATION OF THE CONFERENCE.

;

~~COL: 542 254 210 228 227 2. KEARNEY WED 75 3. EG V~~

"""

K

XXXXXXXXXXX

file 20-3-1-6

UNITED STATES MISSION TO THE UNITED NATIONS

799 UNITED NATIONS PLAZA
NEW YORK, N. Y. 10017

YUkon 6-2424

PRESS RELEASE

FOR RELEASE ON DELIVERY
CHECK TEXT AGAINST DELIVERY

Press Release USUN-162
October 20, 1967

Statement by Ambassador Richard D. Kearney, in Committee VI, on the Law of Treaties, October 20, 1967.

- -

The Government of the United States has set forth its views on certain basic issues relating to the draft articles on the Law of Treaties in the Comments which have been distributed as A/6827, Addendum 2. We would like to reiterate what is said in that document regarding the support of the United States for the development of a body of international law respecting treaties which will be effective throughout the world. There is no more important step which could be taken in the arduous task of codifying and developing international law.

The draft articles which the International Law Commission has prepared are the product of an enormous amount of work, great legal ability, and devotion to the development of international law. Those articles span the wide range of subjects which make up the law of treaties, excluding only those topics, such as state responsibility and state succession, which the Commission considers should be dealt with in a different context. A convention on the law of treaties based on those articles could be the most far reaching contribution to the establishment of international law that has been thus far achieved by humanity. But it is likewise true that a convention based on those articles could have an adverse effect upon the development of international law and, more than that, upon the maintenance of world peace and security.

These potentials for good and evil result from the fact that the treaty, the international agreement, is the cohesive element in the world community. To the extent that there is any binding international legislation, the legislative process must be based on a treaty. To the extent that there is any accepted international executive action, that action derives from a treaty. And, to the extent there is any effective international judicial decision, that decision depends on a treaty. We would, therefore,

be doing a vast disservice both to ourselves and to the future, if, in an endeavor to strengthen the treaty process, we instead weakened it either by clinging to ideas which have been out-run by time or by uncritically accepting as principles for action, untested theories of what the law should be.

In the comments submitted by the United States Government, a number of both kinds of problems are discussed. The articles on interpretation, for example, seem to us to be overly conservative, to rely upon rules which do not take into account modern studies in the art of communication and the actual practice of states.

Article 27 sets up the "ordinary meaning" of the terms of the treaty as the primary canon of interpretation. It may well be doubted whether words have any "ordinary meaning" which can be extracted as an isolated element from the whole complex process of determining what effect two or more States intended to achieve by employing a certain set of words. The English word "ordinary" itself is a word with several somewhat extraordinary meanings. Thus it could mean a tavern or other place serving alcoholic beverages, or a church official, or a kind of restaurant meal, or a volume of religious services, or most extraordinarily, that type of now extinct bicycle with a very large wheel in front, and a small wheel in back. The word, of course, can also mean ordinarily ordinary. This variety of possible meanings does illustrate the point that when a dispute arises over the meaning of terms in a treaty, the basic endeavor should be to determine the meaning that the parties meant and not some alleged ordinary meaning. For this purpose all available sources of evidence should be freely open to the interpreters. To relegate the preparatory work on the treaty or the circumstances of its conclusion to a secondary and subordinate position as is done in Article 28 makes it more difficult to resolve a dispute instead of making it easier. It is the common practice of foreign offices to consider these matters when a point of interpretation arises. And even those international tribunals which reject the use of travaux preparatoires on the ground that the meaning of the disputed treaty term is clear are accustomed to add that there is nothing in the preparatory work which would cause them to change their opinion.

Interpretation, then, is an area in which the Commission prepared somewhat outdated rules which do not meet present demands or conform to present practice. On the other hand, in dealing with the problem of invalidity of treaties, the Commission has prepared a set of articles which go far beyond both present practice and existing law, which lay down sweeping rules in areas where there is no practice and there is no precedent, and which rather than advancing acceptance of international law could hinder it.

We fully realize that this was not the intention of the Commission. In seeking to deal with the difficult problem of invalidity, the Commission, as Article 39 makes clear, sought to pre-empt the entire field. This meant that the Commission had to devise a rule for every conceivable ground on which a treaty could be declared invalid. The result is a series of Articles such as 45 on Error, 46 on Fraud, and 47 on Corruption, in which a rule that has a most drastic consequence -- the invalidity of a treaty -- has been stated in general and vague terms. The vagueness and generality are understandable because no body of international practice or judicial opinion has been developed with respect to these matters. But this same absence of practice and opinion means also that there are no existing international law rules which define and delimit the operation of these rules. Unless it is possible to give greater content to phrases such as "fraud" and "corruption" the question necessarily arises whether at the present stage the advantage to the development of international law from seeking to include all possible reasons for invalidating a treaty is not clearly less important than the danger to the stability of treaties which will result from affording easy excuses to avoid treaty obligations.

In some of the invalidity articles, such as those on error and fraud, the existence of substantially developed principles of municipal law can, by analogy, afford a limited degree of protection against misuse of the concepts in the international arena but the work necessary to convert these municipal legal doctrines to international use has not been carried out. When we consider Article 50 on peremptory norms of international laws any reference to municipal law analogies become much more difficult. Article 50 is concerned solely with international law and thus has no well-developed counterpart in municipal law. What is a peremptory norm of international law can be determined only by international law. And, at this stage in the development of international law, we have not yet developed any means of defining and recognizing peremptory norms. It may not be possible to lay down the rules for distinguishing a peremptory norm from other principles of international law. Certainly no such rules have been established up to this time. But how can we include Articles 50 and 61 in a Convention on the Law of Treaties unless we can agree on what a peremptory norm is? Or, to put the proposition in the negative, how can we agree in a law-making treaty, that a treaty is invalid if it violates jus cogens, if we can't agree what makes a norm peremptory?

Unless we can find answers to such questions, unless we can clarify the grounds upon which a treaty may be invalidated, the proposed Convention on the Law of Treaties could lead to denunciations of treaties on insubstantial and unsubstantiated grounds. This is a prospect which all States should be most anxious to prevent. It is a possibility which smaller and weaker States should above all be concerned to avoid. The development

MORE

of law has been mainly concerned with the protection of the weak against the strong. This has been no less true of the development of international law. The greatest legal protections in the international field and the United Nations Charter itself have been put into effect through the treaty process. We should, therefore, be most hesitant in adopting any rules which would tend to cast doubt upon the general validity of treaties or which would permit unwarranted unilateral terminations or withdrawal. Lax rules and loose requirements will, in the long run, hurt most those who most need treaty protection.

World peace and international cooperation can be sought and developed effectively only through the treaty system and if the stability of that system is undermined, then peace and cooperation are undermined. In considering the inclusion of grounds for invalidating treaties in the draft convention we must consider whether it is possible to define the ground with enough precision so that the possibility of abuse is held within acceptable limits.

Even in instances where a sizeable body of legal discussion and commentary has been developed regarding a ground for termination of a treaty, the difficulties in formulating a rule which can be applied with any degree of certainty are great. For example, Article 59 on rebus sic stantibus contains a series of general propositions which are bound to give rise to bitter argument.

When is a change of circumstance fundamental? Are the circumstances only those directly related to the treaty or may they be indirectly related or even not related at all? How is the subjective criterion that the change was not foreseen to be established? Is this requirement really one that implies improbability of knowing or does it imply impossibility of knowing? Or would the parties be required to have foreseen only what would be predictable by recourse to such means as extrapolation by statistical analysis? A dozen other questions of similar complexity could be drawn from Article 59, and there are no conclusive answers.

These uncertainties highlight a major weakness in the draft. The Articles point out a good many ways to begin arguments over the validity or applicability of a treaty. But they do not contain any sure methods of settling such arguments. Article 62, the major procedural article, in this respect, is somewhat like the famous general who marched his troops up the hill and then marched them down again. In paragraph (1) of the Commentary to Article 62, the Commission states:

MORE

> "...Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation."

But when we examine Article 62 we do not find real safeguards against the possibility of abuse. To be sure, there is a three-month period during which a party claiming invalidity or breach must wait before taking action to terminate or withdraw from or suspend the treaty, though even this period is subject to an exception. But if, as is likely, the other party or parties object during this period, there is no further safeguard provided in the articles. The parties are left to seek a settlement of the dispute under Article 33 of the United Nations Charter.

What safeguard against misuse of the draft article is provided in the provision to seek a solution under Charter Article 33? There is nothing in Article 33 which could be construed as requiring a party to refrain from terminating or suspending a treaty while an effort is being made to seek a solution by negotiation, enquiry, mediation or any of the other methods enumerated in that article. This in itself is not objectionable. There will undoubtedly be numerous occasions on which a party to a treaty will be fully entitled to terminate or suspend it in the absence of any agreed settlement. What is objectionable is that a party not entitled to suspend or terminate may do so and that Article 33 does not provide any secure methods of protecting the other parties against such an illegal action.The world is full of international disputes which, if this were a perfect world, would have been settled under the procedures provided in Article 33. But this is, as we all know, an imperfect world, and Article 33 in operation has proven to be an imperfect method for ensuring that disputes will be settled.

We are confronted with a situation in which there is general agreement that a safeguard is required and a situation in which the safeguard proposed does not afford real protection. We are also dealing with a situation in which the problems are of a peculiarly legal character as has been illustrated by the necessity of referring to analogies in municipal legal systems. The validity of agreements, the interpretation of agreements, the breach of agreements -- these are questions which in every legal system are subject to some form of judicial decision in order to ensure the proper performance of valid obligations. The same safeguard should be provided in this fundamental set of provisions respecting international agreements. Failure to provide for ready recourse to some mandatory means for the impartial settlement of disputes would mean a Convention on the Law of Treaties, which is incomplete, one-sided, and susceptible to misuse.

The treaty must be balanced by expanding Article 62 to provide methods of resolving disputes. These methods could and should be flexible. They should permit parties to select that method of settling a dispute best suited to determination of the questions at issue. The essential element is that a party to a dispute should not be able to refuse settlement of a dispute over a treaty and, at the same time, be left free to take unilateral action with respect to the treaty.

There are a number of other questions relating to the draft articles which the United States considers of substantial importance. These are discussed in the United States comments and will not be gone into at this time. There are also numerous matters of a technical nature regarding the articles which will have to be considered at the Conference. The number of these matters is sufficiently numerous that the United States suggests additional thought should be given to the working methods of the Conference. Our review of the draft articles during the past year has made us conclude that it will be extremely difficult, if not impossible for one main committee by itself to complete a thorough review of all seventy-five articles within the time period of nine weeks. If the Conference worked seven days a week, it would have to deal with almost one article a day in order to complete its work. There are a number of articles which undoubtedly can be disposed of in less than one working day. But there are a number of other articles on which discussion of several days duration can well be anticipated.

If the 1969 session is to be successful, if it is to result in a carefully thought-out and well-drafted Convention which will have general acceptability, there must be a complete examination of the draft articles in 1968. It is important, therefore, that all of us, in preparing for the Conference, devote considerable thought to what methods can be used to ensure this complete review. The importance of the Conference to the development of international law is such that every effort should be made to achieve a successful completion of the Conference.

Thank you, Mr. Chairman.

* * * * * ** *

OTT 608

EN046

ACTION COPY

20-3-1-6

00 OTT

DE NYK

O 191616Z

FM CANDELNY OCT19/67

TO EXTER 2880 IMMED

DRAFT STATEMENT TO BE MADE IN 6TH CTTEE: ITEM86: LAW OF TREATIES

FOLLOWING IS DRAFT TEXT OF PROPOSED STATEMENT WHICH WE HOPE TO MAKE IN6TH CTTEE FRI MORNING OCT20. IF YOU HAVE ANY COMMENTS ON THIS WE WOULD BE GRATEFUL IF YOU WOULD LET US HAVE THEM BY PHONE THUR EVENING AROUND 6.

TEXT BEGINS: MR CHAIRMAN

AS WE ALL KNOW PREPARATION OF DRAFT ARTICLES ON LAW OF TREATIES WAS RESULT OF EXTRAORDINARY EFFORTS ON PART OF INTERNATL LAW COMMISSION, INCLUDING SPECIAL RAPPORTEUR SIR HUMPHREY WALDOCK, DRAFT ARTICLES REPRESENT CULMINATION OF ALMOST TWO DECADES OF EFFORT ON PART OF COMMISSION AND INTERNATL COMMUNITY MUST BE VERY GRATEFUL TO COMMISSION FOR ITS OUTSTANDING WORK. IT IS VIEW OF CANDEL THAT IT NOW BECOMES RESPONSIBILITY OF GOVTS TO WHOM TASK OF CODIFICATION HAS NOW BEEN ASSIGNED TO DEVOTE EXTRAORDINARY EFFORTS OF THEIR OWN TO CONTINUATION OF THIS WORK THROUGH DRAFTING OF A SUCCESSFUL INTERNATL CONVENTION;. A CONVENTION WHICH WILL CLEARLY CONSTITUTE AN EXTREMELY IMPORTANT FURTHER STAGE NOT RPT NOT ONLY IN CODIFICATION OF INTERNATL LAW BUT MOREOVER IN REGULATION OF INTERSTATE RELATIONSHIPS IN A KEY FIELD OF THEIR ACTIVITIES.

AS FAR AS CONCERNS DRAFT ARTICLES THEMSELVES IT WOULD NOT RPT NOT BE IN OUR VIEW APPROPRIATE AT THIS TIME TO GO INTO ANY GREAT DETAIL ON MATTERS OF SUBSTANCE. CANDEL BELIEVES THAT DETAILED COMMENTS CAN BETTER BE COVERED IN WRITTEN SUBMISSIONS FOR CONSIDERATION BY MEMBER STATES IN ADVANCE OF AND ALSO DURING ...2

PROPOSED CONFERENCE. I MIGHT ADD IN THIS RESPECT THAT CDN GOVT ITSELF WILL BE SUBMITTING FURTHER EXPLICIT COMMENTS ON DRAFT ARTICLES IN VERY NEAR FUTURE.

NEVERTHELESS THERE ARE CERTAIN MORE GENERAL MATTERS OF A BROAD NATURE ARISING FROM DRAFT ARTICLES ON WHICH I WOULD LIKE TO COMMENT AT THIS TIME. IN PARTICULAR THERE IS ONE IMPORTANT QUESTION OF PRINCIPLE ON WHICH MY DEL WISHES TO MAKE SOME OBSERVATIONS.

IT SEEMS VERY CLEAR TO US THAT IF PROPOSED VIENA CONFERENCE IS TO PRODUCE BROAD INTERNATL AGREEMENT ON RULES OF LAW AND PROCEDURES WHICH ARE IN FUTURE TO GOVERN TREATY RELATIONSHIPS THEN CONFERENCE MUST SUCCEED IN PRODUCING A CONVENTION WHICH [~~WILL DO MORE THAN MERELY BE IN ACCORD WITH INTERNATLY ACCEPTED VIEWS AS TO PRESENT NATURE OF LAW OF TREATIES. NEVER IN CONTRIBUTING TO PROGRESSIVE DEVELOPMENT OF INTERNATL LAW PROPOSED CONVENTION~~] SHOULD ~~ALSO~~ MAKE A POSITIVE CONTRIBUTION TO ORDERLY CONDUCT BY STATES OF THEIR TREATY RELATIONSHIPS AND TO OBSERVANCE BY THEM OF THEIR TREATY OBLIGATIONS. THIS IS NOT RPT NOT GOING TO BE AN EASY TASK FOR AS SPECIAL RAPPORTEUR HIMSELF HAS ALREADY POINTED OUT TO US IN HIS STATEMENT ON OCT 9 ~~WHILE IMPORTANCE TO INTERNATL COMMUNITY OF HAVING AN ADEQUATE AND AUTHORITATIVE BODY OF TREATY LAW CANNOT RPT NOT BE PUT TOO HIGH NEVERTHELESS~~ DIVERGENT VIEWS EXIST EVEN ON MOST BASIC QUESTIONS. I THINK THIS FACT MAY ALSO BE SEEN BOTH FROM DEBATE IN THIS CTTEE AND FROM COMMENTS OF GOVTS.

IN DRAFT SO PAINSTAKINGLY PREPARED BY INTERNATL LAW COMMISSION

...3

THERE ARE MANY ARTICLES WHICH IN VIEW OF MY DEL ENUNCIATE DESIRABLE LEGAL PRINCIPLES ~~THAT MAY BE CAPABLE OF DEFINITION IN ABSTRACT BUT~~ WHICH WILL BE EXCEEDINGLY DIFFICULT TO APPLY IN PRACTICE ~~IN A MANNER~~ ~~WHICH~~ IN ABSENCE OF PARALLEL PROVISIONS TO ~~LIGHT OF CONTEMPORARY ATTITUDES TOWARDS~~ COMPULSORY SETTLEMENT OF DISPUTES, ~~MIGHT NOT RPT NOT WEAKEN TO SOME EXTENT SECURITY OF INTERSTATE TREATY RELATIONS.~~ ARTICLES DEALING FOR EXAMPLE WITH PEREMPTORY NORMS OF INTERNATL LAW AND WITH EFFECT OF CHANGE OF CIRCUMSTANCES ARE ~~WORTHY OF MENTION IN THIS CONNECTION BUT~~ AMONGST MOST IMPORTANT ARE BY NO RPT NO MEANS ONLY EXAMPLES OF ARTICLES ~~WHICH CONTAIN WHAT APPEAR TO BE SUBJECTIVE CRITERIA.~~ REQUIRING HIGHLY SUBJECTIVE determination judgment IT IS CDN VIEW THAT ~~PERHAPS~~ GREATEST CHALLENGE THAT WILL FACE GOVTS AT FORTHCOMING CONFERENCE WILL BE TO DISCOVER A SATISFACTORY METHOD OF APPLYING PRINCIPLES OF INTERNATL LAW ENUNCIATED IN DRAFT ARTICLES TO EVERYDAY TREATY ACTIVITIES OF STATES. THIS AFTER ALL IS SURELY PURPOSE OF CONVENTION-NOT RPT NOT MERELY TO ENUNCIATE LAW IN ABSTRACT BUT TO ENUNCIATE IT IN SUCH A MANNER THAT IT WILL GAIN WIDE ACCEPTABILITY ~~AND~~ RECEIVE EFFECTIVE APPLICATION. and key to a minimum dispute ~~and~~ free interpretation of the Convention.

AS CDN REP ON THIS CTTEE SPEAKING ON THIS SUBJ LAST YEAR ON OCT6/66 AND AS OTHER REPS BOTH THEN AND THIS YEAR HAVE ALSO EMPHASIZED CONSEQUENCES OF A FAILURE-OF AN UNSUCCESSFUL OUTCOME- OF FORTHCOMING PLENIPOTENTIARY CONFERENCE ON LAW OF TREATIES WOULD BE EXTREMELY SERIOUS. FACT THAT GOVTS ARE PREPARED TO JOIN TOGETHER IN CONFERENCE FOR PURPOSE OF DRAWING UP AN EFFECTIVE TREATY IS HOWEVER ITSELF ENCOURAGING SINCE IT INDICATES THAT DESPITE RISKS TO WHICH I HAVE REFERRED THEY ARE CONFIDENT THAT CHALLENGE CAN BE MET.

...4

ALTHOUGH AS I HAVE ALREADY STATED IT IS NOT RPT NOT OUR INTENTION AT THIS TIME TO ENTER INTO A DETAILED DISCUSSION OF INDIVIDUAL DRAFT ARTICLES PERHAPS IT WOULD BE HELPFUL IF I WERE TO INDICATE BRIEFLY AT LEAST SOME OF POINTS ON WHICH IN VIEW OF MY DEL CONFERENCE WILL HAVE TO EXERCISE PARTICULAR CARE.

AMONG THESE AS ~~I HAVE ALREADY IMPLIED~~ ARE ARTICLES 50 AND 61 CONCERNING JUS COGENS. CDA IS IN AGREEMENT WITH IMPORTANCE AND SIGNIFICANCE OF PRINCIPLES ~~UNDERLYING FORMULATIONS EXPRESSED~~ IN THESE TWO ARTICLES. ~~HOWEVER WE BELIEVE THAT~~ IN ABSENCE OF ~~OR AS ALTERNATIVE TO~~ ANY PROVISION FOR ADJUDICATION OF DIFFERENCES RELATING TO APPLICATION OF THESE ARTICLES IN PARTICULAR CASES, CONFERENCE WILL HAVE EITHER TO ATTEMPT TO DEFINE CRITERIA FOR APPLYING JUS COGENS OR ~~TO~~ CONSIDER CAREFULLY IMPLICATIONS OF FAILURE TO ~~DEFINE IN CLEAR TERMS MANNER IN WHICH EXISTENCE OF JUS COGENS NORM IS TO BE DETERMINED.~~

ARTICLES 16 AND 17 DEALING WITH RESERVATIONS AND OBJECTIONS TO SUCH RESERVATIONS ARE ALSO IN VIEW OF MY GOVT ARTICLES REQUIRING FURTHER CLARIFICATION IF THEY ARE NOT RPT NOT TO PROVE A SOURCE OF FUTURE DIFFICULTIES. IN OUR VIEW LANGUAGE OF ARTICLE 16(C) RELATING TO TREATIES WHICH CONTAIN NO RPT NO PROVISIONS FOR RESERVATIONS IS NOT RPT NOT SUFFICIENTLY CLEAR ~~WITH REGARD~~ TO ~~EFFECT OF~~ A RESERVATION WHICH IS INCOMPATIBLE WITH OBJECT AND PURPOSE OF A PARTICULAR TREATY, ~~ON PROCEDURES ALREADY TAKEN BY RESERVING STATE WITH A VIEW TO BECOMING A PARTY TO TREATY IN QUESTION.~~ FURTHER CLARIFICATION ALSO APPEARS DESIRABLE IN RELATION TO PROBLEM WHICH WOULD ARISE IN CASE OF A MULTILATERAL TREATY ...5

CONTAINING NO RPT NO PROVISION ~~WITH REGARD TO RESERVATIONS IN RESPECT~~ OF LEGAL CONSEQUENCES OF AN OBJECTION BY ONE STATE TO A RESERVATION MADE BY ANOTHER. IN OUR ~~VIEW THERE IS SOME CONFLICT BETWEEN~~ DRAFT ARTICLE17 PARA22 OF ~~COMMENTARY; AND REFS IN PARAS3 AND 10 OF~~ COMMENTARY TO ~~INTERNATL COURT OF JUSTICES ANSWER II IN GENOCIDE~~ CONVENTION CASE. ~~IT IS CDN VIEW THAT QUESTION WHETHER IN SUCH CASES A~~ TREATY ENTERS INTO FORCE BETWEEN RESERVING AND OBJECTING STATES DEPENDS NOT RPT NOT UPON COMPATIBILITY OF RESERVATION WITH OBJECT AND PURPOSE OF TREATY BUT ONLY UPON INTENTIONS OF OBJECTING STATE. IF THIS IS SO THEN IT WOULD APPEAR DESIRABLE TO EXPAND WORDING OF ARTICLE17(4)(B) TO PROVIDE FOR THIS EXPLICITLY.

THERE ARE A NUMBER OF OTHER ARTICLES WHICH MAY BE FOUND IN DISCUSSIONS AT VIENA CONFERENCE TO BE A SOURCE OF SUBSTANTIAL DIFFICULTIES OF INTERPRETATION OR TO NEED FURTHER ELABORATION. I MIGHT MENTION IN PASSING AS AN EXAMPLE ARTICLE5 ON CAPACITY. THIS ARTICLE AS A NUMBER OF STATES HAVE POINTED OUT IN THEIR COMMENTS APPEARS INCOMPLETE. MOREOVER IN ITS USE OF SUCH A FUNDAMENTAL TERM AS QUOTE STATE UNQUOTE IT APPEARS NOT RPT NOT WHOLLY CONSISTENT WITH OTHER ARTICLES IN THIS SAME PART OF DRAFT CONVENTION.

CONSIDERATIONS SUCH AS THESE EMPHASIZE UNIQUE NATURE OF FORTHCOMING CONFERENCE WHICH WILL HAVE TO DEAL IN DETAIL NOT RPT NOT ONLY WITH ALL MORE HUM DRUM AND ROUTINE ASPECTS OF TREATY MAKING PROCEDURES AS SUCH BUT ALSO WITH SOME OF GREAT FUNDAMENTAL DOCTRINAL ISSUES IN INTERNATL LAW. ARTICLES WHICH MAY AT FIRST APPEAR ONLY TO DEAL WITH

...6

FORMALITIES ARE OFTEN SEEN IN PART TO RAISE ISSUES OF SUBSTANCE. HERE I WOULD LIKE ESPECIALLY TO REFER TO ARTICLE 62 AND TO RELATIONSHIP WHICH IN CDN VIEW EXISTS BETWEEN THIS ARTICLE AND CERTAIN OTHER DRAFT ARTICLES. A NUMBER OF ARTICLES AND SUBARTICLES INCLUDING ARTICLE10(2)(A);11(1)(B);12(B);24 25 27(4);33(1) AND 33(2);39(1); 53(1);56(1)(A) AND 56(2); AND 61 ALL REQUIRE THAT A CERTAIN FACT OR FACTS BE QUOTE ESTABLISHED UNQUOTE BEFORE PROVISION OF ARTICLE IN QUESTION TAKES EFFECT. INDEED IN THIS RESPECT ARTICLE39 EXTENDS REQUIREMENT FOR ESTABLISHING FACT IN QUESTION TO ALL ARTICLES IN PART V WHICH DEAL WITH INVALIDITY OF TREATIES.

AS MIGHT HAVE BEEN INFERRED FROM MY EARLIER REMARKS RELATING TO JUS COGENS ARTICLES MY GOVT WONDERS WHETHER CONCEPT OF ESTABLISHING A FACT OR FACTS AS IS CONTEMPLATED BY THESE ARTICLES OUGHT NOT RPT NOT NECESSARILY TO MEAN SOMETHING MORE THAN MERELY THAT A GIVEN FACT CAN BE ALLEGED BY ONLY ONE PARTY TO ANY GIVEN TREATY. MIGHT IT NOT RPT NOT INSTEAD IMPLY SOME FORM OF OBJECTIVE DETERMINATION OF FACT THAT IS TO BE ESTABLISHED. IT WILL CERTAINLY BE FOR CONSIDERATION AT CONFERENCE WHETHER USE OF THIS CONCEPT IN ARTICLES TO WHICH I HAVE REFERRED IMPLIES THAT UNTIL PARTICULAR FACT IN QUESTION HAS BEEN SO DETERMINED IT CANNOT RPT NOT PROPERLY BE CONSIDERED TO HAVE BEEN QUOTE ESTABLISHED UNQUOTE AND THUS THAT PROVISIONS OF ARTICLE CONCERNED WOULD NOT RPT NOT TAKE EFFECT UNTIL THEN. THUS IT WOULD APPEAR DESIRABLE AT CONFERENCE TO MAKE RELATIONSHIP BETWEEN ARTICLE62 AND OTHER ARTICLES REFERRED TO ABOVE MORE CLEAR THAN IT IS AT PRESENT.

...7

A FURTHER CLARIFICATION WOULD ALSO SEEM NECESSARY WITH RESPECT TO RELATIONSHIP BETWEEN PROVISIONS OF ARTICLE 62(3) AND ARTICLE OF CHARTER WHICH IN ITSELF APPLIES ONLY TO DISPUTES LIKELY TO ENDANGER INTERNATL PEACE AND SECURITY. WHILE WE APPRECIATE THAT ARTICLE 62(3) REFERS TO MEANS INDICATED IN ARTICLE 33 OF CHARTER WE CONSIDER THAT IT WOULD ALSO BE DESIRABLE TO MAKE MORE CLEAR THAT IT IS NOT RPT NOT INTENTION TO LIMIT APPLICATION OF ARTICLE 62(3) ITSELF ONLY TO DISPUTES LIKELY TO ENDANGER INTERNATL PEACE AND SECURITY.

MR CHAIRMAN ~~BEFORE I END MY REMARKS I~~ WOULD LIKE TO ~~REFER TO SITE OF FORTHCOMING CONFERENCE ON LAW OF TREATIES. CDN GOVT~~ WARMLY WELCOME INVITATION OF GOVT OF AUSTRIA TO HOLD OUR FORTHCOMING CONFERENCE IN VIENA. ~~AS FAR AS CONCERNS~~ DATES WHICH HAVE BEEN PROPOSED BY SECRETARIAT FOR FIRST SESSION OF CONFERENCE WHICH IS TO SAY FROM LATE MAR THROUGH MAY 1968 WE WILL GIVE CAREFUL CONSIDERATION TO VIEWS ALREADY EXPRESSED ANT TO THOSE WHICH MAY YET BE EXPRESSED BY OTHER STATES ON THEM AND WE ARE PREPARED TO ASSOCIATE OURSELVES WITH WISHES OF MAJORITY OF CTTEE IN THIS REGARD.

MR CHAIRMAN IN CLOSING I WOULD AGAIN LIKE TO STRESS THAT IN VIEW OF MY DEL THIS FORTHCOMING CONFERENCE ON LAW OF TREATIES IS ASSUREDLY GOING TO BE ONE OF MOST IMPORTANT OF ALL INTERNATL CONFERENCES WHICH HAVE SO FAR BEEN HELD. ~~ALONG WITH SIR HUMPHREY WALDOCK~~ CDN AUTHORITES TOO HAVE NO RPT NO ILLUSIONS AS TO FORMIDABLE NATURE OF TASK WHICH WILL CONFRONT DELS TO CONFERENCE WHERE THEY WILL HAVE TO DEAL WITH MATTERS NOT RPT NOT ONLY TECHNICALLY DIFFICULT BUT IN MANY POINTS

...8

CONTROVERSIAL. ALTHOUGH INTERNATL LAW COMMISSION HAS NOW AS A BODY CARRIED OUT ITS OWN TASK TO FULL WORK ON LAW OF TREATIES ITSELF IS BY NO RPT NO MEANS YET COMPLETED AND THOSE AT CONFERENCE ARE CERTAINLY GOING TO HAVE NO RPT NO EASY TASK. PRICE THAT WE WILL ALL HAVE TO PAY IN STUDY IN ~~NEGOTIATIONS IN REFORMULATION~~ IF WE ARE TO SUCCEED IN FORGING A VIABLE CONVENTION IS GOING TO BE A HIGH ONE. BUT SURELY IF WE ARE EVENTUALLY SUCCESSFUL IT WILL HAVE BEEN WELL WORTH ~~EFFORT~~. THIS TREATY IF AND WHEN IT COMES INTO BEING WILL NOT RPT NOT IN ANY SENSE BE LIKE MOST OTHERS. IT WILL INDEED BE A JAMOR EVENT IN HISTORY OF INTERNATL LAW. IT WILL SERVE AS A HAND BOOK AND A NAVIGATION GUIDE TO ALL OF USS AND PARTICULARLY TO THOSE NEWER STATES WHICH HAVE ONLY RECENTLY ENTERED ON OFTERN STORMY SEAS OF FORMALIZED INTERNATL RELATIONSHIPS AS THEY ARE EXPRESSED IN TREATY FORM. CDA WILL CERTAINLY TO EVERYTHING IN ITS POWER TO ENSURE THAT FORTHCOMING CONFERENCE IS A SUCCESS. TEXT ENDS:

NNNN VVVVV

MESSAGE

DATE	FILE/DOSSIER	SECURITY SECURITE
OCT17/67	20-3-1-6 28	RESTRICTED

FM/DE EXTERNAL

TO/A	NO	PRECEDENCE
PERMISNY	1-991	IMMEDIATE
INFO		

REF FOLLOWING FOR MR. GOTLIEB

SUB/SUJ 22ND UNGA: LAW OF TREATIES

WE HAVE TODAY RECEIVED FROM EARNSCLIFFE A NOTE THE TEXT OF WHICH IS SET OUT BELOW AND WHICH WE UNDERTOOK TO TRANSMIT TO YOU URGENTLY:

TEXT BEGINS: [Comcentre, please copy text of attached Note]

DISTRIBUTION
LOCAL/LOCALE NO STANDARD

ORIGINATOR/REDACTEUR	DIVISION	TELEPHONE	APPROVED/AUTORISE
SIG J.A.Beesley/sg	Legal	2-2728	SIG D. M. MILLER for J.A.Beesley

EXT 18/BIL (REV 5/64)
(COMMUNICATIONS DIV)

001191

Diary
Div. Diary
File

OTTAWA, October 10, 1967.

Dear Hugh,

By now you will have received the contract for the preparation of the commentary for the Canadian Delegation to the Conference on the Law of Treaties. I hope you found it in order.

We are now preparing some written comments on the I.L.C. Draft Articles on the Law of Treaties to be submitted to the U.N. Secretariat for circulation. Attached is a first draft which I have prepared for this purpose. I should be grateful to know whether you could come to Ottawa to spend a few hours with Alan Beesley and me going over this draft. Perhaps at the same time we could discuss the mechanics of your preparation of the commentary.

Yours sincerely,

J. S. STANFORD

J.S. Stanford

Professor Hugh Lawford,
Faculty of Law,
Queen's University,
Kingston, Ontario.

LAW OF TREATIES

We understand that, at the 21st Session of the U.N. General Assembly, the question of the organisation of the Conference on the Law of Treaties was very fully debated. The U.N. Secretariat and many Western delegations favoured the establishment of two committees between whom the detailed examination of the International Law Commission's draft articles would have been divided. The proposal foundered on the smaller states' difficulty in sending qualified delegations of sufficient size to service two committees and it was decided to have only one committee of the whole.

2. At the current session of the U.N. General Assembly, the Secretariat have revived the proposal for two committees, but it seems to have little support. Britain is now trying to secure the postponement of the Conference by a year. We fear that the promotion of public debate on the "Two Committee" suggestion would militate against reasoned consideration of postponement. The two might well become connected in some minds. Postponement is only now beginning to be considered seriously and support for it may not develop as we had hoped. There are some strong factors against postponement.

3. We understand that discussion of this item in the General Assembly is planned to end around 25-26 October. The British Government understand that the Canadian Government plan to raise the "Two Committee" question before it ends, and would like the Canadian Government at least to defer raising it until the British Government have had an opportunity to decide whether

/or ...

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
LIMITED

A/C.6/L.619
9 October 1967

ORIGINAL: ENGLISH

Twenty-second session
SIXTH COMMITTEE
Agenda item 86

LAW OF TREATIES

Statement made at the 964th meeting, on 9 October 1967, by Sir Humphrey Waldock, Chairman of the International Law Commission and former Special Rapporteur on the law of treaties

1. On this occasion, Mr. Chairman, my understanding is that you invite me to address the distinguished members of this Committee primarily in my role as the former Special Rapporteur on the law of treaties. In responding to your invitation, I should like briefly, but very sincerely, to tender my thanks to the many members of this Committee who at your twenty-first session spoke in such appreciative terms of the work done by the Commission on the law of treaties. The reception given by this Committee to the report on the law of treaties and the General Assembly's decision to convene an international conference to consider the codification of the law of treaties have given, I can assure you, great satisfaction to the Commission and to its Special Rapporteur.

2. I do not find it altogether easy, Mr. Chairman, to orient my remarks to the needs of the Committee at the present stage of its debate on the law of treaties. The Commission's report has been in the hands of delegations for a year. The commentaries in the report are extensive and largely self-explanatory; and it was my particular task to prepare these commentaries for the Commission. In general, therefore, my explanations of the draft articles are already before the Committee.

3. At the same time, the Sixth Committee has already had one general debate on the Commission's draft articles at its session a year ago. In the course of that debate a variety of criticisms and suggestions were made by individual delegates which are summarized in the Committee's report to the General Assembly printed as

document A/6516. In addition, the General Assembly invited Member States to submit their comments on the draft articles and in document A/6827 and its first addendum the Committee has before it the replies of sixteen States and seven international organizations already containing quite a number of specific suggestions for amendment of the draft.

4. I do not, however, imagine that the Committee would wish me today to take up seriatim the particular criticisms or suggestions of particular States or delegations. Indeed, I doubt whether it would be possible for me to do so even if I confined myself to the more substantial points; for the draft articles cover a lot of ground. Moreover, the merit of these criticisms and suggestions, as those of the Commission's proposals, is now a matter entirely for Governments and my function, as I conceive it, is rather to assist them in the understanding of the problems encountered and the solutions arrived at by the Commission. At this stage, therefore, I propose to draw attention only to some general points.

5. Treaties today form a very large part of the total fabric of international law, having overrun many areas traditionally regarded as belonging to customary law. The importance to the international community of having an adequate and authoritative body of treaty law cannot, therefore, be put too high. Yet in 1955 Sir Hersch Lauterpacht, then the Commission's Special Rapporteur, felt driven to say that, apart from the fundamental principle pacta sunt servanda, "there is little agreement and there is much discord at almost every point". Close study of the subject in the Commission during the past decade has certainly confirmed the existence of divergent views even on basic questions. But it also showed that they are quite often more doctrinal than substantial and, with goodwill, are capable of being harmonized and resolved. Accordingly, if I now mention these divergent views, it is not to give them any special emphasis. It is rather to underline that the Commission's approach to the codification of the law of treaties has been essentially pragmatic - to find practical solutions consistent with the general nature of treaties and the practice of States rather than to settle doctrinal controversies. The law of treaties, deriving as it does from basic legal concepts, is perhaps particularly exposed to the risk of conflicting theoretical positions. Fortunately, however, on almost every question the Commission was able to find practical solutions to which members could rally despite any differences in their theoretical starting points.

/...

6. The question of the scope to be given to the draft articles presented the Commission with several problems. Articles 1-3 of the draft, as delegates are aware, confine it to agreements in written form concluded between States, and merely reserve the position regarding agreements not in written form and regarding agreements to which subjects of international law other than States are parties. The Commission did not doubt the importance of "oral" and "tacit" agreements; indeed, quite a number of the draft articles expressly recognize the operation of tacit agreement in the general law of treaties, e.g., article 17, paragraph 5, regarding acceptance of reservations. But we felt that to attempt to lay down a detailed code for unwritten as well as written agreements would unduly complicate and expand the draft. The same considerations led the Commission to omit the agreements of such special entities as insurgents and, still more, of international organizations. As to the latter, it did not question either the frequency or the importance of the agreements of international organizations. But it concluded that careful and prolonged study would be necessary before it could reach firm conclusions as to the precise extent to which the general law of treaties should be considered applicable to international organizations; and the result of such a study, it felt, might well be to delay the codification of the general law of treaties and to enlarge the draft articles beyond a size manageable at a diplomatic conference.

7. Delegates are also aware that the draft does not include detailed provisions concerning State responsibility or State succession in the field of treaties or concerning the consequences of aggression in connexion with the treaties of an aggressor State. Articles 69 and 70 again merely make general reservations with regard to these matters. Here, in addition to the risk of delaying and of unduly expanding the draft, the Commission was reluctant to encroach upon subjects which form part of other branches of international law already under separate study.

8. Other subjects deliberately excluded from the draft are the most-favoured-nation clause and the effect on treaties of the outbreak of hostilities. As to the former, no further explanations are necessary. The Commission, having decided that the most-favoured-nation clause required separate study, has appointed a Special Rapporteur and this appointment seems to be meeting with the general approval of the Sixth Committee at the present session. As to the effect of the

/...

outbreak of hostilities, recent history has shown all too clearly that the subject is still a long way from becoming obsolete. Some of the provisions of the draft, e.g. those in articles 57 to 60, clearly have a certain relevance in this context. But today the law governing the effect of hostilities upon treaties cannot be formulated without reference to the Charter provisions forbidding the threat or use of force. The Commission accordingly felt that any attempt to deal with this subject would necessarily open up difficult and delicate questions belonging to another branch of international law.

9. In short, the draft articles have been tailored by the Commission so as to limit them to the general law governing treaties between States - to the central core of the law of treaties. Once this central core has been settled successfully, it should be easier to expand the codification of the law of treaties by additions or adaptations rather as has happened in the case of diplomatic law. Some of the omissions from the Commission's draft have met with criticism from Governments. Some of these criticisms may have been satisfied at least in part by the Commission's recent decision in regard to its work on State succession and most-favoured-nation clauses. In any event, the Commission does seem to me to have been right in thinking that the draft articles already cover as much ground as is likely to be manageable at this first stage in the codification of the law of treaties.

10. Next, I should like to mention a matter which troubled the Commission greatly in the drafting of a number of articles, even though it may not seem to loom very large in the final text. This is the different relationships which States may have to the text of the same treaty and the rights to be attached to each of those relationships in connexion with such questions as reservations, amendment, termination, notification of instruments relating to a treaty, and correction of errors in texts. Put shortly, the problem is how far States, which have signed a treaty or taken part in its drawing up, but have not yet established their consent to be bound, may have a legal right to have a voice in, be consulted about or be notified of an act affecting the treaty. If the Commission in most context came down in favour of limiting any <u>legal</u> right to actual parties, it did not always find this to be the appropriate solution. Moreover, it recognized that, for diplomatic reasons, non-parties may sometimes be consulted even when a legal right to consultation might not be sustainable.

/...

11. The problem to which I have just referred is also responsible for the inclusion in article 2 of the expressions "negotiating State", "contracting State" and "party" as terms used with special meanings in the draft articles. In order to simplify the drafting of a number of provisions it was necessary to find convenient labels for each category of relation to a treaty and these terms were chosen as seeming to be the most suitable. As the expressions "negotiating State", "contracting State" and "party" are each capable of being used in ordinary parlance with slightly different shades of meaning, it is essential to appreciate that they are used in the draft articles as technical terms - as terms of article - having the particular meanings given to them in article 2, paragraphs (e), (f) and (g).

12. The question whether to distinguish between different categories of treaties - general multilateral, multilateral, plurilateral, bilateral, law-making contractual, etc. - was another question which exercised the Commission but did not leave many traces in the final draft. If the drawing of such distinctions may be attractive in theory, State practice does not seem to support the division of treaties into hard and fast categories. For example, so long as general law-making treaties are subject to reservation, liable to denunciation and need not even be ratified at all, it is not easy to discern any clear basis for drawing fundamental distinctions between these and other treaties in codifying the law. The distinction between bilateral and multilateral treaties obviously may be relevant in some contexts because multiplication of the parties tends to complicate the process of consent in relation to the conclusion, amendment and termination of the treaty. This aspect is therefore reflected in a number of articles, while in article 17, paragraph 2, dealing with the acceptance of reservations, the Commission found it necessary to differentiate between multilateral treaties with a limited and those with a larger number of parties. If that difference is not easy to formulate with precision, it is one which seems to be of substantial importance in the context of reservations.

13. Two broad categories of treaties are, however, singled out by article 4 for special treatment: treaties which are constituent instruments of an international organization and treaties adopted within an international organization. Both these kinds of treaties are of increasing importance today. Article 4 assumes that they are governed by the general law of treaties codified in the draft articles

/...

but that the application of that general law is subject to any relevant rules of the organization. The Commission, as its commentary explains, had some difficulty in finding the precise line to be drawn in regard to the second category. The Commission had originally included treaties drawn up "under the auspices" of an organization but had amended this to treaties "drawn up within an organization". Even so, Governments indicated that they would prefer a more restrictive formula and the text now reads "adopted within an international organization". Members of the Committee may have seen from document A/6827/Add.1, pages 10 and 20, that the Secretary-General of the United Nations and FAO, on the contrary, advocate a somewhat broader view of the treaties to be included in this special category. In this connexion, members of the Committee may find it of interest to consider the case of the projected Convention on Special Missions. If this Convention is "adopted" by resolution of the General Assembly, its application will presumably be "subject to any relevant rules" of the United Nations. What then of the Vienna Convention on Diplomatic Relations to which the Convention on Special Missions is intended to be a supplement?

14. On two questions the Commission failed to arrive at any solution and omitted those questions from the draft articles. The first - participation in multilateral treaties - is only too familiar to members of this Committee and there is no need for me to dwell upon it. The same differences of view appeared in the Commission as have appeared in the General Assembly and at diplomatic conferences and the Commission concluded that, in the light of the division of opinion, it was not yet possible to formulate any general provision. Accordingly, it confined itself to submitting an explanatory note of its proceedings on this question at the end of its commentary on article 12, the article dealing with accession to treaties.

15. The second question on which it failed to arrive at a solution is the temporal element in the interpretation of treaties. The position in the Commission regarding this tricky question is explained in paragraph 16 of its commentary to article 27. The Commission found it difficult to express satisfactorily the interrelation between the principle that a juridical act must be interpreted in accordance with the law and the facts contemporary with it and the effect on a treaty of an evolution in the general rules of international law. It also considered that in any given case much might depend on the particular intention of the parties; and

that the correct application of the temporal element would normally be indicated by interpretation of the treaty in good faith. I may add that some members felt that it might be unsafe to deal with the temporal element in the context of interpretation without first making a close study of the whole problem of the relation between treaties and customary law. At any rate, the Commission concluded that it should refrain from formulating any specific provisions, leaving the temporal element to be taken into account by the general rules of interpretation laid down in article 27 and, in particular, by the provision expressly requiring good faith in interpretation.

16. I now pass, Mr. Chairman, to what some may consider the more controversial area of the law of treaties: the rules regarding the invalidity, termination and suspension of the operation of treaties. Those rules the Commission has sought to codify in part V of the draft articles. Some members at one stage suggested that it might be more logical to deal with the question of "validity" immediately after having set out the rules concerning "conclusion" of treaties. But policy and practical considerations were thought by the Commission to outweigh any theoretical arguments in favour of that arrangement. In the first place it seemed desirable to make it clear that, although the articles setting out grounds of invalidity, termination and suspension are several in number, the normal situation is one in which a treaty concluded in accordance with the provisions of part II is valid and subject to the rule pacta sunt servanda. From this point of view there is advantage in first setting out the law regarding conclusion, entry into force, observance, application, interpretation and amendment before touching upon grounds of nullity or termination which, as it were, bring down a treaty. In the second place, a number of general provisions relate equally to the application of grounds of invalidity, termination and suspension so that for drafting reasons it is more convenient to deal with these subjects together in the same part.

17. Part V, without doubt, contains both difficult and delicate provisions, and notably those concerning the effect on the validity of a treaty of lack of competence under internal law, conflict of a treaty with a norm of jus cogens, breach of a treaty as a ground of termination or suspension, supervening impossibility, fundamental change of circumstances, the consequences of the invalidity, termination or suspension of the operation of a treaty. Some of these provisions have already

/...

given rise to debate and criticism in this Committee and in the comments of Member States in document A/6827; and they will certainly attract the close attention of Governments at the diplomatic conference. You have the Commission's commentaries on these provisions and it would not be useful for me to discuss them in detail now.

18. The Commission was very conscious of the dangers to the security of treaties involved in the principles of law concerned with the grounds of invalidity, termination and suspension. But these principles already exist and are already appealed to in State practice; and the Commission considered that its only course was to try, by codifying them, to give them as much precision as possible and thereby limit the scope for their abuse. In addition, it prefaced the articles on invalidity, termination and suspension with four general provisions limiting the application of those articles. Even more important, recognizing that several of the articles, and notably the jus cogens articles, cannot be made so precise as not to leave room for subjective interpretations, the Commission sought to surround them with procedural checks. These checks are set out in article 62 which prescribes a formal procedure to be followed in the event of a State's invoking any alleged ground of invalidity, termination, withdrawal or suspension and lays down an express obligation, in the event of a dispute, to seek a solution through the peaceful means indicated in Article 33 of the Charter. Some members of this Committee and some Member States have, I know, questioned the sufficiency of these procedural checks and advocated the reference of disputes to the International Court of Justice. Some members of the Commission, including its Special Rapporteur, would also have liked to strengthen further the procedure prescribed in article 62. But, in the present climate of international opinion regarding the compulsory settlement of disputes, the Commission did not feel that a procedure going beyond that in article 62 would meet with general acceptance. The value of article 62, as it now stands, is that it does at least subject the denunciation of a treaty, upon whatever ground, to regular procedures and thus provide some check upon the purely unilateral denunciations which have too often occurred in the past. I could only add the comment that, when every effort has been made to impose the Commission's formulation of the substantive provisions of part V and to tighten the safeguards, the interests of the security of treaties do seem to lie in bringing

/...

such principles as those of fundamental change of circumstances and jus cogens as far as possible under the control of legal criteria and legal procedures authoritatively laid down in a general convention.

19. As Special Rapporteur, Mr. Chairman, I can have no illusions as to the formidable nature of the task which will confront the diplomatic conference. The law of treaties, fundamental and familiar though it may be, is not only technically difficult but, as I have already emphasized, is in many points controversial. The Commission, if merely a body of experts, is representative of the several regions, ideologies and legal systems of the world; and happily it was able to carry the essential process of conciliating the different points of view quite far before handing on the torch to this Committee and to the diplomatic conference. As the present Chairman of the Commission and its former Special Rapporteur, I should like, in concluding my speech, to express the earnest hope that the Commission's draft may prove a sound basis for the work of the conference and pave the way for the first codification of the general law of treaties. If that is achieved, it will certainly be a major event in the history of international law.

---

or not postponement can be secured. We have been asked to request the Canadian Government either to delay their statement or to ensure that they do not include in it a passage referring to the "Two Committee" question. (We understand that the British Mission in New York have already urged the Canadian representatives there to ascertain that there is real support for the "Two Committee" proposal before they bring it into the open).

British High Commission,
OTTAWA.

17 October, 1967.

Mr Ridgway to see
on return pls
11/13/10

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/6827/Add.2
6 October 1967

ORIGINAL: ENGLISH

Twenty-second session
Agenda item 86

LAW OF TREATIES

Report of the Secretary-General

Addendum

CONTENTS

A very staff commentary, but a good one. Last page indicates the U.S. would not adhere without a provision for independent adjudication

[1] For the comments of other Governments see A/6827 and A/6827/Add.1 and for those of the Secretary-General of the United Nations, the specialized agencies and the International Atomic Energy Agency see A/6827/Add.1

UNITED STATES OF AMERICA

Transmitted by a note verbale of 2 October 1967 of the Permanent Representative to the United Nations

[Original: English]

The Government of the United States congratulates the International Law Commission on the completion of its long and arduous labours on the law of treaties. The draft articles, which reflect the thought and care devoted to this subject by the Commission, provide a substantial basis for the adoption of a convention on the law of treaties.

The United States Government approves the substantive approach adopted by the Commission in a great many of the proposed articles. From the point of view of drafting and technical detail it considers further improvement is possible and will make detailed proposals for amendments of this character at the appropriate time. In addition, it will make a number of proposals for substantive improvement in certain articles. At this time, the United States Government will limit its comments to certain problems which require consideration in light of their over-all relationship to the establishment of a body of rules on the law of treaties.

The first basic problem is whether the proposed convention on the law of treaties is to provide the body of law which governs treaties generally. The issue is raised by article 1, article 2, paragraph 1 (a) and article 4. Under article 1 and article 2, paragraph 1 (a), treaties between States and those other international persons, such as international organizations, which are generally considered to have treaty-making capacity, would be excluded from application of the provisions of the convention. This class of treaties is now substantial and will continue to increase in size. Some of the treaties concerned are of considerable importance, such as the trilateral safeguards agreements in the atomic energy field to which the International Atomic Energy Agency is a party. The International Law Commission decided to exclude treaties of this character apparently because they have "many special characteristics" so that ... "it would both unduly complicate and delay the drafting of the present articles..." to

/...

include them.[2/] The United States Government suggests that this decision could well be reviewed in order to determine whether the articles of the draft convention do, in fact, conflict with "special characteristics" of agreements to which international organizations are parties.

In addition to article 1 and article 2, paragraph 1 (a) which have a limiting effect upon the coverage of the proposed convention, article 4 could be construed as permitting any international organization, no matter how restricted in membership or limited in purpose, to exclude the application of the convention to any or all treaties adopted within the organization. The number of multilateral treaties which are adopted within international organizations is continually increasing. To confer upon these organizations the power to abrogate what should be the generally accepted rules of international law respecting treaties is a radical step which could be justified only on the basis of a very strong case of necessity. The United States Government is not aware that any such case has been made. The Commission apparently was motivated by the same considerations of convenience as gave rise to the limitations in article 1, and article 2, paragraph 1 (a). But convenience is not enough to justify weakening to such an extent the developing frameworks of world law. International organizations should be requested to establish, article by article, why the convention should not be applicable to their treaties. Special provisions, if required, could then be made on the basis of demonstrated need, and not by blanket exclusion.

Section 2, containing articles 16 through 20 regarding reservations to multilateral treaties, establishes a system which has both advantages and disadvantages. The flexible system advocated by the International Law Commission for dealing with reservations to multilateral treaties in a world of numerous States with widely variant social, political and economic systems permits a large degree of tolerance for accommodating the special positions which may result from those variances. There may be a question, however, whether the general applicability of the system advocated would be appropriate in all circumstances. This could become a serious question since several provisions in articles 16 and 17 seem to inhibit negotiators from specifying procedures and other requirements regarding the acceptability of reservations.

2/ Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), paragraph 2 of the commentary on article 1, p. 20.

/...

The relationship between articles 16 and 17 is confusing, particularly in view of the opening phrase of paragraph 4 of article 17, which refers only to the preceding paragraphs of that article. That limited reference and the wording of article 17 as a whole give rise to a question whether the prohibitions in article 16 are applicable to the provisions of article 17, especially paragraphs 4 (a) and 4 (c) of the latter. In view of this situation it seems desirable to combine the major requirements of articles 16 and 17 in a single article.

Several provisions in the two articles should also be amended.

The rule in sub-paragraph (b) of article 16 - that where a treaty authorizes specified reservations no other reservations can be made - may be too rigid. It is very difficult - if not impossible - for negotiators to anticipate all the reservations that may be necessary for particular States to become parties to a treaty, and in many instances the essential purpose of including such a provision may, accordingly, be to facilitate reservations with respect to certain provisions of the treaty but not to exclude reservations to other provisions. It is believed that the rule in sub-paragraph (b) would be found in the course of time to be more of an impediment than an aid in the drafting, bringing into force and application of treaties, and should therefore be deleted.

The words "object and purpose" in sub-paragraph (c) of article 16 and in paragraph 2 of article 17 are, as the Commission recognized, highly subjective. Reliance solely upon these words is especially inadvisable because of the uncertainty as to whether or not they encompass the "nature and character" of the treaty. The commentary on paragraph 4 (d) of article 16 cites the advisory opinion of the International Court of Justice on the Genocide Convention, in which the Court stressed the importance of the character of the treaty involved. The United States suggests, accordingly, that the phrase "object and purpose" be replaced by "character and purpose". At the same time, the "limited number" criterion in paragraph 2 of article 17 seems to ignore the character of the treaty involved. A treaty may involve a large number of States and still be of such a character that a reservation would be permissible, only if accepted by all of the parties. Accordingly, it is suggested that the reference to the limited number of negotiating States be omitted.

/...

In paragraph 4 both sub-paragraphs (a) and (c) would seem to prevent the inclusion in a treaty of a provision specifying that any reservation or a specified reservation would be effective only after it had been accepted by a given number of parties. Paragraph 5 of article 17 would seem to inhibit the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months. It would seem desirable to provide for variations if the treaty concerned so permits.

The United States Government considers that articles 27 and 28 on the interpretation of treaties lay down overly rigid and unnecessarily restricted requirements. One criterion of interpretation "in accordance with the ordinary meaning to be given the terms of the treaty" is accorded primacy over all other criteria. But as Lord McNair succinctly states: "... this so-called rule of interpretation like others is merely a starting point, a prima facie guide, and cannot be allowed to obstruct the essential question in the application of treaties, namely, to search for the real intention of the contracting parties in using the language employed by them".3/

The draft articles, unfortunately, do obstruct the essential quest to determine what was the common intent of the parties in using particular language because the ordinary meaning of terms in the treaty is made, not a starting point, but the centre point about which all other aspects of the process of interpretation must revolve like satellites. Thus, consideration of context and of the object and purpose of the treaty as provided in paragraph 1 of article 27 is specifically limited to determining the ordinary meaning to be given the treaty terms while investigation into the factors indicating the genuine purpose of the parties in selecting those terms and the community context in which they are employed is implicitly excluded.

The subordinate position to which "preparatory work" on the treaty "and the circumstances of its conclusion" are relegated by article 28 aptly illustrates the extent to which the Commission's rule of interpretation ignores the intentions of the parties. What guides can be more helpful in deciding the effect a particular clause in a treaty was intended to produce than the official records of the negotiations in which the language was agreed and the documents relating to the

---

3/ McNair, Arnold Duncan, Law of Treaties (Oxford: Oxford University Press, 1961), p. 366.

/...

clause which were submitted or produced in the course of negotiations as well as the other circumstances of its conclusion? This is the almost invariable practice of Foreign Offices in the interpretation and application of treaties. The basic problem is that words can have many meanings, and what may be an ordinary meaning in one set of circumstances, may be an extraordinary one in another. To resolve this difficulty there should be free access to all pertinent sources of information. But article 27 permits recourse only to the treaty, to documents made part thereof by agreement of all the parties, subsequent practice in the application of the treaty, or to relevant rules of international law. This narrow definition of the context that may be examined in determining the meaning of the treaty terms serves to reduce drastically the means available for determining what is the true meaning of a particular word or phrase or clause while broadening considerably the field of choice in which any of several available meanings can be applied to a treaty term as the "ordinary" meaning.

The Government of the United States considers that this series of restrictions upon the interpretation process should be eliminated and that the artificial separation between articles 27 and 28 should be discarded. All of the various elements of articles 27 and 28 should be arranged to avoid any fixed hierarchy so that whatever elements of interpretation are of importance in a particular set of circumstances may be given their appropriate weight, whether it be "ordinary meaning" or "subsequent practice" or "preparatory work" or any of the other elements that facilitate correct interpretation.

Part V of the draft articles raises issues of significance to the maintenance of international stability and order. It is a truism that an effective and peaceful international community can only be built upon the basis of world agreement and the treaty process is the most effective method for securing such agreement.

The objectives of establishing peace and prosperity for all peoples demand that great care should be taken to avoid undermining the validity of treaty commitments. While individual States may momentarily believe an advantage can be derived by escape from particular treaty obligations, rules which permit easy avoidance of treaty obligations are in the final analysis detrimental to all States.

/...

The basic question is whether the requirements for good faith fulfillment of treaty obligations set out in article 23 are not substantially impaired by permitting claims of invalidity to be advanced on insubstantial grounds under certain of the articles in section 2 of part V. The difficulty, in a number of instances, lies not in the fundamental principle giving rise to a claim of invalidity but in the sweeping fashion in which the principle is expressed and the lack of safeguards respecting its application. Articles 45, 46 and 47, for example, are all couched in the most general terms. Under article 45 any error in a treaty, relating to a fact assumed by a State to exist when it concludes a treaty, may then support a claim of invalidity by that State if the fact "formed an essential basis of its consent to be bound by the treaty". The requirements set up are highly subjective. Whether a State assumed a fact to exist and whether that fact formed an essential basis of consent are matters primarily within the knowledge and control of the State claiming that the treaty should be terminated. There is not even the requirement that the erroneous fact be of material importance to the treaty or its execution, which would supply at least one objective test.

Article 46 permits a State to invalidate a treaty which it has been induced to conclude "by the fraudulent conduct of another negotiating party". The International Law Commission admits "that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept."[4/]

In view of this lack of guidance the failure to produce any guide-posts at all to what is "fraudulent conduct" also tends to undermine the stability of treaties. Definitions of fraud can and do vary enormously over such issues as whether conscious deception is required or whether reckless disregard for the factual basis of representations made is sufficient; the circumstances under which the misrepresentation of an agent is considered the fraud of the principal; the extent of reliance upon a misrepresentation which is required to support the claim of fraud. There may not be any real requirement for an article on fraud in view of the lack of precedent but if there is to be one, it should be designed to develop the Law of Treaties, not to undercut it.

4/ Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1), paragraph 2 of the commentary on article 46, p. 73.

In article 47, the operative fact is "the corruption" of a State's representative by another negotiating State. There is no definition of "corruption" given and it is not a term which has any precise meaning in international law. The article in its present form thus lends itself to avoidance of treaty obligations by distorting normal courtesies into attempts to corrupt. If protection against such acts as bribery, which has a specific legal content, is intended, then the article should list and define those acts.

Article 49 presents the same problem but in a different context. The operative clause in this article makes a treaty void if procured "by the threat or use of force in violation of the principles of the Charter of the United Nations". The result is a reference from the article to the United Nations Charter as the means for determining the meaning of "threat or use of force". If a definite meaning had been given this phrase in United Nations usage, this would have aided in supplying protection against possible use of the article for unwarranted attempts to evade treaty obligations. But it is common knowledge that there are very substantial differences as to what is a use of force in violation of the Charter of the United Nations. It has been erroneously urged from some quarters that adverse propaganda or economic measures against a State constitute a threat or use of force in violation of Charter principles. Consequently unless the "threat or use of force" is more clearly defined in article 49, such as making clear that the threat or use of armed force is required, it too could serve to destroy the stability of treaty relationships.

Article 50, as at present drafted, is a perfect example of the principle which is undeniable as an abstract proposition but is so lacking in legal content that there is no way of judging its effects. No attempt is made to define "a peremptory norm of general international law from which no derogation is permitted..." There is no effort made to distinguish a "peremptory norm" from other norms. There is no guide to determine when "no derogation is permitted" from a norm of general international law. The dangers of such a loose formulation might be less if there were consensus in international law which establishes either what the nature and content of "peremptory norms" are, or, at the least, what are the tests for determining a "peremptory norm" and what the nature and content of any particular norm is.

/...

There is no such consensus. The ILC commentary gives as an example "a treaty contemplating an unlawful use of force contrary to the principles of the Charter".5/ As the discussion of article 49 points out there are substantial differences of view as to what kind of force is unlawful and what uses of force are contrary to the principles of the Charter. These differences are such that to say this is a norm from which no derogation is permissible would be meaningless because no one would be sure what was being derogated from. As for tests to determine when a norm is peremptory, the United States is aware of none.

For jus cogens to serve as a basis for voiding a treaty more than philosophical agreement on the existence of the principle is essential. It will be necessary to determine what are the peremptory norms of general international law now in effect. It will be necessary to define those norms so that their scope and content are established. It will be necessary to determine whether or not any exceptions are permitted to the general principle of the norm so that the area of the norm from which derogation is not permitted can be established. Slavery offers a simple example. Confinement at hard labor as punishment for a serious crime should be excluded from any decision that involuntary servitude was a violation of a peremptory norm of international law prohibiting slavery.

If such careful and meticulous delineation of existing peremptory norms is not carried out article 50 might have a most disastrous effect upon international co-operation and harmony because it could radically weaken the treaty structure upon which that harmony and co-operation depend so heavily.

The same objections apply to article 61, which voids any treaty in conflict with a "new peremptory norm of general international law". In the absence of any accepted criteria for deciding how and when a new norm is established, the way is open for any State seeking to discard its treaty obligations to claim the emergence of a norm of international law which overrides those obligations. The total effect of articles 50 and 61 is to create a substantial area of uncertainty with regard to the validity of treaty obligations.

Article 59, which permits a State to withdraw from treaty obligations on the ground of a fundamental change of circumstances, is burdened with the same threat to the stability of treaty obligations. That the International Law Commission recognized this danger is apparent from the negative manner in which the article is expressed and the limitations upon its application contained in article 59.

5/ Ibid., paragraph 2 of the commentary on article 52, p. 77.

Thus paragraph 2 (a) of the article excludes boundary treaties from the operation of the rule, and the reason given in the commentary is... "because otherwise the rule, instead of becoming an instrument of peaceful change, might become a source of dangerous frictions".[6/] The implication of this statement is that it is only boundary treaties whose unilateral termination might become a source of dangerous friction. But there are a wide range of international settlements which are not boundary treaties - but whose unilateral denunciation would give rise to dangerous friction. Peace treaties without territorial clauses, cease-fire agreements, treaty provisions for passage through straits, are a few of the areas where there are obvious dangers inherent in the unilateral application of this provision.

The rule of fundamental change of circumstances or rebus sic stantibus has had at the most a theoretical existence in the writings of jurists and a debatable existence in the practice of States. There are no decisions of international tribunals upholding the rule. The Commission's commentary also states that there are no municipal court cases which have upheld application of the rule.[7/] And State practice, which generally consists of ex parte statements or actions designed to achieve immediate advantage, does not supply any reasoned set of principles which could be adopted as a basic tenet of treaty law.

The United States Government considers that when the dangers implicit in article 59 are weighed against the advantage of providing "a safety valve in the law of treaties",[8/] the balance is against the article as drafted. The claim of fundamental change in circumstances has been made too often on inadequate grounds and is too easily distorted for partisan advantage to anticipate that it will be raised but seldom and only as a last resort. Certainly if this theory is to be included in a convention on the law of treaties as a binding rule, and neither the need for or the desirability of this course has been established, its scope and effect must be much more sharply delimited.

Over and above the internal weaknesses in these articles on invalidity and termination is the all-important question of the limitations which should be imposed to prevent abuse of the articles. No matter how precisely articles of

---

6/ Ibid., paragraph 11 of the commentary on article 59, p. 87.

7/ Ibid., paragraph 3 of the commentary on article 59, p. 85.

8/ Ibid., paragraph 6 of the commentary on article 59, p. 86.

this character may be drafted, no matter how carefully the requirements for action may be defined, if the decision with respect to invalidity or termination is left to the sole decision of one of the parties to a treaty, these articles will weaken rather than strengthen the structure of treaty law. States seeking to avoid carrying out treaty commitments will be ingenious in fashioning arguments based on claims of error, or corruption or change of circumstances or jus cogens. If these arguments are subject to impartial review, if there are required procedures for determining the validity of these claims, the danger of abuse would be substantially curtailed. Article 62 on the procedure to be followed in dealing with such claims requires nothing more than a three months' waiting period after formal notice before a party to a treaty can assert it is terminating, suspending or declaring the treaty invalid. Paragraph 3 of the article specifies that if another party to the treaty objects to the proposed action, the parties must "seek a solution through the means indicated in Article 33 of the United Nations Charter". But there is nothing in article 62 which prohibits the claimant party from terminating or withdrawing from the treaty while one or more of the procedures under Article 33 of the Charter are carried out. In addition, Article 33 of the Charter offers a wide choice of means for solving a dispute but does not require the settlement of the dispute. It may accordingly be asked whether the net effect of article 62 is not to permit a claimant to judge his own case after a lapse of three months.

The Government of the United States does not consider that the procedures in article 62 are adequate. If a convention on the law of treaties is to further the development of international law it must do so by ensuring greater respect for international obligations. If such a convention is to further international peace and security it should not encourage disputes. To establish a whole series of grounds for claiming avoidance of treaty obligations and then to place no actual limitation upon the power of the interested State to decide whether it is entitled to avoid its treaty obligations is not the way to uphold the integrity of treaties or to avoid threats to the peace.

If the proposed convention is to contain provisions which authorize withdrawal from and termination of treaty obligations, then the convention should contain provisions to ensure the fair and honest application of those provisions.

/...

There is but one way to achieve this result and that is by some form of impartial determination. The United States Government is not wedded to any particular method of making the necessary impartial determination. It could envisage resort to the International Court of Justice or to arbitration; in appropriate cases, to some generally acceptable form of fact-finding. But it is fundamentally opposed to entering into a convention so potentially disruptive of treaty obligations without an effective provision for the settlement of disputes.

While it is the articles on validity which most clearly underscore the need for third party adjudication, other sections of the draft convention are replete with provisions which will result in disputes. To list but a few:

(a) What are "acts tending to frustrate the object of a proposed treaty" under article 15?

(b) When is a reservation "incompatible with the object and purpose of the treaty" under article 16?

(c) What determines whether a "fact or act took place or a situation ceased to exist" under article 24?

(d) How is the intent of the parties to accord third States' rights determined under article 32?

(e) Who decides whether a derogation from a provision "is incompatible with the effective execution of the object and purpose of the treaty as a whole" under article 37?

The Government of the United States fully supports the development of a universal international law of treaties. A convention on the law of treaties which lays down definite, clear and reasonable rules, and which provides a procedure that ensures the settlement of disputes regarding the application of those rules, will be a notable contribution toward the building of a peaceful international society. It is because of these great possibilities that the Government of the United States has directed attention to some weaknesses in the draft articles in the hope that the weaknesses will be corrected or eliminated. But if a convention on the law of treaties is produced with provisions that are imprecise and unclear, with language that conceals differences rather than resolves them, and with no substantial procedural safeguards for settling disputes, the result could be to increase rather than reduce controversies among States, thus weakening the most cohesive force in the international community - treaty relationships among nations.

DEPARTMENT OF STATE

Washington, D.C. 20520

October 6, 1967

20-3-1-6
28

Dear Alan:

Enclosed is an advance copy of the U.S. comments on the International Law Commission's Draft Articles on the Law of Treaties. We are submitting the comments to the UN for distribution, but they will probably not be circulated for some few weeks.

You will note that we have taken a rather strong position regarding some aspects of the Draft Articles and, in particular, most of the provisions of Section 5 on invalidity. We have also come out strongly on the need for some form of compulsory adjudication.

I will, of course, be happy to consult with you at any time regarding the U.S. comments or any other questions relating to the upcoming Conference in Vienna.

Sincerely,

Richard D. Kearney
Ambassador
Office of the Legal Adviser

Enclosure:

Comments of the Government of the United States on the Draft Articles on the Law of Treaties

The Honorable
Alan Gottlieb,
Legal Adviser and
Assistant Under Secretary,
Department of External Affairs,
Ottawa.

001216

16.10.23(US)

COMMENTS OF THE GOVERNMENT OF THE UNITED STATES ON THE DRAFT ARTICLES ON THE LAW OF TREATIES

The Government of the United States congratulates the International Law Commission on the completion of its long and arduous labors on the Law of Treaties. The Draft Articles, which reflect the thought and care devoted to this subject by the Commission, provide a substantial basis for the adoption of a Convention on the Law of Treaties.

The United States Government approves the substantive approach adopted by the Commission in a great many of the proposed Articles. From the point of view of drafting and technical detail it considers further improvement is possible and will make detailed proposals for amendments of this character at the appropriate time. In addition it will make a number of proposals for substantive improvement in certain Articles. At this time the United States Government will limit its comments to certain problems which require consideration in light of their overall relationship to the establishment of a body of rules on the Law of Treaties.

The first basic problem is whether the proposed Convention on the Law of Treaties is to provide the body of law which governs treaties generally. The issue is raised by Articles 1, 2 (1a) and 4. Under Articles 1, and 2 (1a), treaties between States and those other international persons, such as international organizations, which are generally considered to have treaty-making capacity, would be excluded from application of the provisions of the Convention. This class of treaties is now substantial and will continue to increase in size. Some of the treaties concerned are of considerable importance, such as the trilateral safeguards agreements in the atomic energy field to which the International Atomic Energy Agency is a party. The International Law Commission decided to exclude treaties of this character apparently because they have "many special characteristics" so that..."it would both unduly complicate and delay the drafting of the present Articles..." to include them. (ILC Report UNGAOR XXI Supl. 9, p. 20). The United States Government suggests that this decision could well be reviewed in order to determine whether the Articles of the Draft Convention do, in fact, conflict with "special characteristics" of agreements to which international organizations are parties.

In addition to Articles 1 and 2 (1a) which have a limiting effect upon the coverage of the proposed Convention, Article 4 could be construed as permitting any international organization, no matter how restricted in membership or limited in purpose, to exclude the application of the Convention to any or all treaties adopted within the organization. The number of multilateral treaties which are adopted within international organizations is continually increasing. To confer upon these organizations the power to abrogate what should be the generally accepted rules

of international law respecting treaties is a radical step which could be justified only on the basis of a very strong case of necessity. The United States Government is not aware that any such case has been made. The Commission apparently was motivated by the same considerations of convenience as gave rise to the limitations in Articles 1 and 2 (1a). But convenience is not enough to justify weakening to such an extent the developing framework of world law. International organizations should be requested to establish, Article by Article, why the Convention should not be applicable to their treaties. Special provisions, if required, could then be made on the basis of demonstrated need, and not by blanket exclusion.

Section 2, containing Articles 16 through 20 regarding reservations to multilateral treaties, establishes a system which has both advantages and disadvantages. The flexible system advocated by the International Law Commission for dealing with reservations to multilateral treaties in a world of numerous States with widely variant social, political, and economic systems permits a large degree of tolerance for accommodating the special positions which may result from those variances. There may be a question, however, whether the general applicability of the system advocated would be appropriate in all circumstances. This could become a serious question since several provisions in Articles 16 and 17 seem to inhibit negotiators from specifying procedures and other requirements regarding the acceptability of reservations.

The relationship between Articles 16 and 17 is confusing, particularly in view of the opening phrase of paragraph 4 of Article 17, which refers only to the preceding paragraphs of that Article. That limited reference and the wording of Article 17 as a whole give rise to a question whether the prohibitions in Article 16 are applicable to the provisions of Article 17, especially paragraph 4 (a) and (c) of the latter. In view of this situation it seems desirable to combine the major requirements of Articles 16 and 17 in a single Article.

Several provisions in the two Articles should also be amended.

The rule in subparagraph (b) of Article 16 - that where a treaty authorizes specified reservations no other reservations can be made - may be too rigid. It is very difficult if not impossible for negotiators to anticipate all the reservations that may be necessary for particular States to become parties to a treaty, and in many instances the essential purpose of including such a provision may, accordingly, be to facilitate reservations with respect to certain provisions of the treaty but not to exclude reservations to other provisions. It is believed that the rule in (b) would be found in the course of time to be more of an impediment than an aid in the drafting, bringing into force and application of treaties, and should therefore be deleted.

The words "object and purpose" in subparagraph (c) of Article 16 and in paragraph 2 of Article 17 are, as the Commission recognized, highly subjective. Reliance solely upon these words is especially inadvisable because of the uncertainty as to whether or not they encompass the "nature and character" of the treaty. In paragraph 4 (d) of the commentary following Article 16 and 17 the Commission cites the advisory opinion of the ICJ on the Genocide Convention, in which the Court stressed the importance of the character of the treaty involved. The United States suggests, accordingly that the phrase "object and purpose" be replaced by "character and purpose" in Article 16 (c). At the same time, the "limited number" criterion in paragraph 2 of Article 17 seems to ignore the character of the treaty involved. A treaty may involve a large number of States and still be of such a character that a reservation would be permissible only if accepted by all of the parties. Accordingly, it is suggested that the reference to the limited number of negotiating States be omitted.

In Article 17 paragraph 4 both (a) and (c) would seem to prevent the inclusion in a treaty of a provision specifying that any reservation or a specified reservation would be effective only after it had been accepted by a given number of parties. Paragraph 5 of Article 17 would seem to inhibit the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months. It would seem desirable in paragraphs 4 and 5 to provide for variations if the treaty concerned so permits.

The United States Government considers that Articles 27 and 28 on the Interpretation of Treaties lay down overly rigid and unnecessarily restricted requirements. One criterion of interpretation "in accordance with the ordinary meaning to be given the terms of the treaty" is accorded primacy over all other criteria. But as Lord McNair succinctly states: "...this so-called rule of interpretation like others is merely a starting-point, a prima facie guide, and cannot be allowed to obstruct the essential quest in the application of treaties, namely, to search for the real intention of the contracting parties in using the language employed by them." (McNair, Law of Treaties, Oxford, 1961, p. 366).

The Draft Articles, unfortunately, do obstruct the essential quest to determine what was the common intent of the parties in using particular language because the ordinary meaning of terms in the treaty is made, not a starting point, but the center point about which all other aspects of the process of interpretation must revolve like satellites. Thus, consideration of context and of the object and purpose of the treaty as provided in paragraph 1 of Article 27 is specifically limited to determining the ordinary meaning to be given the treaty terms while investigation into the factors indicating the genuine purpose of the parties in selecting those terms and the community context in which they are employed is implicitly excluded.

The subordinate position to which "preparatory work" on the treaty "and the circumstances of its conclusion" are relegated by Article 28 aptly illustrates the extent to which the Commission's rule of interpretation

ignores the intentions of the parties. What guides can be more helpful in deciding the effect a particular clause in a treaty was intended to produce than the official records of the negotiations in which the language was agreed and the documents relating to the clause which were submitted or produced in the course of negotiations as well as the other circumstances of its conclusion? This is the almost invariable practice of Foreign Offices in the interpretation and application of treaties. The basic problem is that words can have many meanings, and what may be an ordinary meaning in one set of circumstances, may be an extraordinary one in another. To resolve this difficulty there should be free access to all pertinent sources of information. But Article 27 permits recourse only to the treaty, to documents made part thereof by agreement of all the parties, subsequent practice in the application of the treaty, or to relevant rules of international law. This narrow definition of the context that may be examined in determining the meaning of the treaty terms serves to reduce drastically the means available for determining what is the true meaning of a particular word or phrase or clause while broadening considerably the field of choice in which any of several available meanings can be applied to a treaty term as the "ordinary" meaning.

The Government of the United States considers that this series of restrictions upon the interpretation process should be eliminated and that the artificial separation between Articles 27 and 28 should be discarded. All of the various elements of Articles 27 and 28 should be arranged to avoid any fixed hierarchy so that whatever elements of interpretation are of importance in a particular set of circumstances may be given their appropriate weight, whether it be 'ordinary meaning" or "subsequent practice" or "preparatory work" or any of the other elements that facilitate correct interpretation.

Part V of the draft Articles raises issues of significance to the maintenance of international stability and order. It is a truism that an effective and peaceful international community can only be built upon the basis of world agreement and the treaty process is the most effective method for securing such agreement.

The objectives of establishing peace and prosperity for all peoples demand that great care should be taken to avoid undermining the validity of treaty commitments. While individual States may momentarily believe an advantage can be derived by escape from particular treaty obligations, rules which permit easy avoidance of treaty obligations are in the final analysis detrimental to all States.

The basic question is whether the requirements for good faith fulfillment of treaty obligations set out in Article 23 are not substantially impaired by permitting claims of invalidity to be advanced on insubstantial grounds under certain of the Articles in Section 2 of Part V. The difficulty, in a number of instances, lies not in the fundamental principle

giving rise to a claim of invalidity but in the sweeping fashion in which the principle is expressed and the lack of safeguards respecting its application. Articles 45, 46 and 47, for example, are all couched in the most general terms. Under Article 45 any error in a treaty, relating to a fact assumed by a State to exist when it concludes a treaty, may then support a claim of invalidity by that State if the fact "formed an essential basis of its consent to be bound by the treaty". The requirements set up are highly subjective. Whether a State assumed a fact to exist and whether that fact formed an essential basis of consent are matters primarily within the knowledge and control of the State claiming that the treaty should be terminated. There is not even the requirement that the erroneous fact be of material importance to the treaty or its execution, which would supply at least one objective test.

Article 46 permits a State to invalidate a treaty which it has been induced to conclude "by the fraudulent conduct of another negotiating party". The International Law Commission admits "that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept." (ILC Report Supra, p. 73).

In view of this lack of guidance the failure to produce any guideposts at all to what is "fraudulent conduct" also tends to undermine the stability of treaties. Definitions of fraud can and do vary enormously over such issues as whether conscious deception is required or whether reckless disregard for the factual basis of representations made is sufficient: the circumstances under which the misrepresentation of an agent is considered the fraud of the principal: the extent of reliance upon a misrepresentation which is required to support the claim of fraud. There may not be any real requirement for an article on fraud in view of the lack of precedent but if there is to be one, it should be designed to develop the Law of Treaties, not to undercut it.

In Article 47, the operative fact is "the corruption" of a State's Representative by another negotiating State. There is no definition of "corruption" given and it is not a term which has any precise meaning in international law. The Article in its present form thus lends itself to avoidance of treaty obligations by distorting normal courtesies into attempts to corrupt. If protection against such acts as bribery, which has a specific legal content, is intended, then the Article should list and define those acts.

Article 49 presents the same problem but in a different context. The operative clause in this Article makes a treaty void if procured "by the threat or use of force in violation of the principles of the Charter of the United Nations." The result is a reference from the Article to the United Nations Charter as the means for determining the meaning of "threat or use of force." If a definite meaning had been

given this phrase in United Nations usage, this would have aided in supplying protection against possible use of the Article for unwarranted attempts to evade treaty obligations. But it is common knowledge that there are very substantial differences as to what is a use of force in violation of the Charter of the United Nations. It has been erroneously urged from some quarters that adverse propaganda or economic measures against a State constitute a threat or use of force in violation of Charter principles. Consequently unless "threat or use of force" is more clearly defined in Article 49, such as making clear that the threat or use of armed force is required, it too could serve to destroy the stability of treaty relationships.

Article 50, as at present drafted, is a perfect example of the principle which is undeniable as an abstract proposition but is so lacking in legal content that there is no way of judging its effects. No attempt is made to define "a peremptory norm of general international law from which no derogation is permitted..." There is no effort made to distinguish a "peremptory norm" from other norms. There is no guide to determine when "no derogation is permitted" from a norm of general international law. The dangers of such a loose formulation might be less if there were consensus in international law which establishes either what the nature and content of "peremptory norms" are, or, at the least, what are the tests for determining a "peremptory norm" and what the nature and content of any particular norm is.

There is no such consensus. The ILC commentary gives as an example "a treaty contemplating an unlawful use of force contrary to the principles of the Charter" (ILC Report Supra, p. 77). As the discussion of Article 49 points out there are substantial differences of view as to what kind of force is unlawful and what uses of force are contrary to the principles of the Charter. These differences are such that to say this is a norm from which no derogation is permissible would be meaningless because no one would be sure what was being derogated from. As for tests to determine when a norm is peremptory, the United States is aware of none.

For jus cogens to serve as a basis for voiding a treaty more than philosphical agreement on the existence of the principle is essential. It will be necessary to determine what are the peremptory norms of general international law now in effect. It will be necessary to define those norms so that their scope and content are established. It will be necessary to determine whether or not any exceptions are permitted to the general principle of the norm so that the area of the norm from which derogation is not permitted can be established. Slavery offers a simple example. Confinement at hard labor as punishment for a serious crime should be excluded from any decision that involuntary servitude was a violation of a peremptory norm of international law prohibiting slavery.

If such careful and meticulous delineation of existing peremptory norms is not carried out Article 50 might have a most disastrous effect upon international cooperation and harmony because it could radically weaken the treaty structure upon which that harmony and cooperation depend so heavily.

The same objections apply to Article 61 which voids any treaty in conflict with a "new peremptory norm of general international law." In the absence of any accepted criteria for deciding how and when a new norm is established, the way is open for any State seeking to discard its treaty obligations to claim the emergence of a norm of international law which overrides those obligations. The total effect of Article 50 and 61 is to create a substantial area of uncertainty with regard to the validity of treaty obligations.

Article 59, which permits a State to withdraw from treaty obligations on the ground of a fundamental change of circumstances is burdened with the same threat to the stability of treaty obligations. That the International Law Commission recognized this danger is apparent from the negative manner in which the Article is expressed and the limitations upon its application contained in Article 59. Thus paragraph 2 (a) of the Article excludes boundary treaties from the operation of the rule, and the reason given in the commentary is ... "because, otherwise the rule, instead of becoming an instrument of peaceful change, might become a source of dangerous frictions." (ILC Report Supra, p. 87). The implication of this statement is that it is only boundary treaties whose unilateral termination might become a source of dangerous friction. But there are a wide range of international settlements which are not boundary treaties - but whose unilateral denunciation would give rise to dangerous friction. Peace treaties without territorial clauses, cease fire agreements, treaty provisions for passage through straits, are a few of the areas where there are obvious dangers inherent in the unilateral application of this provision.

The rule of fundamental change of circumstances or rebus sic stantibus has had at the most a theoretical existence in the writings of jurists and a debatable existence in the practice of states. There are no decisions of international tribunals upholding the rule. The Commission's commentary also states that there are no municipal court cases which have upheld application of the rule. (ILC Report Supra, p. 85). And State practice, which generally consists of ex parte statements or actions designed to achieve immediate advantage, does not supply any reasoned set of principles which could be adopted as a basic tenet of treaty law.

The United States Government considers that when the dangers implicit in Article 59 are weighed against the advantage of providing "a safety valve in the law of treaties" (ILC Report Supra, p. 86) the balance is against the Article as drafted. The claim of fundamental change in circumstances has been made too often on inadequate grounds and is too

easily distorted for partisan advantage to anticipate that it will be raised but seldom and only as a last resort. Certainly if this theory is to be included in a Convention on the Law of Treaties as a binding rule, and neither the need for or the desirability of this course has been established, its scope and effect must be much more sharply delimited.

Over and above the internal weaknesses in these Articles on invalidity and termination is the all-important question of the limitations which should be imposed to prevent abuse of the Articles. No matter how precisely Articles of this character may be drafted, no matter how carefully the requirements for action may be defined, if the decision with respect to invalidity or termination is left to the sole decision of one of the parties to a treaty, these articles will weaken rather than strengthen the structure of treaty law. States seeking to avoid carrying out treaty commitments will be ingenious in fashioning arguments based on claims of error, or corruption or change of circumstances or jus cogens. If these arguments are subject to impartial review, if there are required procedures for determining the validity of these claims, the danger of abuse would be substantially curtailed. Article 62 on the procedure to be followed in dealing with such claims requires nothing more than a three months' waiting period after formal notice before a party to a treaty can assert it is terminating, suspending or declaring the treaty invalid. Paragraph 3 of the Article specifies that if another party to the treaty objects to the proposed action, the parties must "seek a solution through the means indicated in Article 33 of the United Nations Charter." But there is nothing in Article 62 which prohibits the claimant party from terminating or withdrawing from the treaty while one or more of the procedures under Article 33 of the Charter are carried out. In addition, Article 33 of the Charter offers a wide choice of means for solving a dispute but does not require the settlement of the dispute. It may accordingly be asked whether the net effect of Article 62 is not to permit a claimant to judge his own case after a lapse of three months.

The Government of the United States does not consider that the procedures in Article 62 are adequate. If a Convention on the Law of Treaties is to further the development of international law it must do so by ensuring greater respect for international obligations. If such a Convention is to further international peace and security it should not encourage disputes. To establish a whole series of grounds for claiming avoidance of treaty obligations and then to place no actual limitation upon the power of the interested State to decide whether it is entitled to avoid its treaty obligations is not the way to uphold the integrity of treaties or to avoid threats to the peace.

If the proposed Convention is to contain provisions which authorize withdrawal from and termination of treaty obligations then the Convention should contain provisions to ensure the fair and honest application of those provisions. There is but one way to achieve this result and that is by some form of impartial determination. The United States Government is not wedded to any particular method of making the necessary impartial determination. It could envisage resort to the International Court of Justice or to arbitration; in appropriate cases, to some generally acceptable form of fact-finding. But it is fundamentally opposed to entering into a Convention so potentially disruptive of treaty obligations without an effective provision for the settlement of disputes.

While it is the Articles on validity which most clearly underscore the need for third party adjudication other sections of the Draft Convention are replete with provisions which will result in disputes. To list but a few:

a. What are "acts tending to frustrate the object of a proposed treaty" under Article 15?

b. When is a reservation "incompatible with the object and purpose of the treaty" under Article 16?

c. What determines whether a "fact or act took place or a situation ceased to exist" under Article 24?

d. How is the intent of the parties to accord third states' rights determined under Article 32?

e. Who decides whether a derogation from a provision "is incompatible with the effective execution of the object and purpose of the treaty as a whole" under Article 37?

The Government of the United States fully supports the development of a universal international Law of Treaties. A Convention on the Law of Treaties which lays down definite, clear and reasonable rules, and which provides a procedure that ensures the settlement of disputes regarding the application of those rules, will be a notable contribution toward the building of a peaceful international society. It is because of these great possibilities that the Government of the United States has directed attention to some weaknesses in the Draft Articles in the hope that the weaknesses will be corrected or eliminated. But if a Convention on the Law of Treaties is produced with provisions that are imprecise and unclear, with language that conceals differences rather than resolves them, and with no substantial procedural safeguards for settling disputes, the result could be to increase rather than reduce controversies among States thus weakening the most cohesive force in the international community - treaty relationships among nations.

ACTION COPY

T

FM PRMNY OCT5/67 RESTR

TO EXTER 2687 PRIORITY

INFO TT COPEN DE HAGUE

REFOURTEL2532 SEP25

SIXTH CTTEE WESTERN GROUP MTG

FURTHER MTG OF REPS OF WESTERN STATES IN SIXTH CTTEE TOOK PLACE WED AFTERNOON OCT4. PURPOSE WAS TO DISCUSS ITEMS CURRENTLY BEFORE CTTEE AND FUTURE PROGRAMME OF WORK.

2. ILC REPORT:

WE LED DISCUSSION ON ILC REPORT BY REFERRING TO OUR PROPOSED STATEMENT(ALREADY DISCUSSED WITH CERTAIN MEMBERS OF GROUP) ON REPORT AND ASKED FOR VIEWS ON ACCEPTABILITY OF IDEA OF POSTPONING DECISION ON HOW TO DEAL WITH SPECIAL MISSIONS UNTIL XXIII UNGA. MAJORITY OF GROUP INCLUDING SCANDINAVIANS AND OTHER COMWEL COUNTRIES AGREE WITH OUR APPROACH ALTHOUGH BRIT AND NETHERLANDS(BOTH STRONG EXPONENTS OF CONFERENCE) CONSIDER THEY SHOULD NOT RPT NOT ALIGN THEMSELVES TOO ACTIVELY WITH METHODS TO POSTPONE A DECISION. WE EXLAINED THAT THOUGH WE WERE WITHOUT INSTRUCTIONS WE WOULD LOOK INTO POSSIBILITY OF COSPONSORING AN AMENDMENT TO PROBABLE GUATEMALAN RESLN AND SCANDINAVIANS WILL ALSO DO THIS(REFOURTEL2663 OCT5).

3. LAW OF TREATIES:

NETHERLANDS INFORMED GROUP THAT NEITHER AUSTRIANS(NOT RPT NOT PRESENT) NOR RPT NOR SECRETARIAT INTEND TO BRING UP QUESTION OF RULES OF PROCEDURE TO REGULATE FORTHCOMING TREATIES CONFERENCE DURING SIXTH CTTEE DEBATE THOUGH SECRETARIAT HAS APPARENTLY PREPARED DRAFT ON THIS SUBJ. WE AND AMERICANS MENTIONED ...2

SECRETARIATS INTEREST IN POSSIBILITY OF HAVING TWO CTTEES AT CONFERENCE(REFOURTEL2605 SEP29).NETHERLANDS WHICH WITH AFRICANS PLAYED IMPORTANT ROLE IN COUNTERING THIS SUGGESTION LAST YEAR STRESSED THAT ITS VIEWS HAVE NOT RPT NOT CHANGED.NUMBER OF OTHER COUNTRIES INCLUDING BRIT AND USA HOWEVER SEE SUCH A MOVE AS POSSIBLY BEING OF CONSIDERABLE VALUE AND CONSIDER THAT ARTICLES ON TREATIES DO IN FACT LEND THEMSELVES TO BEING DIVIDED INTO TWO GROUPS THOSE RELATING TO INVALITDITY(ARTICLES 39 TO 70)AND REST.

4.BRIT BROUGHT UP POSSIBILITY OF POSTPONING CONFERENCE WITH WHICH FRENCH AGREED WHICH USA OPPOSES AND WHICH OTHERS ARE CONSIDERING BUT SEEM UNENTHUSIASTIC ABOUT.

5.IN DISCUSSING LAW OF TREATIES MAJORITY OF GROUP DO NOT RPT NOT PLAN TO DEAL WITH ARTICLES SUBSTANTIVELY BUT MIGHT DO SO WITH RESPECT TO INDIVIDUAL ARTICLES(TO COUNTER PARTICULAR ARGUMENTS PUT FORWARD BY MEMBERS OF OTHER GROUPS)IF CONSIDERED ADVISABLE.

6.PROGRAMME OF FUTURE WORK:

SIXTH CTTEE WAS NOT RPT NOT CLOSER THAN BEFORE TO BEING ABLE TO DETERMINE WITH ANY ACCURACY HOW TO ALLOCATE REMAINING MTGS TO WORK LOAD SINCE CERTAIN ITEMS WERE STILL UNALLOCATED(MALTESE)AND IT IS AT THIS STAGE IMPOSSIBLE TO DETERMINE WHAT IS TO BE DONE IN DEBATE WITH OTHERS(AGGRESSION)ON AGGRESSION A NUMBER OF GROUP FORESAW POSSIBILITY THAT DISCUSSION IN PLENARY WILL HAPPEN SO LATE IN SESSION THAT THERE MAY IN ANY EVENT BE LITTLE TIME LEFT FOR FURTHER DISCUSSION IN SIXTH CTTEE.NEVERTHELESS USSR APPARENTLY STILL ...3

HAVE IN MIND SEEKING APPROX 20 MTGS FOR THIS ITEM.

7. ON FACT FINDING NETHERLANDS AMNOUNCED THAT SPONSORS OF LAST YEARS RESLN HAVE MET AND AGREED INTERSE TO SET UP WORKING GROUP WHICH THEY PROPOSE CONSIST OF APPROX 15 MEMBERS WHICH WOULD STUDY DOCU NOW AVAILABLE AND WOULD BE FREE TO REACH ITS OWN CONCLUSIONS. BULGARIA AND USSR HAVE ALREADY BEEN APPROACHED AND MAY APPARENTLY BE PREPARED TO JOIN IN THIS EXERCISE. IT IS PROPOSED TO DEAL WITH CREATION OF WORKING GROUP AS PROCEDURAL MATTER AT NEXT MTG OF SIXTH CTTEE THAT DISCUSSES FUTURE ORGANIZATION OF WORK AND IF CREATION OF SUCH GROUP PROVES ACCEPTABLE FACT FINDING ITSELF SHOULD NOT RPT NOT REQUIRE MORE THAN 4 OR 5 MTGS.

8. ASYLUM: IF USSR ARE SINCERE IN THEIR ALLEGATION THAT THEY ARE PREPARED TO DEAL WITH MATTER EXPEDITIOUSLY IT SHOULD ALSO REQUIRE ONLY 4 OR 5 MTGS.

9. ON FRIENDLY RELATIONS NUMBER OF MTGS WILL CLEARLY HAVE TO BE REDUCED TO A GREATER OR LESSER EXTENT DEPENDING ON WHAT HAPPENS TO AGGRESSION. WHETHER OR NOT RPT NOT 4TH MTG OF SPECIAL CTTEE CAN TAKE PLACE IN 1968 WILL ALSO BE RELEVANT FACTOR SINCE IF SUCH MTG CANNOT RPT NOT OR DOES NOT RPT NOT OCCUR THEN REPORT OF 3RD MTG COULD BE DISCUSSED PARTIALLY DURING THIS UNGA AND PARTIALLY DURING 23RD UNGA. GROUP HAD CONFLICTING VIEWS ON POSSIBILITY AND DESIRABILITY OF 4TH MTG WHICH IF IT IS TO TAKE PLACE AT ALL NEXT YEAR COULD PROBABLY ONLY BE HELD IN LATE AUG AND EARLY SEP.

10. WORKING GROUP ON WAR CRIMINALS WAS DISCUSSED BRIEFLY. APPARENTLY

IT IS TO CONSIST OF ONE HALF OF DISTR BETWEEN GROUPS AS SET DOWN IN COMMISSION ON HUMAN RIGHTS IE 4 WESTEUROPEANS 4 AFRICANS 3 ASIANS 3 LATINS AND 2 EASTEUROPEANS.

11. GRATEFUL FOR YOUR VIEWS ON NETHERLANDS PROPOSAL RE WORKING GROUP ON FACT FINDING AND ON WHETHER YOU WOULD FAVOUR 4TH MTG OF SPECIAL CTTEE ON FRIENDLY RELATIONS NEXT AUTUMN.

12. SINCE ABOVE MTG TOOK PLACE GENERAL CTTEE HAS MET(OCT5PM) AND RECOMMENDED ALLOCATION OF MALTESE ITEM TO FIRST CTTEE ON UNDERSTANDING THAT WORDING OF ITEM WILL BE CHANGED BY UNGA(IN ORDER WE UNDERSTAND TO PLAY DOWN LEGAL ASPECT).

Diary
Div. Diary
File

Legal Division/J.S. Stanford/jl

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: Mr. J.A. Beesley

FROM / De: J.S. Stanford

REFERENCE / Référence:

SUBJECT / Sujet: Statement in the 6th Committee on the Law of Treaties

SECURITY / Sécurité:

DATE: October 3, 1967

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	78

ENCLOSURES / Annexes -- --

DISTRIBUTION

Attached is a draft Canadian statement on the Law of Treaties for delivery in the 6th Committee. Also attached is the text of our statement on this topic last year.

2. This draft has been prepared on several assumptions, first that the Austrian invitation and the dates proposed by the Secretariat will already be before the Committee, second that we will not wish to say anything at this stage on the question of the presidency of the conference, third that the possibility of postponement will have been raised in a way that will make it appropriate for discussion in the Committee and fourth, that any comments of substance to be made on the draft articles will be made separately in writing (or at least will not be made at this stage). In connection with the last assumption, I should point out that at the time I prepared the draft comments of substance which I have submitted to you and Mr. Gotlieb, it had not been decided whether we would submit all our comments in writing, all orally, or some in writing and some orally.

J.S. STANFORD

J.S. Stanford

Ext. 407D/BIL
[redacted]
(Admin. Services Div.)

001230

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/6827/Add.1
27 September 1967
ENGLISH
ORIGINAL: ENGLISH/FRENCH/
RUSSIAN

Twenty-second session
Agenda item 86

LAW OF TREATIES

Report of the Secretary-General

Addendum

CONTENTS

1/ For the comments from the Governments of Belgium, Botswana, Cambodia, Cyprus, Czechoslovakia, Denmark, Finland, Japan, Poland, the Ukrainian Soviet Socialist Republic, the Union of Soviet Socialist Republics and Yugoslavia see A/6827.

67-21910

COMMENTS ON THE FINAL DRAFT ARTICLES ON THE LAW OF TREATIES PREPARED BY THE INTERNATIONAL LAW COMMISSION

A. MEMBER STATES

AFGHANISTAN

Transmitted by a note verbale of 29 August 1967
from the Permanent Mission to the United Nations

[Original: English]

The Government of Afghanistan, in the last five years, followed with close attention and supported the activities of the United Nations International Law Commission in the field of codification and progressive development of International Law and greatly appreciates the progress achieved by the Commission in regard to the codification of the norms and principles relating to the vital question of the law of treaties.

The Government of Afghanistan considers that the conclusion of a convention next year on this vital problem undoubtedly contributes to friendly relations among nations and may place the law of treaties upon the widest and most secure foundation.

Among the articles of the draft, the Government of Afghanistan considers that article 2 (Use of terms), article 5 (Capacity of States to conclude treaties), articles 30, 31, 32 (General rule regarding third States), article 40 (Fraud), article 47 (Corruption of a representative of the State), article 49 (Coercion of a State by the threat or use of force), article 50 (Treaties conflicting with a peremptory norm of general international law), article 59 (Fundamental change of circumstances) are the basic principles of the draft which should be maintained by the future conference, and the Government of Afghanistan submits its views on these articles as follows:

Article 2

The Government of Afghanistan notes that the term "treaty" has been used throughout the draft convention as a generic term to include all forms of

international treaties concluded between States. But the term should be widened and broadened in order to include the definition of treaties in simplified form, because this kind of treaty is very common and its use is increasing daily.

Articles 30, 31 and 32

The Government of Afghanistan fully supports the principles underlying these articles in regard to the rights and obligations of third States, with the understanding that these rules are based on "pacta tertiis nec nocent nec prosunt" and thus agreements neither impose obligations nor confer rights upon third parties and that a right for a third State cannot arise from a treaty which makes no provision for such a right.

Articles 40, 47 and 49

The Government of Afghanistan notes with satisfaction that these draft articles have laid down the principles of justice and declare that international treaties concluded through personal coercion of representatives of a State or through coercion of a State by the threat or use of force are null and void.

It is understood that the act of coercion too by a State against another State or its representative, in order to procure the signature, ratification, acceptance or approval of a treaty, will unquestionably nullify that treaty. In the view of the Government of Afghanistan the draft article 49 should be broadened in order that coercion as defined in this article should include not only "the threat or use of force" but also other pressures such as economic pressure including economic blockade.

Article 50

The Government of Afghanistan shares the view of the International Law Commission that there exist peremptory norms of international law called jus cogens.

The States must respect these norms of jus cogens, such as the right of self-determination; generally the treaties should not be incompatible with these norms, and the States who are taking part in creating these norms as international order are obliged to respect them.

/...

Article 59

The Government of Afghanistan supports the formulation of this article, with the understanding that in conformity with rebus sic stantibus, any treaty may become inapplicable through a fundamental change of circumstance. The Government of Afghanistan fully agrees that a treaty, when concluded between the parties, has a definite object, and when the purposes, object, and circumstances are changed, the treaty certainly becomes inapplicable.

These were the general remarks on the draft articles of the convention that the Government of Afghanistan makes on this occasion and hopes that they will be circulated for the information of the participants of the conference.

BULGARIA

Transmitted by a note verbale of 17 August 1967
from the Permanent Mission to the United Nations

[Original: French]

The Government of the People's Republic of Bulgaria considers that, on the whole, the draft articles on the law of treaties are a valuable contribution and could serve as a satisfactory basis for the preparation of a convention on international treaties. In this connexion it should be noted that the draft articles reflect efforts both to codify existing rules in this field and to introduce new rules reflecting the progressive development of contemporary international law.

However, some essential amendments, deleting inadequate provisions and supplying omissions, should be made in order to improve the draft.

The Bulgarian Government considers it its duty, in compliance with resolution 2166 (XXI), to submit the following comments, which it reserves the right to explain at the forthcoming discussions on the draft convention concerning the law of treaties:

/...

Object of the convention

The Government of the People's Republic of Bulgaria considers that, at the present stage, the codification of the law of treaties should relate to treaties concluded between States, and notes that the draft convention has been drawn up on those lines. The fact that the scope of application of this draft has been restricted to treaties concluded between States in written form is also to be commended.

It is essential, however, that the draft convention should provide at the outset, and specifically in article 2, paragraph 1 (a), that silence under certain conditions ("qualified silence") may produce legal effects. The draft itself contains some particular applications of this principle (article 17, paragraph 5; article 38; article 62, paragraph 1). This general idea, on which these provisions are based, should be stated at the beginning of the draft convention.

It would also be desirable to have at the beginning a statement of the principle that nothing in the convention may be considered as precluding the application of the customary rules of international law in a field not regulated by this convention. In the present draft of the convention, this principle is expressed only partially in article 34 and might be inferred from the text of article 3.

The reference in article 4 to treaties which are constituent instruments of an international organization does not seem to be warranted. Until the organization has been formed its constituent instrument cannot be applied, and therefore when that stage is reached it is essential that the constituent instrument in question should automatically be subject to the rules laid down by the convention.

Application of the principle of universality and the participation of States in general multilateral treaties

all States

The Bulgarian Government notes that the final text of the draft convention proposed by the General Assembly of the United Nations at its twenty-first session no longer includes article 8 of the 1962 draft on the participation of all States in general multilateral treaties.

The absence of such a provision constitutes a set-back to the trend towards the adoption of the principle of universality in respect of the conclusion of and

/...

accession to general international treaties. The adoption of this principle would eliminate the possibility of discrimination against certain States which wish to participate in treaties and in international relations in accordance with the principle of the sovereign equality of States and the needs of genuine international co-operation.

Formulation of reservations

The Government of the People's Republic of Bulgaria considers that a greater number of States should participate in multilateral treaties, especially those closely affecting their legitimate interests and the interests of the international community. A more flexible system concerning reservations would make it possible for States to achieve wider participation in international treaties and to promote international co-operation on a larger scale in the most varied fields.

It would be desirable to expand the definition of the term "reservation" by providing, in article 2 (d), that a reservation purports not only to exclude or to vary, but also "to limit", the legal effect of certain provisions of the treaty in their application to the State making the reservation.

Conformity of international treaties with the generally accepted norms of international law which have acquired the status of the jus cogens

The provision in draft article 50 that "A treaty is void if it conflicts with a peremptory norm of general international law..." states one of the most important rules of contemporary international law.

The effectiveness of this rule will depend on the precision with which its scope of application is defined.

In the Bulgarian Government's view, the peremptory norms of general international law mentioned in the draft convention should embrace, above all, the fundamental principles of the United Nations Charter. Hence, the legal principles of sovereign equality of States, self-determination of peoples, non-intervention in matters within the domestic jurisdiction of States, prohibition of the use of force against the territorial integrity or political independence of States, the fulfilment in good faith of international obligations and so forth, should be considered peremptory norms of general international law.

/...

The convention should also provide expressly that all treaties which had been concluded, or which might be concluded after, its entry into force, and which conflicted with these principles of international law would be void. There should be a similar provision referring specifically to unequal treaties, as they would per se conflict with the aforesaid peremptory norms.

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

Transmitted by a note verbale of 29 August 1967 from the Permanent Mission to the United Nations

[Original: Russian]

The competent authorities of the Byelorussian SSR have examined the draft articles on the law of treaties, and consider them a suitable basis for discussion at the international conference on the law of treaties. They note that the draft articles on the law of treaties contain a number of articles (48, 49, 50, 62 and 70) which are of great importance for the progressive development of international law, since they establish the invalidity of unequal and colonial treaties and of treaties concluded by means of the threat or use of force, and uphold the principle of international responsibility in respect of aggression.

At the same time, the draft articles on the law of treaties contain a number of articles which require further refinement and modification.

The draft articles on the law of treaties lay down the legal norms to which States should adhere in concluding, not all treaties without exception, but those treaties only which are international in character. However, the title of the document does not reflect this situation and goes beyond the scope of the subject dealt with by the instrument. It would therefore seem more correct to entitle the document: "Draft articles on the law of international treaties".

In article 2, the term "treaty" should be defined more precisely and a definition of the term "general multilateral treaty" should be included, together with a stipulation that all States may become parties to such treaties without discrimination of any kind.

In article 2 (d) it should be specified that reservations must be formulated in writing.

/...

It is possible that a State which has entered into negotiations for the conclusion of a multilateral international treaty may, at a particular stage of the negotiations, refuse to continue them. The negotiations may continue among other parties. In this case, it seems clear that the State which has refused to continue the negotiations will, from the time of its refusal, be free of obligations in respect of the object of the treaty. The text of article 15 does not allow for this eventuality.

It would be advisable to delete paragraph 3 of article 17, and accordingly to leave the definition of the procedure for acceptance of reservations to a treaty which is a constituent instrument of an international organization as a matter to be dealt with by the organizations themselves.

International treaties may also be entered into or acceded to by States which will not be parties to a future convention on the law of treaties or to the "present articles", as stated in the draft. This point should be taken into consideration in article 75.

Since the above comments are not exhaustive or final, the competent authorities of the Byelorussian SSR reserve the right to make further comments on the draft articles at a later stage.

NIGERIA

Transmitted by a note verbale of 11 September 1967 from the Permanent Mission to the United Nations

[Original: English]

Certain preliminary comments and observations of the Government of the Federal Republic of Nigeria on the draft articles on the law of treaties have orally been put on record in proceedings of the General Assembly at previous sessions. Similarly, the Government of Nigeria wishes to reserve its right to make further comments and observations which it considers pertinent at this stage, on the final draft articles, during the debate of the relevant item in the course of the twenty-second regular session of the General Assembly. It is not, however, intended that any such comments and observations will prejudge the specific views and detailed

/...

comments which the Nigerian Government will ultimately put forward at the International Conference of Plenipotentiaries scheduled for the spring of 1968 for the purpose of concluding an international convention on the law of treaties.

B. SECRETARY-GENERAL OF THE UNITED NATIONS

/Original: English/

The Secretary-General welcomes the work undertaken for the progressive development and codification of the law of treaties, and is gratified that the future conference on the subject will have for consideration as its basic text the draft of impressive quality which has been prepared by the International Law Commission.

There are, however, a few points, involving the interests of the United Nations or the technical aspects of depositary functions, to which the Secretary-General would like to invite the attention of Governments. These points are set out below.

Article 4

This article provides that "The application of the present articles to treaties which are constituent instruments of an international organization or are adopted within an international organization shall be subject to any relevant rules of the organization". It would be desirable to replace the underlined words by the words "concluded under the auspices of or deposited with an international organization".

The commentary on article 4 explains that "This phrase is intended to exclude treaties merely drawn up under the auspices of an organization or through use of its facilities and to confine the reservation to treaties the text of which is drawn up and adopted within an organ of the organization".

This limitation of the scope of the article will have the effect of altering the existing legal situation. It has been established in practice that the United Nations under the Charter, and certain of the specialized agencies under their constitutions, have the authority to make rules concerning a broad range of treaties which are associated with their work, and not merely those adopted within their organs. Examples of such rule-making are found in General Assembly resolutions 598 (VI) of 12 January 1952 and 1452 B (XIV) of 7 December 1959, whereby the General Assembly laid down directives for the Secretary-General to follow in his practice as depositary of conventions concluded under the auspices of the United Nations; many of those conventions were of course adopted by conferences held under the auspices of the Organization rather than by United Nations organs. General Assembly

/...

resolutions 1903 (XVIII) of 18 November 1963 and 2021 (XX) of 5 November 1965 lay down rules concerning extended participation in general multilateral treaties concluded under the auspices of the League of Nations; these treaties were of course not even adopted under the auspices of the United Nations, though the Secretary-General acts as depositary of them. From the standpoint of the United Nations it would be sufficient to add to the existing text of draft article 4 only a reference to treaties "deposited with an international organization", but under the practice of certain other organizations a State which is the depositary of a treaty concluded under the auspices of an organization may ask the latter's guidance in the performance of depositary functions, and hence it seems desirable to include also a reference to treaties concluded "under the auspices of an international organization".

Draft article 4 recognizes the existing legal situation with regard to constituent instruments of international organizations, in regard to which it allows freedom to adopt rules at variance with those applicable to treaties in general. Thus the draft articles do not conflict with the Charter and rules adopted under it, as would be the case without draft article 4, for example, in regard to acquisition of membership, which takes place in the United Nations in accordance with Article 4 of the Charter, rules 135-139 of the rules of procedure of the General Assembly and rules 58-60 of the provisional rules of procedure of the Security Council, rather than in accordance with articles 10-12 of the draft articles on the law of treaties. Draft article 4 should, however, be broadened to leave unchanged the existing legal situation with regard to treaties of international organizations other than constituent instruments.

A restrictive innovation respecting the powers of international organizations in regard to such treaties like that proposed in draft article 4 seems likely to create both legal complications and practical difficulties. International organizations have in the past made certain rules about treaties concluded under their auspices or deposited with them. If draft article 4 becomes part of a convention, what is the effect of that convention, once it is brought into force, on the future applicability of those rules, on the one hand in respect of States parties to the new convention, and, on the other, in respect of non-parties?

/...

Could the old rules of an international organization continue to apply to States not parties to the new convention, while the convention alone, and not the rules, would apply to parties?

States members of international organizations should retain the freedom they now have to make and apply rules to treaties in which those organizations have a legitimate interest, even though the treaties were not adopted within their organs. The draft articles are in general based on the present practice of States, and on typical cases; but the rapid evolution of international organizations and their treaty practice may continue, as in the past, to give rise to new problems requiring new solutions. Though the future convention will do much to clarify the law of treaties, serious problems may still arise where its provisions are not well adapted to the special circumstances of an organization, or where the convention gives no clear solution, or where the convention is not binding of its own force on all parties to a dispute and thus does not settle the problem. In any of these circumstances, rule-making by an international organization may prove a more practical and readily available method of overcoming difficulties than any of the other means of settling disputes, and such rule-making should not be restricted more narrowly than at present.

Moreover, problems arise in depositary practice which an international depositary should be able to submit to a deliberative body of his organization for the establishment of rules for his guidance; if such problems are not settled, the functions of the depositary may be involved in continuous controversy and become impossibly onerous. The Secretary-General, for example, has twice been obliged to submit to the General Assembly the problem of reservations to multilateral conventions, and the Assembly has also had to deal with the problem of extended participation in multilateral treaties concluded under the auspices of the League of Nations. Even after a convention on the law of treaties has been adopted, a long period will elapse before all States become parties to it, and serious problems may arise which it would be desirable to settle by the same method as has been used in the past. Paragraph 2 of draft article 72 provides that where a difference arises between a State and a depositary concerning the performance of the latter's functions, the depositary must bring the dispute, "where appropriate, /to the attention/ of the competent organ of the organization

concerned". Under draft article 4 as now worded, it appears that the General Assembly would no longer be competent to make rules settling differences regarding treaties concluded under the auspices of the League of Nations, or treaties like the Convention of the Inter-governmental Maritime Consultative Organization (concerning which a problem was brought before the General Assembly[2/] in 1959), as they were not adopted within an organ of the United Nations. Differences concerning such treaties could, under paragraph 2 of draft article 72, be brought "to the attention of the other States entitled to become parties", but it is not clear how those States, without acting within the framework of an organization, could jointly lay down a rule for the depositary to follow.

The future convention on the law of treaties is likely to involve ultimately some changes in the depositary practice of the Secretary-General, as of most depositaries. If any of those changes should give rise to controversy, a rule established by the international organization concerned might be an appropriate means of authorizing the depositary to act in accordance with the convention in respect of States not yet parties to it; thus recognition in the future convention of the present extent of the rule-making authority of international organizations may well contribute to the effectiveness of the convention rather than detracting from it.

The distinction made in draft article 4 and its commentary between treaties adopted "within an organ" of an organization and treaties "merely drawn up under the auspices of an organization or through use of its facilities" is not very clear, as there are doubtful cases when a conference may or may not be an organ. But even where the distinction is clear, it is arbitrary, as adoption by an organ or by a separate conference is often a mere matter of convenience and should not serve as the basis for a legal distinction. For example, article 23 of the Statute of the International Law Commission provides that when the Commission submits draft articles to the General Assembly, it may recommend that the Assembly should, inter alia, recommend the draft to Members with a view to the conclusion of a convention, or that the Assembly should convoke a conference to conclude a

---

2/ See Official Records of the General Assembly, Fourteenth Session, Annexes, agenda item 65, document A/4188.

convention. One course or another might be taken in practice for various reasons concerning the degree of complexity of the draft, the political urgency of a convention, financial considerations, etc. If for any such reasons the Assembly sends the draft to a conference, and assuming that in either case the Secretary-General is the depositary, why should the Assembly lose the power, which it would have had if it adopted the draft itself, to make rules applicable to the resulting convention?

The purpose of the change of wording suggested at the beginning of these comments on draft article 4 is not to add to the rule-making competence of international organizations, but simply to avoid prejudicing the competence which some of them, notably the United Nations, possess at present under their constitutional systems, and the competence which States may consider it desirable to confer on international organizations in the future. That competence will no doubt be exercised as cautiously and infrequently as it has been in the past. Reassurance is given by the word "rules" in the present text of draft article 4, which implies a requirement that they be legally valid rules, adopted and applied in accordance with the constitutions of the organizations concerned. The authority of each organization and of particular organs within it to make rules regarding treaties may sometimes be a complicated question, but the requirement of constitutional validity gives assurance of careful consideration and eliminates any danger of capricious decisions of minor bodies or minor officials. It can thus be anticipated that exercise of the rule-making authority will be limited to a few cases of genuine need of States or of depositaries, as in the past, and that the general international law of treaties as embodied in the future convention will apply to the vast majority of problems concerning the treaties connected with international organizations.

Article 8

Paragraph 2 of draft article 8 is not in accordance with the practice of United Nations conferences, under which the adoption and amendment of the rules of procedure, including the rules relating to voting, normally takes place by a simple majority of representatives present and voting. This difference, however, will not create any difficulty if, as suggested above, article 4 is broadened to

/...

recognize the possibility that some international organizations have the authority to adopt special rules at variance with the provisions of the draft articles in regard to treaties concluded under their auspices.

Article 9

This article again shows the need for leaving some flexibility to international organizations in regard both to the procedures of their organs and to those of conferences under their auspices. There are cases in which, without any demonstrable agreement of the States participating in the drawing up of the treaty in accordance with sub-paragraph (a), and also without the signatures of representatives in accordance with sub-paragraph (b), the establishment of the authentic text is necessarily left to the secretariat of the conference. The commentary refers to a comparable case where authentication takes the form of a resolution of an international organization or of an act of authentication by a competent authority of an organization. Even where there is a signing ceremony at the end of a conference or of the deliberations of an organ of an international organization, reasons of time frequently prevent representatives from having any opportunity to verify the text, and in that case also the real authentication of the text is performed by the secretariat. But draft article 9 creates no difficulty provided that draft article 4 is altered as suggested above.

Article 15

There are two instances in the practice of the Secretary-General where, before the entry into force of a treaty, instruments of acceptance or accession have been withdrawn by the States concerned. Under sub-paragraph (c) of this draft article, however, instruments once deposited could presumably not be withdrawn, even before the treaty enters into force, and for at least as long as "such entry into force is not unduly delayed". The decision upon the date at which delay in entry into force of a treaty becomes undue may be a difficult matter, upon which a depositary, confronted by a request for withdrawal of an instrument, might have to seek guidance from a competent organ in accordance with article 72, paragraph 2. One way of avoiding the problem would be to modify sub-paragraph (c) so as to allow freedom to withdraw instruments before the treaty enters into force, possibly by

/...

modifying the final phrase to read: "... and provided that such consent has not been withdrawn and that such entry into force is not unduly delayed".

Article 17

The relation between this article and the practice of the Secretary-General regarding entry into force of treaties is not quite clear. The Secretary-General, in accordance with General Assembly resolutions 598 (VI) and 1452 B (XIV), is precluded from passing upon the legal effects of instruments containing reservations or of objections to them. The situation, for depositaries as well as States, will be somewhat clarified by paragraph 4 (c) of draft article 17, which provides that an act expressing a State's consent to be bound is effective as soon as at least one other contracting State has accepted the reservation, but it may be anticipated that, in the future as in the past, express acceptances of reservations will be rare, and that much will continue to depend upon tacit acceptance. In the situation that has thus far existed, the practice of the Secretary-General, when required to make notification of the entry into force of a convention to which reservations have been made, has been as follows. When he has received the number of instruments specified in the treaty as required for entry into force (whether or not reservations in those instruments have been objected to or expressly accepted), the Secretary-General makes a notification referring to the entry into force clause of the treaty, to the receipt of the number of instruments specified therein, and to any objections that have been made to the reservations. Ninety days after such notification, if no objection to entry into force has been received, the Secretary-General proceeds with the registration of the treaty as having entered into force on the date of receipt of the necessary number of instruments. No objection has ever been received either to entry into force or to the ninety-day period allowed for States to express their views.

Article 17, paragraph 5, states that a State is not considered to have tacitly accepted a reservation until "the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later". Is the effect of this time-limit, in the absence of any express acceptance of a reservation, to prevent an instrument containing that reservation from being counted towards entry into force until

/...

twelve months after notification has been given of the reservation? If so, there may be considerably more delay in the entry into force of treaties than under the present practice of the Secretary-General. Should this be considered undesirable, a remedy could be found by shortening the period of twelve months specified in paragraph 5.

Article 44

It is suggested that the end of this article be modified to read as follows: "... his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was brought to the knowledge of the other negotiating States or of the depositary prior to his expressing such consent". A common way of making specific restrictions in regard to the expression of consent of a State to be bound is in the full powers of its representative. In the circumstances of modern multilateral conventions, the full powers of a representative can hardly ever be brought to the notice of the other States concerned, but only of the depositary. If a State, in drawing up full powers to authorize its representative to make a binding signature or to execute and deposit an instrument expressing consent to be bound, makes specific restrictions upon his authority, it seems only just to allow that State to invoke those restrictions if its representative fails to observe them and if the depositary has examined the full powers. Indeed, a number of cases have occurred where representatives have had full powers to sign a treaty only subject to acceptance, and by mistake they signed without mentioning the need of acceptance. In such cases the Secretary-General has not considered that the States were bound unless they confirmed it, and has taken the initiative to clarify the matter before making notification of the signature.

Article 71

In the practice of the United Nations the depositary is the Secretary-General and not the Organization itself. While this does not make much practical difference, in view of the context of the draft articles and in particular of article 72, paragraph 2, it might possibly be desirable to specify in article 71, paragraph 1, that the depositary may be "a State or an international organization or the chief administrative officer of such an organization".

Article 74

In connexion with paragraph 2 (a), it may be pointed out that the practice of the Secretary-General is to notify all States entitled to become parties (including, of course, the contracting States as well) of a proposal to correct an error, rather than simply "the contracting States". It is noted that this practice is not excluded by the present wording.

C. SPECIALIZED AGENCIES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Transmitted by a letter of 7 July from the Legal Counsel of the Food and Agriculture Organization of the United Nations

[Original: English]

General observations

The rules applied by FAO, as regards the Constitution of the Organization and conventions and agreements concluded within the framework of FAO, are laid down in articles II, XIV, XVII, XIX and XX of the Constitution and rules XIX and XXI of the General Rules of the Organization and in the Principles and Procedures adopted by the FAO Conference with respect to conventions and agreements concluded under articles XIV and XV of the Constitution.[3/]

While the rules applied by FAO with respect to international instruments are generally in line with those laid down in the draft articles of the law of treaties, they do differ from the latter in certain respects. A brief comparison between the two sets of rules, indicating both similarities and differences, is made below.

It may not be inappropriate to add one general observation concerning the scope of the draft articles on the law of treaties and their delimitation in relation to the scope of the proposed codification of relations between Governments and inter-governmental organizations. The draft articles on the law of treaties are to apply only to treaties concluded between States; it is clear from the text of, and the commentary on, articles 1 and 2 that treaties between States and international organizations are excluded from the scope of the draft articles. There appears to be a certain tendency towards the conclusion of treaties between States to which one or more international organizations may also be parties.

3/ For the texts of the Constitution and of the General Rules of the Organization see Basic Texts, vol. I, published by the Food and Agriculture Organization of the United Nations, and of the text of Principles and Procedures which Should Govern Conventions and Agreements Concluded under articles XIV and XV of the Constitution, ibid., vol. II, section VII.

Within the framework of FAO, the Agreement for the Establishment on a Permanent Basis of a Latin-American Forest Research and Training Institute[4/] may be a pertinent example since in addition to States, FAO is also a party to the Agreement. There are other examples such as the Indus Water Treaty - 1960, between India, Pakistan and the International Bank for Reconstruction and Development, as well as an ever increasing number of agreements relating to regional projects, particularly in the field of activities of the United Nations Development Programme and the Bank group. It is not clear whether international instruments of this type would fall within the scope of the draft articles on the law of treaties or the rules under consideration by the International Law Commission with respect to relations between Governments and inter-governmental organizations; this problem may well deserve further consideration prior to - and possibly during - the proposed diplomatic conference on the law of treaties. In our opinion, it would be desirable to avoid a situation in which two different sets of rules would be applied to one and the same international instrument, the choice depending on whether a given problem arising in connexion with the instrument concerns relations between States or between States and international organizations.

Observations on individual articles

Article 4

Pursuant to this article, the relevant rules adopted by international organizations would seem to prevail over the draft articles on the law of treaties as regards the constituent instruments of, and treaties adopted within, the international organizations concerned. As pointed out in the commentary on this article, the above rule was originally intended to apply also to treaties drawn up "under the auspices" of international organizations. In addition to the conventions and agreements concluded within the framework of FAO under articles XIV and XV of its Constitution, at least two other treaties have been drawn up under the auspices or with the assistance of FAO, with the approval of its governing bodies, and there may be more international treaties of this type in the not too distant

4/ United Nations, Treaty Series, vol. 390, No. 5610.

future. To the extent that an international organization acts as depositary and possibly assumes certain functions concerning the implementation of such treaties it may also have to follow the relevant rules of the organization in carrying out such functions. Accordingly the term "adopted within an international organization" may have to be given a liberal interpretation, bearing in mind, of course, the observations set out in paragraph (3) of the commentary to article 4.

We presume that the "relevant rules of the organization" referred to in this article comprise both existing rules and rules that may be introduced in the future.

Article 5

This article limits the capacity to conclude treaties to States - including members of a federal union subject to certain qualifications. At an earlier stage, the International Law Commission considered, concurrently with the category of federations or other unions of states, the capacity of "dependent States" to enter into treaties. Thus it had been suggested that a dependent State may possess international capacity to enter into treaties, inter alia, where "the other contracting parties accept its participation in the treaty in its own name separately from the State which is responsible for the conduct of its international relations".[5/] It is not entirely clear whether the omission of a reference to dependent States in article 5 precludes dependent States from becoming parties to international treaties. As far as FAO is concerned, Associate Members which by definition are Territories which are not responsible for the conduct of their international relations (article II-3 of the Constitution) can be admitted to FAO and thereby assume certain rights and obligations provided for in the Constitution. Moreover they can also become parties to conventions and agreements adopted under article XIV of the Constitution. Although in both cases the instruments of acceptance are submitted by the Member Nation that is responsible for the conduct of the international relations of the Territory concerned, the exercise of the rights and duties connected with associate membership is vested in such Associate

---

5/ Yearbook of the International Law Commission, 1962, vol. II, document A/CN.4/144.

Member as far as membership in FAO is concerned. Similarly, Associate Members may be in a position to exercise rights and carrying out obligations under a convention or agreement if by virtue of constitutional arrangements between an Associate Member and the country responsible for its international relations the former has been endowed with the authority to become a party to,international treaties. (See article II, paragraphs 3-4, article XIV, paragraph 5 of the Constitution, rule XXI, paragraphs 1-a (ii), b, c, and 3 of the General Rules of the Organization, paragraphs 7, 14-a (ii) of the Principles and Procedures Governing Conventions and Agreements Concluded under Articles XIV and XV of the Constitution.) In view of the provisions of article 4 of the draft articles, the special status of Associate Members within FAO would not seem to present any particular problems; the above observations should therefore not be construed as a suggestion for reintroducing specifically the concept of "dependent States" in the draft articles.

Articles 6 to 8

Generally speaking, the rules adopted by FAO with regard to full powers and the adoption of instruments are in conformity with the relevant articles of the law of treaties. Both draft amendments to the FAO Constitution and conventions and agreements under article XIV of the Constitution have to be included in the draft agenda of the Conference or Council, as the case may be, and texts have to be circulated well in advance of the opening of the Conference or Council session. Accordingly, Member Governments may be presumed to have taken cognizance of the texts, and no credentials other than those empowering the members of delegations to represent their Governments at the session are required for the purpose of adopting an amendment to the Constitution or a convention or agreement.

The problem of subsequent confirmation of an act performed by a representative of a Member Nation without credentials in the formal sense has arisen in connexion with the signing of, or acceding to, conventions and agreements, for which specific full powers are required. This situation is now regulated by a provision similar to that appearing in article 7 of the law of treaties (rule XXI-4 of the General Rules of the Organization).

The principle of adoption of a text by a two-thirds majority, as reflected in article 8, paragraph 2, of the draft articles, has also been incorporated in articles XIV and XX of the FAO Constitution but the criteria for calculating that majority are not uniform in all cases. Thus, amendments to the Constitution can be adopted by the Conference by a two-thirds majority of the votes cast, provided that such majority is more than one half of the Member Nations of the Organization (article XX-1); conventions and agreements may be adopted by the Conference by a two-thirds majority of the votes cast (article XIV-1), while the majority required for adoption by the FAO Council is two-thirds of the membership of the Council (article XIV-2).

Article 9

The rule governing authentication of conventions and agreements is laid down in article XIV-7 of the FAO Constitution, which is at variance with article 9 of the draft articles.

Articles 10 to 13

The practice of FAO is reflected in paragraph 4 of the Principles and Procedures governing Conventions and Agreements. Thus, both the traditional system, i.e. that of signature, signature subject to ratification, and accession, as well as the simplified system of acceptance by deposit of an instrument of acceptance are being applied with respect to conventions and agreements concluded under article XIV of the Constitution.

Articles 16 to 20

The FAO Constitution does not contain any provision permitting or prohibiting reservations. Since a State wishing to make a reservation to the Constitution would have to do so in applying for membership, the question of acceptance of such reservation would - if it did arise - presumably be decided by the Conference when it examines the application for membership; this would also be in line with article 17, paragraph 3, of the draft articles. Of course, the Conference could also, in accordance with article XVI of the Constitution, refer to the International Court of Justice the question of admissibility and/or the legal effects of such reservations.

The question of reservations to conventions and agreements concluded under article XIV of the Constitution is regulated by paragraph 10 of the Principles and Procedures governing Conventions and Agreements. The practice of the Organization in this respect has been communicated to the United Nations by a letter dated 29 March 1963.[6/]

Articles 21 and 22

Pursuant to paragraph 9 of the Principles and Procedures governing Conventions and Agreements, all texts shall indicate the method of determining the effective date of participation. The conditions for entry into force of a convention or agreement are also invariably specified in the text of the instrument. However, no provision has been made so far for a provisional entry into force, as referred to in article 22 of the draft articles.

Article 25

The presumption expressed in this article, to the effect that the application of a treaty extends to the entire territory of each party, applies to the FAO Constitution. It likewise applies to conventions and agreements concluded under article XIV of the FAO Constitution, it being understood that contracting States may on signature, ratification, accession or acceptance, make a declaration regarding territorial application. In addition, it is specified in the Principles and Procedures governing Conventions and Agreements that each instrument should contain a clause regarding its territorial application, i.e. its geographical scope.

Articles 27 to 29

The interpretation of the FAO Constitution and of the conventions and agreements concluded under article XIV of the Constitution is dealt with in article XVII of the Constitution and in paragraphs 13 and 16 of the principles,

---

6/ Yearbook of the International Law Commission, 1965, vol. II, doc. A/5687. Depositary practice in relation to reservations. Report of the Secretary-General, Introduction, paragraph 5, part I, questions 1-20.

respectively. The first two provisions place the emphasis on procedural aspects (with special reference to settlement of disputes) rather than on the substantive criteria for interpretation. Paragraph 16 of the Principles states that the languages in which the conventions and agreements are drawn up shall be equally authentic. It may be presumed that the methods of interpretation laid down in articles 27 to 29 of the law of treaties could also be applied in regard to treaties concluded within the FAO.

Articles 35 to 36

The provisions of the draft articles relating to the methods for amending, and the legal effect of amendments to, multilateral treaties apply only "unless the treaty otherwise provides".

The amendment of the FAO Constitution is covered by the provisions of article XX thereof. While these provisions generally follow the procedure and criteria laid down in article 36 of the law of treaties, there is at least one important difference: if an amendment of the FAO Constitution does not involve any new obligation for Member Nations, all Member Nations and Associate Members become bound as soon as the amendment has been adopted by the Conference without any subsequent positive act such as ratification or acceptance being required; Member Nations become bound by the amendment in these circumstances even if they have voted against the amendment.

As regards the amendments to conventions and agreements concluded under article XIV of the Constitution, paragraph 8 of the Principles and Procedures governing such instruments contains detailed provisions concerning the procedure and criteria for, and legal effect of, amendments. As in the case of amendments of Constitution, a distinction is made between amendments involving new obligations and other amendments; it may be noted, however, that in any event, amendments have to be approved by at least two-thirds of the parties to the convention or agreement concerned before they can be submitted to the Conference or Council for approval.

Articles 39 to 68

To the extent that any problems relating to the subject matters covered by these articles (invalidity, termination, and suspension of operation of treaties)

may arise in connexion with the FAO Constitution or instruments adopted within the Organization, there are good reasons to believe that the relevant articles on the law of treaties would be applied, subject to any rules adopted by the Organization with respect to any of these subject matters. At present, specific rules are in force with regard to the withdrawal from the Organization and the withdrawal from, or termination of, conventions and agreements concluded under article XIV of the Constitution. The procedure for, and effects of, withdrawal from the Organization are governed by the provisions of article XIX of the Constitution. Detailed provisions concerning withdrawal from or denunciation of conventions and agreements are contained in paragraph 14 of the Principles, while the termination of conventions and agreements is dealt with in paragraph 15 of the Principles.

Articles 71 to 75

The exercise of the depositary functions of FAO is governed by article XIV-7 of the Constitution, rule XXI-3 of the General Rules of the Organization, and paragraph 17 of the Principles and Procedures governing Conventions and Agreements. To the extent that these provisions cover the same ground as the above-mentioned articles on the law of treaties, they are in harmony with those articles.

It may be noted, however, that article 72, paragraph 1 (a), refers only to the original text of the treaty; amendments are not mentioned in this sub-paragraph, nor in any of the subsequent provisions. This might be regarded as a lacuna, and consideration might therefore be given to the desirability of inserting the words "and of any amendments thereto" after the words "of the treaty" in article 72, paragraph 1 (a).

As regards the registration of treaties provided for in article 75 of the draft articles, FAO has consistently complied with the provisions of Article 102 of the United Nations Charter and the regulations issued thereunder. It may be noted that the registration of conventions and agreements is specifically prescribed by article XIV-7 of the Constitution, and that FAO practice in this respect has been developed in the light of the regulations to give effect to Article 102 of the United Nations Charter.[7/]

7/ United Nations, Treaty Series, vol. 76, pp. xviii-xxix; Yearbook of the International Law Commission, 1962, vol. II, doc. A/5209, annex.

INTERNATIONAL LABOUR ORGANISATION

Transmitted by a letter of 18 May 1967 from the Director-General of the International Labour Office

[Original: English]

The rules applied by the ILO, as depository both of the constituent instrument of the Organisation and of instruments adopted within the Organisation, differ in certain respects from those laid down in the draft articles.

First, certain procedures differing from those set forth in the draft articles are laid down in the Constitution of the ILO. Thus it is the Constitution which provides for the procedure of authentication of international labour conventions by the signature of the President of the International Labour Conference and of the Director-General of the International Labour Office - a procedure which is applied also to instruments of amendment to the Constitution.

Second, certain procedures are provided for in standard articles of international labour conventions. Thus, since 1927, international labour conventions have contained provisions concerning their revision and the effects of such revision which are more far-reaching than the rules concerning amendment and modification of treaties contained in part IV of the draft articles.

Third, certain constitutional practices, derived from the particular structure of the Organisation, have been evolved. Thus, the International Law Commission pointed out in its report on the work of its third session (1951) that "because of its constitutional structure, the established practice of the International Labour Organisation, as described in the written statement dated 12 January 1951 of the Organisation submitted to the International Court of Justice in the case of reservations to the Convention on Genocide, excludes the possibility of reservations in international labour conventions".[8/] Again that practice is applied also to acceptance of the obligations of the Constitution of the Organisation.

It is our understanding of article 4 of the draft articles that it is recognized that these various categories of rules will continue to apply to the Constitution of the Organisation and instruments adopted within the International

---

8/ Yearbook of the International Law Commission, 1951, vol. II, document A/1858, paragraph 20.

Labour Organisation, including international labour conventions, even where they differ from the draft articles on the law of treaties and the relevant articles do not expressly provide for possible variations.

INTERNATIONAL TELECOMMUNICATION UNION

Transmitted by a letter of 24 July 1967 from the Secretary-General ad interim of the International Telecommunication Union

[Original: English]

Article 4

1.1 The constituent instrument of the International Telecommunication Union (ITU) is the International Telecommunication Convention, which is revised by the ITU Plenipotentiary Conference, meeting at periodic intervals (usually every five years). The first of these conventions was that of Madrid (1932)[9] whereby the "Telegraph Union" was replaced by the "Telecommunication Union". The Members of the Union were the Governments which signed and ratified the treaty or adhered to it afterwards under arrangements specified. All subsequent conventions (Atlantic City 1947,[10] Buenos Aires 1952,[11] Geneva 1959,[12] Montreux 1965[13]) have contained an annex listing the members and have made provision for the admittance of new members. Countries listed as Members have continued to appear as Members in the lists annexed

---

9/ League of Nations, Treaty Series, vol. 151, No. 3479; International Bureau of the Telegraph Union, International Telecommunication Convention, Madrid, 1932, Bern (1933).

10/ United Nations, Treaty Series, vols. 193, 194, 195, No. 2616; International Telecommunication Union, Final Acts of the International Telecommunication and Radio Conferences, Atlantic City, 1947, Atlantic City (1947).

11/ International Telecommunication Union, International Telecommunication Convention, Buenos Aires, 1952, Geneva (1953).

12/ The General Secretariat of the International Telecommunication Union, International Telecommunication Convention, Geneva, 1959, Geneva.

13/ The General Secretariat of the International Telecommunication Union, International Telecommunication Convention (Montreux, 1965), Geneva.

to successive conventions even though they have not ratified any since the first that they ratified or to which they acceded. They continue, however, to be treated in all respects as Members, except that since the 1952 convention the right to vote is lost:

(a) By a signatory Government two years after the convention has come into force if it has not deposited an instrument of ratification;

(b) When the new convention comes into force, by a country listed as a Member which has not signed or acceded.

1.2 Thus, from a formal juridical point of view, there can be more than one "constituent instrument" in relations between ITU Members although in practice, e.g. choice of contributory unit, the provisions of the current convention are applied.

1.3 It is assumed that where there are inconsistencies between the provisions of the ITU "constituent instrument" (or "instruments") and those of the law of treaties, the former prevail except in cases in which article 50 of the law of treaties operates.

"treaties... adopted within international organizations"

1.4 Some further clarification of the meaning to be attached to "treaties... adopted within international organizations" is desirable so that it can be decided to what extent article 4 is to be applied to the different categories of treaties concluded in the telecommunications field.

I. The regulations

1.5 The provisions of the International Telecommunication Convention (Montreux 1965) are completed by the following sets of administration regulations:

Telegraph regulations
Telephone regulations
Radio regulations
Additional radio regulations

1.6 Ratification of the convention or accession involves acceptance of the regulations in force at the time (a number of Members, however, have made reservations in this regard).

1.7 The Montreux Convention (article 7) makes provision for the convening of administrative conferences of a world-wide character to revise these regulations or part of them or to discuss any other telecommunication question of a world-wide character.

1.8 Delegates attending such conferences must be formally accredited by credentials that confer full powers, or authorize them to represent their Governments without restrictions, or give the right to sign the Final Acts.

1.9 The regulations are drafted without a preamble containing a list of participating countries; they contain a statement that they are annexed to the Telecommunication Convention; and they are signed in a single copy which remains with the inviting Government or in the ITU archives as the case may be, certified copies being delivered to all Members.

1.10 Amendments to the regulations made by administrative conferences appear as final acts, either in the form of amended appendices to the regulations concerned or of a partial revision of the main body of the regulations. Such final acts are signed in a single copy, certified copies being delivered to Members. They contain a proviso that Members must inform the ITU Secretary-General of their approval and that he in turn will communicate this information to the membership.

1.11 As the regulations and amendments to them complete the International Telecommunication Convention, it would seem that they should be regarded as being part of a "constituent instrument" for the purposes of article 4.

II. Regional arrangements

(a) Under article 7 of the Montreux Convention

1.12 Under article 7 of the Montreux Convention regional administrative conferences may be called to consider telecommunication questions of a regional nature but the decisions must not conflict with the interests of other regions or the prescriptions of the administrative regulations. The expenses are a charge against all the Members of the region concerned whether participating or not.

1.13 The final acts of these conferences have been entitled variously "agreement" or "special agreement". They are usually drawn up as treaties with a preamble referring to article 7 of the Montreux Convention (or the equivalent article in

earlier conventions) and listing the participating countries which are referred to as "contracting administrations". The final acts are signed in a single copy which may be deposited with the host Government or the ITU, as the case may be. Certified copies are sent to the signatory Governments which must notify their approval to the Secretary-General of the ITU.

1.14 It would seem logical that regional agreements made by conferences convened under article 7 of the Montreux Convention (or similar articles in earlier conventions) should be considered, for the purposes of article 4, as being "adopted within" the ITU.

(b) Under article 45 of the Montreux Convention

1.15 Article 45 of the Montreux Convention gives Members the right to conclude regional agreements on telecommunication questions susceptible of being treated on a regional basis provided that they are not in conflict with the convention. Such agreements are usually drawn up in very much the same way as the instruments mentioned in the preceding paragraph. They have been called "regional agreement", "regional arrangement" or "convention" or "regional convention". Reference is usually made to the fact that the conference has been convened or the agreement made by virtue of the provisions of article 45 (or the equivalent article in earlier conventions). In some cases ratification rather than approval is required. The conferences are sometimes serviced by the ITU Secretariat but the expenses are charged against the participants only and not against the membership of the region as a whole. The custom has been, where ratification is required, for the instruments to be deposited with the host Government which informs the ITU Secretary-General. Where only approval is required, however, signatories notify the Secretary-General direct.

1.16 There is so much variation in the texts of agreements reached under article 45 that it cannot be determined of them as a category whether or not they can be held to be "adopted within" the ITU. Rather, each agreement and its surrounding circumstances would have to be examined to see to what extent it was the intention of the parties that the agreement be subject to the rules of the ITU.

(c) Other regional agreements

1.17 There seems to be only one regional agreement in the telecommunication field that does not fall within the two preceding categories since no reference is made in it to the relevant articles of the International Telecommunication Convention. Under its terms the inviting Government receives acceptances and there is no provision that these be communicated to the ITU. The instrument appears, however, in the official list of acts of the Union published by the ITU.

III. Special agreements on telecommunication matters

1.18 By article 44 of the Montreux Convention the Members of the Union reserve the right to make special agreements on telecommunication matters which do not concern other Members, provided they do not conflict with the terms of the convention or of the regulations as far as concerns harmful interference to the radio services of other countries.

1.19 The right to make special agreements is qualified by the regulations.

1.20 It is recognized in the telegraph and telephone regulations that derogation from their provisions may be made by special arrangements.

1.21 The radio regulations prescribe that special arrangements may be made as follows:

(i) By two or more Members regarding sub-allocation of bands of frequencies to the appropriate services of the participating countries.

(ii) By two or more Members regarding assignment of frequencies below or above those covered by the table of frequency allocations to stations in one or more specific services provided all Members affected have been invited to the conference.

(iii) By Members on a world-wide basis regarding assignment of frequencies covered by the table of frequency allocations to stations participating in a specific service provided that all Members are invited to the conference.

(iv) Between neighbouring countries regarding stations operating on frequencies above 41 MHz to be located in the territory of one country and intended to improve the national coverage of the other country.

1.22 In cases (i)-(iii) the ITU Secretary-General must be informed in advance of the intention to convene the conference. In all cases contents of the arrangements made must be communicated to him so that he may inform the membership as a whole.

1.23 The radio regulations also provide that special arrangements shall determine the conditions of operation of stations in the fixed and mobile services in order to protect those services from harmful interference, having regard to the difficulties of operation of stations of the maritime mobile service.

1.24 Provision has also been made in various regional agreements for further special regional arrangements.

1.25 It is felt that each special agreement and its surrounding circumstances would have to be examined to see to what extent it was the intention of the parties that the agreement be subject to the rules of the ITU.

Article 5

2.1 Under the Monteaux Convention the Members of the Union are:

(i) Any country or group of territories listed in annex 1 to the Convention. In this list are included States members of federal unions and groups of territories.

(ii) Countries not listed which become Members of the United Nations and accede.

(iii) Any sovereign country not listed which accedes after its application for membership has been approved by two-thirds of the Members of the Union.

2.2 Provision is made for associate membership in which may be included countries, territories and groups of territories the application of which is approved by a majority of the Members and any Trust Territory on behalf of which the United Nations has acceded to the convention and which is sponsored by the United Nations. Associate Members have the same rights and obligations as Members except the right to vote.

Article 6

3.1 Accreditation to ITU plenipotentiary conferences can be given by Heads of State or Government or the Minister for Foreign Affairs. The same persons and the Minister responsible for questions dealt with during the conference can accredit

delegates to ITU administrative conferences. The Secretary-General of the United Nations may accredit the delegation representing a Trust Territory. The head of a diplomatic mission, or the head of the permanent delegation to the European Office of the United Nations for ITU conferences held in Geneva, may accredit a delegation subject to confirmation prior to signature of the final acts by the Head of State or Government, the Minister for Foreign Affairs or (for administrative conferences) the Minister responsible.

Article 7

4.1 No provision is made in the Montreux Convention for confirmation after signature.

Article 8

5.1 The only cases where a special majority is specifically required under ITU rules are:

(a) In connexion with the admission to membership of countries not Members of the United Nations; in this case the approval of two-thirds of the Members of the Union is required;

(b) In connexion with the determination of the agenda of conferences, their date and place of meeting and changes thereto (see paragraphs 13.1 and 13.2 below).

Article 9

6.1 The ITU has no rules on this point.

Article 11

7.1 Ratification is required for signatories to the International Telecommunication Convention: non-signatories may accede. For most other ITU agreements approval only is required.

Articles 16-20

8.1 The general regulations annexed to the Montreux Convention contain the following provision "745: However, if any decision appears to a delegation to be of such a

nature as to prevent its Government from ratifying the convention or from approving the revision of the regulations, the delegation may make reservations, final or provisional, regarding this decision."

8.2 It has been the practice for all telecommunication conventions since that of Madrid (1932) to incorporate reservations made at the time of signature in a final protocol which has been signed by all the parties. Present practice is to refuse instruments of accession containing reservations.

8.3 It is provided in the regulations and amendments thereto that should an administration make reservations about the application of any provision, no other administration shall be obliged to observe that provision in its relations with that particular administration.

8.4 Practice varies as regards regional and special agreements. In a few cases there is a final protocol containing reservations, signed by all the parties. There are no reservations to most of these treaties, however, and nearly all prescribe that accession by non-signatories must be made without reservation.

Article 25

9.1 The ITU membership includes groups of territories which are described variously as:

"group of territories represented by..."

"... provinces in Africa"

"... overseas provinces"

"territories of..."

"overseas territories for the international relations of which the... are responsible".

9.2 Some of the signatories provide at the time of ratification a list of the territories included which is published by the ITU Secretariat.

9.3 There is one case of a federal union where some members, but not all, sign separately and have the right to vote. It has alsays been assumed that the signature of the union as a whole is for all the constituent parts except those members which sign separately.

Article 26

10.1 The Montreux Convention contains the following provisions:

> "266. This Convention shall abrogate and replace, in relations between the Contracting Governments, the International Telecommunication Convention (Geneva, 1959).
>
> "267. The administrative regulations referred to in 203[14] are those in force at the time of signature of this Convention. They shall be regarded as annexed to this Convention and shall remain valid, subject to such partial revisions as may be adopted in consequence of the provisions of 52 [15] until the time of entry into force of new regulations drawn up by the competent world administrative conferences to replace them as annexes to this Convention."

10.2 All the countries or groups of territories listed as Members in the Montreux Convention either signed and ratified or acceded to the previous convention (Geneva 1959) except for five. Of these five: one is still bound by the Madrid Convention (1932), one by the Atlantic City Convention (1947), and three by the Buenos Aires Convention (1952). Three of them have signed some or all of the regulations all of which were completely revised after 1952.

10.3 As has been mentioned above, in practice the rules of the current convention are applied to these Members, e.g., choice and value of unit of contribution.

10.4 In one regional agreement it is provided that it and its plan shall be abrogated between all the contracting parties from the entry into force of a new plan. In the event of a contracting Government not approving the new plan the agreement shall be abrogated in relation to such Government as from the entry into force of the new plan.

Articles 27, 28 and 29

11.1 The Montreux Convention contains the following provisions:

> "234. The official languages of the Union shall be Chinese, English, French, Russian and Spanish.

---

[14] See paragraph 1.5 above.

[15] See paragraph 1.7 above.

"235. The working languages of the Union shall be English, Franch and Spanish.

"236. In case of dispute, the French text shall be authentic.

"237. The final documents of the plenipotentiary and administrative conferences, their final acts, protocols, resolutions, recommendations and opinions, shall be drawn up in the official languages of the Union, in versions equivalent in form and content."

Articles 30-34

12.1 The Montreux Convention provides as follows:

"268. Each Member and Associate Member reserves to itself and to the recognized private operating agencies the right to fix the conditions under which it admits telecommunications exchanged with a State which is not a party to this Convention.

"269. If a telecommunication originating in the territory of such a non-contracting State is accepted by a Member or Associate Member, it must be transmitted and, in so far as it follows the telecommunication channels of a Member or Associate Member, the obligatory provisions of the Convention and regulations and the usual charges shall apply to it."

12.2 The telegraph regulations (Geneva Revision, 1958) contain the following:

"1036. When telegraphic relations are opened with countries which are neither Members nor Associate Members or with recognized private operating agencies in regard to which the provisions of paragraph 2 of article 19 of the Convention have not been applied by a Member or Associate Member, the provisions of these regulations shall invariably be applied to correspondence in the section of the route which lies within the territories of Members or Associate Members, or which are operated by a recognized private operating agency.

"1037. The administrations concerned shall fix the rate applicable to this part of the route. This rate shall be added to that of the non-participating administrations."

Articles 35-39

13.1 The Montreux Convention provides:

"51. Administrative conferences shall normally be convened to consider specific telecommunication matters. Only items included in their agenda may be discussed by such conferences. The decisions of such conferences must in all circumstances be in conformity with the provisions of the Convention.

"52. The agenda of a world administrative conference may include:

(a) The partial revision of the administrative regulations listed in 203; 16/

"53. (b) Exceptionally, the complete revision of one or more of those regulations;

"56. (1) The agenda of an administrative conference shall be determined by the Administrative Council with the concurrence of a majority of the Members of the Union in the case of a world administrative conference, or of a majority of the Members belonging to the region concerned in the case of a regional administrative conference, subject to the provisions of 76.

"57. (2) This agenda shall include any question which a plenipotentiary conference has directed to be placed on the agenda.

"70. (1) The agenda, or date or place of an administrative conference may be changed:

(a) At the request of at least one-quarter of the Members and Associate Members of the Union, in the case of a world administrative conference, or of at least one quarter of the Members and Associate Members of the Union belonging to the region concerned in the case of a regional administrative conference. Their requests shall be addressed individually to the Secretary-General, who shall transmit them to the Administrative Council for approval; or

"71. (b) on a proposal of the Administrative Council.

"72. (2) In cases specified in 70 and 71, the changes proposed shall not be finally adopted until accepted by a majority of the Members of the Union, in the case of a world administrative conference, or of a majority of the Members of the Union belonging to the region concerned, in the case of a regional administrative conference, subject to the provisions of 76.

"74. (2) The convening of such a preparatory meeting and its agenda must be approved by a majority of the Members of the Union in the case of a world administrative conference, or by a majority of the Members of the Union belonging to the region concerned in the case of a regional administrative conference, subject to the provisions of 76.

16/ See paragraph 1.5 above.

"76.9 In the consultations referred to in 56, 64, 69, 72 and 74, Members of the Union who have not replied within the time limits specified by the Administrative Council shall be regarded as not participating in the consultations, and in consequence shall not be taken into account in computing the majority. If the number of replies does not exceed one-half of the Members consulted, a further consultation shall take place."

13.2 The general regulations annexed to the convention contain the following:

"CHAPTER 4

"Time-limits for presentation of proposals to conferences and conditions of submission

"624.1. Immediately after the invitations have been despatched, the Secretary-General shall ask Members and Associate Members to send him, within four months, their proposals for the work of the Conference.

"625.2. All proposals, the adoption of which will involve revision of the text of the convention or regulations, must carry references identifying by their marginal numbers those parts of the text which will require such revision. The reasons for the proposal must be given, as briefly as possible, in each case.

"626.3. The Secretary-General shall communitate the proposals to all Members and Associate Members as they are received.

"627.4. The Secretary-General shall assemble and coordinate the proposals received from administrations and from the Plenary Assemblies of the International Consultative Committees and shall communicate them, at least three months before the opening of the conference, to Members and Associate Members. The General Secretariat and the specialized secretariats shall not be entitled to submit proposals."

Articles 39-68

14.1 The Montreux Convention makes the following provisions for denunciation:

"262 1. Each Member and Associate Member which has ratified, or acceded to, this convention shall have the right to denounce it by a notification addressed to the Secretary-General by diplomatic channel through the intermediary of the government of the country of the seat of the Union. The Secretary-General shall advise the other Members and Associate Members thereof."

/...

"263 2. This denunciation shall take effect at the expiration of a period of one year from the day of the receipt of notification of it by the Secretary-General.

"264 1. The application of this convention to a country, territory or group of territories in accordance with article 20 may be terminated at any time, and such country, territory or group of territories, if it is an Associate Member, ceases upon termination to be such.

"265 2. The declaration of denunciation contemplated in the above paragraph shall be notified in conformity with the conditions set out in 262; it shall take effect in accordance with the provisions of 263."

14.2 Similar provisions are contained in a number of ITU regional and special agreements.

14.3 All such regional and special agreements so far concluded have been concerned with the use of radio. Their basic purpose is to ensure, as far as practicable, that there is an equitable division of the parts of the frequency spectrum with which they are concerned between the relevant services of the parties and that harmful interference is reduced to a minimum. In a number of these agreements the parties undertake not to change the characteristics of emissions covered by the agreement nor to establish new stations except under certain conditions. They also undertake to endeavour to agree on the action required to reduce any harmful interference caused by the application of the agreement. It is further provided that in the event of failure to agree on action to reduce harmful interference, the dissenting administrations may resort to procedures established in the radio regulations for dealing with cases of harmful interference, which involve addressing reports to any specialized agency concerned with the service concerned or a request to the International Frequency Registration Board of the ITU to act. These administrations may also use the procedures for settlement of differences laid down in the International Telecommunication Convention, namely, resort to diplomatic channels or to any special procedures established in treaties concluded between them for the settlement of international disputes or, alternatively, to arbitration according to certain procedures contained in the Convention.

14.4 In one agreement the foregoing procedure is to be adopted in case of failure to agree on action to reduce harmful interference but is made mandatory, not permissive. Another contains a special arbitration procedure which must be followed

should one party to a dispute request it, but the right to denounce is not affected by this provision.

14.5 The Montreux Convention contains no stipulations as to the manner in which instruments for denouncing an agreement shall be validated but provides that they shall be forwarded to the Secretary-General of the Union by the diplomatic channel through the intermediary of the Government of the country of the seat of the Union.

Articles 71-75

15.1 It is the custom in the case of ITU conferences held outside Switzerland for the texts of the convention or agreement to be deposited with the host Government. In the case of conferences held in Switzerland, however, the texts are deposited with the ITU Secretary-General. In most cases it is provided that ratifications, accessions, notifications etc. shall be communicated to the ITU Secretary-General, either direct or by the diplomatic channel through the intermediary of the Government of the country of the seat of the Union. The Secretary-General is charged with the duty of informing the Members. In the few cases where communications are to be made to the depositary Government it is provided that that Government shall inform all parties and the ITU Secretary-General.

15.2 It has not been the custom formally to register each ITU treaty with the Secretariat of the United Nations after it has been agreed. Mention of them is made however in the answers to a questionnaire for the United Nations Juridical Yearbook received every year from the United Nations Secretariat.

15.3 The ITU treaties are published in accordance with ITU rules.

WORLD HEALTH ORGANIZATION

Transmitted by a letter of 13 July 1967 from the Head of the Legal Office of the World Health Organization

/Original: French/

It must be first of all pointed out that the draft articles deal with a subject on which WHO has little to say. Articles 1, 2 and 3 state that the draft articles relate only to treaties concluded between States. Accordingly, treaties to which

/...

the World Health Organization could be a party are excluded. Moreover, article 4 makes the application of treaties which are constituent instruments of an international organization or are adopted within an international organization subject to the relevant rules of the organization. It is therefore only when an organization has no rule relevant to a given case that the draft articles would apply. In other words, in the case of a treaty which is the constituent instrument of an international organization or is adopted within it, the provisions of the draft articles have only a secondary application. Consequently, WHO will confine its observations to such basic articles as relate to cases for which it has no relevant rules.

In this connexion WHO has noted two important points. The first concerns the provisions for withdrawal in draft articles 51 and 53. WHO feels that there is an apparent contradiction between these two articles. The first states in sub-paragraph (b) that a party may withdraw from a treaty at any time by consent of all the parties. The second stipulates that if a treaty does not provide for withdrawal, withdrawal is not allowed unless it is established that the parties intended to admit the possibility of withdrawal. It is clear from the commentaries that it is felt that, in the absence of proof of the parties' intention to admit the possibility of withdrawal, withdrawal is still possible "by consent of all the parties". The text of the articles read in isolation, however, could give rise to confusion. For this reason WHO believes that the wording of these articles should be amended. Moreover, it may not be out of place to mention how this question of withdrawal arose and how WHO dealt with it. In 1949 and 1950 certain countries announced their wish to withdraw from WHO and, in the absence of relevant provisions in the Constitution, the Director-General declared that he could not consider these communications as withdrawals, since the Constitution contained no provision for withdrawal. The Health Assembly, when the matter was put before it by the Executive Board, did not deal with the question of the validity of withdrawal and took no decision expressing its consent or lack of consent to the withdrawal. The attitude it took subsequently, however, when these States resumed active participation would indicate that the Assembly did not believe it was possible for a State to withdraw from WHO in the absence of constitutional provisions covering such action. Accordingly, the provisions of draft article 51 to the effect that withdrawal can take place on certain conditions are not applicable where WHO is concerned.

WHO also has some observations to make on the draft articles concerning reservations. No comment is required on the formulation of reservations, their acceptance, the procedure or their legal effects in the case of regulations which WHO, under article 21 of its Constitution, is authorized to adopt. Article 22 of the Constitution, and the provisions of regulations Nos. 1 and 2 adopted within WHO, contain specific provisions concerning reservations, so that, in accordance with draft article 4, the provisions on reservations in the draft articles are inapplicable. This does not apply to the conventions or agreements covered by article 19 of the Constitution, which the Health Assembly also has authority to adopt, because there is no provision in the Constitution dealing with reservations to those conventions or agreements. Although no such text has yet been adopted, the likelihood is that, in view of the absence of constitutional provisions, the relevant draft articles would be applicable to reservations to such conventions or agreements. Nevertheless, without anticipating what attitude the Health Assembly might take, it can be assumed that such conventions or agreements would contain provisions concerning reservations and the procedure for the acceptance of reservations would be similar to that laid down in the regulations. This procedure does not leave it to the individual States to accept or object to a reservation express or impliedly, as stipulated in draft article 17 (4), but makes the Health Assembly responsible for deciding on the validity of any reservations formulated, its decision being binding on member States, irrespective of how they voted on any particular reservation.

The question of the legal effects of reservations, which is dealt with in article 19 (1), also requires some comment. As WHO has no relevant rules concerning reciprocity, it believes that article 19 (1) should be applicable only in so far as the nature of the treaty makes reciprocity possible. In purely administrative questions WHO might agree to one of its members invoking a reservation against another member on a basis of reciprocity. It is an entirely different matter, however, when questions of health are concerned. In WHO's view, the requirements of public health are paramount. It should be noted in this connexion that the ad hoc committee established by the Executive Board at its ninth session to consider the reservations made by member States to the International Sanitary Regulations included the following paragraphs in its report:[17]

/...

17/ Official records, World Health Organization, 42, 360.

"5.1 The Committee examined whether a reservation accepted by the World Health Assembly under the provisions of article 107 of the International Sanitary Regulations may be applied reciprocally, that is to say, that such a reservation, may be applied not only by the State making the reservation, but also by any other State party to the Regulations in its relationships with the reserving State.

"5.2 The right of a State to claim reciprocity as a condition of acceptance of a reservation to an international instrument is well established. There appears, however, to be serious doubt whether the right to claim reciprocity will exist in all instances, unless the condition of reciprocity is made at the time that the reservation is accepted.

"5.3 With a view to avoiding possible subsequent dissatisfaction and confusion with respect to the rights of the States party to the International Sanitary Regulations, the committee recommends to the Health Assembly that in accepting a reservation to the Regulations under article 107 such acceptance shall be with the specific understanding that the reservation may be applied, not only by the State making the reservation, but also by each other State party to the Regulations in its relations with the reserving State, unless the reservation is such that it does not lend itself to reciprocal treatment."

The World Health Organization therefore believes that draft article 19 should be interpreted as authorizing reciprocity only to the extent to which it is compatible with the nature of the treaty and of the reservation.

INTERNATIONAL ATOMIC ENERGY AGENCY

Transmitted by a letter of 26 June 1967 from the Director of the Legal Division of the International Atomic Energy Agency

[Original: English]

Some recent treaties such as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, and the Treaty on Outer Space provide for several depositaries instead of the traditional one depositary. If it would seem desirable to take account of this novel practice in international law, article 71 "Depositaries and treaties" could read as follows:

1. The depositary or depositaries of a treaty, which may be one or several States or an international organization, shall be designated by the negotiating States in the treaty or in some other manner.

2. Unchanged.

Mr. Gotlieb
Mr. Miller
U.N. Division
Permis, N.Y.
Rome
Vienna

Diary
Div. Diary
File

No. L-915

The Department of External Affairs presents its compliments to the Embassy of Italy and has the honour to acknowledge the Embassy's Note No. 3107 of September 19, 1967 informing the Department of the candidacy of Prof. Robert Ago for the office of President of the proposed International Conference on the Law of Treaties to be held in 1968 and 1969, and requesting the support of the Canadian Government for Prof. Ago's candidacy.

The Department has taken the Embassy's request under consideration and will be pleased to inform the Embassy in due course of the position of the Canadian Government on this question.

The Department of External Affairs avails itself of this opportunity to renew to the Embassy of Italy the assurances of its highest consideration.

OTTAWA, September 27, 1967

20-3-1-6
32 | —
Origin! 24-7-3

A.E. GOTLIEB

FM LDN SEP21/67 RESTR

TO EXTER 4836

REF YOURLET L790 AUG18

UN CONVENTION ON PRIVILEGES AND IMMUNITIES

WE HAVE RECEIVED FROM PROTOCOL AND CONFERENCE DEPT OF FO FOLLOWING LET IN REPLY TO ENQUIRY IN YOUR REFLET:

2.QUOTE WE SPOKE ON SEP15 ABOUT UKS FORMAL RESPONSE TO RESERVATIONS MADE BY CERTAIN COUNTRIES,IN RELATION TO CONVENTION ON PRIVILEGES AND IMMUNITIES OF SPECIALISED AGENCIES OF UN,CONCERNING COMPULSORY JURISDICTION OF INTERNATL COURT OF JUSTICE IN DISPUTES ARISING OUT OF INTERPRETATION OR APPLICATION OF CONVENTION.I WRITE AS YOU ASKED, TO CONFIRM FOR INFO OF CDN GOVT MY REMARKS ABOUT EFFECT OF THIS RESPONSE.

3.HM GOVT IN UK HAVE TAKEN NO RPT NO PUBLIC POSITION ON LEGAL EFFECT OF OUR REACTION TO THESE RESERVATIONS;AND WE WOULD PREFER NOT RPT NOT TO COMMIT OURSELVES ON POINT UNLESS AND UNTIL SOME PRACTICAL ISSUE REQUIRES US TO DO SO.I HOPE YOU WILL BE GOOD ENOUGH TO ASSURE CDN GOVT THAT ALTHOUGH THIS REPLY TO THEIR ENQUIRY MAY SEEM EVASIVE RATHER THAN HELPFUL,IT REPRESENTS OUR PRACTICAL POSITION.THE FACT IS THAT FOR TIME BEING WE ARE CONTENT TO KEEP OPEN POSSIBILITY OF ARGUING EITHER THAT CONVENTION IS NOT RPT NO IN FORCE BETWEEN UK AND RESERVING STATES OR THAT IT IS IN FORCE SUBJECT TO DIFFERENCE OF VIEW ABOUT APPLICABILITY OF PROVISION FOR COMPULSORY REF TO INTERNATL COURT OF JUSTICE.UNQUOTE