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CONFIDENTIAL

20-3-1-6

May 1968

# REPORT OF THE CANADIAN DELEGATION TO THE FIRST SESSION OF THE UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES, HELD AT VIENNA FROM MARCH 26 to MAY 24, 1968

## PART I - INTRODUCTION

### 1. Origin of the Conference

1. This Conference was convened to draft an International Convention on the Law of Treaties in accordance with Resolutions 2166(XXI) adopted by the General Assembly on 5 December, 1966 and 2287(XXII) adopted by the General Assembly on 6 December, 1967. The basic proposal before the Conference was the Draft Articles on the Law of Treaties and accompanying commentary contained in the Reports of the International Law Commission on the second part of its 17th session and on its 18th session, published as G.A.O.R.(XXI) Supplement No. 9 (A/6309/Rev.1). The General Assembly resolutions called for the Conference to meet in two sessions in 1968 and 1969. The plan of work of the Conference was that the first session would consist almost entirely of work in Committee of the Whole and the second session would complete the work of the Committee of the Whole and then proceed to deal with the draft articles in Plenary.

### 2. The Canadian Delegation

2. The Head of the Canadian Delegation to the Conference was Mr. Max Wershof, Canadian Ambassador to Denmark. He was assisted, during the first five weeks of the Conference (March 26 to April 26) by Richard McKinnon of the Canadian Permanent Mission, Geneva, and during the last four weeks (April 28 to May 24) by A. W. Robertson, of the Canadian Permanent Mission, New York and J. S. Stanford of Legal Division, Department of External Affairs, Ottawa.

3. Although he was not a member of the Canadian Delegation, reference should also be made to the contribution of Prof. Hugh Lawford of the Faculty of Law, Queen's University, Kingston, who was largely responsible for the preparation of the commentary for the Canadian Delegation on the I.L.C. draft articles.

### 3. Preparatory Meetings

4. On January 26 and 29, 1968 preliminary meetings to discuss the position of various governments at the Conference in respect of certain of the more important articles took place in London among representatives of the U.S.A., the United Kingdom, Canada, Australia and New Zealand. These meetings were followed, later in the week of January 29, by similar meetings at Strasbourg of representatives of governments members of the Council of Europe and, on February 5-7 in Paris, by meetings of representatives of the W.E.O. group as a whole.

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5. The primary purpose of these meetings was to permit exchanges of views of representatives of western governments on the I.L.C. draft articles and to raise, but not to decide upon, questions of tactics. Full reports of the London and Paris meetings by Mr. Stanford and by the British Foreign Office and Council of Europe Secretariat, respectively, appear in the files. While, as will appear from later parts of this report, the meetings cannot be said to have contributed significantly to the effective functioning of the W.E.O. group at the first session of the Conference, nevertheless Canadian representation at these meetings was of great value in the preparation of the instructions of the Canadian Delegation.

4. Articles of Particular Concern to Canada

6. As one of the world's major treaty making States, Canada has a real and practical interest in the whole of the proposed Convention on the Law of Treaties. However, certain aspects of the draft convention are of particular interest to Canada. The Articles in the I.L.C. draft which were of special concern to the Canadian Government and toward which the major Canadian effort in the first session was directed were the following:

Articles 1 and 3, with particular reference to the question whether the proposed Convention is to apply to the relations inter se of States parties to a treaty to which an international organization is also a party.

Article 5(2) dealing with the capacity of component members of a federal State to conclude treaties.

Articles 16 and 17 concerning the rules governing the formulation of reservations and objections to reservations and the legal effect of objections to reservations.

Article 22 concerning provisional entry into force, including termination of treaties provisionally in force.

Articles 27 and 28 concerning general and supplementary rules of interpretation, particularly the role of travaux préparatoires.

Article 39 concerning the validity and continuance in force of treaties, to which is related the question whether a claim that a treaty is void ab initio is subject to the procedures of Article 62.

Articles 45-50, 57-59 and 61 setting out the substantive grounds upon which a treaty may be declared void or invalid or may be terminated.

Article 62 concerning the procedures to be followed in respect of claims of invalidity, termination, withdrawal from or suspension of a treaty.

## 5. Officers of the Conference

7. The Conference Officers were:

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| President: | Roberto Ago of Italy |
| Vice Presidents (23): | Representatives of Afghanistan, Algeria, Austria, Chile, China, Ethiopia, Finland, France, Guinea, Hungary, India, Mexico, Peru, Philippines, Romania, Sierra Leone, Spain, U.S.S.R., U.A.R., United Kingdom, U.S.A., Venezuela and Yugoslavia. All were appointed for both sessions of the Conferences except Spain, whose place during the 1969 Session will be taken by Guatemala. |
| Chairman of the Committee of the Whole: | Dr. Taslem O. Elias of Nigeria |
| Rapporteur of the Committee of the Whole: | Eduardo Jiménez de Aréchaga of Uruguay. |
| Drafting Committee: | Chairman: Mustafa Kamel Yasseen of Iraq. |
| | Members: Rapporteur of the Committee of the Whole and representatives of Argentina, China, Congo (Brazzaville), France, Ghana, Japan, Kenya, Netherlands, Poland, Sweden, U.S.S.R., United Kingdom and U.S.A. |

## 6. Organization of the Work of the First Session

8. The substantive work of the First Session took place in the Committee of the Whole under the Chairmanship of Dr. Elias of Nigeria. The Committee of the Whole considered all 75 articles of the I.L.C. draft and

seven new articles. It approved 69 articles (including new articles 9 bis, 10 bis, 23 bis, and 69 bis) with many amendments to the I.L.C. text, deleted one (ILC draft Article 38 on modification by subsequent practice) and deferred decision on nine I.L.C. articles and three new articles (5 bis, 62 bis and 76) to the Second Session.

9. The procedure followed was to consider the I.L.C. articles in numerical order. In respect of each article the Committee of the Whole considered the I.L.C. text together with any amendments proposed by representatives. Those amendments which were considered of a substantive nature were voted upon and, at the conclusion of debate and voting, the I.L.C. text, together with substantive amendments, adopted by the Committee of the Whole(by simple majority,as opposed to the two-thirds majority which will be required for the adoption of articles and amendments in Plenary) and amendments of a drafting nature were referred to the Drafting Committee. It should be noted parenthetically that the Chairman frequently ruled that amendments which appeared to the Canadian Delegation (as well as others) to be substantive were only drafting amendments. He therefore referred them to the Drafting Committee without vote and hence without direction from the Committee of the Whole on the substantive issues raised. In most such cases the substantive issue was resolved in the Drafting Committee although in a few cases, in the closing stages of the first session, the Drafting Committee referred such substantive amendments back to the Committee of the Whole for decision.

10. After the Drafting Committee reached agreement on the text of an article the article was then referred back to the Committee of the Whole which, almost without exception, adopted the Drafting Committee text without a vote. In a few instances the Drafting Committee text was either adopted or amended by vote.

11. Special mention should also be made of the role of the I.L.C. Special Rapporteur, Sir Humphrey Waldock, who was present at the Conference as Expert Consultant. It was customary for him, at or near the end of debate on the more important articles, to explain the reasons which had led the I.L.C. to adopt its text. He would also, on some occasions, comment upon and criticize certain of the substantive amendments proposed, often with a decisive influence on voting on the amendments in question. Sir Humphrey attended meetings of the Drafting Committee as well as those of the Committee of the Whole.

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## PART II - THE WORK OF THE FIRST SESSION

### 1. The Rapporteur's Report

12. The Report of the Committee of the Whole on its work at the first session of the Conference (A/CONF. 39/C.1/L 370 and addenda 1-7) records in detail the work of the First Session and should be considered an Annex to this Report. It should be noted that, as there was insufficient time at the end of the first session to permit adoption by the Committee of the Whole of the Report prepared by the Rapporteur, this document must be considered as a draft report, to be adopted by the Committee of the Whole at the opening of the second session of the Conference. Chapter II of the Rapporteur's Report describes the proceedings of the Committee of the Whole article by article and Chapter III contains the text of those articles and resolutions which were adopted by the Committee. No attempt will be made to duplicate this information in the present Report, however a more detailed account of what happened to articles of particular concern to Canada is set out in Section 4 of this Part of the Report.

### 2. Articles upon which the Committee of the Whole took no decision

13. The Committee of the Whole took no decision on Articles 2, 5 bis, 8, 12, 17, 26, 36, 37, 55, 62 bis, 66 and 76 for the reasons indicated below.

14. A group of communist and African states introduced an amendment (L.19/Rev.1) to Article 2 (Use of Terms) which sought to add to that Article a definition of a "General multilateral treaty" as "a multilateral treaty which deals with matters of general interest for the international community of States." This was directly related to amendment L.74 by eleven states that a new article 5 bis be added to the draft Convention, to provide that "All States have the right to participate in general multilateral treaties in accordance with the principle of sovereign equality." Thus the "all states" question, which has arisen at other codification conferences in connection with the final articles on accession, arose at this conference as a question of substance to be dealt with in the body of the Convention itself. In addition, France introduced amendment L.24, paragraph 3 of which sought to add to Article 2 a definition of a "restricted multilateral treaty".

15. The concepts of general and restricted multilateral treaties had possible implications for other articles as well. These were articles 8 (adoption of the text), 12 (consent expressed by accession), 17 (acceptance of and objection to reservations), 26 (successive treaties relating to the same subject matter), 36 (amendment to multilateral treaties), 37 (modification of multilateral treaties between certain of the parties only), 55 (suspension of a multilateral treaty between certain of the parties only) and 66 (consequences of termination of a treaty). However, neither the sponsors

nor the opponents of Article 5 bis and the two additions to Article 2 indicated any desire to bring the issues to the floor during the first session and consequently Articles 2 and 5 bis, together with the other articles referred to above, were put over for consideration by the Committee of the Whole at the second session.

16. Western efforts to introduce into the draft a provision for compulsory third party settlement of disputes arising out of the application of Part V took the form of amendments to paragraph 3 of Article 62. When it became clear that the Afro-Asian countries were prepared to join with the communists to force through Article 62 in the form adopted by the I.L.C., the Sweden et al proposal (L.352/Rev.1/Corr.1) for compulsory settlement was changed from an amendment to Article 62 (which would have been defeated) to a proposed new article, 62 bis (L.352/Rev.2), and other western amendments in the same sense were similarly transformed into amendments to proposed new Article 62 bis. By general agreement consideration of the compulsory settlement of disputes by the Committee of the Whole was put over to the Second Session.

17. Article 76 is a new article, proposed by Switzerland, which would make the entire Convention subject to the compulsory jurisdiction of the International Court of Justice. It was introduced by the Swiss delegation as a matter of principle and without any expectation that it will be adopted. It will presumably come up for consideration, and either be withdrawn or defeated, at the second session when the Conference considers the final articles.

## 3. Resolutions adopted by the Committee of the Whole

18. During its consideration of Article 1 (Scope of the Convention) the Committee of the Whole adopted a motion requesting the Drafting Committee to prepare a resolution by which the Conference would recommend that the General Assembly ask the I.L.C. to study the question of treaties concluded between States and international organizations or between two or more international organizations. This resolution appears in document A/CONF.39/C.1/2.

19. During its consideration of Article 49 (Coercion of a State) the Committee of the Whole adopted a resolution (L.323) for recommendation to the Plenary deploring the threat or use of economic and other forms of pressure in connection with the conclusion of treaties. The reasons for the adoption of this resolution are discussed on page 9 of this Report. The texts of this resolution and the resolution referred to in the preceding paragraph are reproduced in Chapter III of the Draft Report. Both resolutions have yet to be adopted by the Plenary at the second session.

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20. Finally, the Committee of the Whole and the Plenary adopted Nigerian draft resolution L.378, fixing the Second Session of the Conference for 9 April to 21 May 1969 in Vienna.

4. Action Taken at the First Session on Articles of Particular Concern to Canada (see Part I.4)

21. Articles 1 and 3: The delegation was instructed to "press for clarification of the question whether the proposed convention is to apply to relations between States parties to a multilateral convention to which an international organization is also a party." In this the delegation was successful. Article 3(c) as adopted by the Committee of the Whole provides that the Convention will apply to such relations.

Article 5(2): The delegation was instructed "to support (but not to initiate) any move to delete the Article". The main objective was to secure deletion of paragraph 2 in order to avoid recognition in the Convention, as finally adopted, of the principle that component members of a federal State may in certain circumstances enjoy a treaty-making capacity. There were proposals to delete the Article and these were supported by the delegation. In the event, however, Article 5(2) was retained by a simple majority, due largely to the efforts of the U.S.S.R. and its allies, who were concerned about the continued international personality of Byelorussia and the Ukraine, and to the fact that France was able to align the countries of the French community in support of the article. A fully detailed report on the debate and voting on this Article appears in the Departmental files.

The delegation was further instructed "to support amendments to paragraph 2 so that political sub-divisions are not termed States". In this the delegation was successful and the opening words of paragraph 5 now read "Members of a federal union ..." rather than "States members of a federal union ..." which was the I.L.C. text. In view of the provisions of Article 1 that the Convention applies only to treaty relations between States, this amendment may be of critical importance should Canada decide that at the second session it wishes to press for the deletion of paragraph 5(2). In this connection

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it should be noted that a two-thirds majority will be required for adoption of this Article, including paragraph 2, in Plenary.

The Canadian statement on this Article delivered in the Committee of the Whole was prepared in the Department and appears among the Canadian statements appended to this Report.

Articles 16 and 17: The delegation was instructed to "press for a resolution of the apparent ambiguous and conflicting effect of Articles 16(c) and 17(4)(c)". The former prohibits reservations which are incompatible with the object and purpose of the treaty whereas the latter provides that any reservation becomes effective upon its acceptance by another contracting State. It was not possible to secure resolution of this question by amendments to the texts of one or both of the Articles. The question was dealt with by the Expert Consultant however and the position under the present text is set out in the summary of his statements appearing in the Summary Record of the 24th and 25th meetings of the Committee of the Whole. In summary, the situation is that, while Article 16(c) seeks to state an objective rule concerning reservations, it will be for each country to decide for itself whether a specific reservation is or is not compatible with the object and purpose of the treaty. The result is that Article 17(4)(c) will operate in respect of any reservation which is accepted, even including one which might be judged by objective standards to be incompatible within the meaning of Article 16(c).

Article 22: The delegation was instructed to seek to have included in the Convention a provision which would deal specifically with the termination of a treaty which was only provisionally in force. In this the delegation was successful and Article 22(2) adopted by the Committee of the Whole provides for termination of the provisional application by simple notification by the State seeking to withdraw from the treaty.

Articles 27 and 28: The delegation was instructed to oppose a U.S. initiative to seek to raise preparatory work from a supplementary means of interpretation to a source of interpretation to be considered on a par with the text of the treaty. There was general opposition in the Conference to the U.S. initiative which was defeated in Committee of the Whole by a wide margin.

Article 39: The delegation was instructed to seek, in coordination with the W.E.O. group, to establish that all claims of invalidity were subject to the procedures set out in Article 62, whether the claimant alleged that the treaty was void ab initio or only that it was voidable. As a result of a French oral amendment, the second sentence of Article 39(1) was transferred to Article 65. At the meeting of the Committee of the Whole, the Drafting Committee formulation of Article 65 was discussed and amended. A specific reference to the procedures in Article 62, inserted by the Drafting Committee, was deleted by the Committee of the Whole but the summary record of statements made at that meeting discloses the understanding of the Committee that all claims that a treaty is void or invalid are subject to Article 62. The only contrary understanding was expressed by the Cuban representative.

Articles 45-50, 57-59 and 61: The delegation was instructed to seek, in consultation with other members of the W.E.O. group, a satisfactory formulation of the Articles which set out the substantive grounds for invalidity and termination of treaties. In this connection Articles 49 and 50, in particular, should be mentioned. A group of 19 non-aligned States proposed an amendment to Article 49 (Coercion of a State) to include the threat or use of economic or political pressure as a ground for rendering a treaty void. This initiative was successfully resisted by means of a compromise proposal whereby the I.L.C. text of Article 49 was left unchanged and the Committee adopted a resolution condemning "the threat or use of pressure in any form, military, political or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent". One factor which made this compromise possible was the position of the communist delegations, who are reported to have informed the sponsors of the non-aligned amendment that, while they would not oppose the amendment, its adoption would render more difficult their eventual adherence to the treaty. The resolution adopted in Committee has still to be adopted in Plenary at the second session.

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With respect to Article 50 (jus cogens) the delegation was instructed "to seek clarification of the criteria for determining the existence of a norm of jus cogens". This objective was at least partially achieved in that the text of Article 50 adopted by the Committee of the Whole defined a norm of jus cogens as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". This formulation of the Article was an improvement over the I.L.C. draft, though somewhat short of an ideal clarification of the criteria for determining rules of jus cogens.

Article 62: The western group failed at the first session to secure support for an amendment to Article 62 or even acceptance in principle of the concept of compulsory independent settlement of disputes arising in the application of Part V. Detailed reports of developments in connection with this question appear in the file. The essential elements are that, while it appeared at one point that majority support existed at least for the principle of compulsory third party adjudication, by the time Article 62 came to be discussed in the Committee of the Whole such a majority no longer could be found. The communist and Afro-Asian representatives were determined to use their voting majority to force through the I.L.C. text of Article 62 rather than seek a consensus, and proposals for compulsory third party adjudication were saved from this voting guillotine only by the device of being re-formulated as proposals for a new Article 62 bis which, by consent, was put over for consideration during the second session.

22. To summarize briefly, the matters remaining to be considered in Committee of the Whole during the second session include:

(a) The "All States" question,

(b) Restricted Multilateral Treaties,

(c) Compulsory settlement of disputes, and

(d) final articles, which will include questions of entry into force, reservations and probably the "All States" question again, in its more usual and more narrow context of the accession article to this Convention.

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## PART III - COMMENTARY ON CERTAIN ASPECTS OF THE CONFERENCE

### 1. The W.E.O. Group

23. Aside from the fact that it served as a forum for consultation, in which members learned of each others' views, the western European and other States groups functioned most ineffectively at the first session. The London and Paris meetings had disclosed a broad similarity of approach by western governments to the I.L.C. draft, but this was not translated into effective action at the Conference. In commenting upon this ineffectiveness one might focus on two aspects, coordination of tactics and lobbying.

24. With respect to coordination of tactics there was little inclination on the part of Western representatives to subordinate their individual views (which sometimes appeared to be personal rather than governmental positions) to achieve a consensus within the group and enable the group to function effectively as a bloc on important issues. On one of the rare occasions when the W.E.O. group did succeed in agreeing upon a tactical position to be adopted in the Committee of the Whole (in respect of Article 62) this agreement evaporated under pressure within a matter of a few hours and the group was in complete disarray during the Committee meeting. During W.E.O. meetings it was the practice to exchange views frankly. This exchange necessarily involved determining not only what the group's desired objectives were but also what elements of a particular problem represented the minimum acceptable for western governments and in what areas concessions could be made. Unfortunately it was the practice of some members, particularly the Swedish delegation, to adopt this "minimum" position as its own and begin seeking non-aligned support for it. In this way our minimum position became, in effect, the West's starting position and all the acceptable concessions were made without any return concessions from the other groups.

25. This situation was made more acute by the relative degree of lobbying activity carried on by Western delegations. Whereas the Swedish delegation, sometimes assisted by the Netherlands delegation, was active (but enjoyed little success) in pressing for acceptance of minimum western objectives, the major Western delegations were considerably less active in pressing for the more desirable Western objectives. Of the three major Western delegations, the United Kingdom was probably the most active, and the French delegation the least active, in lobbying for Western political objectives. The lack of initiative was particularly noticeable in the French delegation (admittedly much smaller in number than those of the U.S.A. and the U.K.), not so much because it was more pronounced than in

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other (smaller) Western delegations, but because one might have expected more from a major Western power. This may, however, have been a deliberate policy of the French Delegation, reflecting a less forthcoming attitude to the draft convention than other W.E.O. States.

26. One is forced by the experience of the W.E.O. group at the first session to recognize that the subject matter of this conference is not of sufficient direct and immediate political significance to Western governments to lead them to attach real importance to cohesive action in pursuit of even the major Western political objectives in the conference. It remains to be seen whether these attitudes will change between sessions. Even if they do, however, a great deal of the Western position will have been already eroded.

2. The Afro-Asian and Communist Groups

27. Neither of these two groups indicated a willingness to proceed on a "consensus" basis on the matters of particular concern to the Western group. The Afro-Asian Group in particular, led by India, Ghana and Kenya, indicated that it was prepared to use its voting majority as required to force through its views, without seeking compromise solutions. It is to be hoped that this attitude will change prior to consideration of the Convention in Plenary, where a two-thirds majority will be required. If it does not change, the Western group may be faced at the Plenary with a choice of either accepting a Convention in which certain key articles are drawn entirely on Afro-Asian lines or of seeking a blocking third to prevent the adoption of any such articles at all. While neither choice is attractive, it appears clear that Western States will have to find some method of making clear to the Afro-Asian governments their strong feelings (if indeed such strong feelings exist) concerning certain elements of the draft convention, if a spirit of compromise on the part of the Afro-Asians is to be induced for the second session.

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## PART IV - FUTURE ACTION

### 1. Inter-sessional Meetings

28. It has been agreed, at least by the old Commonwealth-USA group, that inter-sessional meetings to discuss the matters to be considered at the second session are desirable. No firm arrangements for such meetings have been made, however, it was tentatively suggested at Vienna that they might take place in New York immediately prior to the beginning of meetings of the Sixth Committee at the 23rd UNGA. At or about the same time meetings of the broader W.E.O. group may also be arranged.

### 2. Article 5

29. Although there was only a simple majority rather than a two-thirds majority in favour of Article 5(2) in the Committee of the Whole, it is far from certain that the article will fail to secure a two-thirds majority in Plenary at the second session. It will therefore be necessary to decide whether Canada wishes to take an initiative inter-sessionally, through approaches in certain selected capitals, to seek support for the amendment or deletion of Article 5(2). In this connection it should be noted that if representations are to be made in capitals, they should be made well in advance of the second session. This matter will be the subject of further consideration within the Department.

### 3. Part V

30. If a satisfactory outcome is to be achieved in respect of Part V (Articles 39 to 68 dealing with the invalidity, termination and suspension of treaties), in particular the question of compulsory third party adjudication of disputes, it will be necessary, as indicated earlier in this Report, to seek the support of non-Western countries. In this connection the United Kingdom Delegation to the Conference in Vienna has suggested the possibility of raising the matter at the Commonwealth Prime Ministers meeting scheduled for early January 1969. In addition, to supplement these efforts, Canada may wish to consider making direct bilateral approaches to the West Indian governments represented at the Conference, Jamaica, Guyana and Trinidad and Tobago, and perhaps also to the more recalcitrant Afro-Asian Governments, in particular those of Ghana, India and Kenya. In all these cases it was the Canadian Delegation's view that the particular representatives of these States had flexible instructions and were acting very much on their own initiatives. Conceivably, therefore, political pressure brought to bear by Canada at a sufficiently high level, in respect of a few key articles, might enable the attitudes of these States to be altered before the second session.

ANNEXES

1. The Draft Report of the Committee of the Whole on its Work at the First Session of the Conference prepared by the Rapporteur.

11. Statements made in the Committee of the Whole by the Canadian Delegation.

111. Summary of Canadian Delegation Voting on Adoption of Articles by the Committee of the Whole.

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ANNEX I

THE DRAFT REPORT OF THE COMMITTEE OF THE WHOLE ON ITS WORK AT THE FIRST SESSION OF THE CONFERENCE PREPARED BY THE RAPPORTEUR

This Annex is the Draft Report of the Committee of the Whole on its work at the first session of the Conference. Insufficient copies of the Draft Report are available at the time of preparation of this report to permit its inclusion with this report. However the draft report consists of the following documents, available through the European Office of the United Nations in Geneva:

A/CONF. 39/C.1/L.370
A/CONF. 39/C.1/L.370 Add. 1 (Part A)
A/CONF. 39/C.1/L.370 Add. 1 (Part B)
A/CONF. 39/C.1/L.370 Add. 2
A/CONF. 39/C.1/L.370 Add. 3 (Part A)
A/CONF. 39/C.1/L.370 Add. 3 (Part B)
A/CONF. 39/C.1/L.370 Add. 3 (Part C)
A/CONF. 39/C.1/L.370 Add. 3 (Part C)
A/CONF. 39/C.1/L.370 Add. 4
A/CONF. 39/C.1/L.370 Add. 5
A/CONF. 39/C.1/L.370 Add. 6
A/CONF. 39/C.1/L.370 Add. 7

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ANNEX II

STATEMENTS MADE IN THE COMMITTEE OF THE WHOLE BY THE CANADIAN DELEGATION

The following are the texts of statements made by the Canadian Delegation during discussions in the Committee of the Whole on the following articles:

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| Article 1 | - The scope of the present articles. |
| 5 | - Capacity of States to conclude treaties. |
| 41 | - Separability of treaty provisions. |
| 49 | - Coercion of a State by the threat or use of force. |
| 50 | - Treaties conflicting with a peremptory norm of general international law (jus cogens). |
| 55 | - Temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only. |
| 56 | - Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty. |
| 57 | - Termination or suspension of the operation of a treaty as a consequence of its breach. |
| 59 | - Fundamental change of circumstances. |
| 62 | - Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty. |
| 70 | - Case of an aggressor State. |
| 72 | - Functions of Depositaries. |

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ANNEX III

## SUMMARY OF CANADIAN DELEGATION VOTING ON ADOPTION OF ARTICLES by the COMMITTEE OF THE WHOLE

The majority of articles adopted in Committee of the Whole at the first session were adopted without vote and, in most cases, were declared by the Chairman to have been adopted unanimously.

The following is a list of those articles which, upon adoption by the Committee of the Whole, were the subject of a vote, with an indication of how Canada voted in each case. Also included in this list are articles which were adopted without vote but in respect of which one or more delegations made statements reserving their positions.

| | |
|---|---|
| Article 1 | - Canada voted in favour of the Article as a whole. |
| 4 | - Canada voted in favour of the Article as a whole. |
| 5 | - paragraph 1 - Canada abstained.<br>- paragraph 2 - Canada voted against.<br>- Article 5 as a whole - Canada voted against. |
| 6 | - paragraph 1(b) - Canada voted for.<br>- paragraph 2(c) - Canada voted for.<br>- Article 6 as a whole - Canada voted for. |
| 7 | - Canada voted in favour of the Article as a whole. |
| 10 bis | - Canada abstained on the Article as a whole. |
| 41 | - Canada abstained on the Article as a whole. |
| 43-49 | - These invalidity articles were adopted without vote, however, at earlier stages in the debate on the invalidity articles many delegations, including that of Canada, emphasized that their support for these articles was subject to the adoption of a satisfactory disputes procedure. |

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Article 50 - Canada voted to retain the phrase "as a whole" in the second sentence of this Article. However Canada abstained on the article as a whole.

53 - Canada voted in favour of this Article as a whole.

57 - This article was adopted without vote, but subject to reservations by the U.S., the U.K. and France concerning the applicability of the disputes procedure to sub-paragraphs 2(a) and 2(c).

59 - This article was adopted without vote, but subject to a reservation of further amendment by the Canadian delegation on the ground that the incorporation of the concept of suspension on the text reported out of the Drafting Committee was not in accordance with the substance of the amendment proposed by Canada and adopted by the Committee of the Whole.

62 - This article was adopted without vote, however the United Kingdom delegation stated that adoption of this article should not be considered as a departure from the strongly held view that the acceptability of this article was conditional upon the incorporation in the convention of a presumption in favour of the validity of treaties and an acceptable disputes procedure.

65. - Canada opposed a successful motion to delete from this article the first sentence of paragraph 1 of the text reported out of the Drafting Committee. Canada abstained on the article as a whole.

69 bis - Canada voted in favour of this article as a whole.

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# Memorandum No. 6

## Fundamental Change of Circumstances

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September 1966

The American Society of International Law

Study Group on the Draft Articles
on the Law of Treaties

Memorandum No. 6
(Provisional Version)*

# Fundamental Change of Circumstances

(Article 59 of the draft articles on the law of treaties adopted by the International Law Commission on July 18 and 19, 1966).

Prepared by the Rapporteur**

* This version is provisional because it was prepared before the records of the eighteenth session of the I.L.C. became available.

** Egon Schwelb
Yale Law School

Fundamental Change of Circumstances.

I. The text of Article 59; previous drafts; legislative history

1. The text of the article on the effect of fundamental change of circumstances on treaties (Article 59, formerly 44) as adopted by the International Law Commission at the second part of its seventeenth session (January 3-28, 1966) and at its eighteenth session (May 4 - July 19 , 1966) is as follows:

Article 59

"Fundamental change of circumstances

"1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) the effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

(a) as a ground for terminating or withdrawing from a treaty establishing a boundary;
(b) if the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty."
(Reports of the I.L.C. on the abovementioned sessions, U.N. Doc. A/6309, September 9, 1966. These reports will appear in

printed form in Supplement No. 9 of the official records of the twenty-first session of the General Assembly.)

2. The following were the successive drafts for the provision which were prepared and considered for and by the I.L.C. in 1963 and 1966:

(i) Article 22 of the Second report on the law of treaties by Sir Humphrey Waldock, Special Rapporteur, Yearbook of the International Law Commission 1963, Vol. II, p. 79. (1963 Waldock Draft)

(ii) Text of Article 22 proposed by the Drafting Committee on June 28, 1963, (YBILC, 1963, vol. I, p. 249)

(iii) Revised text proposed by the Drafting Committee on July 9, 1966, (op. cit. p. 295.)

(iv) Article 44 of the 1963 Report of the I.L.C. Text identical with preceding item (iii). (YBILC 1963, vol. II, p. 207; also G.A.O.R. 18th Session, Supplement No. 9, A/5509.) (1963 I.L.C. Draft.)

(v) Text revised by the Special Rapporteur in the light of Government comments. (Fifth Report, A/CN.4/183/Add. 3, January 3, 1966, p. 20). (1966 Waldock Redraft)

(vi) Text of Article 44 proposed by the Drafting Committee on January 27, 1966 (A/CN.4, SR. 842 paragraph 38.)

(vii) Article 44 of the January, 1966 Report of the I.L.C. (report on the second part of its 17th session, A/CN.4/184)

(viii) Article 59 of the May-July, 1966 Report of the I.L.C. (report on its eighteenth session, A/6309. Identical with preceding item (vii) and reproduced supra under 1.)

3. Comments on the 1963 draft by the Governments of Australia, Denmark, Israel, Jamaica, Portugal, Turkey, the United Kingdom, the United States, the Netherlands, Sweden and Canada and statements on that draft made by delegations to the Sixth Committee of the General Assembly will be found in doc. A/CN.4/175 and addenda 1 to 3. These comments will be reproduced in a comprehensive U.N. document: A/6309/Add. 1

II. The limited scope of the present Memorandum.

4. In the present memorandum the history and development of the controversy centering around the statement that conventio omnis intellegitur rebus sic stantibus from the glossatores and the founders of modern international law to our time will not be examined. For the practical purposes of the Study Group it will be appropriate if the memorandum addresses itself to the following questions:

A. Whether the draft Articles on the Law of Treaties which are now before the General

Assembly and which the I.L.C. recommends should be referred to an international conference of plenipotentiaries with a view to the conclusion of a convention on the subject (A/6309, para. 36) should contain, or retain, an article on the effect upon treaties of a fundamental change of circumstances, and

B. Whether Article 59 as drafted defines the conditions for the invocation of a fundamental change of circumstances with sufficient strictness for it to be acceptable as part of the codification of the law of treaties. (Waldock in A/CN.4/SR. 835, para. 2.)

C. Under C some questions of a general nature will be dealt with.

## III. Examination of Draft Article 59.

### A. The question of the desirability of a provision on fundamental change of circumstances.

5. Mr. Amado recalled (694th meeting of the I.L.C., YBILC 1963 vol. I, p. 142, para. 65; quoted by Mr. Rosenne in A/CN.4/SR. 834, para. 11) that the jurists of his generation had been always inclined to adopt a defensive attitude "to the insidious wiles of that serpent of the law, the rebus sic stantibus clause." One member of the I.L.C., Mr. Ruda, voted against what

now is Article 59 and another, Mr. Briggs, abstained on it at the January 1966 meetings of the Commission (A/CN.4/SR. 842, paragraphs 53, 55 and 57).* A number of Governments and delegations voiced their opposition to the article. These included Governments of very different political attitudes: Colombia, Romania, Turkey and the United States. The United States expressed its reservations about the incorporation of the rule rebus sic stantibus in the draft, at any rate in its 1963 form. It seemed highly questionable to the United States whether the concept of the clause rebus sic stantibus was capable of codification. The U.S. Government expressed doubt whether its incorporation would be a progressive development of international law. Many Governments and members of the Commission emphasized the dangers which this article may have for the security of treaties unless it is made subject to some form of independent adjudication.

6. The Commission, however, did, in general, "not consider the risks to the security of treaties involved in the present article to be different in kind or degree from those involved in the articles dealing with the various grounds of invalidity** or in articles 57

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*The records of the final voting in July 1966 are not available at the time of writing.

**including Article 50 on peremptory norms of international law. Article 37 (now 50) on jus cogens represents a much greater danger to the stability of treaties [than Article 44 (now 59)] (Waldock in A/CN.4/SR. 835 para. 3.)

/breach/, 58 /supervening impossibility of performance/ and 61 /emergence of a new peremptory norm/. The Commission did not think that a principle, valid in itself, could or should be rejected because of a risk that a State acting in bad faith might seek to abuse the principle. The proper function of codification, it believed, was to minimize those risks by strictly defining and circumscribing the conditions under which recourse may properly be had to the principle; and this it has sought to do in the present article." (Para. 13 of the commentary on Article 59 in A/6309, page 197 of the mimeographed English version.)

7. "The Commission was faced", the Special Rapporteur had said, "with the alternatives of either stating that no such rule existed, or trying to define it with sufficient strictness for it to be acceptable as part of the codification of the law of treaties. The first course was ruled out because it would certainly not receive the support of the majority of governments. Having taken the second course, the Commission had to a large extent discharged its task by adopting a close definition of the conditions for the operation of the rule..... The position had been reached where the Commission had arrived at a text which, if applied in good faith, should not leave any room for abuse of the rebus sic

stantibus principle." (A/CN.4/SR. 835, para. 2). Article 59 was, Mr. Verdross said, "the most difficult article in the draft" (YBILC 1963, Vol. I., p. 251, para. 55). It posed the problem "to achieve a balance between the pacta sunt servanda rule and the cautious recognition of the need to allow for the modification of treaties so that excessive rigidity did not prove harmful to the maintenance of peace" (Mr. Rosenne in A/CN.4/SR. 834, para. 11).

8. In support of the choice which the Commission made and which it believed it had to make between denying that the rebus sic stantibus rule existed on the one hand and narrowly defining and circumscribing it, on the other, the following municipal law analogy from an entirely different field may, perhaps, be not entirely irrelevant. Under the French Code of Criminal Procedure of 1808 an improper practice, that of la garde à vue was constantly employed by the police. An offender caught red-handed had to be brought before the Procureur de la République within twenty-four hours; this provision was held to authorize a contrario the police to keep him without warrant during the said twenty-four hours. But this system was -- illegally but constantly -- extended to all other cases where the police got hold of a suspect. The reform of the French law of criminal procedure of 1957-1959 introduced a change. In the

words of a commentator:

> "Whenever it is impossible to bring an evil to an end it is preferable to accept it willingly and to recognize the practice rather than to feign ignorance. Therefore, in a number of cases, the new Code regularises the situation but at the same time regulates it. Nobody may be kept in custody for more than twenty-four hours subject to a possible extension of another twenty-four hours under written order from the Procureur de la République" (Jacques Patey in 9 I.C.L.Q. p. 390 (1960) Emphasis added). The new Code also provides additional guarantees.

Similarly, as it is impossible to bring to an end the centuries old practice of Governments to claim a fundamental change of circumstances in order to free themselves from burdensome treaty obligations, the course chosen by the Commission to regularize the practice and at the same time to regulate it seems to recommend itself. Whether the regulation proposed by the I.L.C. is appropriate will now be considered.

### B. The limiting conditions of the application of the rule.

#### The five conditions of paragraph 1

9. In paragraph 9 of its Commentary on Article 59 (A/6309, page 195 of the mimeographed edition) the Commission lists the following five conditions under which a change of circumstances may be invoked as a ground for terminating a bilateral treaty or for withdrawing from a multilateral treaty:

(1) the change must be of circumstances existing at the time of the conclusion of the treaty;

(2) that change must be a fundamental one;

(3) it must also be one not foreseen by the parties;

(4) the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; and

(5) the effect of the change must be radically to transform the scope of obligations still to be performed under the treaty.

The exceptions provided for in paragraph 2

10. Further limitations on the scope of the rule are the two exceptions defined in sub-paragraphs (a) and (b) of paragraph 2 of the article, where it is stipulated that a fundamental change of circumstances may not be invoked:

(a) as a ground for terminating or withdrawing from a treaty establishing a boundary;

(b) if the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other /party or/ parties to the treaty.

"Fact", "situation", "circumstances"

11. In earlier drafts (Waldock, 1963, and I.L.C.,

1963) what is now Article 59 was introduced by a paragraph providing expressly that a change in the circumstances which existed at the time when the treaty was entered into does not, as such, affect the continued validity of the treaty (Waldock) or may only be invoked as a ground for terminating or withdrawing (I.L.C.) under the conditions set out in the present article. This paragraph was opposed by some members on the ground that it expressed a bias against the rebus sic stantibus rule and was eventually omitted as not necessary. The 1963 I.L.C. draft did not in the operative provision refer to a change of circumstances but to a fundamental change "with regard to a fact or situation". The Government of Israel suggested that the expression "fact or situation" should be correlated with the terminology used in the error article which used the words "error related to a fact or state of facts" (Art. 34 of 1963 I.L.C. draft). The Special Rapporteur (1966 re-draft) accepted this suggestion. In 1966 the Commission returned in Article 59 to the traditional terminology "change of circumstances" while leaving in the error article (Article 45, formerly 34) the phrase "fact or situation." The provision of Article 59, Mr. de Luna said, came into play as a result not of a mere isolated fact, but of a change in the facts surrounding the

treaty, in other words, the circumstances. Thus the traditional term "circumstances" had, he said, the additional advantage of being supported by etymological considerations, since it was derived from the same Latin root, i.e. the verb stare ("stantibus") (A/CN.4/SR. 834, para. 56).

The exceptional character of the rule.

12. The 1966 text emphasizes the exceptional character of this ground of termination or withdrawal by being framed in negative form: "a...change...may not be invoked ... unless, etc....". The word "radically" before "to transform" in paragraph 1(b) serves the same purpose. (Tunkin in A/CN.4/SR. 834, paragraph 35.) Subject to the "self-determination" and the "political change" aspects of the provision which will be referred to later in this memorandum there has been near unanimity both among the members of the I.L.C. and among the Governments and delegations which expressed views on the question that the article provides for an exception from the general rules of international law and must be interpreted restrictively. This view is held not only by the Western Governments and the members of the Commission who are nationals of Western States, but also by Eastern European Governments (Czechoslovakia, Romania) and by the Soviet and Polish members of the

Commission. The latter were clearly under the impact of the horrors Hitler's abuse of the doctrine of rebus sic stantibus and his tearing up and violation of treaties had brought about for their countries and the world. (Lachs in YBILC, 1963, Vol. I., p. 252, para. 73) The doctrine of rebus sic stantibus, Mr. Tunkin said, could not be regarded as a principle that took precedence over other rules of international law, nor should it be understood too widely. (op. cit., p. 253, para. 81.) The views of Mr. Bartoš (op. cit. pp. 148 and 251) and of Mr. Yasseen (op. cit. p. 250) that the rule rebus sic stantibus was a peremptory norm of international law (jus cogens) do not seem to have recommended themselves to the other members of the Commission. These views played, however, a role in the Commission's consideration of the question whether the operation of the rebus sic stantibus rule should be excluded in regard to changes of circumstances for the consequences of which the parties have made provision in the treaty. This question is dealt with in some detail below (paragraphs 22-29) where the necessity of further clarification is stressed. (On the allegations that the rebus sic stantibus rule is jus cogens see also this writer's Memorandum No. 3, February 1966, p. 16)

Striking a balance

13. What Mr. Gros said at the 1963 session about

the draft then before it applies, in this writer's opinion, still more to the 1966 text. After having recalled how much harm the doctrine on the effects of certain changes of circumstances had done, and having emphasized that, consequently, the Commission should not give the impression that it was encouraging any such doctrine, he said that the text proposed was clear and struck a balance between the need to maintain the stability of treaties and the need to take account of the effects of a fundamental change of circumstances in certain cases. (YBILC 1963, vol. I, p. 253, para. 84).

Treaties establishing a boundary

14. The exemption from the rebus sic stantibus rule of treaties establishing a boundary had in Sir Humphrey Waldock's 1963 draft been formulated in wider terms:

> "(a) stipulations of a treaty which effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights;
> (b) stipulations which accompany a transfer of territory or boundary settlement and are expressed to be an essential condition of such transfer or settlement."

The 1963 Drafting Committee proposed the formula "a treaty establishing a territorial settlement", a phrase which like

Waldock's draft was intended to cover not only a transfer of territory itself but also ancillary rights arising from the transfer. (YBILC 1963, Vol. I, p. 250, paragraphs 27 and 31). This proved not to be acceptable to the majority which wished to avoid any reference to the grant of territorial rights and to limit the exception to treaties which either established a territorial boundary or actually transferred territory (op. cit. p. 255, paragraph 18). The phrase "a treaty fixing a boundary" was therefore used in the 1963 draft of the Commission. The Governments of the Netherlands and of Australia suggested a widening of the exception and the Special Rapporteur agreed that it seemed logical to deal with a treaty transferring territory on the same basis as one settling a boundary. In his 1966 redraft he therefore proposed the exemption from the rule of treaty provisions "fixing a boundary or effecting a transfer of territory." In the January, 1966, meetings he pointed out that it was not sufficient to refer to treaties which fixed boundaries. The expression "to fix a boundary" referred to the actual delimitation of frontiers and would exclude such cases as the cession of an island. (A/CN.4/SR. 835, para. 16). Accordingly the final text as approved at the January, 1966, meetings and confirmed at the eighteenth session in July speaks of a "treaty establishing a boundary" which embraces treaties of cession

as well as delimitation treaties. (A/6309, Comment on Art. 59, para. 11.)

15. It should be noted that the rationale of the exception provided for in paragraph 2(a) is not the consideration that the provisions of treaties establishing boundaries are "executed" provisions, but that treaties of that type were intended to create a stable position. It would be inconsistent with the very nature of those treaties to make them subject to the rebus sic stantibus rule (Waldock in A/CN.4/SR. 835, paragraph 14). However, the exception is an exception only in regard to provisions of the treaty which are "executory." If they are executed they do not come under the rule at all, one of the conditions of which it is that the effect of the change is radically to transform the scope of the obligations still to be performed under the treaty (paragraph 1(b)).

Breach of an obligation

16. As far as the second exception from the rebus sic stantibus rule is concerned, i.e. the fact that the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty (paragraph 2(b)) it is of interest to note that the Waldock 1963 draft had contained a similar but much wider clause ("if it /the change/ was caused, or sub-

stantially contributed to, by the acts or omissions of the party invoking it"), but that no corresponding provision appeared in the 1963 I.L.C. draft. The arguments adduced against it at the 1963 session included the argument of Mr. Elias who opposed the provision "because of the complications that the theory of contributory negligence, already a difficult one in municipal law, might introduce in the international sphere" (YBILC 1963, Vol. I, p. 147, paragraph 50). Mr. Bartoš's opposition had more substance: He contended that a change which was caused by the acts or omissions of the party invoking it could be taken into consideration, /i.e. not bar the party from invoking the change/ for example, in the case of an agricultural country in process of industrialization, which wished to withdraw from certain trade treaties, if at the time of their conclusion the parties had had the agricultural nature of the country in mind. (op. cit. p. 149, paragraph 63) The 1963 I.L.C. draft being silent on the question, it was raised again by the comment of the Government of Pakistan which proposed that changes of circumstances which have been deliberately brought about or created by one of the parties to the treaty should be excluded from its /the rebus sic stantibus rule's/ operation (A/CN.4/175, Add. 5, p. 2; Waldock in A/CN.4/SR. 834 para. 2; see also this writer's Memorandum No. 3 on Article 57, para. 16 on page 7). The Pakistani suggestion did "not attract

much support in the Commission". (Waldock in A/CN.4/SR. 835, paragraph 17). The text as approved at the Monte Carlo meetings and confirmed at the 18th session of the I.L.C. makes it a condition for the applicability of the exception that the party invoking a change which it brought about itself must, in bringing it about, have committed a breach either of the treaty or of another international obligation owed to the parties to the treaty. From this it seems to follow that if the acts which brought about the change were not unlawful then the party is not barred from invoking the change. The exception as thus circumscribed is "simply an application of the general principle of law that a party cannot take advantage of its own wrong..... As such it is clearly applicable in any case arising under any of the articles. Nevertheless having regard to the particular risk that a fundamental change of circumstances may result from a breach, or series of breaches, of a treaty, the Commission thought it desirable specifically to exclude from the operation of the present article a fundamental change of circumstances so brought about". (Paragraph 12 of the Comment on Article 59, A/6309, p. 197 of the mimeographed version.)

Change of governmental policy

17. This brings us to the related and, in part, overlapping question whether a subjective change in the attitude or policy of a government can be invoked by that government as a ground for terminating or withdrawing from

a treaty. In his 1963 draft Waldock had proposed to provide expressly that

> "A change in the policies of the State claiming to terminate the treaty, or in its motives or attitude with respect to the treaty, does not constitute an essential change in the circumstances forming the basis of the treaty....."

18. In 1963 the Commission was strongly divided on this question. Mr. Yasseen claimed that this exception might conflict with the facts of international life. Whether the political change had been brought about by revolutionary or by democratic means, it could, in his view, not be excluded from the sphere of application of the principle rebus sic stantibus. He went on to say that if a State had concluded a treaty of alliance with another Power, and if, thereafter, a revolution took place, one of the main objects of which was to secure the country's non-alignment, it was hardly conceivable that the new state of affairs would permit of maintaining the treaty of alliance in force. Similarly, if a political party won an election and changed the foreign policy of the State, would it be possible, he asked, to maintain an earlier treaty of alliance in force? (YBILC, 1963, Vol. I, p. 142, para. 60). Mr. Tunkin agreed with Mr. Yasseen that the provision should be deleted. It could not be excluded a priori that the change in policies could constitute an essential change in the circumstances. (op. cit. p. 145, para. 22). Mr. Bartos said that to say

that a change in the policies of the State claiming to terminate a treaty would be against history. Not only a revolution proper, but far-reaching changes in certain key sectors, could bring about political changes which really amounted to an essential change in circumstances. The Charter recognized the right of peoples to self-determination and, consequently, their right to make any political changes they pleased, even if they caused profound changes in circumstances. (op. cit., p. 149, para. 62). Mr. Jiménez de Aréchaga was also critical of Waldock's draft provision reproduced in paragraph 17 above but less so. He held that there was no reason to exclude a change in the policies of a State from qualifying as a change in circumstances when certain policies might have been assumed by the parties to be an essential foundation or a determining factor in the conclusion of the treaty, especially as changes in economic circumstances, for example, seemed to be admitted. (op. cit., pp. 149/150, para. 70). Mr. Rosenne agreed that the criticism directed against Sir Humphrey Waldock's proposal on this question was not without justification. He suggested the inclusion of a provision to the effect that a mere change of government as such did not affect the continued validity of the treaty. (op. cit. p. 151, para. 20). On the other side, Mr. Briggs agreed that the exception was

worth keeping. (op. cit. p. 146, paragraph 33). The most emphatic support for the exclusion of subjective political change as constituting a change of circumstances came from Mr. (now Judge) Gros and from Mr. Ago. What the Commission was concerned with, the former said, was the case of treaties which, while not incapable of performance, ought to be revised for reasons of equity, an essential change having occurred in the external circumstances which had been taken into consideration at the time of their conclusion. (op. cit. p. 153, paragraph 35). Mr. Ago added that if a change in the policies of one of the parties was to be regarded as adequate grounds for impugning the validity of a treaty concluded by that party when it was following another policy, it would be no use concluding treaties. (op. cit. p. 154, para. 43). Sir Humphrey Waldock, pointed out in reply to the critics, that it was conceivable that in certain types of treaty a change of policy could be regarded as a change in circumstances affecting the possibility of continued execution. The problem would not have come up in respect of treaties of alliance or similar agreements if the Commission had followed his suggestion in respect of what now is Article 53 (dealing with the denunciation of a treaty containing no provision regarding termination) to provide for an implied right of termination of such treaties. (op. cit. p. 157, para. 11; see also Article 17

of waldock's 1963 draft in YBILC 1963, vol. II, p. 64). Article 44 as adopted in 1963 did not contain the controversial provision. The Commentary (paragraph 11) gave the reasons.

19. In its comments (A/CN.4/175 page 155) the United Kingdom Government "doubted whether a subjective change of policy..... can ever be regarded as a fundamental change of circumstances." The Special Rapporteur (Fifth Report, Addendum 3, page 11) listed this comment but recommended no action on it. The problem was not taken up at the January, 1966 meetings when the final text of the present Article 59 was established.*

In paragraph 10 of the Commentary on the final text of Art. 59 (A/6309, page 196) the following is said:

> The question was raised in the Commission whether general changes of circumstances quite outside the treaty might not sometimes bring the principle of fundamental change of circumstances into operation. But the Commission considered that such general changes could properly be invoked as a ground for terminating or withdrawing from a treaty only if their effect was to alter a circumstance constituting an essential basis of the consent of the parties to the treaty. Some members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a government could never be invoked as a ground for terminating, withdrawing from or suspending the operation

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*Whether the question was discussed at the eighteenth session of the Commission cannot be established at the time of writing when the records of that session are not yet available.

> of a treaty. They represented that, if this were not the case, the security of treaties might be prejudiced by recognition of the principle in the present article. Other members, while not dissenting from the view that mere changes of policy on the part of a government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that a change of policy could never in any circumstances be invoked as a ground for terminating a treaty. They instanced a treaty of alliance as a possible case where a radical change of political alignment by the government of a country might make it unacceptable, from the point of view of both parties, to continue with the treaty. The Commission considered that the definition of a "fundamental change of circumstances" in paragraph 1 should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change of policy, and that it was unnecessary to go further into the matter in formulating the article.*

With the exception of the first two sentences this explanation is almost identical with paragraph 11 of the 1963 commentary on the then draft Article 44.

20. The emphasis on unacceptability "from the point of view of both parties" is, perhaps, not too relevant because, if both parties believe that the continuation of the treaty is against their interest then the invocation of the fundamental change of circumstances becomes unnecessary and the treaty can be terminated by consent of the parties (Article 51, formerly 38). However, when evaluating the fact that the article does not contain an express provision against the recognition of subjective policy changes as fundamental changes of circumstances

*Italics in original.

it is necessary to realize that the Commission was dealing here with a problem which is, at best, on the borderline between what is capable of being regulated by law and what is not and, perhaps, even beyond that borderline.

The problem of self-determination

21. The intrinsic substantive aspects of what now is paragraph 2(a) relating to a treaty establishing a boundary have already been dealt with in paragraphs 14 et seq. above. The clause gave also rise to a political controversy comparable to that arising out of the attempt to exclude changes in a State's policy from the field of operation of the rebus sic stantibus rule described in the preceding paragraphs. The controversy arising from paragraph 2(a) centered around the relationship between the boundary treaties clause and the principle or right to self-determination. The outcome of this issue was, however, different from that which concerned the question of the effect of policy changes. The alignment was different. While on the question of policy changes there had been, by and large, a common front between the members from the developing countries and of the Soviet and Polish members of the Commission, in the matter of the relationship between boundary treaties and the right of self-determination, Messrs. Tunkin and Lachs, like the Governments of e.g. Romania and Hungary, defended

what now is paragraph 2(a) against the attacks of Messrs. Tabibi, Bartos and Pal.

22. Mr. Tabibi objected strongly to the boundary treaties clause alleging that it was inconsistent with the principle of self-determination. (YBILC, 1963, Vol. I, p. 139, para. 34). Territorial settlements, he said, affected the fate of millions of human beings and to exclude them from the application of the article would undermine its provisions. Such was the speed of change in the modern world that some treaties could lose their relevance to reality almost before the ink was dry. (op. cit., p. 251, para. 46 and p. 253, para. 97). The parties to a treaty always acted on behalf of their peoples and the fate of peoples could only be decided in accordance with the principle of self-determination. That principle had a bearing on all territorial settlements. Any attempt to keep a treaty in force against the wishes of a people would involve a greater danger to peace than the application of the rebus sic stantibus doctrine. (op. cit. p. 256, paras. 24 and 25). Mr. Bartos said that the draft must not recognize that a treaty effecting a transfer of territory need take no account of future changes resulting from the application of the principle that peoples possessed the right of self-determination. (op. cit., p. 149, para. 64; see also op. cit. p. 251, para. 52.)

Mr. Tunkin, on the other hand, could not agree with the view that Article 59 was of special importance to the newly independent States. Unequal treaties or treaties imposed on former colonies might be challenged as void on the basis of other articles of the draft. (op. cit. p. 155, para. 56). Mr. Lachs doubted the relevance of the article to the question of self-determination. States were freeing themselves from colonial subjection and were gaining independence in accordance with what, he said, had become a substantive rule of contemporary international law. Any treaty conflicting with that rule would come under application of other articles of the draft, including Article 61 (formerly 45; emergence of a new peremptory norm of general international law.) (op. cit. p. 252, paragraph 78).

Sir Humphrey Waldock said that the principle of self-determination might be invoked on the political plane as a special and even legal justification for carrying out territorial changes but it ought not to be introduced as an element in the quite distinct doctrine of treaty law about changes of circumstances affecting the validity of a treaty. He supported Mr. Ago's warning (op. cit., p. 154, para. 45) about the danger of providing an easy way to disturb existing territorial arrangements, and he agreed with Mr. Tunkin that the issue was just as likely to arise between new States as between new and old States. (op. cit.

p. 158, para. 18). Sir Humphrey said in a later intervention that if changes in territorial sovereignty were necessary, they would be brought about by other means and other procedures than the operation of the doctrine of rebus sic stantibus. He did not underestimate the political and legal importance of the principle of self-determination, even if its precise content was extremely difficult to define. He was not one of those who denied that it had any claim to be a legal concept; but it was not a concept which had any particular place in the law of treaties. (op. cit. p. 256, para. 19).

The Commission itself summed up its consideration of this problem in paragraph 11 of the Commentary on Article 59 (A/6309, p. 196) as follows:

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

Changes for the consequences
of which the treaty provides.

22. Waldock's 1963 draft exempted from the operation of the rebus sic stantibus rule cases where the change of circumstances "has been expressly or impliedly provided for in the treaty itself or in a subsequent agreement concluded between the parties in question."

The 1963 I.L.C. draft would have provided that the rule did not apply: ".....(b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself."

The 1966 text while making it a condition for the application of Article 59 that the fundamental change was not foreseen by the parties, does not contain a provision corresponding to the provisions of the waldock and I.L.C. drafts of 1963 and defining the effect of Article 59 on treaties which have made provision for changes of circumstances.

Neither the records of the January, 1966 Monte Carlo meetings of the Commission, where the final text of the present Article 59 was established, nor the report on the eighteenth session of the Commission (A/6309) throw any light on the reasons why the passage "and for the consequences of which [the parties] have made provision in the treaty itself" was deleted. It seems, however, that this

omission is of considerable importance not only for answering the concrete question to which the deleted phrase would have given the reply, but, beyond that, for the more general problem of the status of the rebus sic stantibus rule in the hierarchy of norms as conceived by the authors of the 1966 draft and, in particular, of those among them who were instrumental in effecting the deletion. The proceedings of the Drafting Committee from which the new text (A/CN.4/SR. 842, para. 38) emerged took place in camera. In the following paragraphs certain statements made during the 1963 session will be compiled which explain the attitude of some members of the I.L.C. to the question under consideration and which may have furnished the reason for the deletion of the passage. ¶ 23. In the view of Mr. Yasseen rebus sic stantibus was not a clause, but an objective rule of jus cogens from which derogation was not possible by express provision. (Y.B.I.L.C. 1963, Vol. I, pp. 143-144, para. 59).

24. In commenting on Sir Humphrey's proposal quoted at the beginning of paragraph 22 above Mr. Bartos dissented on the ground that rebus sic stantibus was not now regarded as an implied clause which could be set aside by the parties, but a general rule supplementing the pacta sunt servanda rule. Otherwise the stronger State would always exert pressure to secure the inclusion of a clause such as that

referred to in Waldock's draft. (YBILC 1963, vol. I, p. 149, para. 63). When criticizing a different formulation of Sir Humphrey's original proposal submitted by the 1963 Drafting Committee (op. cit. p. 249/250, para. 27) he said that the exact meaning of the proposed clause ("changes of circumstances for which the parties have made provision in the treaty itself") was not clear to him. was it for the change of circumstances that the parties had made provision, or for the circumstances themselves? A general clause stating that a change of circumstances had no effect on a treaty was very dangerous. Mr. Bartoš observed that a saving clause specifying that no change of circumstances would affect the treaty was included in treaties made by the International Bank for Reconstruction and Development and even in many treaties between strong and weak States. It might, he said, perhaps be accepted that certain changes could be provided for by the parties, but the rebus sic stantibus rule was a rule of jus cogens, and it would be dangerous to adopt a text that might lend itself to the perhaps mistaken interpretation that derogations from the concept of the rebus sic stantibus rule as established jus cogens were permitted under contractual clauses in treaties. He would not rule out the possibility of the parties making provision for certain changes and even adopting subsidiary provisions to remedy situations caused by a change of circumstances, always provided that the parties to the treaty were aware not only of the changes

in question, but also of their possible effects. (YBILC, 1963, vol. I, p. 251, paras. 50-51).

25. Mr. Tunkin (op. cit. p. 253, para. 83), supported by Mr. Pal (op. cit. p. 254, para. 5) thought the clause ought to be deleted because it was inconceivable that the parties could foresee changes of circumstances that would wholly transform the character of the obligations undertaken in the treaty.

26. Mr. Gros pointed out that there were, in practice, treaties which made provision for the possibility of fundamental changes during their execution. Recent economic treaties contained provisions on the eventuality of "serious disequilibrium" or "fundamental disturbances" in a country's economic situation, which established remedial methods and procedures. If such provisions had not been included in the treaty, it might be claimed in such circumstances that a fundamental change had occurred; but where the treaty made provision for the change and prescribed the remedy, that remedy must be applied, not the general system of fundamental change of circumstances laid down in the article. (op. cit. p. 253, para. 87). Mr. de Luna supported Mr. Gros's argument by adducing as an example a treaty drafted in 1962 under the auspices of OECD under which the parties were required to honor the guarantee of the repatriation of property only so long as their balance of payments situation permitted them to do so within reason. (op. cit. p. 254, para. 99).

27. Replying to Mr. Gros's comments Mr. Tunkin said that the deletion of the clause would not mean that provisions concerning changes of circumstances included in the treaty itself would not apply, but that they would be subject to the conditions set out in what now is paragraph 1 of Article 59. On the other hand, if the clause were retained it would, in Mr. Tunkin's view, override the provisions of the present Article 59(1). (op. cit. p. 254, para. 100). This statement appears to indicate that in the speaker's opinion the rebus sic stantibus rule would operate also vis-à-vis the type of treaty provision mentioned by Mr. Gros and Mr. de Luna (para. 26 supra) provided the other conditions of Article 59 are met. In other words: the treaty clause making provision for changes of circumstances would be void to the extent it is repugnant to Article 59 i.e. if it imposes more stringent conditions for the invocation of change of circumstances than Article 59.

28. In his 1963 report (YBILC, 1963, Vol. 2, p. 85, para. 16) Waldock had explained that the clause he was proposing (see para. 22 supra) covered the contingency that the parties might themselves have foreseen the possibility of a particular change of circumstances and provided for it expressly or impliedly in the treaty; in that case the treaty would govern the case and the rebus sic stantibus doctrine could not be invoked to set aside the treaty. In his reply to the critics Sir Humphrey said

he had been considerably startled by Mr. Yasseen's contention (supra para. 23) that the clause would be contrary to international law because the principle of rebus sic stantibus was a rule of jus cogens from which the parties could not derogate. Personally, he (Sir Humphrey) considered that the parties would be well advised to provide for a change of circumstances in the treaty itself, if that could be effectively done, and that such provision would in no way run counter to the doctrine. As far as he could judge, the Commission as a whole did not subscribe to Mr. Yasseen's view. (op. cit., Vol. I, p. 157, para. 14). At a later occasion Sir Humphrey repeated that it seemed to go without saying that the parties were always at liberty to make their own arrangements for changes which they had themselves foreseen. (op. cit. p. 256, para. 20).

29. In the light of this exchange of views in 1963 and of the fact that the clause dealing with consequences of changes for which the parties have made provision was deleted in 1966 it appears to be necessary to seek clarification of this important issue at the General Assembly and Conference stages. It seems that if the clause in a treaty providing for the consequences of change indicates that the parties foresaw the concrete change that has occurred then Article 59 by its very terms ("which was not foreseen by the parties") does not apply. If, however,

the treaty clause concerned is of a more general nature and does not conclusively prove that the particular change was contemplated and foreseen then the problem to be clarified arises whether under the 1966 text of the article the arguments of Messrs. Yasseen, Barlos and Tunkin (paragraphs 23, 24, 25 and 27 supra) or those of Messrs. Waldock, Gros and de Luna (paragraphs 28 and 26 supra) prevail.

c. Questions of a General Nature

Implied term, doctrine, principle or objective rule of law?

30. The controversy recorded in paragraphs 23 through 28 above is only one illustration of the fact that the theoretical foundation of the present draft Article 59 is not merely of academic interest. It is necessary therefore to refer here, at least briefly, to the theories upon which the doctrine of rebus sic stantibus, as it is now proposed for codification, is based. Sir Humphrey Waldock, as his predecessor as Special Rapporteur Sir Gerald Fitzmaurice, recommended to the Commission that it should base itself upon the view that the rebus sic stantibus doctrine is an objective rule of law rather than a presumption as to the original intention of the parties to make the treaty subject to an implied clausula rebus sic stantibus has a long history and traditionally the great majority of writers have presented

the doctrine in the form of a term implied in every perpetual treaty. However, the tendency today is to regard the implied term as only a fiction by which it is attempted to reconcile the dissolution of treaties in consequence of a fundamental change of circumstances with the rule pacta sunt servanda. (YBILC, 1957, Vol. II. p. 58, paragraphs 145 et seq. (Fitzmaurice); op. cit., 1963, Vol. II. p. 82, paragraphs 7 et seq. (Waldock)).

31. There has been no dissent from the Special Rapporteur's recommendation and the I.L.C. has been unanimous on principle at least in accepting the doctrine as an objective rule of law. To accept the doctrine as an objective rule of law rather than as the fiction of an implied clause of the treaty does not mean, of course, that the intention and will of the parties is irrelevant. More often than not the purpose of an objective rule of law is to give effect to the will of the parties. To use a private law analogy: testamentary succession is certainly based on objective rules of law, but these rules of law provide that the will of the testator shall be given effect. Similarly, paragraph (1)(a), when it puts the condition that "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty", is by no means

inconsistent with the theoretical foundation of the article. The objective rule makes the elements which had formed the consent of the parties one of the relevant considerations of its application. Mr. Ago said: "Although it seemed to be true that international law contained a rule of objective law under which a change in the external circumstances could, in certain exceptional cases, bring about the termination of a treaty, and although the rule providing for the operation of the rebus sic stantibus clause could be called a customary rule, nevertheless it was important not to carry the objective theory too far and completely ignore the will of the parties, which was the essential basis for the validity or termination of a treaty. (YBILC, Vol. 1963, vol. I, p. 143, para. 4). It must be kept in mind that in no municipal legal system and still less in international law the terms "objective rule of law" and "rule of jus cogens" are synonymous and that the overwhelming majority of all the objective rules of international law are jus dispositivum. Whether the rebus sic stantibus rule, in addition to being an objective rule of law, is also a peremptory rule was, as the statements reproduced in paragraphs 23 to 28 above show, contested among the members of the Commission.

32. In paragraph 7 of the 1966 commentary on Article 59 the Commission records that it

> "was agreed that the theory of an implied term must be rejected and the doctrine formulated as an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty. It further decided that, in order to emphasize the objective character of the rule, it would be better not to use the term "rebus sic stantibus", either in the text of the article or even in the title, and so avoid the doctrinal implication of that term." (A/6309, p. 194 of mimeographed version; see also para. 7 of 1963 commentary on draft article 44).

33. The Restatement of the Foreign Relations Law of the United States, of the American Law Institute, 1965 version, §§153 (for the text see below para. 36) treats the rebus sic stantibus rule as one of the "special problems of interpretation" and proceeds on the theory of the implied condition which the I.L.C. in its draft has replaced by the concept of an objective rule of law. Professor Lissitzyn points out that the A.L.I. draft is "more conservative than that of the I.L.C., which rejects the test of the intention of the parties and states the doctrine in rather ambiguous language, apparently designed to make it available as a 'safety valve' in situations of acute dissatisfaction with existing treaty relations." He adds that "It remains to be seen whether the pressures of new nations and systems of public order will prevail in the international community over the more cautious approach to this topic adopted by the Re-

statement." (Lissitzyn, The Law of International Agreements in the Restatement, 41 New York University Law Review at p. 110 (March 1966)).

## Application of the rule to treaties of limited duration

34. While jurists have in the past often limited the application of the principle to so-called perpetual treaties, that is, to treaties not making any provision for their termination, the Commission did not accept this limitation. The Commission's main argument for applying the rule also to treaties "given a duration of ten, twenty, fifty or ninety-nine years" were "the cataclysmic events of the present century" which "showed how fundamentally circumstances may change within a period of only ten or twenty years." (Paragraph 8 of the Commentary on Article 59 in A/6309, p. 194; see also paragraph 8 of the 1963 Commentary on draft Article 44). For instruments like atomic test ban agreements which are at the very center of the potentially cataclysmic developments to which the Commission has alluded the rule might be applicable even if the periods of their duration are considerably shorter than those mentioned by the Commission (See 58 A.J.I.L. at p. 670, 1964).

## Suspension of a Treaty for reasons of a fundamental change of circumstances.

35. The Government of Israel suggested in its comments

that the draft should also provide for a suspension of the operation of a treaty on the ground of a fundamental change of circumstances. No express provision to this effect appears, however, in the draft.

## Questions of Procedure and Adjudication

36. Article 62 (formerly 51) which provides for the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty applies to cases of termination under Article 59. Paragraph 13 of the 1966 Commentary (A/6309, page 197) says that "having regard to the extreme importance of the stability of treaties to the security of international relations, /the Commission/ has attached to the present article, as to all articles dealing with grounds of invalidity or termination, the specific procedural safeguards set out in Article 62." Article 62 (formerly 51) which is by many considered to be insufficient and unsatisfactory has repeatedly been discussed in this Study Group and it is not proposed to deal with it in the present memorandum.

## The A.L.I. Draft

37. The Restatement of the Foreign Relations Law of the United States by the American Law Institute, 1965 edition, contains the following statement on the effect of a substantial change of circumstances:

"§153. Rule of Rebus Sic Stantibus: Substantial Change of Circumstances

(1) An international agreement is subject to the implied condition that a substantial change of a temporary or permanent nature, in a state of facts existing at the time when the agreement became effective, suspends or terminates, as the case may be, the obligations of the parties under the agreement to the extent that the continuation of the state of facts was of such importance to the achievement of the objectives of the agreement that the parties would not have intended the obligations to be applicable under the changed circumstances.

(2) A party may rely on an interpretation of the agreement as indicated in Subsection (1) as a basis for suspending or terminating performance of the obligations in question only if it did not cause the change in the state of facts by action inconsistent with the purpose of the agreement and has otherwise acted in good faith.

(3) When the conditions specified in Subsection (1) apply only to a separable portion of the agreement, suspension or termination applies only to that portion."

One important difference between the A.L.I. statement and Article 59 of the I.L.C. draft has already been mentioned and commented upon in paragraphs 33 et seq. above. Another consists in the fact that the A.L.I. statement provides for suspension, as an alternative to termination, of a treaty because of the change of circumstances. Paragraph 2 of the A.L.I. statement corresponds roughly to paragraph 2(b) of Article 59 while the question of separability (para. 3 of the A.L.I. statement) is dealt with in Article 41 (formerly 46) of the I.L.C.

draft. There are substantial differences in the formulation, emphasis and shading of the two drafts,

## Concluding Note

38. Considering that the present memorandum had to be prepared without the availability for study of the summary records of the May-July 1966 session of the International Law Commission when the final draft was adopted the present writer would prefer to present to the Study Group his concluding observations at a later stage, in the light of these records and in the light of the discussion of the Study Group which will take place on October 7-8, 1966.

ONB. COPY TO MR. WERSHOF



Feb 6/68

Subject 20-3-1-6

## Amendment Proposed by the United States

### Article 1

| Present text: | Proposed amendment: |
| --- | --- |
| *The scope of the present articles*<br>The present articles relate to treaties concluded between States. | The present articles apply to treaties concluded between two or more States or other subjects of international law. |

Rationale for amendment:

1. Because of the number and importance of agreements being entered into between States and other international persons, such as international organizations, which are generally conceded to have treaty-making capacity, the proposed convention on the law of treaties should be broadened to govern such agreements. This class of treaties is now substantial and will 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. In general, such treaties have the same characteristics as treaties between States and should therefore be governed by the same body of law. A broadening of the scope of the present articles to cover them would assure much greater stability in international relationships.

2. Acceptance of this amendment will require minor drafting changes throughout the Articles.

3. The word apply is substituted for relate because it is a more precise term which is commonly employed in describing the scope of treaties.

# Article 2

Present text:

*Use of terms*

1. For the purposes of the present articles:

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

(*b*) "Ratification", "Acceptance", "Approval", and "Accession" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.

(c) "Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

(*d*) "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

(*e*) "Negotiating State" means a State which took part in the drawing up and adoption of the text of the treaty.

(*f*) "Contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force.

(*g*) "Party" means a State which has consented to be bound by the treaty and for which the treaty is in force.

(*h*) "Third State" means a State not a party to the treaty.

(*i*) "International organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Proposed amendments:

1. For the purposes of the present articles:

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

(b) "Ratification" or "Accession" means an international act whereby a State establishes on the international plane its consent to be bound by a treaty.

(c) "Full powers" means a document emanating from the competent authority of a State designating a person to represent the State for the purposes of Article 6 or 63.

(d) "Reservation" means a unilateral statement, however phrased or named, made by a State when signing, ratifying, or acceding to a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

(e) (No change)

(f) (No change)

(g) (No change)

(h) (No change)

(i) (No change)

2. (No change)

Rationale for amendments:

1 (a). See rationale for amending Article 1.

1 (b). The terms "acceptance" and "approval" are not sanctioned by traditional usage and are unnecessary here and elsewhere in the articles. Their deletion would simplify the drafting of numerous articles. (The United States will propose a new Article 9 bis to make clear that signature, ratification, and accession are not exhaustive of the means which States may agree upon for indicating consent to be bound.)

The substitution of "an" for "the" before "international act" is proposed in recognition of the other acts (e.g., signature) by which a State can indicate its consent to be bound. The words "in each case" and "so named" should be deleted as unnecessary.

1 (c). The words "or for accomplishing any other act with respect to a treaty" are too broad for a definition of "full powers", given the limited cases where full powers are required. It is sufficient to refer to Articles 6 and 63 to cover such requirements.

# Amendments Proposed by the United States

## Article 4

Present text:

*Treaties which are constituent instruments of international organizations or are adopted within international organizations*

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.

Proposed amendment:

Delete the article. Substitute instead exceptions in favor of the rules of international organizations in Articles 6, 8, 9, 13, 16, 17, 37, 55, 57, and 72.

Rationale for amendment:

The present text could be construed as permitting any international organization, no matter how restricted in membership or limited in purpose, to exclude the application of the proposed convention to its own constituent instrument and to any or all treaties adopted within the organization. The number of multilateral treaties adopted within international organizations is continually increasing. To confer upon these organizations the power to modify or set aside those rules of the draft convention which are intended to have general applicability could be justified only on the basis of a very strong case of necessity.

International organizations, it is true, need some flexibility in procedural matters. This can be built into the appropriate articles without undermining the law-making character of the proposed convention.

## Article 9 bis

Present text:

None.

Proposed new article:

The consent of a State to be bound by a treaty may be expressed as provided in Article 10, 11, or 12, or in such other manner as the negotiating States may agree or the applicable rules of an international organization may provide.

Rationale for amendment:

The purpose of this added article is to indicate that Articles 10, 11, and 12 are not exhaustive of the means which States may agree upon for indicating their consent to be bound.

Its adoption should eliminate the need for references to "acceptance" and "approval" in various other articles of the Convention; e.g., Articles 11, 13, 15, 16, and 18. Certain consequential changes, such as references to "other expressions of consent to be bound" may be substituted where necessary.

## Article 15

Present text:

*Obligation of a State not to frustrate the object of a treaty prior to its entry into force*

A State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:

(*a*) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;

(*b*) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

(c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

Proposed amendment:

A State is obliged to refrain from acts which frustrate the object of a proposed treaty when:

(a) (Delete. Reletter (b) and (c) accordingly.)

(a) It has signed the treaty subject to ratification or other consent to be bound, until it shall have made its intention clear not to become a party; or

(b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that it has not withdrawn its consent to be bound.

Rationale for amendment:

1. Subparagraph (a) should be deleted because it is not supported by existing norms of international law, and it is not a desirable innovation. Its effect could be to discourage States from entering into negotiations, because States could not know at the beginning of negotiations what their obligations under this rule would be.

2. It places an unfair burden on States which may have entered into negotiations with strong reservations on the subject, or may have been under a misapprehension as to their real purpose and extent or may even have withdrawn from the negotiations while they are still in progress.

3. The words "acceptance or approval" may have attained such a special meaning as the result of their inclusion in many recent treaties that their enumeration in the present text may have the effect of excluding other forms of consent to be bound.

4. The draft articles contain no provision for withdrawing a ratification or other consent to be bound, prior to the entry into force of the treaty. In cases where the entry into force of a treaty has been unduly delayed, a State should

the object of the treaty. Subparagraph (b) of the amended text provides for this.

# Amendments Proposed by the United States
## Articles 16 and 17

Present text:

### Article 16

*Formulation of reservations*

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(*a*) The reservation is prohibited by the treaty;

(*b*) The treaty authorizes specified reservations which do not include the reservation in question; or

(*c*) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.

### Article 17

*Acceptance of and objection to reservations*

1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of the treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

Proposed amendment:

Combine Articles 16 and 17 into a single article, as follows:

### Reservations

1. A State, when signing or expressing its consent to be bound by a treaty, may do so subject to a reservation unless

(a) The reservation is prohibited by the treaty;

(b) The reservation is incompatible with the character or purpose of the treaty; or

(c) The reservation is contrary to the rules or practice of an international organization within which the treaty was concluded.

2. A reservation expressly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

3. When the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

Present text:

4. In cases not falling under the preceding paragraphs of this article:

(a) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(c) An act expressing the State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by 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.

Proposed amendment:

4. When a treaty is a constituent instrument of an international organization and unless the treaty otherwise provides, a reservation is subject to acceptance by the competent organ of that organization, but such acceptance shall not preclude any contracting State from objecting to the reservation.

5. In cases not falling under the prededing paragraphs of this article and unless the treaty otherwise provides, an act expressing the State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation, and such acceptance constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force.

6. An objection by another contracting State to a reservation that is not expressly authorized by the treaty precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State.

7. For the purposes of paragraphs 3 and 5 a reservation is considered to have been accepted by a State, unless the treaty otherwise provides, if it shall have raised no objection to the reservation by 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.

Rationale for amendment

1. In the present text 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.

2. The rule in present subparagraph (b) of Article 16 -- that where a treaty authorizes specified reservations no other reservations can be made -- is too rigid. It is difficult -- if not impossible -- for negotiators to anticipate all the reservations that may be necessary for particular States to become parties to a treaty. The essential purpose of including a provision authorizing reservations to particular provisions is to facilitate reservations to these provisions, but not to exclude reservations to other provisions unless specifically so stated. The rule of subparagraph (b) of Article 16 is therefore omitted from the proposed amended version.

3. 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 on these words is especially inadvisable because it is uncertain whether 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 proposes, accordingly, that the phrase "object and purpose" be replaced by "character or purpose" in the compatibility rule and has done this in paragraph 1 (b) of its proposed amendment.

3. The "limited number" criterion in present 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. The reference to the limited number of negotiating States has therefore been omitted from paragraph 3 of the proposed amendment.

4. Certain provisions of present Article 17 seem to inhibit negotiators from specifying other procedures or requirements regarding the acceptability of reservations. Subparagraphs (a) and (c) of paragraph 4 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 contracting States. Paragraph 5 of Article 17 seems to inhibit the negotiating States from providing in the treaty itself for a period shorter or longer than twelve months. Needed flexibility has therefore been provided in corresponding paragraphs 5 and 7 of the amended version by including the phrase "unless the treaty otherwise provides".

5. The rule in paragraph 1 (c) of the proposed amendment is provided in view of the U.S. proposal to delete Article 4.

6. The words "or impliedly" have been omitted from paragraph 2 of the proposed amendment because of their uncertain meaning and difficulty of interpretation in this context.

7. Paragraph 4 of the proposed amendment provides a right to any contracting State to object to a reservation to a constituent instrument of an organization, even though the reservation may be accepted by the competent organ of that organization. Although some reservations to constituent instruments may be of such character as to require application by all parties in their relations with the reserving State, others may be of a kind to make such procedure unnecessary or even intolerable for an objecting State.

8. Paragraph 5 of the proposed amendment combines former paragraphs 4 (a) and 4 (c) of Article 17 in view of their close relationship.

9. Paragraph 6 of the proposed amendment omits any reference to "cases not falling under the preceding paragraphs of the article". This insures an objecting State's freedom to refuse treaty relations with a State making a reservation deemed unacceptable by the objecting State unless the reservation has been expressly authorized by the treaty.

# Amendments Proposed by the United States

## Article 24

Present text:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Proposed amendment:

1. Unless the treaty otherwise provides or it is otherwise established, the provisions of the treaty do not bind a party in relation to any act or fact which took place prior to the date of the entry into force of the treaty with respect to that party.

2. The provisions of the present Convention shall apply only to treaties concluded on or after October 24, 1945, the date of entry into force of the Charter of the United Nations.

Rationale for amendment:

1. The present text of Article 24 is manifestly unclear. Two sets of problems require clarification: whether this Convention on the Law of Treaties is itself retroactive or retrospective and what is a continuing situation for the purpose of the Convention.

2. The basic change proposed in Article 24 is the fixing of a point in time for its application to other treaties. As this Article is written in very general language, a great many disputes could arise over whether specific pre-existing treaties were or were not subject to the Treaties Convention.

It is possible that many old quarrels between States, which had been settled by agreement, would be revived. The result could be that the Convention on the Law of Treaties, rather than contributing to world peace and security, instead increased the likelihood of international conflict.

In order to avoid this danger, a specific cut-off point for the retroactive effect of the Convention should be adopted. October 24, 1945, the date of the

coming into force of the United Nations Charter is the most reasonable date. The preamble of the Charter states the determination of the peoples of the United Nations,

> "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . ."

The date of the adoption of the Charter is thus not only a crucial date in the world legal order generally but especially for a Convention on the Law of Treaties which is to implement the aims of the Charter quoted above. That date marks the development of a new legal regime. As this Convention is to form a part of that regime, it should apply to treaties entering into force after October 24, 1945. According to Article 24, the provisions would not apply "unless a different intention appears from the treaty or is otherwise established." Although one can find some elements of intent throughout the Draft Articles, it is at least doubtful whether a party wishing to rely on the Articles in their present form could adduce sufficient evidence to satisfy the standard in the unless clause. The problems arising from this ambiguity in the Draft Articles could be avoided by introducing into Article 1 a time limitation dealing with the scope of the Convention. However, since the problem arises especially in connection with Article 24, an additional paragraph to that Article is proposed, specifying the date of entry into force of the Charter of the United Nations as a cutoff date. The proposal for inclusion of a cutoff date in Article 24 may be disposed of by consideration of the same matter in connection with Article 1.

3. Retention of the phrase "any situation which ceased to exist before the date of the entry into force of the treaty" could lead to considerable difficulty with regard to treaties containing jurisdictional clauses.

It was pointed out at the 850th meeting of the Commission that the use of the term "situation" caused substantial difficulty. Whereas facts or acts generally were historical -- it was relatively easy to determine when they took place -- a situation began at a certain moment and continued. It was rather difficult to tell when it ended. In the De Becker Case the applicant before the European Commission of Human Rights complained that his loss of certain civil rights, as a result of conviction by a Belgian Military Court in 1946, violated the rights guaranteed him under the European Convention of Human Rights to which Belgium was a party and which entered into force on June 14, 1955. The Commission held that, whereas the applicant was in a "continuing situation" after 1955, his application was admissible.

It is anomalous for a treaty to be inapplicable to a fact which has taken place before it entered into force but applicable to a situation arising from that fact which may continue indefinitely, particularly as any fact or act which takes place produces an effect or situation which continues for a shorter or longer time. There is an additional complication: When does a situation cease to exist? Does a minor change in a situation make it a new situation, or is a major change required, or is it only complete obliteration of the situation which meets the test -- such as the death of the complainant in the De Becker Case?

Because of this uncertainty, the proposed amendment of Article 24 omits the clause regarding "any situation which ceased to exist."

# Amendments proposed by the United States

## Articles 27 and 28

**Present text:**

Article 27

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty;

(b) Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

**Proposed amendment:**

1. A treaty shall be interpreted in good faith in order to determine the meaning to be given to its terms in the light of all relevant factors, including in particular:

(a) the context of the treaty;

(b) its objects and purposes;

(c) any agreement between the parties regarding the interpretation of the treaty;

(d) any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;

(e) any subsequent practice in the application of the treaty which establishes the common understanding of the meaning of the terms as between the parties generally;

(f) the preparatory work of the treaty;

(g) the circumstances of its conclusion;

(h) any relevent rules of international law applicable in the relations between the parties;

(i) the special meaning to be given to a term if the parties intended such term to have a special meaning.

Article 28

*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 27, or to determine the meaning when the interpretation according to article 27:

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.

Delete

Rationale for amendment:

1. The basic problem raised by Articles 27 and 28 is the establishment of a hierarchy between a general rule of interpretation and supplementary interpretation. Only when an attempt at interpretation in accordance with Article 27 has failed by leaving a meaning which is "ambiguous or obscure" or which leads to a result which is "manifestly absurd or unreasonable" can one consult the preparatory work and the circumstances of the conclusion of a treaty. Under the rules in the present text of Article 27 a meaning might be arrived at that would be neither ambiguous nor obscure, nor manifestly absurd or unreasonable but might still be far from the meaning the parties actually intended. The meaning actually intended would be more likely to be reached if the preparatory work and circumstances of the conclusion of the treaty, referred to in Article 28, were considered along with the rules set forth in Article 27.

2. The use of the term "ordinary meaning" in paragraph 1 of Article 27 gives rise to a further problem. The criterion of interpretation "in accordance with the ordinary meaning to be given to the terms of the treaty" is accorded primacy over all other criteria. However, 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 present text of Articles 27 and 28 actually obstructs the consideration of the essential factors that give evidence of the common intent of the parties in using particular language.

3. A third problem arises in paragraph 2, in which the term "context" is given a very restricted meaning. It clearly excludes the circumstances of the conclusion of the treaty, which are included in Article 28 but which in the view of many scholars are properly part of the context.

4. The most helpful guides in deciding the effect of a particular clause in a treaty are the official records of the negotiations in which the language was agreed and the relevant documents submitted or produced in the course of negotiations, as well as other circumstances of the conclusion of the treaty. These are the materials upon which Foreign Offices almost invariably rely in the interpretation and application of treaties.

Amendments proposed by the United States

## Article 29

Present text:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

Proposed amendment:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular language version shall prevail.

2. No change.

3. The terms of the treaty are presumed to have the same meaning in each authentic language.

4. Except in the case mentioned in paragraph 1, when a comparison of the several language versions discloses a difference in meaning which the application of Article 27 does not remove, a meaning shall be adopted which is most consonant with the objects and purposes of the treaty.

Rationale for amendment:

1. The word "text" is used in the present draft in two different senses: in the first instance in paragraph 1 it refers to the entire text of the treaty in all the languages in which it is authenticated; in the second instance in that paragraph, it refers to one of the language versions of the treaty. In order to avoid this dual use of the word "text" in Article 29, the words "language version", "authentic language", and "language versions" are substituted in the proposed amendment.

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2. Paragraphs 1 and 2 lay down residual rules which are acceptable. However, the present text of paragraph 3 is unsatisfactory. The presumption in the first sentence of paragraph 3 seems to carry out the thought that if a term has one and only one identical meaning in the various language versions of the treaty, then that meaning is governing over other meanings which the term may have in any one of the languages. There is some percentage of error inherent in the application of this principle, but, given the limited scope of its application, the formulation is not unacceptable.

The basic difficulty in paragraph 3 arises in the second sentence, which lays down two rules for disposing of differences between terms in different language versions:

(a) resort to the means of interpretation provided in Articles 27 and 28, and if that fails,

(b) adoption of a meaning which reconciles the texts as far as possible.

Even if efforts to improve Articles 27 and 28 fail, the need to resort to supplementary methods of interpretation in resolving this type of conflict are so obvious that step (a) can be accepted without change. Step (b), however, is a formula singularly devoid of content. A rule calling for reconciliation "as far as possible", after recourse to available means of interpretation has been exhausted, is merely a direction to effect some sort of compromise without any indication of the basis for a compromise. Moreover, in many cases, there is no room for reconciliation--as illustrated by the terms "public control" and "controle public" in the Mavrommatis Case. The same type of problem could easily arise in the increasing number of treaties in which "public order" in the English version is juxtaposed to "ordre publique" in the French. The situation here is clearly one in which the achievement of the objects and purposes of the treaty is the only realistic touchstone, and the sentence has been modified to make this the test. The

sentence has been made a separate paragraph in the proposed amendment of the article because it is considered to be of equal importance with the preceding paragraphs 1 and 2.

# Amendments Proposed by the United States

## Article 38

Present text:

*Modification of treaties by subsequent practice*

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

Proposed amendment:

Subsequent practice modifying application of a treaty

The application of a treaty may be modified by subsequent practice clearly establishing the agreement of all parties affected to such modification.

Rationale for amendment:

1. The present text of Article 38 might be read as suggesting the possibility of a change in the actual text of a treaty. However, according to the Commission's comment, it is the application of the treaty in a manner not envisaged by its provisions that is contemplated.

2. The word "clearly" has been added to the article to emphasize the importance of evidence beyond doubt that modification of the application through practice of the parties is manifest.

3. The phrase "agreement of the parties" has been replaced by the phrase "all parties affected" to avoid any misunderstanding of the principle that two or more of the parties to a multilateral treaty are not permitted to modify the application of such a treaty without the agreement of other parties whose rights are affected by such modification.

# Amendments Proposed by the United States

## Article 41

Present text:

*Separability of treaty provisions*

1. A right of a party provided for in a treaty to denounce, withdraw from or suspend the operation of the treaty may only be exercised with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree.

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may only be invoked with respect to the whole treaty except as provided in the following paragraphs or in article 57.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:

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

(*b*) Acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole.

4. Subject to paragraph 3, in cases falling under articles 45 and 47 the State entitled to invoke the fraud or corruption may do so with respect either to the whole treaty or to the particular clauses alone.

5. In cases falling under articles 48, 49 and 50, no separation of the provisions of the treaty is permitted.

Proposed amendment:

1. (same)

2. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present articles may only be invoked with respect to the whole treaty except as provided in Article 57 or paragraph 3 below.

3. If the ground relates to particular clauses alone, it may only be invoked with respect to those clauses where:

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

(b) acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole;

(c) continued performance of the treaty would be unjust; and

(d) the ground does not arise under Article 46, 47, 48 or 49.

4. Delete.

5. Delete.

Rationale for amendment:

1. As Article 41 is presently drafted, it is not clear that only paragraph 1 relates to a "right" to denounce, withdraw from or

suspend the operation of a treaty and that the remaining paragraphs apply only to a "ground" for invalidating, terminating, withdrawing from or suspending the operation of a treaty. The proposed amendment makes this distinction clear.

2. The proposed amendment to paragraph 3(a) requires that particular clauses be "clearly" separable. This change is in accord with the Commission's commentary on this provision.

3. Deletion of paragraph 4 and the transfer of Articles 46 (Fraud) and 47 (Corruption) to subparagraph 3(d), thereby providing for nonseparability, is compelled by several related considerations. There is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given either of these concepts; and no definition is provided in the Draft Articles. Therefore, charges of invalidity may readily be made on either of these grounds, particularly if the charge may relate to only those parts of a treaty which the charging state finds undesirable. Such charges would be extremely disruptive of stable treaty relations and conducive to discord and conflict in international relations. A party considering whether to allege fraud or corruption should be limited to the choice of making the allegation with the consequence that the entire treaty may fall, or resting content with the entire treaty.

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4. The proposed amendment deletes reference to Article 50 from present paragraph 5 and amended 3(d). The United States has expressed concern over Article 50 as it is presently drafted; but if the article is amended or even retained in its present form, application of a rule of nonseparability to Article 50 grounds could produce harsh and undesirable results. A treaty, particularly a long one such as a treaty of peace, may contain provisions on a great variety of subjects. Under the Commission's text, if one provision -- even of little importance in the context of the treaty as a whole -- were contrary to a peremptory norm, the entire treaty could be terminated on that ground by one of the parties.

5. Paragraph 3(c) of the proposed amendment is new. Possibly its substance is already included in paragraph 3(a), because a provision would not be separable if its removal would make continued performance of the remaining treaty provisions unjust. Addition of paragraph 3(c) makes this point clear.

# Amendments Proposed by the United States

## Article 42

Present text:

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 to 47 inclusive or articles 57 to 59 inclusive if, after becoming aware of the facts:

(*a*) It shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(*b*) It must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation.

Proposed amendment:

1. A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 7, 43 to 48 inclusive or articles 57 to 59 inclusive if, after becoming aware of the facts:

(a) It shall have expressly agreed that the treaty, as the case may be, is valid or remains in force or continues in operation; or

(b) It must by reason of its conduct be considered as having acquiesced, as the case may be, in the validity of the treaty or in its maintenance in force or in operation.

2. In any case, a State which invokes a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 43 - 48 shall be considered to have acquiesced in the validity of the treaty or in its maintenance in force or in operation if a period of ten years has elapsed from the date it first exercised rights or obtained the performance of obligations pursuant to the treaty.

Rationale for amendment:

1. Articles 7 and 48 are included among the articles referred to in the proposed amendment to paragraph 1 because there is no rational

justification for allowing a State a continuing choice to enforce or invalidate a treaty once it has learned of the act mentioned in Article 7 or of the coercion of its representative. The State may decide that, even where an act was performed by a person who cannot be considered as a representative or its representative has been coerced, the balance of rights contained in the treaty is desirable to it. Once it has made this decision, as established by paragraph 1(a) or 1(b), the general policy favoring stable treaty relations requires that the State should not later be free to change its decision.

2. Addition of proposed paragraph 2 will help provide a greater degree of certainty to treaty relationships without risking undue hardship to any State. It is reasonable that there should be some fixed period after which all parties would be entitled to depend completely upon the existence of a treaty relationship. In the modern world of fast moving events and rapid and complete communications, 10 years after receipt of benefits under the treaty seems a reasonable period of time. Witnesses and documents attesting to or rebutting an alleged ground of invalidity may not be available after this period. The States involved will probably have undergone at least one change of government personnel during this period. And the requirement that the period does not begin to run until after the State alleging

invalidity has exercised rights or obtained another State's performance under the treaty assures that it will have had the opportunity to examine into the background of the treaty before the limitation period begins to run.

# Amendments Proposed by the United States

## Article 45

Present text:

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

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

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 74 then applies.

Proposed amendment:

1. A state may invoke an error as invalidating its consent to be bound by a treaty if:

(a) the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty;

(b) the assumed fact or situation was of material importance to its consent to be bound or the performance of the treaty; and

(c) the state initiates the procedure for its claim of invalidity within one year after it discovers the error.

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

3. (No change)

Rationale for amendment:

1. As presently drafted, the requirements of Article 45 are highly subjective; only the state claiming error knows what its factual assumptions were while giving its consent to be bound by the treaty and

which of those assumptions were essential to its consent. In order to foster stable treaty relations and to avoid upsetting peaceful international relations, it is important to assure that claims of invalidity shall not be made unless they are in fact based upon substantial and material grounds. In furtherance of this goal, proposed paragraph 1(b) adds to Article 45 the "objective" criterion that the error claimed be "of material importance to ... conclusion or performance of the treaty." This requirement will assure that no state may invalidate a treaty because its consent was in fact based upon assumptions which reasonable men would conclude should not have influenced its judgment.

2. Proposed paragraph 1(c) further seeks to assure stability in treaty relations by requiring the ground of error to be invoked pursuant to Article 62 within one year after the error has been discovered. Fairness to the other party, or parties, to the treaty requires that their enjoyment of treaty rights should not be subject to cancellation long after an error has been discovered.

3. The proposed amendment to paragraph 2 reasserts, in altered form, that portion of the rule enunciated by the I.C.J. in the Temple case, rejected by the Commission: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such

as to put that party on notice of the possible error." By requiring the claiming party to establish that it could not have avoided the alleged error through the exercise of reasonable diligence, the amendment strikes a balance between the rules enunciated by the Court and the Commission.

# Amendments Proposed by the United States

## Article 57

*Article 57*

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

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

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

(a) The other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) Any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(a) A repudiation of the treaty not sanctioned by the present articles; or

(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

Proposed amendment:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part as may be appropriate considering the nature and extent of the breach and the extent to which the treaty obligations have been performed by the parties.

2. (a) No change.

(b) A party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State, as may be appropriate.

(c) No change.

3. (a) No change.

(b) The substantial violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. No change.

Rationale for amendment:

1. The first two proposed amendments are designed to introduce the element of proportionality to the response to breach by another party. A principal reason for Article 57 is that it would be unfair to compel a party which has been deprived of benefits under a treaty to continue to perform its obligations. But it seems equally

unfair to give an option to a party which has been only slightly affected by a breach of a bilateral treaty to terminate and suspend the operation of the entire treaty.

2. The addition of the word "substantial" in paragraph 3 (b) is intended as an additional safeguard against a party's invoking a technical breach as a ground for terminating or suspending the operation of a treaty under Article 57.

# Amendments Proposed by the United States

## Article 58

Present text:

*Article 58*

*Supervening impossibility of performance*

A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

Proposed amendments:

1. A party may invoke an impossibility of performing a treaty as a ground for terminating it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the performance of the treaty.

2. If the object can be replaced or the treaty can be performed using an alternate means, the disappearance or destruction of the object may be invoked only as a ground for suspending the operation of the treaty.

3. A party may not invoke impossibility of performance as a ground for terminating or suspending the operation of a treaty where the disappearance or destruction of the indispensible object is due to its own act or omission.

Rationale for amendment:

1. The change proposed in paragraph 1 is solely one of drafting.

2. The new paragraph 2 is derived largely from the second sentence of the ILC draft. To that formulation the concept of performance of the treaty using an alternate means has been added.

It is believed that the addition of this concept may be helpful in deciding whether or not a destroyed object is in fact "indispensable" for the performance of the treaty.

3. The Commission rejected a proposal by Sir Humphrey Waldock similar to that made in paragraph 3. The proposal, however, is in accord with the universally accepted principle that a party responsible for a loss or injury should bear the consequences thereof.

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# Amendments Proposed by the United States

## Article 59

*Article 59*

*Fundamental change of circumstances*

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(*a*) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(*b*) The effect of the change is radically to transform the scope of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked:

(*a*) As a ground for terminating or withdrawing from a treaty establishing a boundary;

(*b*) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

Proposed amendments:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty and which was not forseen by the parties or provided for in the treaty may only be invoked as a ground for terminating or withdrawing from the treaty if:

(a) No change.

(b) The effect of the change is radically to increase the burden of obligations still to be performed under the treaty

2. No change.

(a) As a ground for terminating or withdrawing from a treaty defining territorial limits or other territorial arrangements;

or withdrawal

(b) If termination/would seriously impair the rights or interests of another party; or

(c) If the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty.

Rationale for amendments:

1. Article 59 in its present form is vague and difficult to apply. It is susceptible of a construction which could permit one party to treat another party in an unfair manner. The amendments proposed are designed to clarify the scope and effect of the article.

2. The first change in paragraph 1 is designed to protect the right of the parties to deal with changed circumstances in the treaty itself

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if they wish to do so. The second change in paragraph 1 relates solely to drafting. It seems better in English to avoid the double negative "not...unless" and to recast the idea in the manner proposed.

3. The purpose of the changes in paragraph 1 (b) and 2 (b) is to establish standards which would serve to protect parties from being subjected to serious injury by application of the draft article.

The substitution of "increase the burden" for "transform the scope" would establish a more objective standard against which to measure the change. It is conceivable that a change of circumstances might "transform the scope" of obligations to be performed without at the same time "increasing the burden" of such obligations. In that case, it does not seem desirable that a State should be able successfully to invoke the changed circumstances as a ground for terminating or withdrawing from the treaty.

The proposed new 2 (b) is designed to give to a State against which Article 59 is invoked the opportunity of establishing that the "termination or withdrawal would seriously impair" its rights or interests. If the objecting State meets this burden, the invocation of the changed circumstances would not be allowed.

4. The discussion of paragraph 2 (a) in the Commentary indicates that the Commission intended the phrase "treaty establishing a boundary" to include treaties of cession as well as delimitation treaties. The draft article does not appear clear on this point. Moreover, there are treaties which do not establish boundaries but do provide for territorial arrangements which should be excluded from paragraph 1. The Antarctica treaty is an example of the type of 'territorial arrangement' which the proposed amendment is designed to catch.

5. Subparagraph (b) of paragraph 2 has been renumbered (c) in the proposed amendment.

Pocket 20-1-8

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August 4, 1966

To the Study Group on the I. L. C. Draft
on the Law of Treaties:

Enclosed is the summary of the March 1966 meeting of the Study Group revised by the Rapporteur, Dr. Egon Schwelb, in the light of comments received from participants in the meeting.

Richard W. Edwards, Jr.
Assistant to the
Executive Director

September 1966

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Study Group on the Draft Articles

on the Law of Treaties

Memorandum No. 5
(Provisional Version)*

Termination or suspension of the operation of a treaty as a consequence of its breach. (Article 57 of the draft articles on the law of treaties adopted by the International Law Commission on July 18 and 19, 1966).

Prepared by the Rapporteur**

* This version is provisional because it was prepared before the Report of the International Law Commission on the work of its 18th session and the records of that session had been distributed at U.N. Headquarters.

** Egon Schwelb
Yale Law School

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## Text of the draft article:

## Article 57 (formerly Article 42)

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

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

2. A material breach of a multilateral treaty by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the treaty or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any other party to suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of the present article, consists in:

(a) a repudiation of the treaty not sanctioned by the present articles; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

## I. Legislative History

1. The basis for the elaboration of the present Article 57 was Article 20 in Sir Humphrey Waldock's Second report on the law of treaties (Doc. A/CN.4/156; Yearbook of the International Law Commission 1963, Vol. II at pp. 72 ff.). The draft article was considered by the I.L.C. at its 691st, 692nd, and 693rd meetings and referred to the Drafting Committee. (Y.B.I.L.C. 1963, Vol. I pp. 120 - 132.) The text as revised by the Drafting Committee (Y.B.I.L.C. 1963, Vol. I, p. 245) was considered at the 709th meeting and adopted on the understanding that further drafting changes will be made by 12 votes to none with 5 abstentions.

(op. cit. p. 247) The text incorporating the anticipated further drafting changes (op. cit. p. 294) was considered at the 717th meeting and adopted by 18 votes to none with one abstention (op. cit. p. 295) It appears, with the Commission's commentary, as Article 42 of the Report of the Commission covering the work of its fifteenth (1963) session. (Y.B.I.L.C. 1963, Vol. II, at p. 204, also G.A.O.R. 18th session, Supplement No. 9, A/5509).

2. Comments by the following Governments and delegations to the General Assembly were made on draft Article 42, now 57 and appear in U.N. Doc. A/CN.4/175 and Addenda (mimeographed):
Australia (p. 12), Israel (p. 58), Portugal (p. 125), United Kingdom (p. 154), United States (p. 187), Ghana delegation (p. 284), Guatemala delegation (p. 284), United States delegation (p. 284), the Netherlands (Addendum 1 p. 20), Sweden (Addendum 2, p. 7), and Canada (Addendum 3, p. 2).

3. The Government comments were analyzed in the Fifth Report on the Law of Treaties by Sir Humphrey Waldock. A/CN.4/183/Add. 2, pp. 17 ff, mimeographed; his observations and proposals, including a revised text for the Article are contained on pp. 22 - 26 of the same document.

4. The Article was considered again at the second part of the seventeenth session of the Commission in January, 1966, at its 831st and 832nd meetings and again referred to the Drafting Committee. The text proposed by the Drafting Committee at that stage (Doc. A/CN.4/SR. 842) was considered at the 842nd meeting and, as further amended in plenary meeting, approved by 14 votes to none. (ibid.) It appears without commentary in the Annex to the Report of the I.L.C. on the second part of its 17th session, A/CN.4/184 (mimeographed) as Article 42 and as Article 57 in Doc. A/6348 of August 9, 1966 (Text of draft articles on the law of treaties, as finally adopted by the Commission on 18 and 19 July 1966). At the time of the preparation of the present paper the Report of the I.L.C. on the work of its eighteenth session to contain its commentaries and recommendations is not yet available. It will appear as document A/6309.

## II. General Observations

5. The principle on which the Article is based is the consideration that "good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect"

(Waldock, YBILC 1963 Vol. II, p. 73). By and large, there has been agreement among the members of the Commission on this principle and it has not been challenged by those Governments which commented on the Article as drafted by the Commission in 1963.

5. There has not been agreement on the question, however, whether all the provisions of Article 57 as formulated represented the lex lata or whether the text contained elements of "progressive development" i.e. suggestions de lege ferenda. Mr. Briggs emphasized repeatedly that a unilateral right of repudiation of a treaty was no part of contemporary international law and that there did not exist a unilateral right to repudiate treaty obligations on the ground that a breach had been committed. (Y.B.I.L.C. 1963, Vol. I, p. 123 and p. 132.) Mr. Briggs eventually withdrew an amendment to eliminate the reference to termination in the draft (op. cit. p. 246) and at the January 1966 meetings of the Commission he accepted the wording of the article on the understanding that there existed not a unilateral right of withdrawal from a treaty, but a right to invoke the breach as a ground for terminating the treaty. (A/CN. 4/SR. 831, para. 45). The representative of the United Kingdom said in the Sixth Committee that the "new rules" of the draft Article then before the Committee required very careful study and must be subjected to constructive criticism before they could be accepted as part of present-day international law. (A/C.6/SR.786)

6. There was agreement among the members of the I.L.C. that a balance must be struck between the stability of treaties and the position of the injured party. (de Luna, Vol. 1 Y.B.I.L.C. 1963, p. 120, Tabibi, p. 123, Lachs (ibid). It was dangerous to provide for the possibility of denunciation in the case of any and every breach of a treaty. (Bartos, op.cit. p. 124). The more uncertain the position with regard to jurisdiction the Special Rapporteur argued, the more necessary it was for the substantive rules to be given a strict and precise formulation (op.cit. p. 130). There was general agreement in the I.L.C. to keep the definition narrow. (op.cit. p. 132). These arguments led to the conclusion that not every breach of a treaty but only a material breach (violation substantielle) should bring about the consequences set forth in the Article.

## III. "Material breach"

### The choice of the adjective.

7. The concept of a material breach of a bilateral (para. 1) or of a multilateral (para. 2) treaty and its definition (para. 3) is therefore the basic element of the draft article.

Sir Humphrey Waldock's predecessor as Special Rapporteur on the Law of Treaties, Sir Gerald Fitzmaurice, had in his draft of 1957 limited the right of denunciation to cases of "fundamental breach" which he defined as "a breach of the treaty in an essential respect, going to the root or foundation of the treaty relationship between the parties, and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty." (Fitzmaurice, Second Report, A/CN. 4/107, Y.B.I.L.C. 1957, Vol. II p. 31.) Sir Humphrey Waldock submitted (and the Commission concurred in his conclusion) "that the word 'material' used by some authorities is to be preferred to the word 'fundamental' to express the kind of breach which may entitle the other party to terminate the relationship established by the treaty. In the Special Rapporteur's view the word 'fundamental' might be understood as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an entirely ancillary character." (Waldock, Second Report, Y.B.I.L.C. 1963, Vol. II p. 75)

8. Mr. Verdross claimed that "no objective criterion existed for distinguishing between breaches which were material and those which were not." (Y.B.I.L.C. 1963, Vol. 1 p. 125) At the January, 1966, meetings Mr. Verdross recognized, however, that paragraph 3 had the merit of being the first attempt to define what was meant by "a material breach" of a treaty. (A/CN. 4/SR 831, para. 38.) Mr. Amado, commenting on the adjectives used by successive special rapporteurs ("fundamental", "material") asked what other adjectives could be found to express the idea that the mere breach of a treaty could not bring about its extinction. He admitted that he was at a loss to find an answer. (op.cit. p. 130) No alternative or additional adjective was found. An explanation of the term "material", its definition "for the purposes of the present article" is contained in paragraph 3. The provision of sub-paragraph 2 (c) which is dealt with separately below (paras. 35 ff.) has also a bearing on the concept of "material breach."

9. Non performance as a breach. At the January meetings of the Commission Mr. Briggs put the question whether mere non-performance constituted a breach of a treaty. (A/CN. 4/S.R. 831, para. 52) The question does not seem to have been taken up. In this writer's view the answer would seem to be in the affirmative.

10. Repudiation of the treaty not sanctioned by the draft articles.

Under sub-paragraph 3 (a) "a repudiation of the treaty not sanctioned by the present articles" is a material breach. Under the draft articles there can, of course, be some cases of perfectly legitimate repudiation (Waldock in A/CN.4/SR. 832, para. 3). Examples are a well-founded claim of the invalidity of the treaty based on any of the articles dealing with invalidity (Articles 43 to 50) as fraud, error, coercion, conflict with a jus cogens rule or, under the very provisions of draft Article 57, the termination by State A of a treaty on the ground of its breach by State B. If State B is really guilty of a material breach then the termination (or repudiation) of a treaty by State A is not a material breach of the treaty on the part of State A within the meaning of sub-paragraph 3 (a).

11. The provision of sub-paragraph 3 (a) is hardly of great practical importance, at least from the point of view of the law of treaties as codified in the draft. If State X has repudiated a treaty and State Y terminates it because it considers the repudiation to be a material breach then there exists a consensus between X and Y on the termination of the treaty. In the words of the decision of the Judicial Committee of the Privy Council in The Blonde (1922) 1 A.C. 313: the one State (in our example State Y) accepts the repudiation of the Convention by State X and treats the Convention as no longer binding. It may, of course, be of importance to know whether X or Y is guilty of a material breach of the treaty. This, however, is a question of responsibility or redress which is outside the scope of the draft articles. Similarly, if State Z, a party to a multi-lateral treaty, repudiates that treaty and the other parties by unanimous agreement terminate it in the relations between themselves and that State, i.e. if they expell it from the treaty under sub-paragraph 2 (a) (ii) then there is agreement between all the parties to the effect that Z shall cease to be a party.

12. The "main definition" of "material breach."

The "main definition" of the term "material breach" is in sub-paragraph 3 (b). The two sub-paragraphs (a) and (b) together comprehend the whole definition. (Waldock, Fifth Report on the Law of Treaties, A/CN.4/183/Add. 2 p.18, footnote 9.) Under sub-paragraph (b) of the text approved by the Commission in July 1966 "the violation of a provision essential to the accomplishment of the object or purpose of the treaty" constitutes a material breach. The earlier text read: "the violation of a provision essential to the accomplishment of any of the objects or purposes of the treaty."

13. Critique of the main definition. Some typical situations which may, or may not, come within this definition will be considered in the following paragraphs. A general comment on the drafting of sub-paragraph 3 (b) might, however, be made at this stage. According to its text any violation of a provision essential to the accomplishment of the object or purpose of the treaty is by definition a material breach. Any breach of such a provision, however trivial a breach it may be, is deemed to be a material breach. The adjective "material", standing alone, conveys the idea of the opposite of immaterial, the opposite of trivial. If a legal definition is added, however, which makes every violation of an important provision a material breach the concept of "material breach" is extended beyond what these two words by themselves connote. Such widening of the meaning of the word "material" "for the purposes of the present article" is not desirable and the records of the Commission's proceedings show that this cannot have been the Commission's intention. The question to what extent the problem was solved by the change of wording in July 1966 calls for consideration. (When this paper was prepared the commentary on Article 57 and the records of the 18th Session of the I.L.C. were not available.)

14. The 1963 draft of the article, like the 1966 text, made the qualification of a breach as material dependent exclusively on the character of the provision which had been violated although the definition of the type of provision was then somewhat different from the present text ("a provision which is essential to the effective execution of any of the objects or purposes of the treaty." [Art. 42 (3) (b) of the 1963 text].) The 1963 draft was therefore open to the same observations as the text of 1966. However, Sir Humphrey Waldock's draft of 1963 did take care of this problem by providing that "A material breach of a treaty results from..... (b) a breach so substantial as to be tantamount to setting aside any provision..... (ii) the failure to perform which is not compatible with the effective fulfilment of the object and purpose of the treaty." (Article 20 (2) (b) (ii), YBILC, 1963, Vol. II, p. 73) It is certainly appropriate that only the violation of an essential provision should bring about the right of the other party or parties to terminate or to suspend the treaty. But in addition to stipulating for this basic requirement, it should, in this writer's view, be also provided that only a serious or substantial or important violation should be a condition for the other party's (or parties') remedies under the article. A trivial breach even of an essential provision should not be available as a pretext for denouncing a treaty.

15. Non-performance pursuant to U.N. action. The non-performance of a treaty may be caused by a decision of the Security Council to apply sanctions pursuant to Article 41 of the Charter. Such a non-performance is not a "material breach" within the meaning of Article

57 and does not constitute a ground for the suspension or termination of a treaty. (de Luna in A/CN.4/SR. 831, para. 66). It is submitted that this consequence follows from Article 103 of the Charter because the continued performance of the treaty (e.g. a commercial treaty) would be in conflict with the obligation of the U. N. Member State or States concerned under the Charter (Art. 25) and the obligation under the Charter prevails. If one of the involved States is not a member of the United Nations, then the question of the interpretation of Art. 2, para. 6 of the Charter becomes relevant. This question was discussed by the Study Group at an earlier occasion (see Report on the Meetings held on December 3 and December 4, 1965, p.7 and the Rapporteur's Memorandum No. 1 of November 1965, pp. 8-11). The legal position is more involved if the interruption of economic relations were applied not in implementing a decision of the Security Council, but pursuant to a recommendation of the General Assembly or under a regional arrangement.

16. Provocation. On the question what influence should be attributed to the fact that the breach had been provoked by the earlier attitude of the injured State, Mr. de Luna expressed the view that the provocation extenuated but did not nullify the breach. (YBILC 1963, Vol. I p. 121). Sir Humphrey Waldock said that personally he doubted whether, if there were any provocation on the part of another party, a material breach could properly be said to exist at all (A/CN. 4/SR. 832, para 6). He suggested that the Drafting Committee should be asked to consider, in general terms, the question of the possible contribution by the complainant State to a ground for termination. He pointed out that the problem had already been envisaged in what now is Article 45 (formerly 34) on error, paragraph 2 of which stated that the rule laid down in paragraph 1 did not apply where the complainant State had, by its own conduct, contributed to the error. He suggested that the Drafting Committee should examine whether such articles as Articles 57 (formerly 42) on breach and 59 (formerly 44) on fundamental change of circumstances, should not also contain a clause to deal with the case where the conduct of the complainant State might have been partly the cause of the ground of termination. (ibid.) In regard to the article on fundamental change of circumstances the Government of Pakistan had proposed that changes of the circumstances which have been deliberately brought about or created by one of the parties to the treaty should be excluded from its operation. (A/CN. 4/175, Add. 5, p. 2). The Commission inserted a provision on these lines in its final text of Article 59 (formerly 44) on fundamental change of circumstances which now provides that a fundamental change of circumstances may not be invoked - ".... if the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty." No corresponding rule appears, however, in the Commission's final draft of Article 57.

17. Inter-dependent Treaties. The problem of the separability of treaty provisions arises in connection with many of the provisions of the draft. The general provision devoted to it is Article 41 (formerly Article 46)the application of the principle to the termination and suspension of treaties as a consequence of their breach under draft Article 57, paragraphs 1 and 2 is referred to, but not examined in detail later in this paper. In the present context, i.e. in examining the delimitation of the concept of a material breach, it might be appropriate to recall that Lord McNair, after having stated "that some common-sense limit must be placed upon the unity and indivisibility of the sum total of the provisions of a treaty" pointed out "that, conversely, in special circumstances it may be possible to show that of two separate treaties each was the consideration for the other and that they were intended to be interdependent; and that in that case the breach of one might give rise to a right to abrogate the other." (McNair, The Law of Treaties, 1961, p. 571) Mr. de Luna also drew attention to this problem. It might happen, he said, that the denunciation of one treaty was lawful because of the breach of another. That situation could arise where two treaties were so closely inter-related that the breach of one frustrated the purpose and object of the other. (YBILC 1963 Vol. II, p. 121 Sec. 79).

18. The following example of inter-related conventions may be given from the history of the United Nations attempts to legislate in the field of freedom of information: The United Nations Conference on Freedom of Information, Geneva, 1948, prepared: 1) the Draft Convention on the Gathering and International Transmission of News; 2) the Draft Convention concerning the Institution of an International Right of Correction; and 3) the Draft Convention on Freedom of Information. (Final Act of the Conference, U.N. Publication Sales No. 1948. XIV.2, E/CONF.6/79). The States with highly developed news media were greatly interested in the draft listed as 1) above because it purported to improve the process of news gathering and the status of foreign correspondents, while the countries with less developed news media expected a protection of their interests from the draft listed under 2). In 1949, the General Assembly decided to amalgamate drafts 1) and 2) and approved them under the title of draft Convention on the International Transmission of News and the Right of Correction. (G.A. res. 277 (III)C of May 13, 1949). This was a clear demonstration of the fact that the one set of provisions was the consideration for the other set of provisions. Moreover, the General Assembly gave expression to the interdependence of the amalgamated draft Convention with the third of the drafts listed above by deciding that the former shall not be open for signature until the General Assembly has taken definite action on the draft Convention on Freedom of Information. (G.A. res. 277 (III)A). By 1966 this definite action has not yet been taken; the General Assembly is still seised of the draft. In 1952 the General Assembly separated

the provisions on the international right of correction from the amalgamated convention it had approved in 1949 and opened them for signature as a separate instrument. (Convention on the International Right of Correction, G.A. res. 630 (VII) of December 16, 1952). Because the quid pro quo is missing this instrument has been ratified only by very few States. If at any time in the future the scheme of the three instruments as conceived in 1948 - 1949 should materialize, it would certainly be appropriate to attach to the material breach of one of the treaties the consequences foreseen in draft Article 57 in regard to all of them.

19. The I.L.C. draft does not deal with the problem of interdependent treaties and its wording seems to exclude the application of the rules of Article 57 to such a situation ("A material breach of a ..... treaty entitles ..... to invoke the breach as a ground for terminating the treaty or suspending its operation....")

20. Violation of Provisions of an Ancillary Character. As already stated (paragraphs 9 ff.) Article 57 does not define "material breach" except by the adjective "material", the reference to an unjustified repudiation (para. 3(a)) and the very general statement that the treaty provision the violation of which is invoked must be "essential to the accomplishment of the object or purpose of the treaty." Beyond that the text of the article throws no specific light on the concept. Commission's commentary on the 1963 draft (Article 42) emphasizes that the term "material" covers not only the violation of a provision directly touching the central purposes of the treaty. Other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character. (para 8 of the commentary on Art. 42 in the 1963 report of the I.L.C.) (At the time of this writing the final commentary on the 1966 text of draft article 57 is not yet available.) Neither the text nor the commentary give examples thus leaving the interpretation and application to State practice and to the jurisprudence of international tribunals.

21. Sir Humphrey Waldock's 1963 draft was to the effect that a material breach of a treaty results from "..... a refusal to implement a provision of the treaty binding upon all the parties and requiring the submission of any dispute arising out of the interpretation or application of the treaty to arbitration or judicial settlement, or a refusal to accept an award or judgement rendered under such a provision." (YBILC 1963, Vol.II. p. 73). Mr. Rosenne pointed out that it would be preferable to speak of complying with rather than accepting an award or judgment (Y.B.LL.C. 1963, Vol. I p. 126, para. 58.) However, the Commission's draft does not contain an express provision on this subject. It is

arguable that the refusal to implement a binding provision of the treaty to submit a dispute to arbitration or judicial settlement and, still more, the refusal to comply with the award or judgment violates a provision essential to the accomplishment of the object or purpose of the treaty. It would be preferable, however, to state so expressly in the text of the draft convention. [The problem commented upon in this paragraph, i.e. the consequences of the violation of an arbitration or judicial settlement clause is, of course, different from the question dealt with in the present Article 62 (formerly Art. 51) concerning the procedure to be followed in cases of invalidity, termination etc. of a treaty.]

IV. The Rights of the Innocent Party or Parties.

22. Sir Humphrey Waldock's 1963 draft of the article started with the statement that "the breach of a treaty by one party does not of itself have the effect of terminating the treaty or of suspending its operation." (YBILC 1963, Vol. II, p. 72, Art. 20 (1) (a).) While the paragraph does not appear in the texts adopted by the Commission in 1963 and 1966 respectively, there is no doubt that it expresses a rule of law which is, by implication, also laid down in the Commission's texts. A material breach entitles, however, the other party or parties to invoke the breach as a ground for terminating the treaty or suspending its operation. The innocent party or parties do not have a discretionary right to terminate the treaty, but they are merely entitled to invoke the breach if it was a material one. (Mr. Gros, YBILC 1963, Vol. I, p. 246, para. 110). The details of the application of the principle are different in the case of bilateral treaties (paragraph 1) and in the case of multilateral treaties (paragraph 2).

23. Before entering upon a description of the regulation of these two situations, it is in order to comment on the phrase "to suspend the operation of the treaty" or "suspending its operation" which is one of the remedies which the article grants in the case of the breach of both bilateral and multilateral treaties. The Special Repporteur stated that "suspension would involve non-application of the clause in question until it became clear that the defaulting State was ready once again to apply the whole of the treaty." (op.cit. p. 132, paragraph 35). The consequences of the suspension of the operation of a treaty are defined in Article 68 (formerly 54) to the effect that unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present articles:

(a) relieves the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of suspension;

(b) does not otherwise affect the legal relations between the parties established by the treaty. During the period of the suspension, the parties shall refrain from acts tending to render the resumption of the operation of the treaty impossible. The 1963 commentary on Article 54 (para. 3) explained that the very purpose of suspending the operation of the treaty rather than terminating it was to keep the treaty relationship in being.

The I.L.A. Restatement, 1965 edition, Sec. 158, p. 484 (text in paragraph 46 below) permits suspending the performance of obligations towards the violating party, so long as the latter is in violation. Whether the difference between "termination" and "suspension of the operation" of a treaty is as fundamental in practice as it appears to be in theory can be doubted. Il n'y a rien qui dure comme le provisoire.

24. Bilateral treaties. In the case of the breach of a bilateral treaty the other party has the choice of terminating the treaty or suspending its operation. (Art. 57(1)). In the case of the material breach of a multilateral treaty by one of the parties paragraph 2 of Article 57 distinguishes between the rights of:

(a) the other parties by unanimous agreement

(b) of an individual party specially affected by the breach and

(c) of any other individual party in the case of a particularly qualified breach.

25. The other parties by unanimous agreement. The other parties are entitled by unanimous agreement to suspend the operation of the treaty or to terminate it either:

(i) in the relations between themselves and the defaulting State, i.e. to expell the defaulting State from the community of States parties to the treaty, or

(ii) as between all the parties, i.e. to bring the whole treaty relationship to an end.

Several members of the Commission expressed repeatedly misgivings concerning the application of the latter provision to general multilateral treaties in the maintenance of which the international community had a great interest. To take account of the concern of these members to some extent at least, Article 40 (Article 30 bis in the January, 1966 report A/CN.4/184) was included. (See statement by Waldock in A/CN.4/SR.482 para. 32). It deals with "obligations under other rules of international law" and provides:

"The invalidity, termination, or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the present articles or of the terms of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it is subject under any other rule of international law."

26. A party specially affected. The provision of paragraph 2(b) that a party specially affected by the breach is entitled to invoke it as a ground for suspending the operation of the treaty in the relations between itself and the defaulting State was inserted in 1966 as a consequence of comments by Governments, including the comment by the United States representative on the Sixth Committee. The United States and Netherlands Governments had proposed to grant the right to suspend the operation of the treaty to a party "whose rights or obligations are adversely affected by the breach" (A/C.6/SR. 784; see also U. S. Government comments in A/CN.4/175 p. 188 and Netherlands comments in A/CN. 4/175, add. 1 p. 20). The United States and Netherlands suggestions were opposed by several members of the commission, including Mr. Briggs and Mr. Rosenne (A/CN.4/SR.831, paragraphs 47 and and 24 ff. respectively) inter alia on the ground that all the parties to a multilateral treaty had the same interest with regard to any violation of the treaty. The Special Rapporteur (A/CN.4/183 add. 2 p. 22) had explained that the Commission had assumed that since the provision authorizes suspension of the operation of the treaty only bilaterally as against the offending State, only a party whose own interests are affected by the breach would be likely to wish to exercise the right provided for in what now is paragraph 2(b). However, he went on to say, if it is really thought that the right provided for in that paragraph may be abused by a party not itself affected but anxious to find a pretext for suspending the operation of the treaty vis à vis the particular offending State, little objection is seen to limiting the provision specifically to parties whose interests are affected by the breach. The Special Rapporteur therefore proposed to say "any other party whose interests are affected by the breach". Eventually, the drafting Committee proposed the present text "a party specially affected by the breach", a formula which proved to be generally acceptable. Mr. Rosenne found it "quite satisfactory" (A/CN.4/SR. 842 para. 7).

27. The right of a party specially affected by a breach to suspend the operation of a multilateral treaty in the relations between itself and the defaulting State raises, in this writer's view, a very serious problem which did not, of course, escape the attention of members of the I.L.C. This writer is not sure, however, whether the Commission solved it in a completely satisfactory manner. If

a provision of a multilateral treaty has the character of jus cogens then the problem we are about to discuss does not arise, provided that the peremptory character of the rule is established beyond challenge. If a rule cannot be derogated from by treaty (Article 50, formerly 37) then it stands to reason that it cannot be set aside by suspending a treaty in which the peremptory rule happens to be embodied. The problem does not arise either if the party affected by the breach of the multilateral treaty has the duty to fulfill an obligation embodied in the treaty also under any other rule of international law, not necessarily a peremptory rule. (Article 40 referred to in paragraph 25 above).

28. The problem arises, when the general multilateral treaty concerned imposes on States parties obligations for which it is the only source and which do not exist apart from the treaty.

Paragraph 2(b) applies to all multilateral treaties. The Commission did not accept for the purposes of the present Article 57 any distinction between "law-making treaties" on the one hand and treaties having the character of contracts on the other. In particular it did not accept the distinction advocated by Sir Gerald Fitzmaurice in his second Report on the Law of Treaties of 1957 between the following two categories of treaties: His first category comprised treaties where neither juridically nor from the practical point of view the obligation of any party is dependent on a corresponding performance by the others, where the obligation has an absolute rather than a reciprocal character; where the obligation is towards all the world rather than towards particular parties. Sir Gerald's second category consisted of treaties which create obligations which are not absolute and are essentially bilateral and reciprocal in application. In regard to cases coming within the first category: law-making treaties (traités lois), regime-creating treaties, treaties involving undertakings to conform to certain standards, Fitzmaurice proposed that a breach can never constitute a ground of termination or withdrawal by other parties and cannot ever justify non-performance of the obligation of the treaty in respect of the defaulting party or its nationals, vessels etc. (YBILC, 1957, Vol. II p. 31, para. 19(1)(iv). He explained that "a fundamental breach by one party of a treaty on human rights could neither justify termination of the treaty nor corresponding breaches of the treaty even in respect of nationals of the offending party*. The same would apply as regards the obligation of any country to maintain certain standards of working conditions or to prohibit certain practices in consequence of the conventions of the International Labor Organization; or again under maritime conventions as regards standards

*Italics in the original.

of safety at sea." (op. cit. p. 54, paragraph 125).

29. Mr. Bartos expressed the view that the so-called traité lois had the force of international custom. Article 42 (now 57) was perhaps too liberal to be applicable to treaties of that kind. The humanitarian conventions formed part of the legal conscience of nations; surely, he said, a State could not be free to suspend the application of such conventions just because another State had ceased to apply them. A very serious question was involved, and perhaps the substance should prevail over the form. (A/CN.4/SR. 832, para. 22). Sir Humphrey Waldock stated it would clearly not serve any good purpose for the injured State to suspend the operation of a particular clause of a humanitarian convention with respect to nationals of the defaulting State; the effects of the illegality would then be visited on innocent persons.*

30. It is believed that the Commission did not altogether avoid the danger of which its distinquished members were clearly aware. In the present text of Article 57 the danger is lessened, but not completely absent. The requirement of unanimity of the "other parties" stipulated in sub-paragraph 2(a) affords strong protection against a frivolous suspension or termination of a humanitarian treaty. The requirement that the single party intending to have recourse to a bilateral suspension under sub-paragraph 2(b) must be specially affected by the breach reduces the incidence of such suspensions of humanitarian conventions considerably but does not eliminate them altogether. The fact that peremptory rules of international law and rules of customary law existing independently of the treaty cannot be evaded by the suspension of the operation of the treaty (as stated in paragraph 27 supra) narrows the field of application of sub-paragraph 2(b) further. But when all is said, there still remains many cases where, in Waldock's phrase, the effects of the illegality committed by one State can be visited on innocent persons.

31. In Article 1 of the European Convention on Human Rights of 1950 the High Contracting Parties undertake to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Similarly, in Article 2 of the draft United Nations Covenant on Civil and Political Rights as prepared by the Third Committee of the General Assembly (Annex to A/6342) each State Party will undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in that Covenant without distinction of any kind,

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* Italic added

such as race, color etc. By the International Convention on the Elimination of All Forms of Racial Discrimination each State Party undertakes to prohibit and bring to an end racial discrimination by any persons, group or organization (Art. 2) and to assure to everyone within its jurisdiction effective protection and remedies. If there were agreement among Governments and among writers that these two conventions and the draft Covenant embody rules of customary international law or even peremptory rules of general international law then for the reasons given in paragraph 27 supra no problem would exist. Without wishing to enter into the merits of this question, it must be said that the proposition that the two conventions and the draft Covenant codify only rules of law which exist apart from them is, to say the least, controversial. In the view of those at least who do not accept this proposition a party specially affected by the breach of one of these instruments can invoke the breach as a ground for suspending its operation in the relations between itself and the defaulting State. This is what the text of para. 2(c) of Article 57 says. It is obvious that such a suspension is contrary to the spirit of the instrument. The European Commission on Human Rights stated in the well-known case of Austria v. Italy (Yearbook of the European Convention on Human Rights, Vol. 4, p. 116):

> "that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual interests, but to realize the ideals and the aims of the Council of Europe, as expressed in its statute, and to establish a common ordre public of the free democracies of Europe."

The obligations undertaken by the Parties, the Commission went on to say, are essentially of an objective character, being designed to protect the fundamental rights of individuals from infringement by any of the Contracting Parties, and not to create subjective and reciprocal rights between the Contracting Parties themselves. When a Party refers an alleged breach of the Convention to the Commission, it is not to be regarded as exercising a right of action for the purpose of enforcing its own rights but rather as bringing before the Commission an alleged violation of the ordre public of Europe. (ibid.) There is no doubt that mutatis mutandis the situation will be analogous when the Racial Discrimination Convention enters into force or when the draft Covenant becomes valid law.

32. Paragraph 2(b) requires, of course, that the party suspending the multilateral treaty must be "specially affected." Its general interest in the maintenance of the standards established

by a humanitarian convention, its right to see, e.g., the ordre public of Europe upheld, is not sufficient. This general interest may be the basis, as it is under the European Convention, for demanding specific performance of the obligation undertaken by the defaulting State, but it does not suffice to justify the bilateral suspension of the operation of the Convention because of a breach. However, a particular State may, in addition, be also specially affected by the breach, e.g. because its nationals were the victims of the breach. It is even arguable that in certain circumstances a State may be specially affected by the breach of a human rights convention the victims of which were not its own nationals but the nationals of the defaulting State itself. Situations where this consequence can occur are rare and call for very careful scrutiny. They do exist however, e.g. when an international treaty grants to State A locus standi in matters of nationals of State B who are ethnically related to the population of State A, as e.g. the provisions agreed upon between the Austrian and Italian Governments on September 5, 1946 for the protection of the German-speaking inhabitants of the Bolzano Province and of the neighboring bilingual townships of Trento Province (Annex IV and Article 10(2) of the Peace Treaty with Italy of February 10, 1947).

33. If - this is an entirely hypothetical case which is here presented in order to illustrate the implications of sub-paragraph (b) of paragraph 2 - one Party to the European Convention were guilty of a material breach of the Convention and this breach were of a character that it "specially affected" another party, the latter would by virtue of the sub-paragraph be entitled to suspend the operation of the Convention in the relations between itself and the former State. The fact that it has undertaken to secure the rights defined in the Convention to everyone within its jurisdiction, irrespective of nationality, and that the Convention has established a common ordre public of the free democracies of Europe would not save the situation because the sub-paragraph authorizes the suspension of the operation of the Convention in whole or in part, i.e. including the provision of Article 1 (quoted in paragraph 31 supra) and the ordre public derived from the Convention as a whole. It is necessary, therefore, to insert a proviso in draft Article 57 which would exclude these entirely undesirable and certainly not intended consequences.

34. To draft such a proviso is admittedly very difficult. It could be provided that sub-paragraph 2(b) does not apply to a Convention in regard to which it is established that the parties did not intend to admit the suspension of its operation as a consequence of its breach. This would be an elaboration and extension of the provision of paragraph 4 of Article 57 according

to which "the foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach." It is doubtful, however, whether this language would be sufficient because most of the humanitarian conventions of this type, including the European Convention on Human Rights and the International Convention on the Elimination of all Forms of Racial Discrimination, but not the draft Covenant on Civil and Political Rights contain denunciation clauses. (For a more detailed treatment of these clauses see Memorandum No. 3 on jus cogens of February, 1966, pp. 20 ff.). These humanitarian treaties not only do not expressly provide that they cannot be suspended because of a breach - if this were so the problem might be considered covered by paragraph 4 of Article 57 - but it is difficult to contend that the parties to a Convention which can be denounced without cause (Art. 65 of the European Convention; Art. 21 of the Racial Discrimination Convention) intended it not to be liable to suspension on the ground of a material breach by a Party. The A.L.I. Restatement of the Foreign Relations Law of the United States, 1965 edition Sec. 158, p. 484 (for the text see paragraph 46 below) qualifies in general the right to suspend or terminate an agreement by the phrase "except as otherwise provided in the agreement". This formula though stronger than Art. 57(4) would probably not be sufficient either, for the reasons just given, in regard to humanitarian treaties providing for the unlimited right to denounce them.

It might therefore be preferable to proceed, in drafting the proviso, from the formulae suggested by Fitzmaurice in 1957 (see paragraph 28 supra) and expressly exempt from the operation of sub-paragraph 2(b) treaties on human rights, world health conventions, labor conventions and maritime conventions on standards of safety at sea. A more sweeping exemption on these lines would, however, also create considerable problems. Sir Gerald's two categories of treaties and treaty obligations are not as distinct and watertight as appears on first sight. There is an element of reciprocity, e.g., in the very idea of international labor legislation as witnessed by the Preamble to the Constitution of the International Labor Organization according to which the parties were moved to establish the Organization not only "by sentiments of justice and humanity" but also by the consideration that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries." If - this, again is an entirely hypothetical case - after 1919 a major industrial Power had repealed its hours of work legislation and a working week of, say, 72 or more hours had been introduced, it is debatable, to say the least, whether the other parties to the Hours of Work (Industry) Convention, 1919, could have been expected to continue to observe it in spite of

the material breach which had occurred.* There is also the difficult task of defining properly these exempted types of treaty.

While this Rapporteur is not, at present, in a position to suggest a completely satisfactory text for providing exceptions from sub-paragraph 2(b), he wishes again to stress the desirability of solving the serious problem which the present text poses.

35. The suspension of the operation of a treaty by a party because the material breach radically changes the position of every party. Sir Humphrey Waldock's 1963 draft contained a provision that "if a material breach of a treaty by one or more parties is of such a kind as to frustrate the object and purpose of the treaty also in the relations between the other parties not involved in the breach, any such other party may, it it thinks fit, withdraw from the treaty". (YBILC 1963, Vol. II, p. 73, draft Article 20, para. 4). Mr. Castrén proposed a clause serving the same purpose. He suggested that in the case of a material breach of a multilateral treaty, any other party may "in the relations between itself and the other parties withdraw from the treaty, if the breach is of such a kind as to frustrate the object and purpose of the treaty." (YBILC 1963, Vol. I p. 120, para. 67). These proposals were, however, not embodied in the Commission's 1963 draft of the article. The question Waldock and Castrén had intended to regulate because of very topical interest a few weeks after the 1963 session of the Commission (May 6 to July 12, 1963) when, on August 5 of the same year, the Test Ban Treaty was signed. The Test Ban Treaty raised the following problem:

> If, in the hypothetical situation of a material Soviet violation of the Treaty, the United States acquires the right to suspend the performance of its own reciprocal obligations under the treaty vis-à-vis the Soviet Union, it is by no means a self-evident consequence that the United States is also freed from its undertaking under the treaty vis-à-vis other innocent parties, say, India, Ghana, or Mexico. However, if, in the hypothetical case, the United States continued to be bound by the prohibitions of the treaty for at least three months (Article IV of the Treaty) vis-à-vis India, Ghana or Mexico, then its right to suspend the operation of the treaty in its relationship with the

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* See Schwelb in 58 A.J.I.L. pp. 665-666 (1964).

> Soviet Union would be a shell. The situation would, of course, be the same if the United States were the defaulting party and the Soviet Union the innocent party."*

It is believed that the suggestions made in the Sixth Committee of the 1963 session of the General Assembly by the United States (A/C.6/SR. 784; see paragraph 26 supra) and by other delegations (Ghana, A/C.6/SR. 791) were intended to solve this difficulty.

36. The issue was squarely presented by the Governments of Canada and Sweden in their Comments (A/CN.4/175/Add.3, April 15, 1965, and Add. 2, April 12, 1965. The Government of Canada pointed to the implication of the 1963 draft that as regards multilateral treaties of a sort under which the States parties agree to refrain from some action or other, in the case of a flagrant violation by one party no other party would have any recourse on its own. It could not suspend its obligations vis-à-vis the violator (by doing whatever it had agreed to refrain from doing) without violating its own obligations to the other parties. Canada suggested amending the article in such a way that where there has been a violation of a treaty of the described sort, the legitimate right of suspension by an individual party need not depend on a consensus, but may be exercised ergo omnes. The Special Rapporteur (Fifth Report, A/CN.4/183/Add. 2, Observations and Proposals, paragraph 5) observed that the exception suggested by the Canadian Government appeared to be too widely stated. The Government of Sweden noted that the 1963 draft only entitled a party to a multilateral treaty to suspend or terminate the treaty in relation to another party which has violated it or to seek the agreement of the other parties in order to free itself wholly from the treaty. Circumstances might be such, however, that the State ought to be allowed even to terminate or suspend the treaty unilaterally, e.g. if the participation of the State committing the breach was an essential condition for the adherence of the other State (l.c.p.8). The Special Rapporteur suggested that the Commission re-examine this point in the light of the Government comments and submitted as a basis for discussion a revised version of his 1963 draft of a proviso reading as follows:

> "Paragraph 2(bis). Notwithstanding paragraph 2, if the provision to which the breach relates is of such a character that its violation by one party frustrates the object and purpose of the treaty generally as between all the parties, any party may suspend the operation of the treaty with respect to itself or withdraw

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*Schwelb, "The Nuclear Test Ban Treaty and International Law," 58 A.J.I.L. at p. 664 (1964).

(Waldock, Fifth Report, A/CN.4/183/Add. 2, Observations and Proposals, paragraphs 6 and 9).

37. At the January, 1966 meetings of the Commission, one member (Mr. Rosenne) felt that the new paragraph 2(bis) introduced a highly subjective element. The problem raised by the Canadian Government should in his view be covered by the provisions of what now is Article 59 (fundamental change of circumstances) (A/CN.4/SR.831, paragraph 34). Other members disagreed with this view (Mr. Castrén, l.c. para. 42, Mr. Cadieux(Canada), l.c. para. 61). This writer respectfully agrees with the latter opinion. The attempt to cover a qualified breach of a treaty by the clause rebus sic stantibus would make of the clause a jack-of-all-trades, a concept so wide that it would become unnecessary to deal with more specific grounds for termination or suspension such as any material breach (Article 57) or supervening impossibility of performance (Article 58). This would run counter to the need, in the interest of the security of treaties, to confine the doctrine of rebus sic stantibus within narrow limits and to regulate strictly the conditions under which it may be invoked. (See e.g. the Commission's commentary on Article 44 of the 1963 draft, paragraph 1).

38. This is not to say that the situation for which paragraph 2(c) purports to supply the remedy does not have many features in common with the situation regulated by Article 59 (fundamental change of circumstances). Mr. Castrén drew attention to what might be characterized as a situation akin to, but not identical with, the facts which make the doctrine of rebus sic stantibus applicable. (A/CN.4/SR.842 para. 9). According to him there was the danger that under the text of paragraph 2(c), a party would lose its rights but would retain its obligations. He raised the question whether the defaulting party would still be bound by the treaty, the operation of which another party has suspended with respect to that other party. He asked whether the defaulting party would have the right to withdraw from the treaty. The text gives the right to suspend the treaty to "any other party" i.e. to every party except the party which has committed the material breach. The text does not support the view that the defaulting party would be entitled to suspend its operation, still less to withdraw from it. Vis-à-vis the party which has exercised the right to suspend the operation of the treaty the treaty is, of course, suspended also as far as the defaulting State is concerned. In the relationship to third parties which have acquiesced in the breach the obligations of the defaulting State would apparently remain in force. The situation may, of course, be such that the defaulting State and the State which has applied paragraph 2(c) are the most important participants in the treaty and that when their mutual rights and

obligations are suspended the whole treaty régime collapses. This collapse would amount to a fundamental change of circumstances. It does not seem, however, that the defaulting State would be entitled to invoke it, as Article 59(2)(b) prevents such invocation "if the fundamental change is the result of a breach by the party invoking it either of the treaty or of a different international obligation owed to the other parties to the treaty." The problem to which Mr. Castrén drew attention certainly exists.

39. Mr. Briggs made two comments on the provisions of draft paragraph 2 (bis). He said they went much too far and he could not support their inclusion; they appeared to establish a right to suspend the operation of the treaty by unilateral action. Mr. Briggs' second comment was that the paragraph raised a further difficulty through its reference to "the object and purpose of the treaty". It was difficult to see the difference between that criterion and the one laid down in the definition of "material breach" in paragraph 3(b) which also speaks of "a provision essential to the accomplishment of the object or purpose of the treaty". (A/CN.4/SR.831, paragraphs 50 and 51). In regard to the second point, Mr. Briggs' intervention appears to have been successful. In the final text of sub-paragraph 2(c) entirely different phraseology is used.

40. Mr. Yasseen (A/CN.4/SR.831 para. 57) supported by Mr. Briggs (A/CN.4/SR.842, paragraph 20) did not think that provision should be made for so far-reaching a step as withdrawal, even in the circumstances contemplated in the paragraph. It would be sufficient to authorize the State concerned to declare that it was suspending the operation of the treaty so far as it was concerned. Eventually he moved the deletion of the words "or to withdraw from the treaty" from the draft as submitted by the Drafting Committee and his amendment was adopted by 12 votes to 1. (A/CN.4/SR.842, paragraphs 2, 13, and 29) As a consequence, in the circumstances contemplated in Article 57(2)(c) only suspension of the operation of the treaty, not withdrawal from it, is authorized.

41. Sub-paragraph 2(c) is intended to apply to such treaties as disarmament treaties, in which the rights and obligations were so intimately connected that if one State violated an obligation, the breach would immediately affect all the others. (Waldock in A/CN.4/SR.832 para. 8). It is intended to meet the very special case of certain treaties for which paragraph 2(b) [which authorizes suspension only between the specially affected State and the defaulting State, but not suspension ergo omnes] would not provide a proper safeguard. (idem in A/CN.4/SR.832, para. 14). In the case of paragraph 2(c) unanimous agreement

of the innocent parties is not required. (Ago, l.c. paragraph 19.)

42. Under the present text of paragraph 2(c), any party other than the defaulting party may suspend the operation of the treaty with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty. The stress is on the character of the treaty and the type of treaty to which the provision is mainly to apply is a disarmament treaty or a nuclear test ban treaty in its capacity of a disarmament treaty. The Test Ban Treaty of 1963 is not necessarily and certainly not exclusively a disarmament treaty as it does not prohibit underground testing, stockpiling and the use in war of nuclear weapons. On the other hand, it was, according to its Preamble, concluded by the parties "desiring to put an end to the contamination of man's environment by radio-active substances" so that it is also very much akin to a world health or human rights treaty.* Mr. Castrén gave as a further example the case of a treaty of demilitarization and neutrality that was accompanied by an international guarantee. He implied that if the guarantee ceased to exist because the guarantors had not complied with their obligations, the territorial State was relieved of the obligations to comply with the demilitarization clauses (A/CN.4/SR.842, paragraph 21).

43. In paragraphs 13 and 14 supra the comment was made that the existence of a "material breach" is made dependent on the importance of the violated provision, and not also on the importance of the violation itself (paragraph 3(b). The same applies mutatis mutandis to the definition of that qualified material breach which authorizes any party (other than the defaulting party) to suspend the operation of the treaty with respect to itself (para. 2(c)). Here, too, the stress is exclusively on the character of the treaty, not also on the character of the breach.

44. The separability of treaties. The question of the separability of treaty provisions is of great relevance for the whole of the law of treaties and is treated comprehensively in Article 41 (formerly 46). It is not proposed to deal with it in detail in the present report. The question of separability is of particular importance in connection with termination and suspension of a treaty as a consequence of a breach. Article 41 refers in its paragraph 2 to Article 57.

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* Schwelb, op, cit., p. 666.

45. The treatment of the problem of separability in the various provisions of Article 57 is not uniform. The Study Group will recall that attention to this fact was drawn at its meetings on March 11 and 12, 1966 (see page 14 of the Report on those meetings relating to the then Article 42). The phrase "in whole or in part" is contained in paragraph 1 of Article 57, dealing with bilateral treaties, and in paragraph 2(b) which provides for the bilateral suspension of a multilateral treaty by a party specially affected by the breach. The right to suspend or to terminate "in whole or in part" is not spelled out in paragraph 2(a), which deals with suspension or termination by unanimous agreement of all the innocent parties and in paragraph 2(c) which provides for the special cases where a unilateral suspension by one party ergo omnes is authorized. At the meetings of the Study Group in March, 1966 it was said that the differences among the various provisions of Article 57 (then Article 42) on the separability question were probably due to a drafting oversight. As the records of the 18th session of the L.L.C. are not yet available, the correctness of this assumption cannot yet be corroborated. The differences might conceivably have as their reason the fact that the Commission supports the possibility of severance of treaty provisions in regard to bilateral relationship (bilateral treaties, para. 1, and bilateral suspension of multilateral treaties, para. 2(b)) and does not favor it in situations where all parties to a multilateral treaty are involved (para. 2(a) and 2(c)), when it seems to prefer an all-or-nothing solution. However, it might be desirable to distinquish between the two sub-items of paragraph 2(a). If the other parties by unanimous agreement decide to suspend or to terminate the treaty as between all the parties (para. 2(a)(ii)) then it might be appropriate, as the Commission seems to intend, to apply the radical measure to the whole treaty. The requirement of unanimity is a guarantee against this measure being decided upon lightly. If the other parties proceed less radically, i.e. only to termination or suspension in the relations between themselves and the defaulting State, then the greater flexibility of doing so in regard to either the whole or only a part of the treaty might be appropriate.

46. Comparison with the A.L.I. draft. The American Law Institute's Restatement of the Foreign Relations Law of the United States, 1962, as revised in 1964 and 1965, 1965 edition, p. 484 contains the following provision on the subject-matter of draft Article 57 of the I.L.C. draft:

> § 158. Violation of Agreement
> (1) Upon violation of an international agreement, any aggrieved party may, within a reasonable time and except as otherwise provided in the agreement

(a) suspend performance of its obligations towards the violating party so long as the latter is in violation, if the violation and suspension involve corresponding provisions or the suspension is otherwise reasonably related to the violation,

(b) terminate as between itself and the violating party a separable part of the agreement that includes the obligations violated and obligations of the aggrieved party clearly intended to be their counterpart, or

(c) terminate the entire agreement as between itself and the violating party if the violation, considered in relation to all the terms of the agreement and the extent to which they have been performed, has the effect of depriving the aggrieved party of an essential benefit of the agreement.

(2) The exercise of the rights stated in Subsection (1) does not deprive the aggrieved party of the claim for violation of international law that accrues to it as a result of the violation of the agreement and that may be adjudicated in an appropriate forum as indicated in Sec. 3 (1) (a).

It will be noted that the A.L.I. draft differs in several points from the I.L.C. draft.

47. The most fundamental difference appears to be the fact that the A.L.I. draft does not contain counterparts to Article 57 (2) (a) (ii) and 2(c), the provisions which authorize the suspension or termination of a treaty as between all the parties and the suspension by one party with respect to itself ergo omnes respectively. The rules formulated in Sec. 158 (1) (a), (b), and (c) of the A.L.I. draft provide only for suspension of performance or termination bilaterally between the aggrieved party and the violating party.

48. The rule expressed in the A.L.I. draft by the words "within a reasonable time" in the introductory phrase of the A.L.I. draft is, in the I.L.C. draft, taken care of by its general provision on the international law analogue of the doctrine of estoppel, Article 42 (formerly 47) (Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty.") Draft article 42 provides, inter alia, that a State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles .... 57 ... if, after becoming aware of the facts: ..... (b) it must by reason of its conduct be considered as having acquiesced, as the case may be, .... in its [the treaty's] maintenance in force or in operation." In formulating Article 42, the Commission intentionally avoided the use of such municipal

law terms as "préclusion" or "estoppel". (Commentary on Article 47 of the 1963 draft, para. 5).

49. The phrase "except as otherwise provided in the agreement" in the introductory clause of the A.L.I. draft is very pertinent indeed and preferable to paragraph 4 of Article 57. As indicated in paragraph 34 a provision on similar lines might protect to some extent the security of multilateral humanitarian conventions against destruction of their value for the international community, although it might not be sufficient to cover the cases of Conventions which expressly provide for the right to denunciation. In any event, the intention of contracting parties to establish an international standard, an international ordre public, in certain fields should be respected and not over-ridden by the codification of the law of treaties.

50. The A.L.I. draft's approach to the question of separability of treaty provisions differs from that of Article 57 of the I.L.C. draft. The latter leaves, in paragraphs 1 and 2(b), the choice between the suspension and termination of the whole treaty or of part only of the treaty to the aggrieved party, and seems to exclude partial termination or suspension altogether in the cases contemplated in subparagraphs 2(a) and (c) (see paragraph 45 above). The A.L.I. draft seems to exclude the discretion of the aggrieved party and to make the choice dependent on objective criteria. It leans in favor of terminating separable parts of the agreement where such parts objectively exist and it subjects the termination of the entire agreement to the more exacting conditions of its Sec. 158 (1) (c).

51. Paragraph (2) of Sec. 158 of the A.L.I draft states that the exercise of the rights to suspension or termination by the aggrieved party does not deprive that party of the claim for violation of international law that accrues to it as a result of the violation of the agreement. For the reason, explained by I.L.C. particularly in its 1964 report (paragraph 18), the Commission decided to exclude from its codification of the law of treaties matters related to the topic of State responsibility and to take them up when it comes to deal with that topic itself. In 1963, the Commission included, however, a specific reservation on this matter in Article 26, paragraph 5 (formerly Article 63 paragraph 5) which article in the 1966 draft is entitled "Application of successive treaties relating to the same subject-matter". The provision reads as follows:

> "5. Paragraph 4 [stating the law for the case when the parties to the later treaty do not include all the parties to the earlier one] is without prejudice to

> Article 37 [agreements to modify multilateral treaties between certain of the parties only] or to any question of the termination or suspension of the operation of a treaty under Article 57 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

In addition to this clause which covers only the case of a breach of a treaty by the conclusion and application of another treaty, the Commission inserted in 1966 a new article (Article 69) on "Cases of State succession and State responsibility" which is a general saving clause in regard to questions of responsibility arising from breach of a treaty. Article 69 reads as follows:

> "The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State."

52. The last clause of Sec. 158(2) of the A.L.I. draft refers to the problem of international adjudication. This is a question which is outside the scope of the present report. It has already been the subject of papers submitted to the Study Group at an earlier occasion by Professor James F. Hogg in Memorandum No. 4 and by this writer in Memorandum No. 3. The subject was discussed at the March, 1966 meetings of the Group. In the 1966 I.L.C. draft it is treated in Article 62 (formerly 51).

## V. Concluding Observations

53. Draft Article 57 is a necessary provision. Its main content conforms to general principles of law and its concrete provisions, as they have emerged from the deliberations of the International Law Commission, are equitable, well drafted and clear.

In the present memorandum, attention has been drawn to a few points where improvements of the existing text would appear to be desirable. Of these, the following appear to be the most important: In the definition of "material breach" in paragraph 3(b) the character of the violated provision and not also the character of the violation itself is made the exclusive criterion. The same applies mutatis mutandis to the formulation of the requirement for the applicability of paragraph 2(c).

The question to what extent the breach of an ancillary provision, e.g. of an arbitration clause is a material breach might

possibly be clarified in the text of the article.

Further attempts should be made to protect general multilateral treaties, in particular humanitarian conventions, against the adverse affect which sub-paragraph 2(b) and possibly also sub-paragraph 2(c) might have on their security.

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THE AMERICAN SOCIETY OF INTERNATIONAL LAW

Study Group on the Draft Articles

on the Law of Treaties

Report on the Meetings held
on March 11 and 12, 1966

By the Rapporteur

## Draft Articles on Peremptory Norms of International Law
[Articles ~~37~~ 50 and ~~45~~ 61]

The Study Group had been furnished with a memorandum on these two articles prepared by the Rapporteur [Memorandum No. 3, February 1966.] In regard to the Rapporteur's criticism that the existing draft of Article 37 does not identify the peremptory rules of international law, that it does not provide even in general terms any indication as to what are and what are not peremptory rules, and that the text leaves everything to be worked out in state practice and by the jurisprudence of international tribunals, one participant replied that the generality of the provision of Article 37 was in his view unavoidable. He was of the view, however, that the second part of Article 37 ["which can be modified only by a subsequent norm of general international law having the same character"] should be deleted. He believed that a universal agreement of a non-peremptory character can deprive a norm of its peremptory character.

Another speaker supporting this view pointed out that, e.g., a law which outlaws gambling contracts can be repealed by a law which is not a peremptory norm. To this the reply was made that in this regard the municipal law analogy breaks down because in municipal law legal norms, peremptory and otherwise, emanate from the legislature and regulate, inter alia, contracts entered into by private persons. Under the

concept of jus cogens as contemplated by the ILC, both the peremptory norms and the transactions purporting to be regulated by them are derived from states. It was also said that a norm which could be repealed by a non-peremptory norm was, for this reason, not a peremptory norm.

One participant emphasized, as had also been reported in Memorandum No. 3, that the views of the ILC members as to what rules are peremptory showed a very great variety. One ILC member felt that all peremptory rules can be derived from the United Nations Charter. This speaker also dissented from the observations contained in Memorandum No. 3 concerning the jus cogens character of the provisions of the Genocide Convention and the relationship between the London Agreement of August 8, 1945, as amended in Berlin on October 6, 1945, concerning crimes against humanity and the ruling of the Nuremberg Tribunal on the one side and the provisions of the Genocide Convention on the other (page 22 of Memorandum No. 3). The speaker said that the International Military Tribunal had ruled only on the question of its own jurisdiction and not on whether or not acts of genocide unconnected with the war or with war crimes were international crimes. To this the reply was made that following the Berlin Protocol of October 6, 1945, the Nuremberg Tribunal had interpreted the substantive provision of Article 6(c) of its Charter defining crimes against humanity.

Several speakers were of the opinion that the important point was the principle that there are peremptory rules of general international law and that the question what these norms were was of secondary importance. One participant suggested that Article 37 be replaced by the following text:

> "The validity of treaty provisions shall be determined with reference to existing international law and the Charter of the United Nations as well as the provisions of this Convention."

It was said that Article 37 may not mean very much in practical terms at present but it may gain actuality in twenty to thirty years.

One speaker informed the group of a recent case which had been decided by the Constitutional Court of the Federal Republic of Germany* where the question of international jus cogens had been directly at issue. A Swiss company, the speaker reported, had claimed that a taxation treaty between Switzerland and the Federal Republic of Germany which permitted the Federal government of Germany to levy a certain tax [relating to the equalization of war burdens] also upon Swiss nationals was contrary to a jus cogens rule of international law which the company claimed forbade states to tax aliens in connection with war expenditures. The Federal Constitutional Court took the Swiss company's allegation very seriously but came to the conclusion that the alleged jus cogens rule of international law did not exist and therefore decided against the Swiss appellant company.

One speaker commenting on this incident stated that, as conceived by the International Law Commission, the question of the validity of an international treaty because of its repugnance to a peremptory rule could not be raised by a private litigant in a municipal court. To this the reply was given that under the Basic Law of the Federal Republic of Germany the general rules of international law formed part of federal law. If the appellant's contention had been correct that the German-Swiss treaty violated a peremptory rule of international law then the Constitutional Court would have been under the obligation to disregard the offending treaty, i.e., to treat it as void and to apply the peremptory rule of international law.

One speaker gave as a possible example of a peremptory norm that had ceased to be such a norm the views expressed in 1923 about the abhorrent and objectionable character of the Greek-Turkish Agreement on the Exchange of Populations. After World War II, notwithstanding this view, compulsory exchanges of populations had, however, been ordered on a large scale.

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* Entscheidungen des Bundesverfassungsgerichts, Volume 18, 1965, at page 441.

In reply to this it was said that the criticism of the 1923 Convention had been based on the views of writers and on non-committal government statements and that it was proved in 1945 that a peremptory rule prohibiting transfers of population did not or not yet exist. The example of the Swiss-Germany taxation treaty illustrated how unlimited the possibilities to claim the existence of peremptory norms were and how easy it was to base on this claim the allegation that a treaty is void.

A speaker raised the question of what the expression "having the same character" in Article 37 meant.

The opinion prevailing in the Group was that Article 37 represented a basically desirable development. One speaker said that Western lawyers should not believe that the principle of jus cogens was contrary to Western interest. A precise definition remained, however, to be achieved. The speaker suggested that the norms of jus cogens are those which protect important interests other than those of the contracting states. Such interests include those of individuals or groups, the organized world community, and third states. The norms of jus cogens could therefore be divided into three categories:

1. Rules protecting basic interests of individuals or groups (protection against genocide, safeguarding human rights, humanitarian treatment of prisoners of war and of civilian populations in time of war, etc.);

2. Rules protecting the interests of the organized community of nations as such (e.g., rules governing the activities of international organs such as the I.C.J.);

3. Rules protecting substantial interests of third states (e.g., freedom of navigation on the high seas or innocent passage through the territorial sea.)

It was said that it was necessary not to go too far in formulating grounds of the invalidity of treaties. It was necessary to balance stability and change.

A speaker pointed out that the generality required for the emergence of new rules of jus cogens implied that all the important parts of the world must agree to the emergence of such a new rule. Such a new rule could, therefore, not emerge without the approval of a great Power and the assurance could, therefore, be given to the Senate of the United States that the rest of the world will not establish peremptory rules against the United States. To make this clear, the speaker said, was more desirable and more realistic than to insist on compulsory judicial adjudication on the question of the existence of a peremptory rule. To subject to compulsory jurisdiction of the I.C.J. the problems now proposed to be regulated by the less ambitious provisions of draft Article 51 would, one participant said, be a concealed revision of the Charter. The importance of these issues, another speaker added, dims the chances of an agreement on compulsory adjudication. One participant pointed out that the United States has always been more inclined to accept compulsory jurisdiction to interpret treaties than compulsory jurisdiction to interpret and apply customary law. The procedures contemplated in Article 51 should, if possible, be improved without insistence on compulsory adjudication.

One participant emphasized that jus cogens should not be identified with the Charter provisions. Another speaker said that he would prefer to include in the text of Article 37 a possible catalogue of peremptory norms but if this could not be achieved he would prefer having the present text in the draft to having no provision on jus cogens. There was the danger that a Diplomatic Conference might prefer to drop Article 37 altogether if it was made more specific.

Several speakers emphasized that the idea of a higher law was desirable. However, another speaker pointed out that the prestige of the ILC was very great and to put the rubber stamp of the ILC on the existing text without clarification will provide a perfect citation for everybody who wants to allege the invalidity of a treaty.

One speaker pointed out that another suggested function of jus cogens was that new states were not free to reject a peremptory norm while they claim the right not to recognize other rules of international law which were created before they acceded to independence. It was said that while Article 103 of the Charter has not been the starting point for a great

deal of practice, it has buttressed the view that the Charter is a higher law and this has been beneficial. This does not increase arguments but helps to focus the argument on the more important matters.

Several speakers commented on the problem of separability and on the question of the alleged or real retroactive operation of peremptory norms.

## Draft Articles Relating to Substantive Grounds for the Invalidity of Treaties Other than Violation of a Rule of Jus Cogens

The Study Group had beer furnished with a memorandum (Memorandum No. 4) by Professor James F. Hogg which dealt with Articles 31-36, 46, 51, and 52 of the ILC draft. This series of articles, it was said, represented compromises of differing and inconsistent positions. The high degree of abstraction made this series of articles highly susceptible of abuse. Article 51 overlaid them all.

### Article 31 (provisions of internal law) with Cross-References to Article 34 (error)

In commenting on the relationship between Article 4 and 4(bis) on the one hand and Article 31 on the other, it was pointed out that the former were only technical and the real problem was in Article 31.

The debate centered around the criticism of the word "manifest" in Article 31. While one speaker characterized it as very vague and ambiguous, another believed that it represented an acceptable compromise between the two extreme views of the general irrelevance, and of the relevance in all cases, of violations of the internal law of the State Party.

The group also discussed the suggestion that the words "provision of its internal law regarding competence to conclude treaties" might be replaced by the words "in violation of a provision of its internal law." Several speakers maintained that the rules of internal law which were relevant

under Article 31 were the rules regarding competence to conclude not a concrete treaty but "to conclude treaties." The provision did, therefore, not relate to substantive rules of internal law but only to the question whether the organ or organs whose consent was required had given that consent.

One speaker pointed to the difficulty of drawing the line between jurisdiction and substance in this connection. He gave as an example the fact that an appeal was pending before the Constitutional Court of the Federal Republic of Germany in which it was alleged that the Federal Government of Germany had lacked competence to confer, by the Rome Treaty of 1957, certain powers on the Council of Ministers of the European Economic Community [Common Market].* The view was expressed that this may be a question of substantive constitutional law and not of competence to conclude treaties. One speaker said that the violation of an internal substantive law was usually less "manifest" than the violation of the law regarding competence. In regard to the effect of internal law under Article 31 attention was drawn to Article 34 [error] and to the fact that the latter article was drafted in such a way as not to exclude errors of law. Article 34 covered all possible conceptions of error, error by one party, mutual error, error of international law, error of regional law and error of municipal law. Attention was drawn also to the fact that Article 34 stated affirmatively that a state may invoke an error, etc. It was also pointed out that Article 34 (1966 text) spoke of "an error in a treaty." In the case concerning the validity of the German ratification of the Common Market Treaty referred to earlier it could, one participant said, not be claimed that the error of the Federal Government of Germany (if it was an error) that it had competence to confer powers on the Council of Ministers of the E.E.C. was an error "in the Rome Treaty."

The question was raised how Article 31 related to multilateral treaties and what the functions of the depository of such a treaty were in regard to it; in particular, whether the depository was under the obligation to inquire into the

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* Under West-German Constitutional Law the Federation may, by legislation, transfer sovereign powers to international institutions. (Rapporteur).

provisions relating to the conclusion of treaties of all the countries of the world. One of the participants referred to an incident relating to an African State which deposited the instrument of ratification of a treaty, but later decided that the treaty should have been submitted to its legislature. The legislature consented to the ratification, but subject to a reservation. The depositary suggested to the State concerned that it renounce the treaty and then sign and ratify it again subject to the reservation.

Attention was drawn to the fact that Article 30 made the articles under consideration (Articles 31 through 37) an exclusive or exhaustive list of the grounds of the invalidity of treaties.

The question of the authority to denounce treaties was also discussed in connection with Article 31. The diplomatic-technical rules on this question are, of course, to be found in Article 49, which refers to Article 4; but the question of the authority under internal law in the context of Article 31 may also arise. In this connection reference was made to the exchange of views between IMCO and the United States Government on the necessity of full powers to denounce a treaty.

One participant put the question whether a treaty was "in force" if there had been a "manifest" violation of internal law. The answer given by one speaker was that, until the State concerned raised the question the treaty was in force. ("A State may not invoke, etc."). The State whose internal law regarding competence to conclude treaties was violated may, however, lose the right to invoke it by estoppel, etc.

Attention was also drawn to the difference in the formulation of Article 31 (A State may not invoke . . . unless) and Article 34 (A State may invoke . . .).

Article 32 (Specific restrictions, etc.)

Article 32 was drafted in terms of bilateral treaties, one participant pointed out ("of the other contracting State"). Another speaker drew attention to the fact that the "manifest" rule of Article 31 did not apply to the circumstances of Article 32. At conferences convened to draft multilateral treaties it was only the secretariat which looked at the

credentials and the authority of representatives, one speaker said, while the other representatives do not.*

Article 33 (Fraud)

Several speakers questioned the necessity of a separate article on fraud, in addition to the article on error (Art. 34). The basic concepts of "fraud" in Anglo-American law and of "dol" in French law were discussed, as well as the question whether recklessness could or should be equated to fraud ("culpa lata dolus est"). Fraud, it was said, is inconsistent with the element of good faith and fraud was sufficiently different from error to justify separate treatment in the draft. Article 33 dealt only with the fraudulent conduct of another contracting State. Fraud by a third State, it was explained, might be covered by Article 34 (error). Moreover, "fraud" dealt with matters outside the treaty while the scope of error relevant under Article 34 was limited to an error in a treaty.

The Group also considered the problem of the imputability of fraud, i.e., a situation where some representatives of a State and not others may have the knowledge of facts which knowledge makes the conduct fraudulent. The question was how to get back from the agent to the government.

Article 34 (Error)

Having already considered Article 34 in connection with Article 31 (supra) the Group resumed the examination of the error article. It was said that the expression "in a treaty" may not be the final wording. The expression "in a treaty" goes behind the actual text of the treaty and relates to the whole context. This follows from Article 1 and Article 69 of the draft codification. It was also pointed out that the 1963 draft used the term "error respecting the substance of a treaty" which, in January, 1966, was changed to "error in a treaty."

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* There is, however, usually a credentials committee which reports to the Conference. (Rapporteur).

To the question how substantial an error must be to have the consequences set forth in Article 34 the reply was given that it must have formed an essential basis of the party's consent to be bound by the treaty.

By way of illustration how the concept of error worked in present-day international practice, one of the participants described the situation which had arisen when a Latin American country became a party to the Single Convention on Narcotic Drugs by which it undertook to suppress, inter alia, the chewing of cocoa leaves. Later the State concerned came to the conclusion that it was not able to suppress cocoa-leaf chewing and that its ratification of the Convention had been effected by mistake, i.e., in error within the meaning of Article 34. The State wanted to enter a reservation in regard to cocoa-leaf chewing. It was advised, however, that its ratification had not been voidable for error, but that it had acted in the hope of being able to deal successfully with the cocoa leaves problem. This disappointed hope could not be said to be an error and, as in the similar case of the African State referred to earlier in the debate (re Art. 31,) the appropriate procedure to follow was to denounce the Convention and to accede to it again with a reservation as to the suppression of the chewing of cocoa leaves. The error had at best been an error in the assessment of possibilities, not an error "in the treaty."

In regard to paragraph 3 of Article 34 it was explained by one speaker that it applied to agreed errors (relating to the wording) only, which is made clear in Article 26. Another speaker expressed this idea by saying that paragraph 3 of Article 34 limited its paragraph 1. One participant said that when it had been discovered that in amending Articles 23, 27, and 61 of the Charter it had been overlooked that a consequential amendment of Article 109 of the Charter was necessary, it had been considered by delegations to settle the question through a "correction of error" as contemplated in draft Article 26.*

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* However, the General Assembly proceeded by adopting under Article 108 of the Charter a (new) amendment to the Charter: G.A. Res. 2101 (XX) of December 20, 1965, increasing the number of votes required under Article 109(1) from seven to nine. (Rapporteur).

## Articles 35 and 36 (Coercion)

In explaining the relationship between Articles 35 and 36 (coercion) on the one hand and Article 37 (jus cogens) on the other, one participant said that in Articles 35 and 36 the question to be examined was whether the consent of the State had been validly given, while in the case of Article 37 the fact was that the consent had been given and the treaty was nevertheless void because it conflicted with a peremptory norm of general international law. This speaker found the allegation of an overlap between these articles (35 and 36 on the one side and 37 on the other) difficult to agree with.

It was explained to the Group that there was not much difference between the 1963 and 1966 texts of Articles 35 and 36, but that an important change had been made in January, 1966, in regard to the loss of the right to invoke force as a ground for invalidating the treaty (estoppel). Under the 1966 text of Article 47 estoppel does not operate in cases of coercion; Article 35 (coercion of a representative) is no longer listed among those listed in Article 47. Article 36 (coercion of a State as distinguished from coercion of its representative) had not been listed in the 1963 text of Article 47 either.

As an example of the situation covered by Article 35 (coercion of a representative of a State) which was part of recent history, the treatment of President Hácha of Czechoslovakia by Hitler and his assistants on March 14/15, 1939, was given when President Hácha was forced "to place the Czech people under the protection of the Führer."

One participant drew attention to a recent memorandum by Hungary in which Hungary claims that certain German-Hungarian agreements concluded in 1944 had been agreed to by Hungary under coercion and were therefore void. The speaker indicated that he would attempt to obtain a copy of the Hungarian memorandum for the Study Group.

The opinion was expressed that the distinction between Articles 35 and 36 was not great. In the case of the coercion of the representative of the State personally the expression of the State's consent shall be without any legal effect (1966 text); under the 1963 text of Article 35 the expression of consent would have been voidable, not void. In support of

the change it was mentioned that the coercion of the representative may color his report to his government, the evaluation he gives, etc.

One participant expressed the view that Article 35 was an escape mechanism of minor importance.

It was emphasized that Article 36 was now lex lata; the existing differences concerned the question what "force" was. Article 36 was, however, not retrospective beyond the entry into force of the Charter. Article 107 of the Charter protected the Peace Treaties of 1947 and 1951.

One speaker expressed his misgivings concerning Article 36, which in its present wording expressed the Commission's feeling of righteousness and was capable of broad application. If Mainland China were induced by the use or threat of force to become a party to the Test Ban Treaty of 1963, would this, the speaker asked, involve the nullity of the whole Treaty? Another member of the Group suggested that Article 36 should use the same language as Article 35 and should declare void not the Treaty, but the expression of a State's consent to be bound by it. It was emphasized that apparently Article 36 did not mean what it said and that in such a situation the treaty remained in force among the States which had accepted it not under duress. If this is so, another participant submitted, another problem might arise: Suppose that the acceptance of a multilateral treaty by State A was procured by force; can State B, on learning that A's acceptance is void, claim that the acceptance of the Treaty by A had formed an essential basis of its (B's) consent to the Treaty and invoke the error about A's acceptance to invalidate its own consent under Article 34?

Comments of the group on selected aspects of the remaining articles considered on the basis of Memorandum No. 4.

Article 51

Article 51 speaks, it was pointed out, of a party alleging the nullity of a treaty. Elsewhere in the draft different expressions are used and the question was what was the difference between them: "invalidating a party's consent," "without any legal effect," "void," "nullity."

The importance of the regulation of the problems dealt with in Article 51 (procedure concerning allegations of nullity, etc.) was stressed by several speakers, and the arguments for and against the solution proposed in Article 51 made in this connection were similar to those submitted earlier in connection with the question of jus cogens.

Article 63

On the question of the application of treaties having incompatible provisions (Article 63) reference was made to Mr. Tunkin's claim that agreements relating to the stationing of troops in Laos which were incompatible with the 1962 Agreement on Laos were void. Other examples were also mentioned such as the 1948 Agreement on the River Danube* which was in conflict with prior treaties on the subject (the statut définitif du Danube of 1921** and others).

One participant mentioned the situation which had arisen when Belgium, the Netherlands and Luxembourg concluded an agreement inter se of which it was alleged that it was inconsistent with the Treaty of Rome establishing the European Economic Community. The Court of the European Communities in fact so held; but it did not decide that the Benelux agreement was void, but the municipal statutes of the three States which gave effect to the Three-Power Agreement in the internal legal systems of the three countries. The Court of the Communities did not adjudicate on the validity of the Three-Power Agreement as such. Another participant raised the question whether the E.E.C. Treaty did not have the character of jus cogens for the Members of the Community. In reply the view was expressed that only norms of general international law could have the quality of peremptory norms.

There was considerable support for the existing text of Article 63 among the members of the Study Group. There might be a situation, one speaker said, where the second treaty was originally an empty shell, but if the first treaty with which the second treaty conflicts is terminated by agreement the second treaty can be applied without anybody's rights being violated. Such a solution of the difficulty would not be possible if the second treaty were "void."

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* U.N.T.S. Vol. 33 pp. 197 ff
** L.N.T.S., 26, p. 174, 17; A.J.I.L. (1923) Suppl. pp. 13-27

Article 46

In a short discussion of the provisions on separability (Article 46) it was said that paragraph 3 was the difficult part of the article. Doubts were also expressed about the appropriateness of the special treatment of fraud (Article 46, para. 4) entitling the "innocent" party to invoke the fraud with respect either to the whole treaty or to particular clauses alone. This introduces a punitive element into the draft which ought to be more properly postponed until the questions of responsibility and remedies are the subject matter of codification. Frauds may vary. The analogous provisions of Article 42, giving the innocent party or parties the choice between terminating or suspending either in whole, or in part, was subjected to the same criticism.

Article 42

On a matter of detail, one participant asked why Article 42, para. 1 and para. 2(b), contained the words "in whole or in part," while these words were not contained in paragraph 2(a) and (c). This, it was said, was probably a drafting oversight.

Article 46

In support of the special treatment of fraud in Article 46(4) it was said that the choice given there was not a remedy for the fraud. The victim has simply been given an option. To this the reply was made that the inter-dependency or the absence of it should apply and the guilty State should not be deprived of the inter-dependency criterion. Another member of the Group added that a "leonine treaty" might result, to the detriment of the guilty party.

Article 52

Attention was drawn to Article 52, para. 2, which was to the effect that if the nullity of a treaty results from fraud or coercion imputable to one party, the provision of paragraph 1 of the Article may not be invoked by that party. This provision, which does not apply to error, was a justification to keep fraud and error separate.