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TO June, 1966 VOLUME No. TWO

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EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary (through United Nations Division (Mr. Barton), Personnel Operations Division and Mr. Wershof) (Commitment Control)

SECURITY / Sécurité: CONFIDENTIAL

DATE: June 1, 1966

FROM / De: Legal Division

NUMBER / Numéro:

REFERENCE / Référance:

FILE / DOSSIER: OTTAWA 20-3-1-6

MISSION:

SUBJECT / Sujet: Stanley House Symposium - Departmental Representation

cc 20-11-1
cc 1-11-L-1-1

ENCLOSURES / Annexes:

DISTRIBUTION:

Plans for the Stanley House Symposium, July 11-16, on the Law of Treaties and Friendly Relations, are progressing smoothly. The Canada Council has invited all twelve of the professors on our proposed list of participants and, to date, four have accepted and two have refused.

2. As mentioned to you in April, we had hoped originally that either Mr. Wershof or Mr. Robinson would have been free to head three or four departmental representatives to the Symposium, but both have prior commitments. Consequently, it is our intention to compose our "delegation" as follows:

Mr. Gotlieb
Mr. Barton
Mr. Miller
Mr. Lapointe

The two junior members, Miller and Lapointe, both of Legal Division, have been chosen on the basis of their present responsibilities in relation to the subjects for discussion, and our desire to include an officer of the French-language expression. Do you approve?

3. Incidentally, whereas the Canada Council generously provides not only the venue for this Symposium but also pays the travelling expenses of the professors, the Department has to cover the expenses incurred by its representatives in going to Stanley House and returning. The cost of lodging them at the House is, however, borne by the Council.

A. B. GOTLIEB

Legal Division

Ext. 407D/Bil.

[redacted]ervices Div.)

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: U.N. Documents Section, United Nations Division

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: U.N. Documents for International Law Symposium

SECURITY / Sécurité: UNCLASSIFIED

DATE: May 27, 1966

NUMBER / Numéro:

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 31

ENCLOSURES / Annexes

DISTRIBUTION

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In association with the Canada Council, the Department is organizing an International Law Symposium at the Council's Stanley House in July, to which a dozen or so professors of international law have been invited. The two main subjects for discussion are the Law of Treaties and Friendly Relations. Accordingly, we should be grateful if, as a matter of urgency, you could provide us with eighteen copies each of the following documents:

Law of Treaties

(A) Annual Reports of International Law Commission for 14th, 15th, 16th and 17th sessions.

(B) Reports by Sir Humphrey Waldock -

6th Report - A/CN 4/186, 11 March 1966
A/CN 4/186/Add. 1, 25 March 1966

5th Report - A/CN 4/183/
Add. 1/Add. 2/Add. 3/Add. 4

4th Report - A/CN 4/177, 19 March 1965; and all Addenda

(C) Law of Treaties - A/CN 4/L.115, 31 March 1966 plus Corrigendum

Friendly Relations

(A) Reports of the Sixth Committee for 17th, 18th, 19th(?) and 20th sessions.

(B) Report of the Special Committee (Mexico) - A/5746, 16 November 1964

(C) Draft Report of the Special Committee (New York) -

A/AC 125/L.38 and Adds. 1-7

(D) Selected Background Documentation by Secretariat -

A/C 6/L.537, Rev. 1, 23 March 1964

A/C 6/L.537, Rev. 1/Add. 1, 20 October 1965 (in two volumes)

A. E. GOTLIEB

Legal Division

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

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ILC 18TH Session

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CC 20-3-1-6

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DOCUS YOU WILL ALSO WISH TO TAKE INTO ACCOUNT ARE AS FOLLOWS:

A/CN.4/182:COMMENTS BY GOVTS ON PART III OF THE DRAFT ARTICLES ON THE LAW OF TREATIES DRAWN UP BY THE COMMISSION AT ITS SIXTEENTH SESSION FEB21,1966;A/CN.4/182/ADD.3:COMMENTS BY GOVTS ON PART III OF THE DRAFT ARTICLES ON THE LAW OF TREATIES DRAWN UP BY THE COMMISSION AT ITS SIXTEENTH SESSION(YUGOSLAVIA)APR15/66;A/CN.4/186: SIXTH REPORT ON THE LAW OF TREATIES;MAR11/66;AND A/CN.4/186ADD.1 MAR25/66 AND ADD.2 APR12/66 SIXTH REPORT ON THE LAW OF TREATIES.

2.WE HAVE FORWARDED AIRMAIL COPIES OF ALL THESE DOCUS TO YOU.

EXTERNAL AFFAIRS | AFFAIRES EXTÉRIEURES

Mr. Ritchie to see & file

TO / À: THE UNDER SECRETARY OF STATE FOR EXTERNAL AFFAIRS OTTAWA CANADA

FROM / De: THE CANADIAN PERMANENT MISSION GENEVA SWITZERLAND

REFERENCE / Référence: Our telegram 66 of February 1, 1966

TO: Robertson | L | APR 6 1966 | REGISTRY

SECURITY / Sécurité: CONFIDENTIAL

DATE: March 31st, 1966

NUMBER / Numéro: 139

FILE / DOSSIER
OTTAWA 20-3-1-6
MISSION 25/45

cc 20-5-2-2

SUBJECT / Sujet: Second part of the 17th session of the International Law Commission.

ENCLOSURES / Annexes: 2

DISTRIBUTION

Copies with enclosures to [redacted] A.W. Robertson [redacted] 20-5-2-2 & file

We are attaching, for the approval of the Under-Secretary of State for External Affairs, the report on the winter session of the International Law Commission.

J. Alan Beesley
Permanent Mission

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

13.4.26(US)

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CONFIDENTIAL

REPORT ON THE SECOND PART OF THE SEVENTEENTH SESSION OF THE INTERNATIONAL LAW COMMISSION MONACO, JANUARY 3-28, 1966

Introduction

The International Law Commission held the second part of its seventeenth session at the Palais des Congrès, Principality of Monaco, from 3 to 28 January 1966.

2. At its sixteenth session in 1964 and at the first part of its seventeenth session in 1965, the Commission declared that it was essential to hold a four-week series of meetings in the beginning of 1966, in order to finish in the course of that year its draft articles on the law of treaties and on special missions before the end of the term of office of its present members. The General Assembly, by resolution 2045 (XX) of 8 December 1965, approved the Commission's proposal to meet from 3 to 28 January 1966. In the meantime, the Government of the Principality of Monaco had invited the Commission to hold its meetings of January 1966 in Monaco, and had undertaken to defray the additional costs involved. The Commission decided, after consultation with the Secretary-General, to accept the invitation. The second part of the seventeenth session of the Commission was therefore held in Monaco.

Membership and Attendance

3. The Commission consists of the following members:

Name	Nationality
Mr. Robert AGO	Italy
Mr. Gilberto AMADO	Brazil
Mr. Milan BARTOS	Yugoslavia
Mr. Mohammed BEDJAOUI	Algeria
Mr. Herbert W. BRIGGS	United States of America
Mr. Marcel CADIEUX	Canada
Mr. Erik CASTREN	Finland
Mr. Abdullah EL-ERIAN	United Arab Republic
Mr. Taslim O. ELIAS	Nigeria
Mr. Eduardo JIMENEZ de ARECHAGA	Uruguay
Mr. Manfred LACHS	Poland
Mr. Chieh LIU	China
Mr. Antonio de LUNA	Spain
Mr. Radhabinod PAL	India
Mr. Angel M. PAREDES	Ecuador
Mr. Obed PESSOU	Senegal
Mr. Paul REUTER	France
Mr. Shabtai ROSENNE	Israel
Mr. José Maria RUDA	Argentina
Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Senjin TSURUOKA	Japan
Mr. Grigory I. TUNKIN	Union of Soviet Socialist Republics
Mr. Alfred VERDROSS	Austria
Sir Humphrey WALDOCK	United Kingdom of Great Britain and Northern Ireland
Mr. Mustafa Kamil YASSEEN	Iraq

4. Of the members of the Commission, only El-Erian, Liu, Pal, Parades and Tabibi were unable to attend at least a part of the session. I was able to attend only the first half of the session and a number of other members, including Bedjaoui, Castren, Elias, de Aréchaga, Lachs, de Luna, Reuter, Ruda, Tsuruoka and Verdross were unable to be present for the whole of the session.

Officers

5. The following officers, elected during the first part of the seventeenth session, remained in office during the second part: Chairman: Bartos; First Vice-Chairman: Aréchaga; Second Vice-Chairman: Reuter; Rapporteur: Elias.

6. The Drafting Committee appointed at the first part of the session likewise remained in office, composed of the following: Mr. Eduardo Jiménez de Aréchaga; Members: Ago, Briggs, Lachs, Reuter, Tunkin, Waldock and Yasseen. De Luna and I also served temporarily during the first half of the winter session, as members of the Committee.

7. Baguinian, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission, assisted by Gurdon Wattles, (who has taken on most of the responsibilities of the position of Secretary, particularly vis-à-vis the Drafting Committee.)

8. Amado, Bedjaoui, Elias, Tsuruoka, Tunkin and I were all assisted by observers.

Agenda and Meetings

9. The agenda of the seventeenth session had been adopted during the first part of the session, according to which the second part of the session was devoted almost wholly to the law of treaties, although consideration was also given to the organization and duration of the eighteenth session in 1966, to co-operation with other bodies, and to certain other items of business.

10. In the course of the second part of the seventeenth session, the Commission held twenty-three public meetings. (In addition, the Drafting Committee held eight meetings.)

Resolution of Appreciation to the Government of Monaco

11. As reported in the Commission's report (Document A/CN.4/184), the Commission unanimously adopted, on the motion of Amado, a resolution expressing appreciation to the Monaco Government for its hospitality, (which included a reception by the Prince and Princess for the members of the Commission, the observers, and senior officials of the Secretariat.)

Organization and Duration of the Eighteenth Session

12. The Commission unanimously decided in favour of a two-week extension of its eighteenth session, should it be required, as seems most likely, in accordance with General Assembly Resolution 2045(X) of December 8, 1965. The dates envisaged for the eighteenth session in Geneva are, therefore, May 4 to July 22, 1966.

Co-operation with Other Bodies

13. The European Committee on Legal Co-operation, a body set up by the Council of Europe for the purpose of co-operation amongst member States in legal fields, was represented at the Commission's meetings by Mr. H. Golsong, Director of Legal Affairs, Council of Europe, who addressed the Commission on the work of the Committee. The members of the Commission were very favourably impressed with the information provided them on the kind of work being done by the European Committee on Legal Co-operation, which includes immunity of States, consular functions, and reservations to international treaties, all of which subjects are directly connected with the work of the Commission. It seems clear that, in these fields, the Committee is doing substantive work which may be of interest and assistance to the Commission. At the suggestion of a number of members of the Commission, it was proposed to establish a co-operative relationship between the Commission and the European Committee. A further indication of the extent of the interest of the Commission in the work of the Legal Committee is that, at the request of the Special Rapporteur on Treaties, Mr. Golsong agreed to pass on the results of the Committee's work to date on reservations in time for Waldock to make use of the material in his preparations for the eighteenth session.

14. The Inter-American Juridical Committee, the standing organ of the Inter-American Council of Jurists, was also represented by an Observer (Mr. José Joaquin Caicedo Castilla), who addressed the Commission on the legal work of the Organization of American States, which includes drafts concerning the breadth of the territorial sea, international responsibility of the State, industrial and agricultural utilization, rivers and lakes, and differences between intervention and collective action.

Seminar on International Law

15. Raton, Legal Adviser of the United Nations Office at Geneva, informed the Commission of the intention of the European Office to hold during the eighteenth session a second seminar on international law. It will be of slightly longer duration than last year's, in order to provide participants with opportunity for research in the Palais library. The number of participants this year will be increased to twenty or twenty-one in order to provide better geographical distribution.

16. A number of observations were made by members of the Commission concerning the Seminar, including:

(a) approval of the action of Ireland and Sweden in providing one fellowship each to enable a national of a developing country to attend the Seminar;

(b) the suggestion that a further attempt be made to explore the possibilities of obtaining fellowships from governments and private sources;

(c) the suggestion that Commission members other than the lecturers attend some lectures in order to broaden the debate;

(d) that the maximum number of participants be increased to thirty; and

(e) that consideration be given to having universities in the respective countries of origin choose the applicants.

17. Subsequent to the conclusion of the winter session, Raton made it known to the Permanent Mission in Geneva that, as there had been a Canadian participant selected last year and there were applicants from both Australia and the United States this year, it was unlikely that a Canadian candidate would be selected. He agreed, however, to make informal arrangements, if possible, for the participation in an unofficial capacity of a young Canadian woman who is studying for her Doctorate of Law at Geneva.

Draft Articles on the Law of Treaties

18. During its meetings in Monaco the Commission had before it, in connection with the Law of Treaties, a portion of the fourth report (A/CN.4/177/Add.2) of Sir Humphrey Waldock, Special Rapporteur, which had not previously been examined; the fifth report of the Special Rapporteur (A/CN.4/183 and Adds. 1-4); Part II of the draft articles on the Law of Treaties, adopted by the Commission at its fifteenth session in 1963; and the comments of Governments of those draft articles (A/CN.4/175/and Adds. 1-4).

19. As previously reported in our telegram 66 of January 31, the Commission got through a heavy work-load during the winter session and was able to re-examine articles 30 to 50 of the draft articles in the light of comments of governments and to adopt revised versions of nineteen articles, the text of which has been transmitted in that same telegram.

20. It will be recalled that it had been intended that the Commission would complete, during its winter session, not only its work on Part II,

but would also dispose of articles 8 and 9 on participation, and 11 on accession from Part I which had been left over from the first part of the seventeenth session and which raised the contentious "all States" question. Early in the discussion, however, the Commission agreed, at the suggestion of Rosenne and Elias, to defer consideration of these questions until the eighteenth session when it was assumed there would be fuller representation. It was generally agreed that it was inappropriate to take decisions on these issues with only a relatively small proportion of the Commission present.

21. The Commission also found it necessary to defer a decision on article 40 (Termination or suspension of the operation of Treaties by agreement) until the eighteenth session, and to postpone to that session the report of the Drafting Committee on articles 49 (Authority to denounce, terminate, or withdraw from a treaty); 50 (Procedure under a right provided for in the treaty); and 51 (Procedure in other cases).

22. It should be noted that the texts of all the articles adopted are subject to review at the eighteenth session of the Commission, when it is intended that the draft articles on the Law of Treaties be completed. It should be noted also that the question of the order of presentation of the article has been deferred to the eighteenth session, as has consideration of all of the commentaries. No revised commentaries were, therefore, adopted for the articles accepted at the winter session.

Comments

23. It was not, of course, necessary for the Commission to re-examine the articles in such depth and to such a detailed extent as had been the case during the first reading of the articles at the fifteenth session. Nevertheless, the major issues were reconsidered in the light of government comments and interventions of delegations in the Sixth Committee, including some new questions arising out of government views.

24. Most of the articles were tightened up, and some, like articles 33 on fraud, 34 on error and 36 on coercion of a State were left virtually unaltered. None was changed radically. Some new elements were introduced, however, such as the Canadian suggestion for an article permitting suspension or withdrawal from a treaty in the case of material breach of a treaty requiring the parties to refrain from taking certain action; (article 42(c)). Another new provision was that in article 30(bis), intended to cover the question of effect of termination, denunciation, withdrawal or suspension of general multilateral treaties embodying general rules of international law, included at the suggestion of Tunkin and Bartos.

Length of Session

25. The amount of work accomplished by the Commission during the relatively brief winter session would seem to suggest that two shorter

sessions a year would provide a more efficient working method for the Commission than does their single lengthy summer session. A pattern has developed over the years whereby the Commission begins its work in a relatively leisurely fashion, gradually speeding up its tempo to the point towards the end of the session where many members of the Commission, particularly the Special Rapporteur and the members of the Drafting Committee, are seriously overworked. If the Monaco session can be taken as any indication, a shorter session seems to enable the members of the Commission to work at greater speed from the outset without becoming overtired by the end of the session. The knowledge of the deadline seems also to have cut down on the length of the interventions of certain members. An additional advantage, of course, enjoyed by the Commission at its Monaco session, was that there was seldom more than fourteen or fifteen members present, and for obvious reasons this is a more efficient working number than is the larger group of twenty to twenty-five.

Political Questions

26. No political issues intruded directly into the discussion but a number of interventions by Tunkin and, to a lesser extent, by Bartos, Yasseen and Bedjaoui were politically motivated, particularly those on the unacceptability of permitting the injured State the option of affirming treaties concluded as a result of coercion of representatives (article 35), and on the question of the introduction of the notion of independent adjudication into the articles on fraud (33), coercion of States (36), jus cogens (37) and rebus sic stantibus (44). An amusing incident occurred during the discussion of article 46 on separability. Lachs, who had not been present during the debate on articles 35 and 36, made the same arguments which had been put forth by Briggs and me, during the debate on article 35, on the desirability of providing the injured State with the option of separability. Tunkin found it necessary to correct him sternly, and Lachs later fell into line on the question. Rosenne too found it difficult to reconcile his position on article 35 with that on article 46, and had, ultimately, to accept the Tunkin view of absolute nullity. Interestingly, however, Tunkin and Bartos side-stepped the question pressed by Yasseen and Bedjaoui of including economic and political pressure in the reference in article 36 to threat or use of force.

27. It is worth noting that some headway was made on the question of independent adjudication, with de Aréchaga, Ruda, Elias, Ago, Waldock and Briggs all recognizing the need to give careful consideration to the formulation of article 51. Reuter, while not stressing the particular point, made clear his view that the Commission was not in agreement on the content of some of its most important articles, and he may therefore also be susceptible to persuasion on this question during the discussion of article 51 at the eighteenth session.

28. Article 51, as well as the "all States" articles 8, 9, and 11 are likely to provoke political controversy during the eighteenth session which may interfere with the very heavy work-load which the Commission will have to get through if its work on the law of treaties and of special missions is to be completed. It is for consideration whether it would be desirable to consult with certain countries on these questions prior to the session.

M. Cadieux

ANNEX

REPORT ON RESUMED SEVENTEENTH (WINTER) SESSION ON INTERNATIONAL LAW COMMISSION

DRAFT ARTICLES ON LAW OF TREATIES

Order and Arrangement of Articles

The Special Rapporteur raised with the Commission at the outset of the session the question of the arrangement and order of the articles in Part II. (The arrangement he proposed is described in document A/CN.4/183 of November 15, 1965, in paragraphs 4 to 12 inclusive and in the Legal Division Commentary at page 37.) The question was discussed briefly during the first and second meetings of the Commission with Elias, Pessou, Ago and Tunkin supporting the chronological order, and Castren, Yasseen, Briggs and myself supporting the revised order proposed by Waldock. It was decided to refer the question to the Drafting Committee for further consideration, and, in the meantime, to consider the articles in numerical order, rather than in the order set out in Waldock's Fifth Report. The Drafting Committee did not reach any conclusion on the matter, and it was referred to the Eighteenth Session, when the question will be considered in the light of the final revision of all the articles.

Title of Part II

2. The Special Rapporteur proposed a change in the title of Part II from "Invalidity and Termination of Treaties" to "Invalidity, Termination and Suspension of the Operation of Treaties". This was the title agreed on, after a brief discussion.

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

1963 Version

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

2. The background to the article is summarized in the Commentary on pages 4 and 5. The comments of governments and of Sixth Committee delegations are summarized, and the Special Rapporteur's observations are set out in document A/CA.4/177/Add.2. Some governments consider that the article stated a conclusion that is self-evident and that it might therefore be

unnecessary, particularly in the light of the article on pacta sunt servande, Article 55. The Israeli Government had pointed out that there was an inconsistency in using the term "nullity" while at the same time speaking of "invalidating consent", "without legal effect" and "void". The question of separability was also raised by some governments. The United States Government comments also raised the question whether it was intended that all grounds for termination be covered by the article. The Special Rapporteur took these comments into account and proposed the following re-wording of Article 30:

Special Rapporteur's reformulation

> "Every treaty concluded and brought into force in accordance with the provisions of Part II shall be considered as being valid, in force and in operation with regard to any party to the treaty, unless the invalidity, termination or suspension of the operation of the treaty or the withdrawal of the party in question from the treaty results from the application of Articles 31 to 51 inclusive."

4. Much of the discussion of the article turned on the question of the need to include it at all, in the light of Article 55, which had been drafted since the Commission's preliminary adoption of the article. Rosenne, Tunkin, Briggs, Amado, Yasseen and Elias all expressed doubts as to the need for the article. Ago, Castren, Bartos and I considered that it warranted retention on the grounds that the article would provide a useful bulwark for the stability of treaties, by indicating that any party wishing to invoke grounds of invalidity or termination would have to establish those grounds in accordance with provisions of the draft articles. Ago argued, with some effect, that Article 30 was limitative, in providing that any treaty was valid unless it was invalid for any of the reasons enumerated subsequently. I expressed the view that the rule laid down in article 30 might have some positive value. Whether it was essential was a different question, the answer to which would depend in part on the contents of the rest of the draft. Consequently, it would perhaps be preferable that the Commission should suspend judgment on that point until it had settled the terms of the other articles.

5. When making its final decision on article 30 the Commission should bear in mind the Special Rapporteur's concern, which was that the comments of governments should be taken into account. Rosenne pointed out that the article did not now set out all possible grounds for termination; for instance, obsolescence and disuetude were not covered. He also argued that the 1963 formulation of the article in the form of a presumption was not very satisfactory, and that it had rightly been criticized for stating the obvious.

6. Bartos agreed with Rosenne that there might perhaps be grounds for invalidity other than those referred to in article 30. He considered therefore that the Commission should retain the article, while making it clear that what it stated was not a presumption but a general rule, to which there might be certain exceptions listed in the draft article. Waldock

pointed out that article 30 should not be amalgamated with article 55, since they served different purposes. Article 55 dealt with a treaty with respect to which neither validity nor termination was in issue. It was decided to refer the article to the Drafting Committee for consideration.

7. The Drafting Committee subsequently proposed the following formulation:

Drafting Committee's reformulation

"1. The invalidity of a treaty may be established only as a result of the application of the present articles.

"2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty."

8. The Special Rapporteur, in introducing the revised version of the article, explained that the Drafting Committee had agreed that it was undesirable to state the article in the form of a presumption, and had accordingly stipulated that invalidity could only be established in accordance with the rules set out in the draft articles. The Committee had considered also that a distinction must be made between invalidity on the one hand and termination, denunciation or withdrawal on the other, because invalidity could not be established under the terms of the treaty, as could the other three. For this reason, the article had been drafted in form of two sub-paragraphs.

9. Rosenne suggested that the article ultimately be split into two articles. Yasseen stated that paragraph 1 was unacceptable to him since he did not consider that the draft articles gave an exhaustive list of all reasons for invalidity. He doubted, for instance, whether coercion by economic or political pressure was covered. He therefore asked for a paragraph-by-paragraph vote. Bedjaoui concurred with Yasseen's view. Verdross enquired whether invalidity as a result of coercion of a representatime of a State could be considered as covered by the draft article. The Chairman suggested that, since the Commission had by then decided to consider corruption at its Summer Session, the vote be taken on that understanding. Paragraph 1 was then adopted by 14 votes in favour, none against, with 4 abstentions (Yasseen, Bedjaoui, Reuter and Pessou). Paragraph 2 was adopted by 16 in favour, none against, with 2 abstentions (Reuter and Pessou). The article as a whole was then adopted by 14 in favour, none against with 4 abstentions (Yasseen, Bedjaoui, Reuter and Pessou). Reuter stated, in explanation of his vote, that while he might later wish to change his position, he had reservations arising out of the question of the relationship between the draft article and the United Nations Charter. Some seemed to think that the draft did not cover everything covered by the Charter, while

others appeared to consider that it would involve a revision of the Charter. (This is an important question, to which consideration should be given.)

Article 30(bis) (Obligations of parties under other rules of International law)

> "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 application of the present articles or of the terms of the treaty, shall not in any way impair the duty of any party to a treaty to fulfil any obligation embodied in the treaty to which it is subjected under any other rule of international law."

10. In introducing the text of this new article prepared by the Drafting Committee, the Special Rapporteur explained that it had been inspired by paragraph 4 of article 53, but that it expressed the rule in general terms so as to cover not only cases of termination but also cases of invalidity, withdrawal and suspension. (The article had its origin in the expressions of concern by Tunkin and Bartos during the debate on article 42, that the termination or suspension of general multilateral treaties should not impair the duty of any party to fulfil any obligation embodied in a treaty to which it was also subjected under any other rule of international law). Waldock said that it had been decided by the Drafting Committee that a provision on the question had been included in article 53, but not in articles 52 or 54.

11. Ago and Lachs raised the question of including the word "also" before the word "objective", and Waldock agreed to its re-introduction. The Chairman then put the article to the vote with the inclusion of that word. The article as amended was adopted by 13 votes in favour, one against (Lachs) and one abstention (Ruda). Lachs and Ruda explained that they voted against the article because of their opposition to the retention of the word "also".

SECTION II: INVALIDITY OF TREATIES

Article 31 (Provisions of internal law regarding competence to enter into treaties)

1963 Version

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

12. The background to this article is set out in the Commentary at pages 6 to 8. The comments of governments and of the Sixth Committee are summarized, and the Special Rapporteur's observations and proposals are set out in document A/Cn.4/177/Add.2.

13. As pointed out in the Commentary, a considerable number of governments commented on this article and those of Denmark have some relevance to Canada. (The Danish comments pointed out that "If its consent has been validly expressed, a State cannot rely on its internal law, nor its constitution, as an excuse for not giving effect to a treaty.") A number of governments criticized the proviso "unless the violation of its internal law was manifest". The Netherlands Government suggested that the clause be made more objective by providing "unless the other parties have been actually aware of the violation of internal law or unless this violation is so manifest that the other parties must be deemed to have been aware of it". A number of governments also suggested that the cross-reference to article 4 be dropped.

14. In introducing the article, the Special Rapporteur pointed out that of the governments commenting, 17 governments and delegations expressed themselves in favour of the rule proposed by the Commission, 7 governments and delegations appeared to be opposed to it, while 3 did not make their position clear on the central question of principle. This situation reflected the discussions at the 15th Session, when members were to some extent divided. In these circumstances, the Special Rapporteur considered that, since most governments had accepted, as the best compromise possible on a difficult problem, the fundamental thesis that any failure to comply with the provisions of internal law did not in principle affect the validity of the treaty, and that its invalidity could only be invoked when the failure had been manifest, this position should be maintained. He had, however, proposed a shorter version of the article, omitting the cross-reference to article 4, which he considered more relevant now to article 32, and embodying the Netherlands Government's suggestion on the proviso.

15. The revised formulation proposed by the Special Rapporteur provided as follows:

Special Rapporteur's re-formulation

"Violation of internal law

The fact that a treaty has been concluded in violation of its internal law may be invoked by a State as invalidating its consent to be bound by the treaty only if the violation of its internal law was known to the other States concerned or was so evident that they must be considered as having notice of it".

16. Bartos and Elias expressed approval of the new formulation while Briggs, Castren and Amado suggested drafting improvements. Castren suggested a more positive formulation beginning: "a State may not invoke the fact that a treaty has been concluded in violation of its internal

would be desirable to use a formulation re-worded in terms of a right to invoke the lack of authority as invalidating the expression of the State's consent to be bound by the treaty. He considered also that the title of the article should be made more specific by changing it to "unauthorized act of a representative". The reformulation he proposed reads as follows:

Special Rapporteur's reformulation

"Unauthorized act of a representative

1. Where a representative, who is not considered under article 4 as representing his State for the purpose or as furnished with the necessary authority, purports to express the consent of his State to be bound by a treaty, his lack of authority may be invoked as invalidating such consent unless this has afterwards been confirmed, expressly or impliedly, by his State.

2. Where the authority of a representative to express the consent of his State to be bound by a treaty has been made subject to a particular restriction, his omission to observe that restriction may be invoked as invalidating the consent only after the restriction was brought to the notice of the other contracting States prior to his expressing such consent."

21. In introducing his reformulation, Waldock explained that the article dealt with the lack of authority to express a State's consent to be bound by a treaty, not by reason of internal constitutional provisions, but because the representative had not been furnished with the necessary authority. The article was closely connected with the provision of article 4, to which a cross-reference must be made.

22. Amado wondered whether the successive drafting changes had altered the original intention of the Commission. Instead now of looking at the act of the representative, one had to consider the person of the representative. He was somewhat critical of the re-draft, as were Ago, Elias, Yasseen and Tunkin.

23. Ago considered that paragraph 11 raised one of the most delicate points in the whole draft, in its reference to a "restriction" which might mean either a restriction on the full powers of a representative or a constitutional restriction. If of the latter nature, would it be sufficient as grounds for invalidating expressions of consent for a State to send the text of its constitution to all other States? Amado pointed out that the problem raised by Ago had particular relevance to Latin America where there were frequent changes of government. Yasseen could not accept the notion of invalidating "consent", since there could be no consent of a State where the representative had exceeded his authority. Paragraph 2 was acceptable to him, however. Briggs stated that article 32 dealt with an agent's competence to bind the State, rather than with the invalidity of a State's proposed consent; at the fifteenth session, about half of the

law as invalidating its consent", etc. ... It was agreed that the article be referred to the Drafting Committee for consideration in the light of the discussion.

17. The Special Rapporteur subsequently introduced the Drafting Committee's reformulation, worded as follows:

Drafting Committee's reformulation

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

18. He explained that the text embodied a delicate compromise based on the agreement reached in 1963, but considerably shortened. As there had been general agreement that the reference to article 4 was inappropriate, it had been dropped. The Drafting Committee had maintained the limitation decided on in the fifteenth session that the provision of internal law should be one regarding competence to conclude a treaty. (The Committee did not accept the Netherlands Government position, which had been accepted by Waldock, nor the suggestion of Briggs that the reference to "the fact" be dropped and reference be made instead to "grounds for invalidating".) The article was adopted by 16 for, none against 2 abstentions (Ruda and Briggs).

Article 32 (Lack of authority to bind the State)

1963 Version

"1. If the representative of a State, who cannot be considered under the provisions of article 4 as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, unless it is afterwards confirmed, either expressly or impliedly, by his State.

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

19. The background to this article is given in the Commentary, at pages 9 and 10. The comments of governments and of Sixth Committee delegations are summarized, and the observations and proposals of the Special Rapporteur set out in document A/Cn.4/177/Add.2, at page 18.

20. Only the United States Government submitted substantive comments, suggesting that the surrounding circumstances also be considered in determining authority to express consent to be bound by a treaty. The Special Rapporteur did not accept the United States argument but considered that it

Commission's members doubted the need of the article; if it was needed, perhaps it belonged to article 4, or immediately after it. Paragraph 2 of article 32 might not be required at all.

24. In Ago's view, the problem which had been settled in article 31 was again before the Commission. To invalidate a State's consent, it was only necessary for it to have brought a restriction, however slight, to the notice of the other State. If the intention was to limit the scope of the paragraph to cases where full powers contained restrictions, the provision should say so clearly. Tunkin agreed in large part with Briggs. The new draft did not state as plainly as the 1963 version that the act of a person not duly authorized to represent the State could have no legal effect. Rosenne, having thought the article presented no difficulties, concluded after hearing the discussion that it dealt with two entirely different topics: (a) the act of an unauthorized person; and, (b) an authorized act. Paragraph 1 should be connected with article 4, and paragraph 2 made more clearly a part of Part II.

25. I expressed the view that article 32 had certain positive features and should form part of the system of rules to be submitted to governments. It was as yet difficult to say definitely whether the article should be in Part II or whether it should be regarded as a modification of article 4; but on the whole I was inclined to share the Special Rapporteur's view. The article was really concerned with the validity of an international instrument and with the circumstances in which that validity could be disputed. Like Briggs, I had had some hesitation about the drafting of the last part of paragraph 1, but the comments just made by the Special Rapporteur had fully satisfied me.

26. My view on paragraph 2 was the same as Mr. Yasseen's. The question of the authority of those authorized ex officio to bind the State was covered by article 31; paragraph 2 applied only to the case of persons duly authorized to bind the State. It might even be applicable to ministers for foreign affairs and heads of State, who did not always have unrestricted authority to bind a State. The situation contemplated in the paragraph was not one where ratification was imperfect or where there were constitutional limitations, but one where there was a particular restriction which might limit the authority of a person who would normally be authorized to bind a State. It seemed to me, therefore, that paragraph 2 was useful and its drafting acceptable. In order to cover the problem raised by Mr. Ago, the Commentary should refer to the special circumstances envisaged in the paragraph.

27. Waldock pointed out, in reply to Tunkin, that it was not correct to say that the act of an unauthorized representative had no legal effect, because it might be subsequently confirmed by his State. Castren concurred with my view that the main subject of the article was not representation, but the representative's lack of authority, which might have the consequence of invalidating a treaty. Ago concurred with Rosenne that the provision dealt with the act of a person who is not the representative of a State

within the meaning of article 4, and hence did not produce legal effects. Such a case was covered by article 4, however, and was therefore unnecessary. He recommended widening article 1 to provide for unauthorized acts ultimately expressing the State's consent through subsequent confirmation. A second paragraph might then be added, linked with article 4, providing for confirmation of consent by someone who was not a duly authorized representative. Tunkin agreed that paragraph 1 should be transferred to article 4 or a new article 4(bis), whereas paragraph 2, being concerned with validity as such, should remain in Part II. Bartos concurred with Tunkin. Yasseen stated that he still preferred the 1963 formulation. It was agreed that the article be referred to the Drafting Committee to consider it in the light of the discussion.

28. The Special Rapporteur subsequently intorduced the new article 4(bis), formerly paragraph 1 of article 32, providing as follows:

> "An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 4 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State."

He explained that the Commission had decided to associate the first paragraph of article 32 with article 4 because the case of an act by a person who could not be regarded as representing a State within the meaning of article 4 should logically be dealt with immediately after that article. The right place for a provision stating that such an act had no legal effect, though it could be subsequently confirmed, was not the section concerning the invalidity of treaties, but that concerning the representation of a State for purpose of concluding a treaty. The text was adopted by a vote of 17 in favour, none against with no abstentions.

29. The Special Rapporteur then introduced the new formulation of article 32, providing as follows:

Special Rapporteur's reformulation

> "If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was brought to the notice of the other contracting States prior to his expressing such consent."

30. He explained that the text was based on former paragraph 2 of article 32, the main change being the greater emphasis on the authority of a representative with respect to a particular treaty. The new text was then adopted by 17 votes in favour, none against with no abstentions.

Article 33 (Fraud)

1963 Version

> "1. If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke

the fraud as invalidating its consent to be bound by the treaty.

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

32. The background to this article is set out in pages 12 and 13 inclusive of the Commentary. Governments comments, and Sixth Committee delegation statements are analyzed, and the Special Rapporteur's observations and proposals are set out in document A/CN.4/183.

33. Israel had suggested that the article follow article 34 on error, in order to distinguish between various degrees of improper conduct. A number of governments and delegations had suggested including a reference to a single fraudulent act as well as to "fraudulent conduct". Jamaica suggested a time limit on the part of the defrauded State for invalidating its consent, and the United Kingdom and United States suggested the need for independent adjudication on its interpretation and application.

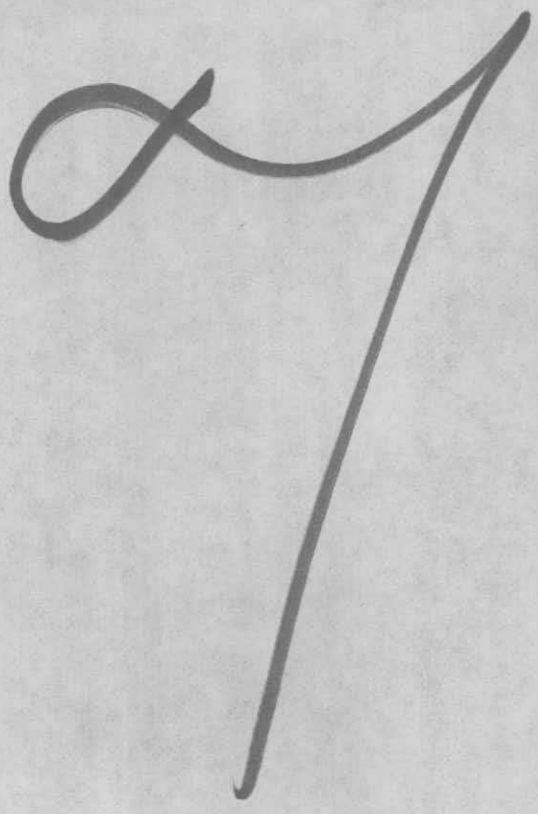
34. The Special Rapporteur accepted the suggestion on the order of the articles, but not that on the time limit, and left for the consideration of article 51 the problem of independent adjudication. He considered, however, that governments and delegations appeared to share the view expressed by the majority of the Commission at its fifteenth session that it would be better to formulate the general concept of fraud applicable in the Law of Treaties in as clear terms as possible, and to leave its precise scope to be worked out in practice and in the decisions of the International Tribunals. He did not personally consider it necessary to provide for the case of a single fraudulent act, but considered it appropriate to do so in the light of the views expressed. The reformulation he proposed was as follows:

Fraud

Special Rapporteur's reformulation

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

35. In introducing the article, the Special Rapporteur explained that, while a few governments had opposed the idea of separate articles on fraud and error, the majority did not object. The two questions were essentially different, the effects of fraud being more serious because they destroyed the confidence between the parties. He had dropped paragraph 2 on severability since it was intended that one article be produced to cover all such cases. He considered that the suggestion of a time limit ought to be taken up in connection with article 47.



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

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

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

40. The background on the article is set out in pages 14 to 17 of the Commentary. The comments of governments and Sixth Committee delegations, and the Special Rapporteur's observations and proposals are set out in document A/CN.4/183.

41. The Special Rapporteur reformulated the article as follows:

Special Rapporteur's reformulation

"Error"

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

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

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

42. In introducing the revised text, Waldock explained that the article raised two questions already under consideration by the Drafting Committee in connection with article 33 on fraud. The first was the suggestion by Briggs to replace the reference to invalidating a State's consent by the words "grounds for invalidating consent", (which, in the event, was not accepted by the Drafting Committee). The second was the question of separability, which had been omitted from the re-draft on the assumption that it would be covered by the general article on separability. He referred to the fact that a number of governments had suggested that provision be made for mistakes of law as well as mistakes of fact. His own impression was that

36. Ago, Elias, Castren, Yasseen, Tunkin, Rosenne, Griggs, Pessou and I all supported the reformulation. I suggested, however, that after the close of the discussion on the article, the Special Rapporteur might perhaps give his opinion on the United Kingdom Government's suggestion that provision should be made for independent adjudication on the interpretation and the application of the article in the event of dispute; a like idea seemed to have been in the mind of the Government of the United States. It was not perhaps necessary to deal with that question in the context of article 33, but at some point the Commission should consider and express a judgment on that question. Briggs concurred in this suggestion and also suggested, as in the case of the previous paragraph, the insertion of the words "a ground for", so as to emphasize that the mere fact of invoking fraud did not automatically invalidate consent. Yasseen considered that the insertion of the reference to a single act was necessary, with Bartos, Ago and Waldock expressing the view that it was not. Bedjaoui expressed regret that the effect of material injury (lésion) had not been covered. He went on to say that Algeria's colonial history had begun with a fraud, namely the conclusion of the treaty of Tafna in 1837.

37. The Special Rapporteur stated, in response to my comments and those of Briggs, that the question of independent adjudication arose in connection with many of the articles, and it was not necessary to consider it in particular in the case of article 33. The article was then referred to the Drafting Committee.

38. The Drafting Committee produced the following revised text of article 33:

Drafting Committee's reformulation

"A State which has been induced to conclude a treaty by the fraudulent conduct of another contracting State may invoke the fraud as invalidating its consent to be bound by the treaty."

39. In introducing the new text, the Special Rapporteur explained that it was essentially the same as that previously contained in paragraph 1 of the 1963 version. The Drafting Committee had re-considered the question first raised at the fifteenth session whether the phrase "fraudulent conduct" would cover a single act of fraud, and the majority had considered that it would. The question of severability, formerly contained in paragraph 2 would be covered by a general article on severability. Yasseen reiterated his view on the need for a reference to a single fraudulent act, but said he would not refuse to approve the article. The article was then adopted by 17 votes in favour, none against, with no abstentions.

Article 34 (Error)

1963 Version

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

during the fifteenth session, the great majority of members had wished to confine the article to mistakes of fact. A mistake of law could, of course, contribute in some measure to a mistake of fact, as pointed out in paragraph 7 of the Commentary on the article. His conclusion was that no change should be made on this question. He explained also that the Government of Thailand had expressed the view that the scope of the exception provided for in paragraph 2 was too wide and could have the effect of rendering paragraph 1 ineffective. While there was some truth in this observation, he considered it preferable to retain the language used by the International Court of Justice in The Temple case.

43. Much of the discussion of the article was directed to the question whether errors of law should also be taken into consideration. Yasseen, Rosenne, Castren, Briggs, and Ago all agreed that errors of law should not be admitted as grounds for invalidating consent. Bedjaoui argued that it should be, particularly in the case of the less developed countries, and Bartos expressed reservations as to whether the possibility of invoking an error respecting a rule of law should be rigidly and absolutely excluded; while agreeing in principle that an error as to law should not be admitted except in serious cases, nevertheless if States had some excuses for having fallen into the error, the possibility of invalidating consent should not be wholly excluded. Tunkin did not express himself on the point, but confined himself to expressing approval of the new text. Ago made an interesting intervention, in which he warned "of the serious danger in introducing into the draft a provision which would make it only too easy to call in question the existence of treaties." (This was one of several forthright and rather courageous interventions by Ago on rather delicate questions during the Winter Session).

44. Waldock agreed with Ago that, while errors of law could be involved in errors of facts, he strongly opposed any amendment of the rule, because he shared Ago's concern that it would be very dangerous to open the door to reliance on an error of law as grounds for invalidating a treaty. Some discussion occurred on the language of the Court in The Temple case, Rosenne pointing out that Thailand was sensitive on the question and Briggs replying that every Court decision results in one dissatisfied party. The article was referred to the Drafting Committee for consideration in the light of the discussion.

45. The Drafting Committee's reformulation provides as follows:

Drafting Committee's reformulation

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

46. In introducing the re-draft, the Special Rapporteur explained that the phrase "an error respecting the substance of a treaty" had been criticized on the ground that it might be read as including a wrong interpretation of the treaty, and the Drafting Committee had accordingly

decided to replace it by the phrase "an error in a treaty". Some discussion occurred concerning the re-draft, including the phrase "possible error", and the question of the exact language used by the Court in the Temple case. It was agreed that any necessary amendments required due to faulty translation be made in the French text, and the article was put to the vote on that basis. The article was then adopted by 17 votes in favour, none against, no abstentions.

Article 35 (Personal coercion of representatives of States)

1963 Version

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

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

47. The background on the article is outlined in pages 18 to 20 of the Commentary. The comments of governments and delegations and the observations and proposals of the Special Rapporteur are set out in document A/CN.4/183. The Special Rapporteur's reformulation of the article provides as follows:

Special Rapporteur's reformulation

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

48. In introducing his revised version of the article the Special Rapporteur pointed out that few governments had commented on it. The main question which had been raised was whether in the event of coercion, the expression of consent should be regarded as "without any legal effect", as had been stated in paragraph 1 of the 1963 text, or whether it should simply give the injured State a right to invoke the coercion as grounds for invalidating its consent. He reminded the Commission that while historical instances of coercion by the Hitler regime had been very much in mind during the Commission's 1963 discussions, it should be noted that article 36 was the one dealing with coercion of a State by the threat or use of force, and it provided that any treaty procured by such coercion "should be void". The circumstances envisaged in article 35 were, however, different. The case was one of coercion or blackmail against an individual representative, and it might well be that the State concerned would prefer to maintain the treaty while objecting to coercion. In that event, the State would be ratifying the act of its representative. He had therefore suggested a re-wording of article 35 bringing the language closer to that of article 33 on fraud, and providing the injured State with the option of invalidating the consent or confirming it.

49. The question of allowing the injured State the option of invalidating or confirming the consent provoked a considerable difference of views with political overtones.

50. Briggs urged the retention of the 1963 language, referring to representatives being coerced "into expressing the consent of a State to be bound by a treaty "rather than replacing it by the Special Rapporteur's re-wording "if the signature of a representative of a State to a treaty has been procured by coercion." He favoured giving the injured State an option rather than providing for absolute nullity, but rather than equate personal coercion to fraud, he preferred the language which had been suggested by Israel: "the State whose representative has been coerced may invoke the coercion as invalidating its consent to be bound by the treaty". Yasseen spoke strongly against the possibility of validating consent obtained by coercion, which, in his view, should be without any legal effect. Tunkin took up the point, and spoke of "the new trend in international law, which had undergone great changes during recent years", prohibiting the use of force and holding States responsible for acts of aggression, in contrast to the old international law, when treaties obtained by force had been considered binding. He agreed with Briggs, however, that any act expressing consent, and not only signature, should be covered by the article.

51. Castren expressed a preference for the 1963 approach providing for nullity in the case of personal coercion. (Pessou thought the Drafting Committee should be able to provide for cases where representatives resisted coercion even at the risk of being repudiated by his own government.) De Luna, Amado and Elias concurred with the Tunkin-Yasseen approach. Ago suggested, however, and Rosenne agreed, that the question was one of choice between "relative and absolute nullity". They considered that it would be more prudent to adopt the view that personal coercion would lead to the relative nullity of a treaty, while coercion of a State or conflict with a peremptory norm would produce absolute nullity ab initio. The discussion on the question carried over into a subsequent meeting.

52. I stated that I was inclined to favour the Special Rapporteur's new formulation, with the slight changes suggested by Mr. Briggs; it was an improvement on the previous version, mainly because it was more flexible and provided for the voidability of the instrument accepted by the representative under coercion instead of for its nullity ab initio. The Commission should offer to the international community a rule that was better suited to its requirements; there was no intention of setting contemporary against traditional law or of encouraging reprehensible practices.

53. Pressure brought to bear on the representative of a State was usually of a clandestine nature and could only be proved long after the event. So far as the injured State and third parties were concerned, quite a long period might elapse between accession to the treaty and the time when the grounds for invalidating the consent could be invoked. De facto situations and interests might have been created in good faith. Consequently, it would

be imprudent not to give to those concerned a chance to consider the situation with care before they applied the necessary remedy, and it would be inadvisable to stipulate that, in all such cases, the treaty would be void. It was true that the aggrieved State could ask to be relieved of its obligations, but why should it be compelled to do so? Surely it was better to leave that State free to choose between annulling the treaty and proposing, or even demanding, some other form of compensation.

54. Furthermore, the Commission should take into account the complexity and delicacy of the circumstances. When it had finally been proved that the representative's will had been coerced, the injured State might not always deem it desirable to give the case a great deal of publicity which might damage the good name of the representative concerned and might render political relations with the guilty State difficult or even jeopardize them. Such a course might not always be consonant with the interests of the injured State, or even with those of the international community.

55. A comparable problem arose when a diplomatic agent was guilty of behaviour that was incompatible with his status. The receiving State could declare him persona non grata and require him to leave the country, but it would realize that such action would have political repercussions. Alternatively, it could act more discreetly; it could transmit its complaint through the diplomatic channel and ask the other State to withdraw the official concerned. In my opinion, a less categorical approach of that kind was better adapted to the needs of diplomacy.

56. I had no intention of introducing a political note into the discussion, but I was anxious that the Commission should not take up a position which some persons might find rather too dogmatic and unrealistic. It might well happen that the injured State was not entirely guiltless. Naturally, the Commission was bound to condemn the use of coercion; but it should prefer the simpler, wiser and more effective formula it had adopted in 1963.

57. It was also necessary to examine with care by what independent means, judicial or other, it would be possible to determine whether the rule applied in particular cases. If the Commission allowed States to repudiate their contractual obligations by unilaterally claiming that their representatives had been subjected to pressure, it would open the way to do many abuses that, in the absence of some kind of objective control, the whole edifice it was constructing would be extremely fragile.

58. Bedjaoui, Bartos, de Luna, Tunkin, Amado and Elias argued strongly for nullity in the case of coercion of a representative of a State, while Briggs, Waldock and I argued that the injured State ought to be given the option of affirming or disaffirming the treaty. Rosenne did not commit himself on the issue. I pointed out in reply to Tunkin that the importance of the issue should not be exaggerated, since nullity could only take effect if the injured State raised the question of coercion, and it would only do so if it

considered it in its interest to do so. Bartos stated his strong opposition to my reasoning, since such treaties should be void absolutely, and nothing had to be done to declare it so. After a further discussion the article was referred to the Drafting Committee.

59. The new formulation proposed by the Drafting Committee was as follows:

Drafting Committee's re-formulation

> "The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect."

After some further discussion, the article was adopted by 17 votes in favour, none against with no abstentions.

Article 36 (Coercion of a State by the threat or use of force)

1963 Version

> "Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of theUnited Nations shall be void."

60. The background on the article is set out in the Commentary on pages 21 to 24. The comments of Governments are summarized and the Special Rapporteur's observations and proposals are set out in document A/CN.4/183/Add.1.

61. The revised text suggested by the Special Rapporteur in the light of governments comments was as follows:

Special Rapporteur's reformulation

> "Any treaty and any act expressing the consent of a State to be bound by a treaty which is procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void."

62. In introducing his revised text, the Special Rapporteur explained that he had taken into account a small but valid drafting point raised by the Government of Israel. Some governments had suggested including the notion of economic coercion explicitly in the text, but he had abided by the Commission's conclusions in 1963 that the precise meaning of the acts covered by the article "threat of use of force in violation of the principles of the Charter" should be left to be determined in practice by interpretation of the relevant provisions of the charges. He referred also to the fact that the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States had been unable to arrive at any definitive conclusion on the question. In the circumstances the best course was to retain the 1963 "open-ended" formula.

63. Some governments had raised the interesting legal point of the temporal application of the rule in article 36. This already had been covered in part in articles 37 and 45. As to the United States Government's point whether the rules of jus cogens contained in the draft article should become operative only from the time of adoption of the draft article, he considered this illogical and had suggested no change in article 36; also the point might be borne in mind, in connection with article 52, (legal consequences of the nullity of a treaty) and article 53 (legal consequences of the termination of a treaty).

64. Bartos pointed out that, after considerable discussion on the question in 1963, the Commission had decided not to mention economic coercion. He said also that whereas article 36 concerned treaties void due to coercion, article 37 concerned treaties void by reason of substance, i.e. conflict with jus cogens.

65. Briggs expressed concern at the effect of the system of absolute nullity embodied in articles 36 and 37. It was not the function of the Commission to issue a resounding manifesto in favour of righteousness. Its function was to formulate precise legal rules capable of being applied through regular procedures. It was necessary to invoke a claim of nullity. Nullity did not occur by itself. The Friendly Relations Committees had been unable to define the scope and precise meaning of the use of force. Adoption of the proposed wording would be tantamount to signing a blank cheque. The content of the rule of law would be left to be determined by the future votes of a shifting majority in a political body. The Commission should either adopt a text providing for reference to a finding by an international judicial tribunal or provide that a State claiming injury may invoke such a ground of invalidity in accordance with article 51.

66. Elias considered the 1963 formulation preferable to the new one. He did not favour introducing into article 36 any direct reference to article 51, or mentioning the question of judicial adjudication. If such a change were made in article 36, it was also to be made in article 32, 33 and 34. His subsequent statement was an interesting one. He said that he had "assumed throughout the Commission's discussions on the draft articles on the Law of Treaties that any dispute regarding the correct interpretation of the articles would be submitted to adjudication by an international tribunal". The expression "threat of use of force" would remain somewhat imprecise until it was interpreted by a Court.

67. De Luna reviewed the historical development of the concept that treaties procured by coercion were invalid, and expressed the view that pressure of any kind was contrary to the spirit of the Charter, but the principle was so recent that it would be better not to be too specific. The Commission should declare itself in favour of a flexible formula and leave it to the Friendly Relations Committee, a political body, to decide how it should be interpreted in practice. Yasseen made his usual (but rather effective) intervention in favour of expressly referring to political and economic coercion. Rosenne endorsed the Special Rapporteur's new formulation and stated that the Commission was neither required nor competent to define what kind of force or threat of force would bring a

transaction within the scope of article 36. He replied to Briggs by saying that the Legal Committee at the San Francisco Conference had deliberately decided that interpretation of political questions could not easily or appropriately be referred to judicial settlement. A regular procedure to establish that a treaty was void was essential, and article 51 was adequate for thepurpose. Castren remarked that government comments and Sixth Committee statements had expressed great interest in the article and made clear that they considered it of capital importance. He accepted the Special Rapporteur's reformulation. Verdross also approved Waldock's reformulation and took up the point raised by Yasseen concerning the Charter; in his view, the new formulation referred not to article 2, paragraph 4 of the Charter. The formulation left the door open for future developments in the interpretation of the Charter, and in the present state of the law the Commission could go no further.

68. Tunkin expressed general agreement with the Special Rapporteur's conclusions, noted that most governments had agreed with the Commission's text and had emphasized the great importance of the rule; he went on to refer to arguments by West German writers that any situation obtained by the use of force was illegal and had no legal effects, and consequently any obligations imposed on Germany by force were illegal and could not bind that country; this argument was a non-acceptable attempt to defend the actions of an aggressor State. He criticized the suggestion by Briggs that a State might invoke the use of force as a ground of invalidity as weakening the article by rendering such treaties not void but voidable. The Commission had taken the view that such coercion was a matter of concern to every State and that such treaties were objectively void. As to Briggs' other suggestion, compulsory international jurisdiction was not universally accepted, and the Commission should confine itself to laying down the substantive rule without going into procedure. On the question of political and economic pressure, while he agreed to an amendment referring to this question or to one referring to force in any form, he was prepared to accept the 1963 text.

69. I stated that, on the whole, my views were similar to the Special Rapporteur's. So far as the definition of force was concerned, the solution adopted in 1963, and employed again by the Special Rapporteur in his new version, was a step forward in the development of international law, and in general had been approved by States. Moreover, as Mr. Verdross had said, it had the advantage of being flexible and of not prejudging the future. Its content would be determined by the international community in accordance with procedures which community would itself choose. The wording did not in fact rule out what Mr. Yasseen wished it to include. With the development of an international conscience, certain requirements, could be given expression in collectively adopted instruments. As to whether article 36 should state that a treaty procured by the threat or

use of force was void or voidable, I agreed with the Special Rapporteur that such a treaty was clearly void. Since resort to coercion destroyed or disturbed the public order, it called for the gravest penalties. My view on the relationship between the rule as stated and the procedure for determining the cases in which it was applicable was the same as that of Mr. Briggs. A rule was strengthened, not weakened, if a procedure for carrying it into effect was indicated. If there was no such indication, the rule might remain nugatory - for whoever had used force to procure a treaty would probably use it again to prevent any change in the result so obtained - and might constitute a danger for small States, which stood in particular need of protection by an independent body. The rule would be more effective if its application were determined objectively instead of by the most powerful States. I was convinced that there was a connection between the rules adopted by the Commission and the question of the procedure to be followed in applying them.

70. Ago pointed out the importance of the article, which marked a stage in the development of modern international law. The reference to the principles of the Charter was actually a reference to the fundamental principles, which were not only laid down in the Charter but have become general rules of international law which non-members of the United Nations should be able to accept. If certain principles were not laid down in the Charter, one of the obligations mentioned in the Charter was the obligation to respect the rules of international law, and so this problem was covered. On the question of coercion in violation of the principles of the Charter, wars of aggression should be distinguished from wars of defence. On the question of nullity or voidability, while he was not entirely convinced that there should be such a sharp contrast between the two, in the case of article 36, the nullity was absolute. On the question of independent adjudication, he thought that rules of substance and of procedure should be kept separate. It would be unfortunate if the Commission proposes no rule of substance simply because the means of establishing the law were inadequate. On the question of political or economic pressure, he made the forthright statement that "there were surely very few treaties in the conclusion of which some pressure had not been exerted on one side or the other". The formula proposed was sufficiently broad to allow ample latitude for interpretation. On the whole, he preferred the 1963 text, which was lapidary and fully sufficient.

71. Briggs intervened again, in reply to Tunkin, to say that his two alternative suggestions had been intended to strengthen the rule by introducing a reference to orderly procedures, instead of leaving the whole matter to the subjective interpretation of States. Budjaoui stressed the fundamental importance of the article, and expressed agreement with Tunkin and Yasseen on the question of economic pressure. Amado concurred in the Special Rapporteur's formulation, stating the view that economic pressure would ultimately come to be included in the idea of force. Bartos expressed a preference for the 1963 formulation, in spite of its omission of certain important elements.

72. Waldock, in summing up, concluded that he should withdraw the drafting amendment proposed to meet the point raised by the Government of Israel. On the question of coercion against aggressors, a peace treaty imposed upon an aggressor was not in violation of the Charter. "There is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor." On the question of independent adjudication, while he shared the general views expressed by Briggs and me, he was inclined to agree with Rosenne that it would not be possible to go beyond the provisions of article 51. The article was then referred to the Drafting Committee.

73. The formulation proposed by the Drafting Committee was as follows:

Drafting Committee's re-formulation

> "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations".

74. In introducing the text, Waldock explained that in substance it was identical to the one agreed to in 1963. Yasseen proposed that the article be amended to read:

> "A treaty is void if its conclusion has been procured by the coercion of a State by acts or threats in violation of the principles of the Charter of the United Nations".

75. Reuter enquired whether the word "principles" should be construed to mean "rules", and Waldock replied in the affirmative. Ruda raised the question whether the principles referred to were those set out in article 2 of theCharter, or those included in the term "Principles" with a capital P; in other words, whether the reference was to the general philosophy of the Charter or to those principles enumerated in articles 2, 4 and 26.

76. Lachs criticized the omission from Yasseen's amendment of any reference to the use of force, which he thought ought to be included, and Tunkin concurred with Lachs. Yasseen therefore proposed another amendment, embodying a reference to "the threat or use of force" and going on to say "or by any act or threat" etc... Ago warned against weakening the rule by making it too cumbersome, and Waldock made a plea to maintain the 1963 compromise. Yasseen then stated that, while he would not withdraw his proposal, he would not press it to a vote. Amado and Bartos expressed agreement with Yasseen's proposal but thought the compromise should be adhered to.

77. Reuter noted that the members of the Commission were not in agreement on what the text meant, but said he would vote for it. Briggs stated he would abstain because the discussion had shown that members were not agreed on the meaning of the text.

78. Tunkin made an interesting intervention in defence of the text, pointing out that even in municipal law, it was rare to find two jurists who placed exactly the same interpretation on a particular rule of law. The principle set out in article 2 of the Charter had been accepted by all States. Despite unavoidable difference of opinion on interpretation, it could not be said that they were not agreed. In essence, article 36 was a consequence of article 2(4) of the Charter.

79. Aréchaga said that the Commission was codifying the Law of Treaties and not the law of international security. It was for the competent organs of the United Nations to settle any disagreement on the application of the rule.

80. Some further discussion occurred on whether the word "principles" should be capitalized, and it was agreed that it should not be. The article was then adopted by 15 votes in favour, none against with one abstention (Briggs).

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

1963 Version

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

81. The background on this important article is set out in pages 25 to 28 of the Commentary. The comments of governments and Sixth Committee delegations and the Special Rapporteur's observations and proposals are contained in document A/CN.4/183/Add.1.

82. The new formulation proposed by the Special Rapporteur was as follows:

Special Rapporteur's reformulation

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

83. The Special Rapporteur, in introducing the article, pointed out that it had attracted considerable attention from governments, the great majority of which approved it in principle, although some had expressed misgivings about the way in which it would operate in the absence of a system of compulsory independent adjudication. The principal observations were directed toward the problem of the time factor for the application of the article, which should be read in conjunction with article 45 dealing with the subsequent emergency of a rule of jus cogens. He doubted the United States interpretation of article 37 as capable of having retroactive effects, but had proposed the insertion of the words "at the time of its

conclusion" to link the article with article 45. He wished to withdraw, however, the words "ab initio" so as to avoid differentiation between one kind of voidance and another.

84. Verdross informed the Commission of an article he had recently published replying to the sharp attack by Professor Schwarzenberger in the Texas Law Review. He noted that nearly all governments had accepted the basic principle of the article but suggested an indication in a Commentary as to which rules were jus cogens rules. Castren agreed with the Netherlands Government point that the phrase "a peremptory norm of general international law from which no derogation is permitted" was pleonastic. He had some reservations about the drafting changes suggested by the Special Rapporteur. Perhaps articles 37 and 45 should be combined, or cross-referenced. Ago replied to the criticisms made by some governments as to the possibility of there being a conflict of rules resulting from successive treaties by pointing out that even if a jus cogens rule had originated in a treaty, the rule did not owe its substance to the treaty but to the fact that it was a rule of general international law. The Commission had given three examples of such rules. A treaty in conflict with jus cogens was void for all States. The 1963 text should be retained without the changes suggested. He was glad Mr. Verdross had replied to Schwarzenberger. Rosenne stressed the great importance of the article and regretted that the Commission had omitted from the Commentary any reference to international public order. The time factor could best be dealt with in the Commentary.

85. Tunkin expressed preference for the 1963 text and said he could not agree to the introduction of the controversial concept of international public order into the Commentary. Yasseen referred to slavery and piracy as having been outlawed by jus cogens. The objection concerning independent adjudication applied to nearly all international law. A distinction should be drawn between two aspects of the international legal order: the normative aspect and the institutional aspect. He preferred the 1963 text. De Luna stated that jus cogens was the indispensable minimum for the existence of the international community. He preferred the 1963 text. Amado concurred with de Luna, as did Bartos, who made an interesting intervention on the relationship of sovereignty and jus cogens. While not opposed to the idea that the sovereignty of States was the basis of the international community, he did not think that sovereignty could be absolute now that the international community had become organized. Every treaty was a voluntary restriction on international sovereignty in an organized international community. There was not necessarily a surrender of national sovereignty, but members of the community required the respect of certain rules. By becoming members of the international society, States recognized the existence of a minimum international order, which was none other than jus cogens. The abstract notions of absolute freedom and absolute sovereignty were not compatible with the existence of international society. He preferred the 1963 text. Briggs said his objection to the concept of automatic nullity introduced in article 37 were even stronger than in the case of article 36. There was no agreement either within the Commission or outside it about the scope and content of the rule. His second objection was that it made no provision for independent adjudication.

86. I intervened to say that I had recognized that the rule laid down in article 37 marked an important stage in the progressive development of international law. It was significant that the Commission had been well nigh unanimous on the subject of the article and that most governments had considered it acceptable. The rule was not perhaps as precise as might be wished, but it was better to have some rule, even an imperfect rule, than no rule at all. I admitted the distinction that had been drawn between normative development and institutional development, but I still believed that there was a connection between the two and that the second was indispensable to the first. As Mr. Briggs had said, a normative development that disregarded institutional problems would be fraught with danger, and the Commission would be wrong to gloss over the gaps in its work. With regard to the drafting, the words "ab initio"were not perhaps strictly necessary, but the words "at the time of its conclusion" were necessary in that they added a useful detail. If it omitted to define what was definable, the Commission might be encouraging the continuance of undesirable practices.

87. The Special Rapporteur summed up by saying the Commission was generally agreed on the rule. He appreciated the point made by Briggs and me on the possible dangers of the rule in the absence of independent adjudication, but felt the Commission was justified at the present stage of international law in stating the rule and leaving its full content to be worked out in practice. He would not press the small drafting amendments he had put forward. Ago intervened again to say that in urging that the content of rules not be confused with their application, he had not meant to express opposition to institutional development. Progress made in the development of the rules of subxtance would demonstrate the absolute need for institutional development. He also expressed the view that, since the rules of jus cogens were scattered throughout various branches of international law, examples ought not to be given. The article was referred to the Drafting Committee.

88. The Drafting Committee proposed the following text:

Drafting Committee's reformulation

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

89. In introducing the article, the Special Rapporteur stated that, although the Commission had considered deleting the word "peremptory", the majority thought that it might create language difficulties and it had been retained. Reuter intervened to say that while he had voted for article 36 because he was convinced that in a specific case the Commission would be in agreement on its interpretation in the case of article 37, it seemed to him that there was too great a difference of opinion on what was meant by jus cogens. For that reason, he would abstain on the opening phrase. The second part of the article raised an even more serious problem of how a subsequent norm of general international law having the same character comes into being.

He would therefore vote against the article. The article was put to the vote and adopted by 14 votes in favour, one against (Reuter) and one abstention (Briggs). Briggs explained his abstention on the same grounds as in article 36. Tsuruoka stated that, while he had voted for the article, he was not fully satisfied with it.

Article 38 (Termination of treaties through the operation of their own provisions)

1963 Version

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

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

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

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

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

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

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

90. The background to the article is set out on pages 29 and 30 of the Commentary. The comments of governments and delegations are summarized, and the Special Rapporteur's observations and proposals set out in document SR. 828/Add.1.

91. The revised text submitted by the Special Rapporteur was as follows:

Special Rapporteur's reformulation

"Termination or suspension of the operation of a treaty under its own provisions

"1. A treaty terminates or its operation is suspended or the withdrawal of a party from the treaty takes effect on such date or on the fulfilment of such condition or on the occurrence of such event as may be provided for in the treaty.

"2. A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force."

92. In introducing his revised formulation, the Special Rapporteur said that it had attracted a few government comments but that it had been criticized, as it had during the 1963 discussion, on the grounds that much of its contents were self-evident. He had therefore abbreviated the text without altering its substance. Paragraph 2 reproduced the only important provision. Multilateral treaties commonly laid down a minimum number of ratifications for entry into force and it was desirable to provide against the termination of a treaty through the withdrawal of parties causing the number to fall below the minimum required.

93. Bartos expressed reservations about the changes and warned against too much pruning. Rosenne doubted the need to retain paragraph 1 but thought the redraft an improvement. Paragraph 2, however, should be made a separate article. Yasseen preferred the redraft. Ago considered it important to specify that where a treaty stipulated a term or resolutive condition, or specified some future event for the termination of the treaty, that treaty could not be terminated before the expiry of the term or before the fulfilment of the condition or the occurrence of the event. Paragraph 2 and paragraph 3(a) were important and should not be deleted. De Luna and Bartos concurred with Ago. Castren maintained the view expressed in 1963 that with the exception of paragraph 3(b), which stated a useful rule of law, the remainder of the article, which was merely descriptive, could be deleted. The redraft was, however, an improvement. Briggs considered the redraft an improvement, but doubted the need of the article. Tunkin and Verdross expressed similar views, except for paragraph 2 which embodied a useful rule. The article was referred to the Drafting Committee.

94. The Special Rapporteur subsequently explained that the Drafting Committee had decided to delete paragraph 1 of the earlier text and to transfer to other articles certain elements of the remainder. The rule which had formerly appeared in paragraph 3(b) had been imbodied in a new article 39(bis). Paragraph 2 would be incorporated into article 50, which dealt with the question when a notice of termination, denunciation or withdrawal would take effect.

95. Even if it stated the obvious, a rule of that kind would still be useful in the draft. The proposal to delete the article was then adopted with 14 votes in favour, one against (Bartos) and 3 abstentions (Amado, Waldock and Ago). Waldock said, in explanation of vote, that he had abstained because it was meaningless to vote when certain elements of the article were to be retained and their fate could not finally be determined until the Commission had completed Part II. Ago associated himself with Waldock's position.

Article 39 (Treaties containing no provisions regarding their termination)

1963 Version

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion

or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case, a party may denounce or withdraw from the treaty upon giving to the other parties or to the depositary not less than twelve months notice to that effect."

96. The background on this article is set out in pages 31 to 33 of the Commentary. The comments of governments and delegations in the Sixth Committee and the observations and proposals of the Special Rapporteur are set out in A/CN.4/183/Add. 1. The new formulation proposed by Waldock provides as follows:

Special Rapporteur's reformulation

"Treaties containing no provisions regarding their termination or the suspension of their operation

1. When a treaty contains no provision regarding its termination and does not provide for denunciation or withdrawal or for the suspension of its operation, a party may denounce, withdraw from or suspend the operation of the treaty only if it appears from the treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended to admit the possibility of such denunciation, withdrawal or suspension of the treaty's operation.

2. A party shall in every case given not less than twelve months' notice of its intention to denounce, withdraw from or suspend the operation of the treaty under the provisions of paragraph 1."

97. In introducing his revised formulation, the Special Rapporteur said that governments had on the whole accepted the general concept of the article and recognized that where there were indications of an intention to that effect on the part of the States concerned, a treaty could be subject to denunciation or withdrawal even though it did not contain any actual provision on the subject. He had redrafted the article in the light of government comments in the form of two separate paragraphs which made for a clearer and simpler presentation. He would, however, alter the text in line with the preference of the Drafting Committee for a negative formulation.

98. Yasseen had doubts as to whether the possibility of terminating, suspending or denouncing a treaty under the article was based on the treaty itself or on a tacit agreement of the parties. He considered also that the article was not entirely consistent with the articles on interpretation, since article 70 laid stress on the text and treated preparatory work as a subsidiary source. Article 39, however, gave status to preparatory work as an independent means of determining the intention of the parties. From the point of view of form, however, the redraft was an improvement. Verdross, Tunkin and Rosenne concurred with Yasseen, Tunkin suggesting adherence to the more cautious 1963 formulation. Briggs approved the deletion of the reference to "the character" of the treaty, expressed the preference for a negative formulation, and went on to outline at some length the view that

the article must not detract from the pacta sunt servanda rule. He approved the new draft, however, subject to certain amendments. De Luna and Castren associated themselves with the views of Yasseen and Briggs. Amado, Ago and Bartos all expressed preference for the 1963 text, but formulated negatively.

99. I concurred in the general view that the division of the article into two paragraphs was an improvement and that the rule contained in paragraph 1 should be retained. The apparent contradiction noted by speakers could be avoided by drafting changes.

100. The Special Rapporteur summed up by saying the Commission appeared to be in general agreement on the need to adopt a negative formulation which would state that where a treaty had no specific provision on the subject of termination or denunciation, no such right existed unless the exceptional circumstances set forth in paragraph 1 obtained. He pointed out that the reference to the preparatory work contained in the words "statements of the parties" was intended to cover subsequent statements as well as the travaux préparatoires. Bartos intervened to say that the Commission in referring to statements of the parties had intended to refer to those made at the close of the negotiations which formed an integral part of the consent expressed by the parties. Some discussion occurred on this point, and on the desirability of eliminating the expression "the character of the treaty". The article was then referred to the Drafting Committee.

101. The new formulation produced by the Drafting Committee provides as follows:

Drafting Committee's re-formulation

"Denunciation of a treaty containing no provision regarding termination

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it otherwise appears that the parties intended to admit the possibility of denunciation or withdrawal.

2. A party shall give not less than twelve month's notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article."

102. In introducing the new text, the Special Rapporteur explained that it was essentially the same as that approved in 1963 but that it had been divided into two paragraphs. The Drafting Committee had avoided going into details about the interpretation of the intention of the parties, and had simply used the general phrase "the parties intended". The point might need reconsideration when the Commission reviews the provisions

concerning interpretation in Part III. The article was then put to the vote and adopted by 18 votes in favour, with none against.

Article 39(bis) (Reduction of the parties to a multilateral treaty below the number necessary for its entry into force)

103. This article, which had formerly formed part of article 38, provided as follows:

Drafting Committee's re-formulation

"A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force."

104. In introducing the article, the Special Rapporteur explained that the Drafting Committee had attached importance to including a rule which related not only to the termination of treaties through the operation of their own provisions, but also to cases where no provision existed for termination. The article was adopted by 18 votes in favour, with none against.

Article 40 (Termination or suspension of the operation of treaties by agreement)

1963 Version

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

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

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

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

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

105. The background to this article is set out in paragraphs 34 to 38 of the Commentary. The comments of governments and of delegations in the Sixth Committee are summarized, and the Special Rapporteur's observations and proposals are set out in document A/CN.4/183/Add.2. (It will be noted that the Canadian Government submitted comments on this article.)

106. The Special Rapporteur's redraft of the article provides as follows:

Special Rapporteur's reformulation

> "1. A treaty may at any time be terminated or its operation suspended, in whole or in part, by agreement of all the parties, subject to paragraph 2.
>
> 2. Until the expiry of six years from the adoption of its text, or such other period as may be specified in the treaty, the termination of a multilateral treaty shall also require the consent of not less than two-thirds of all the States which adopted the text."

107. In introducing his revised formulation, the Special Rapporteur stated that the most important observation by governments on the article was that by Israel, pointing out that the possibility of tacit agreement to terminate a treaty seemed to have been excluded from the 1963 text. He had also dropped the sub-paragraphs contained in paragraph 1 on the ground that it was unnecessary to specify the form of an agreement to terminate. He had provided also for the possibility of partial termination and transferred to paragraph 1 the clause concerning suspension. On the question of the time limit (on which the Canadian Government had recommended 10 years), he had sought to find a mean between the various suggestions made by governments and had provided for a six-year period. The object of paragraph 2 was to protect the interest of States that it take in part in the negotiations against the premature termination of the treaty, particularly in cases when few ratifications were required to bring it into force.

108. Yasseen found difficulties over the implication that parties could terminate or suspend a treaty orally, and did not consider the addition of the words "in whole or in part" necessary. He suggested, on the time limit, a period of 10 years. Castren approved the new text but also doubted the need to provide for partial termination. He concurred with the reformulation of paragraph 2. De Luna found difficulty with oral termination, but thought it unnecessary to provide for partial termination. Rosenne pointed to possible difficulties arising out of the phrase "which adopted a text". Tunkin concurred in Rosenne's views, expressed general approval of the text apart from that point, and suggested that the time limit be decided by a diplomatic conference. Verdross concurred with Tunkin's views.

109. Briggs approved paragraph 1 but suggested the deletion of paragraph 2. He saw no reason to be so solicitous of the interests of States participating in the adoption of a treaty, nor did he see what legal right that conferred upon them. Ago expressed general concurrence with Tunkin's views, and suggested deleting paragraph 2.

He raised the question whether suspension required the agreement of all the parties. Bartos did not agree with Ago that it was open to the parties at any time to suspend a multilateral treaty without consulting all the other parties.

110. The Special Rapporteur, in summing up, said the consensus of opinion was that the Commission should maintain the position adopted at its fifteenth session, but that no indication need be given of the form which the agreement to terminate or suspend might take. Consideration would have to be given to Ago's point about suspension. The article was then referred to the Drafting Committee.

111. The new formulation proposed by the Drafting Committee provides as follows:

Drafting Committee's re-formulation

Termination or suspension of the operation of treaties by agreement

/The Commission decided to postpone the decision on this article until its eighteenth session/

The text proposed by the Drafting Committee reads as follows:

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

"2. The operation of a treaty may at any time be suspended by agreement of all the parties.

"3. The operation of a multilateral treaty may not be suspended as between certain parties only except under the same conditions as those laid down in article 67 for the modification of a multilateral treaty."

112. In introducing the article, the Special Rapporteur explained that the Drafting Committee had decided to drop former paragraph 2 on the protection of the rights of the parties to a treaty against its premature termination by a few parties, on the ground that it would unduly complicate the article. Paragraphs 1 and 2 represented a simplification of the former paragraphs 1 and 3. The new paragraph 3 had been introduced to deal with the question raised by Ago whether the agreement of all the parties was always necessary for the suspension of the operation of the treaty. The new provision would cover the case of an agreement between certain of the parties only, subject to the same strict conditions laid down in article 67 for modifying agreements. Aréchaga requested a separate vote, paragraph by paragraph, as he wished to vote against paragraph 3, on which there had been insufficient time for consideration. In his view, suspension inter se of the operation of a treaty would lead

to the disappearance of important treaty relationships. Even if the rights of some parties were not affected, they could well have an interest in the integral application of the treaty amongst all the contracting parties. Bartos concurred with Aréchaga in the request of separate vote. Yasseen proposed that paragraph 3 be referred for further study to the Eighteenth session, as he could not make up his mind on the question. After a further brief general discussion on paragraph 3, it was agreed by a vote of 14 votes in favour, none against with 4 abstentions, that paragraph 3 be referred to the Eighteenth session. The Special Rapporteur suggested that the whole article be deferred until the Eighteenth session, and it was so agreed without a vote.

Article 41 (Termination implied from entering into a subsequent treaty)

1963 Version

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

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

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

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

113. The background on this article is set out in pages 39 to 41 of the Commentary. The comments of governments and of delegations in the Sixth Committee are summarized, and the observations and proposals of the Special Rapporteur are set out in document A/CN.4/183/Add2.

114. The re-draft proposed by the Special Rapporteur provides as follows:

Special Rapporteur's reformulation

"Termination of suspension of the operation of a treaty implied from entering into a subsequent treaty

1. A treaty shall be considered as terminated if all the parties to it enter into a further treaty relating to the same subject-matter and:

(a) it appears from the latter treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended that the matter should thenceforth be

governed exclusively by the later treaty; or

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

2. However, the earlier treaty shall be considered as only suspended in operation if it appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that such was the intention of the parties when concluding the later treaty.

3. Under the conditions set out in paragraph 1 and 2, if the provisions of the later treaty relate only to a part of the earlier treaty and the two treaties are otherwise capable of being applied at the same time, that part alone shall be considered as terminated or suspended in operation."

115. In introducing this article, the Special Rapporteur explained that it was not an easy one to draft since that article and article 63 dealt with the two sides of the same problem. When the Commission drafted the article, it recognized that there is necessarily a close link between implied termination under this article and the application of treaties concluded between the same parties which have compatible provision. The present article is not concerned with the priority of treaty provision which are incompatible, however, but deals with the case where it clearly appears that the intention of the parties in concluding the later treaty was either definitively or temporarily to supersede the régime of the earlier treaty by that of the later one. Not many comments had been received from governments. The Israel Government considered that the article contained and an inherent contradiction, but the Swedish and United States Governments had found it helpful

116. He had attempted to achieve an exact correlation between the article and article 63. It could be argued that article 41 was concerned with a form of termination by implied agreement, but the case was a special one because the implication arose from the conclusion of a subsequent treaty incompatible with the earlier treaty. It should be noted that in the proposed new text of the article reference was made both in paragraph 1(a) and paragraph 2 to preparatory work. The Commission might prefer it to be dropped or to discuss it at a later stage. De Luna stated that paragraph 1(a) laid down a rule which was correct and necessary, but the provision of paragraph (a) of paragraph 2 should be brought into line with the rules concerning interpretation. He preferred the 1963 version of paragraph 2.

117. Rosenne considered that paragraph 1 was repetitive of article 40. The form of termination was immaterial. Article 41 also duplicated article 66. From the practical point of view, article 66 dealt with the whole question adequately. Those elements which appeared in article 41, which were not covered by the new article 40 should be transferred to article 63.

Alternatively, the consideration of article 41 could be postponed until the Commission had reached a conclusion about article 63. The Commission should consider the possibility of formulating a special article on suspension and its legal consequences. Ago said he had been struck by some of Mr. Rosenne's comments and the Commission should ponder them and review the whole of articles 40, 41 and 63, and try to simplify them and eliminate repetitious matter. Verdross concorded with Rosenne and Ago, and expressed a difference of view with the Special Rapporteur's on the reference to preparatory work in paragraph 1(a) and paragraph 2, which should, in his view, be omitted. Briggs considered that article 41 should be deleted, since the real issue was which treaty prevailed in a case of conflict, and that issue was fully covered in article 63. Tunkin considered, however, that cases contemplated in article 41 were not infrequent and could give rise to difficulties. If there were no express agreement between the parties to abrogate a treaty when a later treaty was concluded that was incompatible with it, the inference was the they had intended to abrogate it. There seemed to be some justification for retaining a separate article on the matter which was not the same as that covered in article 63.

118. I said that I agreed with Tunkin. Article 41 dealt with a delicate problem, and proposed a rule that was different from those embodied in article 40 and article 63. Under article 40, the will of the parties operated to terminate the treaty, under article 41 the parties, by stipulating a new rule, expressed the will to terminate a treaty, and under article 63, one treaty was replaced by another without any conscious intention by the parties to terminate the earlier one. Consequently, the rule laid down in paragraph 1 was unnecessary. No doubt it could be included either in article 40 or in article 63, but it was better to set it out in a separate article because it dealt with a case which was distinct from the others. From the drafting point of view, the Special Rapporteur's reformulation was a great improvement.

119. Castren and Bartos concurred with Tunkin and me. Ago intervened again to say that he had not intended to deny that the situation covered by the article was a real one. He agreed that the whole matter concerning suspension of the operation of a treaty should be dealt with separately. Paragraph 3, however, was definitively connected with the subject matter of article 63. The article will be clear if it avoided reference to the problem of interpretation. De Luna and Tunkin and Amado agreed with Ago that it would be wise to make no mention of interpretation in article 41.

120. Yasseen considered that the article dealt not only with the termination or the suspension of the operation of a treaty by a special tacit or express agreement, but also with the objective incompatility of two treaties, and it therefore deserved to form the subject of a separate treaty. Ago pointed out that there were always questions of interpretation of intention in deciding whether the provisions of a treaty were incompatible with those of another. The Special Rapporteur expressed opposition to the amalgamation of articles 40 and 41. He agreed, however that it would be

better not to deal with the application of rules of interpretation in the article. The article was then referred to the Drafting Committee.

121. The new formulation proposed by the Drafting Committee is as follows:

Drafting Committee's re-formulation

"Termination or suspension of the operation of a treaty implied from entering into a subsequent treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a further treaty relating to the same subject-matter and:

(a) it appears that the parties intended that the matter should thenceforth be governed by the later treaty, or

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

2. The earlier treaty shall be considered as only suspended in operation if it appears that such was the intention of the parties when concluding the later treaty."

122. In introducing the Drafting Committee's reformulation, the Special Rapporteur explained that the Drafting Committee had decided to keep the provisions of the two articles separate. Much of the discussion in the Commission had centered on the provisions of paragraph 1(b). Those provisions had to be considered in relation to those of article 63, which laid down the rule that where two treaties had incompatible provisions those of the later treaty superseded those of the original version. The purpose of paragraph 1(b) was to state that the earlier treay would be terminated if the provisions of the later treaty were so far incompatible with those of the earlier one that the two treaties were not capable of being applied at the same time.

123. Verdross proposed the deletion of the word "however" at the beginning of paragraph 2, and it was so agreed. Rosenne stated he would vote against paragraph 1(b) because he considered that theproblem it dealt with covered by article 63, and asked for separate vote on the paragraph. Paragraph 1(a) and paragraph 2 as amended were then adopted by 16 votes, in favour, with none against, and 2 abstentions (Briggs and Tunkin). Paragraph 1(b) was adopted by 16 votes in favour with 1 against (Rosenne), and 2 abstentions (Tsuruoka and Briggs). Article 41 as a whole was amended and then adopted by 16 votes in favour, none against, with 2 abstentions (Briggs and Rosenne).

Article 42 (Termination or suspension of the operation of a treaty as a consequence of its breach)

1963 Version

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

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

(a) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by common agreement either:

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

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

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

(a) The unfounded repudiation of the treaty; or

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

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

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

124. The background of this article is set out in pages 42 to 48 of the Commentary. The comments of governments and of delegations in the Sixth Committee are summarized, and the Special Rapporteur's observations and proposals are set out in document A/CN.4/183/Add.2. (It should be noted that the Canadian Government submitted comments on this article recommending that provision be made to cover the situation of material breach resulting in the right to suspend or withdraw from the treaty in which the parties undertake to refrain from some action, i.e. a disarmament or non-proliferation treaty.)

125. The Special Rapporteur suggested the following revision of the text:

Special Rapporteur's reformulation

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

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

(a) Any other party whose interests are affected by the breach to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by unanimous agreement to suspend or terminate the operation of the treaty either (i) only in the relations between themselves and the defaulting State or, (ii) as between all the parties.

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 from the treaty.

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

(a) The unfounded repudiation of the treaty; or

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

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

126. In introducing his reformulation of the article, the Special Rapporteur began by explaining that paragraph 4 on separability would be left aside as had been done in the case of other articles. He pointed out that no government had raised any difficulty over the rules laid down in paragraph 1 for bilateral treaties, or the crucial paragraph 3 which defined the term "breach" for the purposes of the article. Government comments had centered on the provisions of paragraph 2, with the Netherlands and the United States Governments suggesting that only a party whose rights or obligations were adversely affected by the breach could invoke it as a ground for suspending the operation of the treaty. He had proposed the words "whose interests are affected by the breach."

He did not consider the United States Government suggestion to introduce a similar qualification in paragraph 2(b) to be acceptable.

127. He pointed out that the Government of Canada had suggested that, in the event of the breach of a treaty which required the parties to refrain from some action, an individual party other than the defaulting State should be entitled to suspend the operation of the treaty with regard to all the parties without having first to obtain the agreement of the others. He had some doubts as to the validity of that suggestion which, in any case, appeared to go much too far. He had, therefore, put forth tentatively an additional paragraph 2(bis) which introduced the proposal in somewhat more restrictive terms.

128. He had re-drafted paragraph 2(b) so as to enable the other party to the treaty, not only to suspend, but also to terminate the treaty in the relations between themselves and the defaulting State.

129. Rosenne expressed agreement with the Special Rapporteur's disinclination to make a distinction between contractual and law-making treaties. On the question of parties adversely affected, he doubted the validity of this distinction, as the concept of "legal interest" was extremely ill defined in international law. All parties to a multilateral treaty had the same interests with regard to the observance of a treaty so long as it was in force. With regard to the Canadian suggestion, he felt that the new paragraph 2(bis) introduced a highly subjective element, and the problem should be covered by article 44. Verdross stated the paragraph should simply give the State the right to terminate the treaty or to suspend its operation in whole or in part, rather than "invoke the breach as a ground" for so doing. He agreed with Rosenne on the question of parties adversely affected. He also queried the inclusion of the term "unfounded" repudiation. Castron considered the re-draft a considerable improvement, but did not agree with the attempt to take into account the position of parties adversely affected, supported the Canadian proposal, but did not agree with the suggestion of Verdross, which he thought was more than a drafting change. Briggs opposed the proposal by Verdross to delete the reference to invoking the breach as grounds for termination, opposed theUnited States Government suggestion to limit the case to parties adversely affected, and considered also that the Canadian proposal raised certain difficulties, and thought paragraph 2(bis) went too far. He could, however, accept the article without paragraph 2(bis).

130. Yasseen accepted the change reflecting the position of parties adversely affected, but considered that suspension was a sufficient sanction. He made the same suggestion with respect to paragraph 2(bis) embodying the Canadian proposal. In general, he approved the revised draft.

131. I intervened to express approval of the revised draft. I agreed with Yasseen that paragraph 2(a) should distinguish between the general

interest of all the parties and the specific and direct interest which might arise out of an adjustment made, within the general context of the treaty, between two or more parties but not all the parties to a treaty. I also supported paragraph 2(bis). The Special Rapporteur had rightly noted that the Canadian Government had been thinking of the particular case of conventions concerning disarmament. He had also been right to modify in narrower terms the more general formula. While it was possible to argue, as Mr. Rosenne did, that the case might conceivably be covered by the clausula rebus sic stantibus, the specific change in circumstances visualized by the Canadian Government was precisely that dealt with in the article - the breach of a treaty. There was nothing wrong in defining more clearly in a provision devoted to the problem the specific case mentioned by the Commission. The case was not that covered by the terms of paragraph 2(b), when collective action was indicated. In the type of treaty which the Canadian Government had been thinking of, a treaty concerning the non-proliferation of nuclear weapons, for example, a State which noted that a neighbouring State had violated the treaty would certainly not be disposed to contemplate the annulment of the treaty only if all the other parties agreed. Nor was thecase one of material breach covered by paragraph 3, though there was a connection between paragraph 2(bis) and paragraph 3. It was really a drafting question rather than one of substance. If the Commission accepted the idea that some treaties might be so important for the parties that the violation of such treaties made it impossible for the States which had committed themselves to the treaty to remain parties thereto, it might amend paragraph 2(bis) by adding a reference to the case covered by paragraph 3 or, conversely, re-draft paragraph 3 so as to refer to the idea mentioned in paragraph 2(bis).

132. De Luna agreed with the reformulation of the article. Verdross intervened again to say that suspension should not be made too easy. He approved paragraph 2(bis) which he thought useful. Tunkin expressed concern about the way in which article 42 would affect general multilateral treaties as distinct from treaties not of a general character. He suggested that the Drafting Committee consider the possibility of stipulating that, in any cases of breach of a general multilateral treaty, the suspension might apply only to the provision that had been violated. He agreed with the provision taking special account of those parties whose interests are affected. While he had not had time to study paragraph 2(bis), he considered the Canadian proposal a useful one. Bartos expressed agreement with Tunkin on the problem of multilateral treaties of general interest. It was desirable to disturb as little as possible the international legal order in cases where it was undoubtedly in the general interest to uphold the established order.

133. The Special Rapporteur, in summing up the discussion, explained that he considered it preferable to retain the 1963 wording rather than that suggested by Verdross on the question of invoking the breach as

grounds for termination. He had reservations also about deleting the adjective "unfounded", but this might be considered by the Drafting Committee. With respect to paragraph 2, on the question of parties whose rights or obligations were adversely affected, the discussion had shown that many members of the Commission felt strongly that all parties to multilateral treaty had the same general interest in the observance of it by every other party. On the same paragraph Tunkin had raised an important question of substance concerning general multilateral treaties. He was not sure, however, that the suggestion that suspension related only to that part of the treaty which had been the subject of a material breach was a good one, since this might be no remedy vis-à-vis the party guilty of the breach, whereas other provisions might be of more importance to the guilty party. Another point relating to paragraph 2 was whether provocation should be taken into account. He doubted the need, since in cases of provocation, there really was no material breach. On paragraph 2(b), he considered it desirable to provide for termination as well as suspension.

134. On the important point of substance raised by paragraph 2(bis), incorporating the Canadian proposal, opinion in the Commission had been divided. There appeared to be some support for including a provision for covering 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. The paragraph should go to the Drafting Committee for reconsideration, particularly in the light of the suggestion by Yasseen that suspension of the operation of the treaty was sufficient, and that it was unnecessary to provide for a right on termination.

135. Tunkin intervened again to stress the importance of the possible implication of the application of article 42 to general multilateral treaties which did not contain provisions for withdrawal, while containing provisions for revision. If article 42 were made applicable to codifying treaties such as these, the very purpose of not only all conferences of plenipotentiaries which had adopted them, but also the Commission itself, would be frustrated. Rosenne concurred with the Special Rapporteur's conclusions. He considered also that a convincing case had been made for special treatment of codifying treaties. Waldock intervened, in answer to Tunkin, to say that paragraph 2(a) limited suspension to relations between the party invoking the breach and the defaulting State, and was restrictive in providing that termination would require the common agreement of all the parties. Paragraph 2(bis),on the other hand, was intended to meet the special case of certain treaties for which paragraph 2(b) would not provide as adequate safeguard. Aréchaga considered paragraph 2(bis) a welcome improvement, and did not consider the danger warned of by Tunkin as a serious one.

136. Ago explained the difference of views between Tunkin and Waldock as arising out of the fact that article 42 dealt simultaneously with two classes of general multilateral treaties which were very different from each other. There were, firstly, treaties like disarmament treaties, or nuclear test ban treaties, where a material breach should relieve the other parties of their obligations. The second kind were codifying treaties which constituted the law of the international community whereby, even if one of the parties broke the treaty, the law still remained binding. Bartos pointed out that, in the case of humanitarian conventions, a State could not suspend their application just because another State might have refused to apply them. Waldock expressed the view that Tunkin's proposal might endanger the stability of treaties. One of the weaknesses of international law was the helplessness of an injured State in the face of a breach of a treaty; that article 42 was intended to give such a State some possibility of effective action. The article was then referred to the Drafting Committee.

137. The reformulation of the article submitted by the Drafting Committee provides as follows:

Drafting Committee's reformulation

"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 any of the objects or purposes of the treaty.

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

138. In introducing the new draft, the Special Rapporteur explained that no change had been made in paragraph 1, but the order of sub-paragraphs (a) and (b) in paragraph 2 had been reversed, sub-paragraph 3 was new (former 2(bis)), and dealt with a special category of treaties such as disarmament agreements, where a breach might upset the whole basis of the treaty for all the parties. The action they could take in such a situation was confined to suspension or withdrawal.

139. Rosenne reiterated his objections to a provision referring to the interests of a party being affected by a breach. He was concerned also to ensure that the article did not affect treaties concerning arbitration or the compulsory settlement of disputes which had been protected under the former article 42, paragraph 5. Castren expressed approval of the new draft. Yasseen stated that it was going too far to allow a State to withdraw from the kind of treaties as envisaged in paragraph 2(c). The Special Rapporteur considered that Rosenne's concern about arbitration treaties was was adequately covered by article 51. He accepted, however, Yasseen's proposal to delete the provisions permitting withdrawal from the treaty under paragraph 2(c). Verdross raised the question again of the use of the word "unfounded", and at Ago's suggestion it was agreed that the passage in question read "a repudiation not authorized by the present article". Yasseen's amendment deleting the right to withdraw in paragraph 2(c) was put to the vote, and adopted by 12 votes in favour, to 1 against (Castren), with no abstentions. The article as amended was then put to the vote and adopted by 14 votes in favour, none against.

Article 43 (Supervening impossibility of performance).

1963 Version

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

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

3. Under the conditions specified in article 46, if the impossibility relates to particular clauses of the treaty, it may be invoked as a

ground for terminating or suspending the operation of those clauses only."

140. The background on the article is set out in pages 49 and 50 of the Commentary. The comments of governments and of the Sixth Committee delegations are summarized, and the observations and proposals of the Special Rapporteur are set out in document A/CN.4/183/Add.3.

141. The Special Rapporteur's revised version of the article provides as follows:

Special Rapporteur's reformulation

"1. If the total disappearance or destruction of the subject-matter of the rights and obligations contained in a treaty renders its performance temporarily impossible, such impossibility of performance may be invoked as a ground for suspending the operation of the treaty.

2. If it is clear that such impossibility of performance will be permanent, it may be invoked as a ground for terminating or withdrawing from the treaty.

3. Paragraphs 1 and 2 shall not apply when the impossibility of performance is the result of a breach of the treaty by the party invoking such impossibility.

4. If part of the treaty has already been executed, a party which has received benefits under the executed provisions may be required to give equitable compensation to the other party or parties in respect of such benefits.

142. In introducing the new article, the Special Rapporteur explained that his re-draft omitted former paragraph 3 dealing with the question of separability, as had been done with other articles. The order of the former paragraph 1 and 2 had been reversed. His new paragraph 3 stated that the rules in paragraphs 1 and 2 would not apply when the impossibility of performance was the result of a breach of the treaty by the party invoking such impossibility. This language was based on a suggestion by the Government of Israel, but it also met the point made by the Pakistani delegation that the impossibility of performance might result on circumstances deliberately created by the complainant State. The new paragraph 4 had been introduced in order to provide a basis for discussion of the difficult problem of a treaty already executed in part where a party to the treaty had received benefits under the executed provisions.

143. Yasseen preferred the new order of paragraphs 1 and 2, but preferred the 1963 text. Paragraph 3 now raised, in his view, the question of State responsibility, which should not be singled out for special treatment. Castren considered that the re-draft of paragraph 1 did not change the substance. He accepted the changes in paragraph 2, but doubted whether paragraph 4 was desirable. The principle of unjust enrichment had not been generally accepted, and the problem was a complex one.

144. Ago pointed out that both the word "subject matter" in the English text and the word "object" in French raised difficulties, since the rights and obligations in question were not in rem but contractual. If a dam built in one country across a river flowing between two countries by agreement between the two countries, and providing electrical services to both, were destroyed, was the subject matter also destroyed? The Drafting Committee and the Commission should give serious consideration to paragraph 4. Rosenne accepted paragraphs 1 and 2 but expressed reservations on paragraph 4 which, if desirable, might more properly be considered in connection with article 53. De Luna agreed with Ago that the article was concerned not with rights in rem but objective rights derived from an international obligation. The question of force majeure must also be considered. He did not think the question was one of State responsibility but was rather that of unjust enrichment. Paragraph 4 might better be deleted. Aréchaga, Ruda, Tunkin, Ago, Briggs, and Yasseen all intervened to express their views on the respective merits of the 1963 draft and the new version. Some further discussion occurred on the question whether the article raised the issue of State responsibility, with Tunkin, de Luna, Ago, Yasseen and Bartos intervening on the question. De Aréchaga suggested that all members were in basic agreement on the practical solution to be adopted in the case envisaged in the new paragraph 3. They were divided only on the doctrinal question of the basis of State responsibility in that case. Some felt that responsibility was based on the treaty itself and was a liability ex contractu; the Chairman regarded it as a liability by operation of law ex lege; Yasseen thought it arose from a violation of international law or ex delicto. It was agreed that the article be referred to the Drafting Committee.

144. The Drafting Committee proposed the following reformulation of the article:

Drafting Committee's reformulation

"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."

145. In introducing the new formulation, the Special Rapporteur explained that the article had been considerably abbreviated. The Drafting Committee had deleted the phrase "the subject matter of the rights and obligations contained in a treaty" which had appeared in his reformulation of the article, and substituted the word "object", on the ground that the impossibility of performance might be due to the destruction of some ancillary element. The article was put to the vote and adopted by 13 votes in favour, none against with one abstention (Bartos). Bartos explained his abstention on the ground

that impossibility did not result solely from the disappearance or destruction of an object indispensable for the execution of a treaty. There might be other cases of impossibility that do not involve any fundamental change of circumstances.

Article 44 (Fundamental change of circumstances)

1963 Version

"1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as a ground for terminating or withdrawing from a treaty under the conditions set out in the present article.

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

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

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

3. Paragraph 2 above does not apply:

(a) To a treaty fixing a boundary; or

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

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

146. The background to the article is set out in the Commentary on pages 51 to 53. The comments of governments and of the Sixth Committee delegations, and the Special Rapporteur's observations and proposals, are set out in document A/CN.4/183/Add.3.

147. The new formulation proposed by the Special Rapporteur was as follows:

Special Rapporteur's reformulation

"1. A fundamental change which has occurred with regard to a fact or state of facts existing at the time when a treaty was entered into may be invoked by a party as a ground for terminating or withdrawing from the treaty only if:

(a) The existence of that fact or state of facts constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) The effect of the change is to transform in an essential respect the character of continuing obligations undertaken in the treaty; and

(c) The change has not been foreseen by the parties and its consequences provided for in the treaty.

2. A fundamental change may not be invoked as a ground for terminating or withdrawing from a treaty provision fixing a boundary or effecting a transfer of territory.

148. The debates on this important and controversial article extended through three meetings of the Commission. Only Briggs and Ruda, however, opposed the inclusion in the articles of the clausula rebus sic stantibus. While much of the discussion centered on the question of the need for a provision requiring negotiations or third party settlement, a good deal of discussion occurred also on the substantive provision of the article.

149. In introducing his re-draft of the article, the Special Rapporteur explained that he had deleted paragraph 1 of the 1963 version, which was really in the nature of an introduction, and was unnecessary. He mentioned that the discussions in the Drafting Committee on other articles had indicated a preference for framing the articles on termination and suspension in the negative. Presumably the same should be done with this article. In paragraph 2, he had taken into account the Israel Government's suggestion to bring the wording into line with that of article 34 and to refer to a "state of facts". (However, that expression had now been replaced in article 34 by the word "situation".) He had also accepted the Australian Government proposal to insert in sub-paragraph (b) the word "continuing" before the word "obligations". With respect to paragraph 3, he had decided that the two exceptions laid down therein were of a very different kind, and that it would be more logical to transfer the two exceptions to the new paragraph 1, since it was linked with the conditions for the operation of the rule.

150. He accepted also the suggestion of the Australian and the Netherlands Governments enlarging the scope of the exception relating to boundaries. He had not accepted the Canadian Government's suggestion that a reference be made to boundaries fixed by a thalweg which might be altered by a natural disaster such as a flood. Such a case raised a question of interpretation in the light of a change of facts.

151. Verdross approved the re-draft but considered the new opening clause was too weak. On the boundary question, he considered the real issue was whether the clausula rebus sic stantibus was applicable to a treaty which had been fully executed. He suggested that a requirement be included for diplomatic negotiations to be attempted before the clausula could be invoked. Castren considered the re-draft an improvement, but suggested drafting changes. He did not approve the extension of the scope of paragraph 2 to cover treaties effecting a transfer of territory, and

concurred in Verdross's view that reference should be made to executed treaties. He did not consider it necessary to provide for negotiation, since the case was already covered at least in part by article 51. De Luna agreed with Verdross on the territorial question, but not on the need to provide for negotiation. He could accept the re-draft. He noted that the conditions laid down in sub-paragraph (a), (b) and (c) were cumulative.

152. Briggs stated that he had not accepted the 1963 version, since it did not set out a rule of international law but only a doctrine. Thirteen governments had referred to it as a doctrine, one as a theory, one as a notion, and one as a clause. Of the eight which had accepted it as a principle, only three had called it a rule. Practice was not sufficiently developed on the question. He went on to suggest drafting changes, and concluded by concurring with Verdross on the need for including a condition on procedure, preferably judicial.

153. Ruda also doubted that the principle was recognized as a rule of modern international law, and felt that the exceptional character of the principle should be stressed in the opening paragraph. Like Briggs, he queried the replacement of the term "fact or situation" by the words "a fact or state of facts". He agreed with de Luna that the conditions in sub-paragraphs (a), (b) and (c) were cumulative, and while agreeing with Verdross in principle on executed treaties, the reference to boundaries should be retained, but not the new reference to transfers of territory. He noted that the idea of higher jurisdiction appeared to overhang the entire draft. Articles 31, 43 and 44 all contained highly subjective notions on which a ruling could only be given by a third party. Consequently, he supported the comments by the United Kingdom Government that article 51 was inadequate.

154. Rosenne favoured the 1963 formulation. The exceptional character of the rule should be stressed, and the difference between mere changes of circumstances and fundamental changes of circumstances should be maintained. The Commission should not attempt to interpret the Charter of the United Nations on the question of self-determination. He did not accept Verdross's proposal to refer to executed treaties. Yasseen expressed the view that the question of application of the article should be independent of the question of its formulation. He did not agree with the suggestion of Verdross for a requirement of negotiations, but agreed with Verdross on the desirability of referring to executed treaties. Tunkin stated his view that the clausula rebus sic stantibus constituted a rule of international law, but it was imprecise, and for that reason presented a danger to the stability of treaties and international relations as a whole. The Commission's task was to define the rule clearly and make it applicable only in exceptional cases. On the whole, he preferred the 1963 text subject to certain drafting changes. He agreed with de Luna that the three conditions set out in the article were cumulative. On the problem of combining substantive and procedural rules, the difficulty of so doing was often deliberately taken advantage of in order to hamper the development of international law.

Compulsory jurisdiction had only been accepted by some forty member States of the United Nations. (Pessou made his usual obscure and subjective intervention, stressing the good relations between France and the French-speaking States of Africa and their special methods of settling disputes.)

155. Ago considered the clausula rebus sic stantibus a rule and a necessary one. He agreed that settlement procedures were necessary, but did not commit himself on the necessity of so providing. On balance, he considered the new version an improvement, although he preferred the word "circumstances" to "state of facts". He did not accept the suggestion by Verdross concerning executed treaties, since a treaty which had been fully executed ceased to exist.

156. De Luna approved the 1963 version, and agreed with Rosenne, Yasseen and Tunkin that procedural rules should not be a condition of the formulation of substantive rules, but of their application. Violations of substantive treaty provisions were rare. Some 30,000 international treaties were daily being carried out in good faith by the parties thereto.

157. De Aréchaga agreed with Briggs on the desirability of an express reference to judicial procedure, and with Verdross on the need to include a reference to diplomatic negotiations. However, he was prepared to abide by the compromise reached in 1963. That being his position, however, he wished to place on record his interpretation that article 51 did not provide an unilateral right of termination, except in the event of no reply being received from the other party. The reference to article 33 of the Charter was not devoid of legal significance since it obliged all member States to seek a solution of their disputes by "peaceful means of their own choice". He accepted Verdross's suggestion regarding executed treaties.

158. Briggs intervened again to answer Tunkin. A formulation such as he had proposed would not hamper the development of international law. The orderly development of international law required a reference to judicial procedure. Bartos considered the clausula rebus sic stantibus indispensable to international law, but that it should be formulated with the utmost care lest it prejudice stability of treaties. He agreed with Verdross that article 44 should not apply to a treaty which had been executed.

159. Waldock considered that there was ample evidence of the existence of a rule or doctrine that the continuance of a treaty could be effected by a fundamental change of circumstances, but strict conditions should be laid down for the application of the rule. He was sympathetic to the view that there was a need for procedural requirements, but this applied even more to some other articles. Without such safeguards the article should be directly linked to article 51. The rule pacta sunt servanda was, however, in itself a safeguard. He then commented on the drafting changes suggested, disagreed with the suggestion of Verdross on the need for a reference to executed treaties, and suggested that the article be sent to the Drafting Committee.

160. In introducing the re-draft, the Special Rapporteur explained that the drafting changes in paragraph 1 did not affect the substance. The phrase "fact or situation" had been dropped in favour of the word "a circumstance". The contents of paragraph 36 of the 1963 text had been transferred to paragraph 1. The reference to fixing a boundary had been changed to establishing a boundary, so as to cover a transfer accession of territory. Ago proposed some drafting changes. His amendments were accepted and the amended article was adopted by 13 in favour, 1 against (Ruda), and 1 absetention (Briggs). The final version of the article as adopted was as follows:

Drafting Committee's reformulation

"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."

Article 45 (Emergence of a new peremptory norm of general international law)

1963 Version

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

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

161. The background on the article is set out in pages 56 and 57 of the Commentary. The comments of governments and of the Sixth Committee delegations are summarized and the Special Rapporteur's observations and proposals are set out in document A/CN.4/183/Add.3.

162. The reformulation proposed by the Special Rapporteur was as follows:

Special Rapporteur's reformulation

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

2. If certain clauses only of the treaty are in conflict with the new norm and the conditions specified in article 46, paragraph 1, apply, those clauses alone shall be void."

163. In introducing his re-draft of the article, the Special Rapporteur said that there had been no detailed comments on it and such governments as had made observations, had merely referred to their comments on article 37 and reiterated their difficulties with the jus cogens rule itself. There was a strong case for retaining paragraph 2 on separability, even if the Commission dealt with the whole question of separability in a single article, because of the desirability of underlining the difference between articles 37 and 45. In paragraph 1, he had proposed only the minor drafting changes of the replacement of the word "when" by the word "if". He pointed out that governments had criticized the language "a treaty becomes void" on the grounds that it suggested nullity, the consequences of which were dealt with not in article 52 on the legal consequences of the termination of a treaty, but in article 53 on the legal consequences of the termination of a treaty. He personally preferred a different expression to describe the effects of the emergence of a new rule of jus cogens. In his view, the situation in article 45 was that performance had become contrary to international law and the treaty was therefore terminated.

164. Yasseen approved the re-draft, because it conveyed the idea that nullity was not retroactive. It was not appropriate in the case of a new peremptory rule conflicting with an earlier treaty that the treaty be void ab initio. He considered that paragraph 2 could be dropped, however, since there would be a single article on separability. Castren repeated his proposal made during the discussion on article 37 that articles 37 and 45 be amalgamated. He did not like the expression "becomes void" since nullity applies ab initio. Ago suggested the expression "terminates" in place of "becomes void" to get around the difficulty. Verdross queried the need for the adjective "peremptory". Ago opposed Castren's suggestion to amalgamate articles 37 and 45, but concurred with Yasseen that separability should be dealt with in a separate article. Amado supported Verdross's proposal to delete the word "peremptory" and with respect to Ago's suggestion, considered that both "becomes void" and "terminates" might be used. Aréchaga opposed Castren's suggestion to amalgamate articles 37 and 45, since the case envisaged in 37 was one of nullity whereas that in 45 was one of termination. He considered, however, that in the light of this fact the expression "becomes void" was inappropriate and agreed with Ago that the rule should state simply that the treaty terminates. He also agreed with Yasseen that separability be dealt with in

a separate article. Tunkin, Briggs, Bartos, Ruda, Yasseen, and de Luna all expressed views on the issues of nullity, separability and the relationship of articles 37 and 45. Rosenne commented on these questions and also raised the problem of the transitory aspect of the situation that could arise with the emergence of the new peremptory norm. Ago proposed a new text using the phrase "becomes void and terminates as from the time when the new norm is established".

165. Waldock summed up the discussion and suggested that the Drafting Committee also be asked to consider the point raised by Rosenne, Ago and Bartos about the need to cover transitional arrangements. The article was then referred to the Drafting Committee. The Drafting Committee proposed the following reformulation of the article:

Drafting Committee's reformulation

"Establishment of a new peremptory norm of general international law

If a new peremptory norm of general international law of the kind referred to in article 37 is established, any existing treaty which is incompatible with that norm becomes void and terminates."

166. In introducing the new formulation, the Special Rapporteur explained that it was substantially the same as in 1963, but the order of the sentences has been reversed to avoid the use of the word "when", which was ambiguous in English and might suggest that the emergence of a new norm of general international law occurred frequently. The Drafting Committee has decided that it was preferable to use the words "incompatible with" rather than "conflicts with".

167. Verdross stated that the expression "becomes void and terminates" was tautological and it would be sufficient to say "becomes void". Some discussion occurred on this point and on the phrase questioned by Ruda "a new peremptory norm of general international law of the kind referred to in article 37". The article was then put to the vote and adopted by 13 votes in favour, none against with 2 abstentions (Pessou and Briggs).

Article 46 (Separability of treaty provisions for the purposes of the operation of the present articles)

1963 Version

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

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

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

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

168. The background on the article is set out in the Commentary on pages 57 to 59. The comments of governments and of the Sixth Committee delegations and the Special Rapporteur observations and proposals are set out in document A/CN.4/183. The new formulation proposed by the Special Rapporteur was as follows:

Special Rapporteur's reformulation

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

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

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

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

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

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

169. This article proved one of the most controversial discussed at the session, reactivating, in more intense form, the arguments which had been made on article 35 as to the desirability of permitting an injured State the option of salvaging something from a treaty induced by personal coercion.

170. In introducing his re-draft of the article, the Special Rapporteur explained that he was proposing that this article, together with article 47 and 49 be transferred to the General Rules under section 1 of Part II, so as to lay down at the outset the restrictions on the operation of the detailed articles which would follow, and which would lay down the grounds for invoking the invalidity, termination, or suspension of treaties. In considering the problem of separability in one article instead of a number of separate articles, as had been the case in 1963, the Commission should

be quite clear as to which articles should be subject to the operation of the separability rule, and also as to whether it applied automatically or at the discretion of the State invoking termination or nullity.

171. Aréchaga expressed approval of the proposal to transfer the article into the section on General Rules, and agreed that separability be handled in one article. He noted that the Special Rapporteur had grouped treaties into three categories: those in which certain clauses could clearly be separated from the rest of the treaty so long as the parties had not expressed any intention of prohibiting separability when the treaty had entered into force: those giving an option to the injured State in cases of coercion or fraud to terminate or suspend the operation of only some parts of the treaty; and those where the violation was so serious that separability was unthinkable. He considered that article 38 should be referred to in paragraph 3, and that no separability should be allowed in a case of treaties violating jus cogens.

172. Rosenne stressed the desirability of adhering to the fundamental principle that treaties were indivisible and that separability was an exception. Yasseen, however, stated that the essential point was that whatever could be saved of a treaty should be saved. There was no difficulty in cases involving termination, but greater caution was needed in cases of nullity, for in such cases nullity resulted from a challenge to the international legal order. Separability should be allowed in the case of fraud, but not in cases of coercion even if directed only against the representative of the State. The major part of the debate which followed, lasting through two meetings, was concerned with this point.

173. Ruda, Lachs, Reuter, Briggs, Rosenne, Ago, Castren and Waldock all argued that to preclude separability in the cases of treaties induced through the personal coercion of a representative of a State would favour the State committing the wrong, and that the injured State should have the option of maintaining or rejecting those parts of the treaty not induced by coercion. Lachs repeated (in almost the same terms, the arguments I had made during the discussion of article 35) that the injured State may not necessarily wish to declare the treaty void ab initio, but may try to secure compensation under the terms of the treaty itself, and accept those elements which had been freely negotiated and reject those which had been imposed. It was of paramount importance to consider the interest of the injured State, and it should be allowed the option.

174. Tunkin, followed by Bartos, de Luna, Amado and Yasseen, strongly disagreed with Lachs, and an exchange occurred between Tunkin and Ago on the desirability of salvaging part of such a treaty. Tsuruoka pointed out at the close of the discussion that a State which considered itself to be the victim of coercion of the kind referred in article 35 and which wished to save that part of the treaty which had not resulted from coercion

could equally well invoke fraud as a ground for nullity. If on the other hand it preferred to regard all treaties as void, it could even in cases of fraud invoke the fact of coercion. The result therefore was much the same.

175. The Special Rapporteur summed up, characterizing the debate as "surprisingly lively", and the article was referred to the Drafting Committee.

176. The revised formulation produced by the Drafting Committee excluded separability in the case of coercion of representative s or States and cases involving jus cogens. After a further brief discussion the article was referred back to the Drafting Committee, and subsequently presented again in slightly amended form, providing as follows:

Drafting Committee's reformulation

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 42.

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 separably from the remainder of the treaty with regard to their application; and

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

4. In cases falling under article 33 the State entitled to invoke the fraud may do so with respect either to the whole treaty or to the particular clauses alone.

5. In cases falling under articles 35, 36 and 37, no separation of the provisions of the treaty is permitted.

The article was then adopted by 14 votes in favour, none against, and no abstentions.

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

1963 Version

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

(a) Waived the right; or

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

177. The background on the article is set out on pages 60 to 62 of the Commentary. The comments of governments and of the Sixth Committee delegations, and the Special Rapporteur observations and proposals, are set out in document A/CN.4/183.

178. The Special Rapporteur's reformulation of the article provides as follows:

Special Rapporteur's reformulation

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

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

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

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

179. In introducing his revision of the article, the Special Rapporteur explained that some governments had objected to the way in which the rules had been expressed, and more particularly to the use of the words "waived" and "so conducted itself as to be debarred". The text adopted in 1963, was, however, the result of a compromise and the Commission's inability to find better language. In order to take account of some of the comments made, he suggested that the rule should be stated in more affirmative terms,

though he was by no means certain that that particular form was the right one. In sub-paragraph (b) of his re-draft, he had introduced the concept of implied agreement, and perhaps it would be preferable to substitute the word "accepted" for the words "agreed to regard". If objection were made to his proposal, it would not be difficult to express the idea in sub-paragraph (b) in negative form.

180. Some governments had proposed that a time limit should be laid down within which a ground of invalidity would have to be invoked (if at all), but he did not think that such a stipulation would be practicable in the situation covered in article 47 because circumstances varied widely. He had changed the title of the article and had used the word "relinguishment", as the word "loss" seemed inappropriate.

181. Briggs considered that there had been a marked shift of emphasis in the re-draft from estoppel to implied consent to accept a treaty which, but for the implied consent, might not be binding. Such an implied consent was in reality a second consent to a previously accepted treaty, and the States' failure to invoke a ground of invalidity or termination was less of a new consent or implied agreement to remain bound than a bar to the possibility of invoking the ground later. The Commission's draft should stress that inconsistent conduct by States was barred. The Israel Government had urged the Commission to distinguish carefully between the principle of preclusion and tacit consent, but the new draft seemed to confuse them more than the 1963 text. He suggested drafting changes, and went on to express approval of the transfer of the article into the section under General Rules.

182. Aréchaga queried the use of the word "automatic", which might create difficulties when article 51 came to be interpreted. Castren was not sure that the article should be transferred to General Rules. He approved the new formulation, and made suggestions as to drafting changes. Ago expressed approval of the reformulation, made a number of drafting suggestions relating to the French language version only, and accepted the proposal of Briggs and Castren to amalgamate sub-paragraph (a) and (b). He suggested also that the article contain a cross-reference to articles 31 to 34 rather than articles 31 to 35, since the Commission had decided that coercion would be a ground for invoking the absolute nullity of a treaty.

183. Verdross preferred the 1963 text which, in his view, had drawn a clear distinction between an express waiver (sub-paragraph (a)) and a tacit waiver (sub-paragraph (b)). Accordingly, he accepted the drafting changes proposed by Briggs. Rosenne considered that the shift of emphasis was essentially a matter of legal theory, and that the practical effect would be the same, and accepted the new text. He considered that the legislative history of the article was essentially that of estoppel (preclusion), but had no strong views. Ruda concurred with Verdross in his preference for the 1963 draft. Aréchaga, after examining the legal rationale for the estoppel and tacit consent theories expressed a

preference for the 1963 formulation, which had embodied the notion of estoppel. A more serious objection to the new text was that it would be necessary under its provisions to show that a State must be considered as having agreed to regard the treaty as valid or as continuing in force; it would not be sufficient to establish the conduct of the State; a purely subjective element was introduced. De Luna intervened again to express his approval of the Special Rapporteur's decision not to use the word "estoppel". A provision should be included, however, to cover the case of recognition resulting from a failure to protest. Yasseen considered that the Commission had recognized the doctrine of estoppel in its 1963 draft, and that, though the rule had not been questioned by governments, the Commission had since defined its attitude towards certain cases of nullity, particularly coercion. The new text was an improvement because it placed the rule on the basis of tacit confirmation of a voidable act (and not on the idea of tacit consent.)

184. Tunkin agreed that the new text was an improvement. Under its terms only such acts as those which implied consent to the treaty as being valid or remaining in force will be taken into consideration, so that some limitation was imposed on the application of the rule. Verdross approved the new draft, since he considered that the article should be based not on the theory of estoppel, which was a rule of procedure, but on a more general rule, based on tacit recognition or confirmation. Ago wondered whether the Commission, having evolved a broad concept in 1963, was now whittling it down on the basis of the fiction of tacit agreement. This fiction could not cover all cases, and while he was no supporter of the estoppel theory, he had some doubts about the new proposal. Aréchaga endorsed Ago's views, and considered that the introduction into the article of the subjective requirements that there must have been agreement or tacit consent, which many authorities regarded as the foundation of customary law, would restrict the scope of a doctrine which had always found acceptance in international law, and would thereby cause great difficulty in application.

185. Reuter, in reply to Yassen and Tunkin, who had opposed including article 35 amongst these to which article 47 would apply, pointed to the problem of boundaries between two former colonies which had been fixed by means which several members of the Commission considered would result in absolute nullity. He warned of the possible danger to the maintenance of peace. Bedjaoui promptly intervened to support the views of Yasseen, Tunkin, de Luna and Bartos that article 47 should not apply to article 35. "The situations to which Mr. Reuter referred were vestiges of the past. To maintain such situations in being would be an incentive for the State which had coerced the person of the representative of another State". Amado and Bartos expressed agreement with Bedjaoui.

186. The Special Rapporteur said he did not agree with the contention that the new text was the outcome of a fundamental change of approach. The application of the principle of estoppel in the present context raised essentially the question of good faith. No matter what form was adopted, it would still be necessary to explain what kind of conduct would prevent a State from invoking a ground of invalidity. After some further discussion by Briggs, Aréchaga and Waldock, the article was referred to the Drafting Committee.

187. The Drafting Committee subsequently proposed the following reformulation of the article:

Drafting Committee's reformulation

"Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 31 to 34 inclusive or articles 42 to 44 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."

After a further brief discussion the article was put to the vote and adopted by 15 votes in favour, none against, no abstentions.

Mr. Bottled to Mr. W.E. Robertson

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ILC:17TH SESSION(SECOND PART)

COMMISSION CONCLUDED 2ND PART OF 17TH SESSION ON JAN28 HAVING REEXAMINED REVISED AND ADOPTED 20 ARTICLES(AS AGAINST 28 ADOPTED AT FIRST PART OF 17TH SESSION).EARLY IN THE SESSION THE COMMISSION DECIDED TO DEFER CONSIDERATION OF THE CONTENTIOUS QUOTE ALL STATES UNQUOTE ARTICLES 8 AND 9 TO 18TH SESSION.COMMISSION FOUND IT NECESSARY ALSO TO DEFER FINAL DECISION ON ARTICLES 40(TERMINATION OR SUSPENSION BY AGREEMENT)AND 49(AUTHORITY TO DENOUNCE,TERMINATE OR WITHDRAW FROM A TREATY).COMMISSION ALSO DECIDED,AGAINST THE OPPOSITION OF BRIGGS AND ROSENNE,TO DEFER CONSIDERATION OF ARTICLES 50(PROCEDURE UNDER A RIGHT PROVIDED FOR IN A TREATY)AND 51(PROCEDURES IN OTHER CASES).FULL REPORT WILL FOLLOW BY BAG WHEN ILC REPORT IS ISSUED.IN MEANTIME TEXT OF REVISED ARTICLES ADOPTED AT 2ND PART OF 17TH SESSION IS SET OUT BELOW.

2.ARTICLE 4(BIS)-SUBSEQUENT CONFIRMATION OF ACT PERFORMED WITHOUT AUTHORITY:QUOTE AN ACT RELATING TO THE CONCLUSION OF A TREATY PERFORMED BY A PERSON WHO CANNOT RPT NOT BE CONSIDERED UNDER ARTICLE 4 AS REPRESENTING HIS STATE FOR THAT PURPOSE IS WITHOUT LEGAL EFFECT UNLESS AFTERWARDS CONFIRMED BY THE COMPETENT AUTHORITY OF THE STATE UNQUOTE.TEXT ADOPTED JAN26 BY 17-0-0.

SECTION 1:GENERAL RULES,ARTICLE 30-VALIDITY AND CONTINUANCE IN FORCE OF TREATIES:QUOTE 1.THE INVALIDITY OF A TREATY MAY BE ESTA-

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BLISHED ONLY AS A RESULT OF THE APPLICATION OF THE PRESENT ARTICLES. 2.A TREATY MAY BE TERMINATED OR DENOUNCED OR WITHDRAWN FROM BY A PARTY ONLY AS A RESULT OF THE APPLICATION OF THE TERMS OF THE TREATY OR OF THE PRESENT ARTICLES.THE SAME RULE APPLIES TO SUSPENSION OF THE OPERATION OF A TREATY UNQUOTE.PARA1 ADOPTED JAN27 BY 14-0-4 (YASSEN BEDJAOUI REUTER AND PESSOU ABSTAINING).PARA2 ADOPTED BY 16-0-2(REUTER AND PESSOU ABSTAINING).ARTICLE AS A WHOLE ADOPTED 14-0-4(YASSEN BEDJAOUI REUTER AND PESSOU ABSTAINING).

ARTICLE 30 BIS-OBLIGATIONS OF PARTIES UNDER OTHER RULES OF INTERNATL LAW:QUOTE 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 APPLICATION OF THE PRESENT ARTICLES OR OF THE TERMS OF THE TREATY,SHALL NOT RPT NOT IN ANY WAY IMPAIR THE DUTY OF ANY PARTY TO A TREATY TO FULFIL ANY OBLIGATION EMBODIED IN THE TREATY TO WHICH IT IS ALSO SUBJECTED UNDER ANY OTHER RULE OF INTERNATL LAW UNQUOTE.TEXT ADOPTED JAN27 BY 13,1 AGAINST(LACHS) 1 ABSENTION(RUDA).

ARTICLE 31-SECTION 2:INVALIDITY OF TREATIES:QUOTE A STATE MAY NOT RPT NOT INVOKE THE FACT THAT ITS CONSENT TO BE FOUND BY A TREATY HAS BEEN EXPRESSED IN VIOLATION OF A PROVISION OF ITS INTERNAL LAW REGARDING COMPETENCE TO CONCLUDE TREATIES AS INVALIDATING THAT CONSENT UNLESS VIOLATION OF ITS INTERNAL LAW WAS MANIFEST UNQUOTE TEXT ADOPTED JAN27 BY 16-0-2(RUDA AND BRIGGS ABSTAINING).

ARTICLE 32-SPECIFIC RESTRICTION ON AUTHORITY TO EXPRESS THE CONSENT

...3

OF THE STATE:QUOTE IF THE AUTHORITY OF A REP TO EXPRESS THE CONSENT OF HIS STATE TO BE BOUND BY A PARTICULAR TREATY HAS BEEN MADE SUBJECT TO A SPECIFIC RESTRICTION,HIS OMISSION TO OBSERVE THAT RESTRICTION MAY NOT RPT NOT BE INVOKED AS INVALIDATING A CONSENT EXPRESSED BY HIM UNLESS THE RESTRICTION WAS BROUGHT TO THE NOTICE OF THE OTHER CONTRACTING STATES PRIOR TO HIS EXPRESSING SUCH CONSENT.UNQUOTE.TEXT ADOPTED JAN26 BY 17-0-0.

ARTICLE 33-FRAUD:QUOTE A STATE WHICH HAS BEEN INDUCED TO CONCLUDE A TREATY BY THE FRAUDULENT CONDUCT OF ANOTHER CONTRACTING STATE MAY INVOKE THE FRAUD AS INVALIDATING ITS CONSENT TO BE BOUND BY THE TREATY UNQUOTE.TEXT ADOPTED JAN26 BY 17-0-0.

ARTICLE 34-ERROR:QUOTE 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. PARA ~~1054~~ 1 SHALL NOT RPT 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 RPT NOT AFFECT ITS VALIDITY,AND ARTICLE 26 THEN APPLIES UNQUOTE TEXT ADOPTED JAN26 BY 17-0-0.

ARTICLE 35-COERCION OF A REP OF A STATE:QUOTE THE EXPRESSION OF A STATES CONSENT TO BE BOUND BY A TREATY WHICH HAS BEEN PRODUCED BY

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THE COERCION OF ITS REP THROUGH ACTS OR THREATS DIRECTED AGAINST HIM PERSONALLY SHALL BE WITHOUT ANY LEGAL EFFECT UNQUOTE.TEXT ADOPTED JAN27 BY 17-0-0.

ARTICLE 36-COERCION OF A STATE BY THE THREAT OF USE OF FORCE:QUOTE A TREATY IS VOID IF ITS CONCLUSION HAS BEEN PROCURED BY THE THREAT OR USE OF FORCE IN VIOLATION OF THE PRINCIPLES OF THE CHARTER OF THE UN UNQUOTE.ADOPTED JAN26 AFTER CONSIDERABLE DISCUSSION BY 15-0-1 (BRIGGS ABSTAINING).

ARTICLE 37-TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATL LAW(JUS COGENS):QUOTE A TREATY IS VOID IF IT CONFLICTS WITH A PEREMPTORY NORM OF GENERAL INTERNAL LAW FROM WHICH NO RPT NO DEROGATION IS PERMITTED AND WHICH CAN BE MODIFIED ONLY BY A SUBSEQUENT NORM OF GENERAL INTERNATL LAW HAVING THE SAME CHARACTER UNQUOTE.TEXT ADOPTED JAN27 BY 13-1(AGAINST(REUTER)1 ABSENTION(BRIGGS)

ARTICLE 38-TERMINATION OR THE SUSPENSION OF THE OPERATION OF A TREATY BY APPLICATION OF ITS OWN PROVISION.DELETED JAN27 BY 14-1 AGAINST(BARTOS)AND 3 ABSTENTIONS(AMADO WALDOCK AND AGO).

ARTICLE 39-DENUNCIATION OF A TREATY CONTAINING NO RPT NO PROVISION REGARDING TERMINATION:QUOTE 1.A TREATY WHICH CONTAINS NO RPT NO PROVISION REGARDING ITS TERMINATION AND WHICH DOES NOT RPT NOT PROVIDE FOR DENUNCIATION OR WITHDRAWAL IS NOT RPT NOT SUBJECT TO DENUNCIATION OR WITHDRAWAL UNLESS IT OTHERWISE APPEARS THAT THE PARTIES INTENDED TO ADMIT THE POSSIBILITY OF DENUNCIATION OR WITHDRAWAL.2.A PARTY SHALL GIVE NOT RPT NOT LESS THAN TWELVE MONTHS

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NOTICE OF ITS INTENTION TO DENOUNCE OR WITHDRAW FROM A TREATY UNDER PARA1 OF THIS ARTICLE UNQUOTE.TEXT ADOPTED JAN27 BY 18-0-0.

ARTICLE 39(BIS)-REDUCTION OF THE PARTIES TO A MULTILATERAL TREATY BELOW THE NUMBER NECESSARY FOR ITS ENTRY INTO FORCE:QUOTE A MULTILATERAL TREATY DOES NOT RPT NOT TERMINATE BY REASON ONLY OF THE FACT THAT THE NUMBER OF THE PARTIES FALLS BELOW THE NUMBER SPECIFIED IN THE TREATY AS NECESSARY FOR ITS ENTRY INTO FORCE UNQUOTE.TEXT ADOPTED JAN27 BY 18-0-0.

ARTICLE 40-TERMINATION OR SUSPENSION OF THE OPERATION OF TREATIES BY AGREEMENT:QUOTE 1.A TREATY MAY AT ANY TIME BE TERMINATED BY AGREEMENT OF ALL THE PARTIES.2.THE OPERATION OF A TREATY MAY AT ANY TIME BE SUSPENDED BY AGREEMENT OF ALL THE PARTIES.3.THE OPERATION OF A MULTILATERAL TREATY MAY NOT RPT NOT BE SUSPENDED AS BETWEEN CERTAIN PARTIES ONLY EXCEPT UNDER THE SAME CONDITIONS AS THOSE LAID DOWN IN ARTICLE 67 FOR THE MODIFICATION OF A MULTILATERAL TREATY UNQUOTE.COMMISSION DECIDED TO RESERVE WHOLE ARTICLE TO 18TH SESSION.

ARTICLE 41-TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY IMPLIED FROM ENTERING INTO A SUBSEQUENT TREATY:QUOTE 1.A TREATY SHALL BE CONSIDERED AS TERMINATED IF ALL THE PARTIES TO IT CONCLUDE A FURTHER TREATY RELATING TO THE SAME SUBJECT-MATTER AND:(A)IT APPEARS THAT THE PARTIES INTENDED THAT THE MATTER SHOULD THENCEFORTH BE GOVERNED BY THE LATER TREATY;OR(B)THE PROVISIONS OF THE LATER TREATY ARE SO FAR INCOMPATIBLE WITH THOSE OF THE EARLIER ON THAT THE TWO TREATIES ARE NOT RPT NOT CAPABLE OF BEING APPLIED AT THE

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SAME TIME.2.THE EARLIER TREATY SHALL BE CONSIDERED AS ONLY SUSPENDED IN OPERATION IF IT APPEARS THAT SUCH WAS THE INTENTION OF THE PARTIES WHEN CONCLUDING THE LATER TREATY UNQUOTE.PARA1(A)ADOPTED JAN27 BY 16-0-2(BRIGGS AND TSURUOKA ABSTAINING);PARA1(B)ADOPTED JAN27 BY 15-1 AGAINST(ROSENNE)2 ABSENTIONS(TSURUOKA AND BRIGGS); ARTICLE AS A WHOLE ADOPTED JAN27 BY 15-0-2(BRIGGS AND ROSENNE ABSTAINING).

ARTICLE 42-TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH:QUOTE 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 PORITION OF EVERY PARTY WITH RESPECT TO THE FURTHER PERFORMANCE OF ITS OBLIGATIONS UNDER THE TREATY.3.A MATERIAL BREACH OF A TREATY,FOR THE PURPOSE

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OF THE PRESENT ARTICLE, CONSISTS IN (A) A REPUDICATION OF THE TREATY NOT RPT NOT AUTHORIZED BY THE PRESENT ARTICLES; OR (B) THE VIOLATION OF A PROVISION ESSENTIAL TO THE ACCOMPLISHMENT OF ANY OF THE OBJECTS OR PURPOSES OF THE TREATY. 4. THE FOREGOING PARAS ARE WITHOUT PREJUDICE TO ANY PROVISIONS IN THE TREATY APPLICABLE IN THE EVENT OF A BREACH. DELETION OF QUOTE OR TO WITHDRAW FROM THE TREATY UNQUOTE (IN PARA2 (C) AFTER QUOTE WITH RESPECT TO ITSELF UNQUOTE) ADOPTED JAN27 BY 12-1 AGAINST (CASTREN) - NO RPT NO ABSTENTION. PARA3 AMENDED ON VERDROSS PROPOSAL WHICH WAS ACCEPTED WITHOUT VOTE. ARTICLE AS A WHOLE ADOPTED JAN27 BY 14-0-0.

ARTICLE 43 - SUPERVENING IMPOSSIBILITY OF PERFORMANCE: QUOTE A PARTY MAY INVOKE AN IMPOSSIBILITY OF PERFORMING A TREATY AS A GROUND FOR TERMINATING IT IF THE IMPOSSIBILITY RESULTS FROM THE PERM 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 UNQUOTE. TEXT ADOPTED JAN27 BY 13-0-1 (BARTOS).

ARTICLE 44 - FUNDAMENTAL CHANGE OF CIRCUMSTANCES: QUOTE 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 RPT NOT FORESEEN BY THE PARTIES, MAY NOT RPT NOT BE INVOKED AS A GROUND FOR TERMINATING OR WITHDRAWING FROM THE TREATY UNLESS: (A) THE EXISTENCE OF THESE CIRCUMSTANCES CONSTITUTED AN ESSENTIAL BASIS OF THE CONSENT OF THE PARTIES TO BE BOUND BY THE TREATY; AND (B) THE

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EFFECT OF THE CHANGE IS RADICALLY TO TRANSFORM THE SCOPE OF OBLIGATION OWED TO THE PARTIES TO THE TREATY. UNQUOTE. ADOPTED JAN 27 BY 13-1 AGAINST (RUDA) WITH 1 ABSENTION (BRIGGS).

ARTICLE 45-ESTABLISHMENT OF A NEW PEREMPTORY NORM OF GENERAL INTERNATL LAW: QUOTE IF A NEW PEREMPTORY NORM OF GENERAL INTERNATL LAW OF THE KIND REFERRED TO IN ARTICLE 37 IS ESTABLISHED, ANY EXISTING TREATY WHICH IS INCOMPATIBLE WITH THAT NORM BECOMES VOID AND TERMINATES. UNQUOTE. TEXT ADOPTED JAN 27 BY 14-0-2 (PESSOU AND BRIGGS ABSTAINING).

ARTICLE 46-SEPARABILITY OF TREATY PROVISIONS: QUOTE 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 ARTICLES OR ARTICLE 42. 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 RPT NOT AN ESSENTIAL BASIS OF THE CONSENT OF THE OTHER PARTY OR PARTIES TO THE TREATY AS A WHOLE. 4. IN CASES FALLING UNDER ARTICLE 33 THE STATE ENTITLED TO INVOKE THE FRAUD MAY DO SO WITH RESPECT

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EITHER TO THE WHOLE TREATY OR TO THE PARTICULAR CLAUSES ALONE.5. IN CASES FALLING UNDER ARTICLES 35,36 AND 37, NO RPT NO SEPARATION OF THE PROVISIONS OF THE TREATY IS PERMITTED UNQUOTE. TEXT ADOPTED JAN28 BY 14-0-0.

ARTICLE 47-LOSS OF A RIGHT TO INVOKE A GROUND FOR INVALIDATING, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY: QUOTE A STATE MAY NO RPT NO LONGER INVOKE A GROUND FOR INVALIDATING, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE OPERATION OF A TREATY UNDER ARTICLES 31 TO 34 INCLUSIVE OR ARTICLES 42 TO 44 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 UNQUOTE. ADOPTED JAN27 BY 15-0-0.

ARTICLES 49,50 AND 51-RESERVED FOR CONSIDERATION AT 18TH SESSION (MAY/66)."

CABINET DU PREMIER MINISTRE

MEMORANDUM

Mr. R. Robertson

Jan. 28, 1966.

From H.J. Lawford.

January 1966

The American Society of International Law

I.L.C. Draft

Study Group on the Draft Articles on the Law of Treaties

Draft Report on the Meetings held on December 3 and December 4, 1965

RL

20-3-66

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By the Rapporteur

Administrative Part

1. Processing of Report.

The Group decided that the report on the meetings held on December 3-4 should be circulated to the participants in draft form. Members will be asked to comment on the draft within two weeks. The report, revised in the light of the comments, might then be made immediately available to selected non-participants who are known to be particularly interested in the subject.

2 Fifth Report by Sir Humphrey Waldock

The Group requested that the Fifth Report by the Special Rapporteur of the I.L.C., the issuance of which was imminent at the time of the meetings, should be made immediately available to members of the Group by the Society.

3 Next meetings of the Group.

It was decided to recommend that the next meetings of the Study Group should be held in the first part of March, 1966. A subsequent series of meetings should then take place in the early fall of 1966.

4 Documentation for the March, 1966 meetings.

It was decided to request that memoranda on the following subjects should be prepared for the March, 1966, meetings

(a) Invalidity of Treaties.

(b) Treaties conflicting with a peremptory norm of General International Law.

Mr. Hogg undertook to prepare the memorandum on item (a) and Mr. Schwelb the memorandum on item (b).

UNIO
PRESS RELEASE L/1511
UNITED NATIONS, N.Y.

Legal Law 20-2-66 file

INTERNATIONAL LAW COMMISSION ENDS SESSION IN MONACO

(THE FOLLOWING WAS RECEIVED FROM THE INFORMATION SERVICE OF THE UNITED NATIONS OFFICE AT GENEVA.)

THE INTERNATIONAL LAW COMMISSION ENDED THE SECOND PART OF ITS SEVENTEENTH SESSION IN MONACO ON 28 JANUARY. THE MEETING STARTED ON 3 JANUARY.

THE COMMISSION DEVOTED ITS WORK TO THE LAW OF TREATIES, FOLLOWING A DECISION IT TOOK DURING THE FIRST PART OF THE SESSION. THE DISCUSSIONS WERE BASED ON COMMENTS BY GOVERNMENTS ON THE FIFTH REPORT BY SIR HUMPHREY WALDOCK OF THE UNITED KINGDOM, THE SPECIAL RAPPORTEUR OF THE COMMISSION.

THE COMMISSION RE-EXAMINED CERTAIN ARTICLES APPROVED IN FIRST READING IN 1963 AND ADOPTED THE TEXT OF 19 ARTICLES ON VALIDITY, TERMINATION AND SUSPENSION OF THE APPLICATION OF TREATIES. THE TEXT OF THE DRAFT ARTICLES ON THE LAW OF TREATIES WILL BE COMPLETED AT THE EIGHTEENTH SESSION TO BE HELD AT THE UNITED NATIONS OFFICE AT GENEVA FROM 4 MAY TO 22 JULY 1966.

DURING THE FIRST PART OF THE SESSION, HELD IN GENEVA FROM MAY TO JULY 1965, THE COMMISSION COMPLETED THE DRAFTING OF 28 ARTICLES WHICH INCLUDED GENERAL PROVISIONS RELATING TO THE CONCLUSION OF TREATIES, RESERVATIONS, ENTRY INTO FORCE, REGISTRATION, CORRECTIONS OF ERRORS AND FUNCTIONS OF DEPOSITORIES.

THE COMMISSION ADOPTED A RESOLUTION EXPRESSING THANKS TO THE GOVERNMENT OF MONACO FOR ITS INVITATION TO HOLD THE SESSION THERE.

THE COMMISSION ALSO DECIDED, IN ACCORDANCE WITH ITS STATUTE, TO ESTABLISH CO-OPERATIVE RELATIONS WITH THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION, AN ORGAN OF THE COUNCIL OF EUROPE.

OFFICERS AND MEMBERSHIP

THE COMMISSION, WHICH WAS CREATED BY GENERAL ASSEMBLY RESOLUTION 174 (II) OF 21 NOVEMBER 1947, IS COMPOSED OF 25 MEMBERS WHO ARE NOT REPRESENTATIVES OF GOVERNMENTS, BUT SIT AS EXPERTS.

MORE

MILAN BARTOS (YUGOSLAVIA) IS CHAIRMAN OF THE COMMISSION: EDUARDO JIMENEZ DE ARECHAGA (URUGUAY), FIRST VICE-CHAIRMAN; PAUL REUTER (FRANCE), SECOND VICE-CHAIRMAN; AND TASLIM OLAWALE ELIAS (NIGERIA), RAPPORTEUR.

THE OTHER MEMBERS ARE: ROBERT AGO (ITALY), GILBERTO AMADO (BRAZIL), MOHAMMED BEDJAOUI (ALGERIA), HERBERT W. BRIGGS (UNITED STATES), MARCEL CADIEUX (CANADA), ERIK CASTREN (FINLAND), ABDULLAH EL-ERIAN (UNITED ARAB REPUBLIC), MANFRED LACHS (POLAND), LIU CHIEH (CHINA), ANTONIO DE LUNA (SPAIN), RADHABINOD PAL (INDIA), ANGEL MODESTO PAREDES (ECUADOR) OBED PESSOU (DAHOMEY), SHABTAI ROSENNE (ISRAEL), JOSE MARIA RUDA (ARGENTINA), ABDUL HAKIM TABIBI (AFGHANISTAN), SENJIN TSURUOKA (JAPAN), GRIGORY I. TUNKIN (UNION OF SOVIET SOCIALIST REPUBLICS), ALFRED VERDROSS (AUSTRIA), SIR HUMPHREY WALDOCK (UNITED KINGDOM), AND MUSTAFA KAMIL YASEEN (IRAQ).

ALL MEMBERS, WITH THE EXCEPTION OF MESSRS. EL-ERIAN, LIU CHIEH, PAL, PAREDES AND TABIBI ATTENDED THE MEETING IN MONACO.

HS555P 31 JAN 66

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PRESS RELEASE L/1503
UNITED NATIONS, N.Y.

INTERNATIONAL LAW COMMISSION CONTINUES WORK ON LAW OF TREATIES

(THE FOLLOWING WAS RECEIVED FROM THE INFORMATION SERVICE OF THE EUROPEAN OFFICE OF THE UNITED NATIONS, GENEVA.)

THE INTERNATIONAL LAW COMMISSION, WHICH OPENED THE SECOND PART OF ITS SEVENTEENTH SESSION IN MONACO ON 3 JANUARY, IS CONTINUING THE DRAFTING OF THE REMAINING ARTICLES OF THE LAW OF TREATIES.

DURING THE FIRST PART OF THE SESSION, HELD IN GENEVA FROM MAY TO JULY 1965, THE COMMISSION COMPLETED THE DRAFTING OF 28 ARTICLES WHICH INCLUDED GENERAL PROVISIONS RELATING TO THE CONCLUSION OF TREATIES, RESERVATIONS, ENTRY INTO FORCE, REGISTRATION, CORRECTION OF ERRORS AND FUNCTIONS OF DEPOSITORIES.

THE COMMISSION IS NOW EXAMINING THE REMAINING DRAFT ARTICLES WHICH WERE ADOPTED, IN FIRST READING, IN 1963.

THE DISCUSSIONS ARE BASED ON COMMENTS BY GOVERNMENTS ON THE FIFTH REPORT BY SIR HUMPHREY WALDOCK OF THE UNITED KINGDOM, THE SPECIAL RAPPORTEUR OF THE COMMISSION. SIR HUMPHREYS FIFTH REPORT WAS PRESENTED TO THE COMMISSION AT THE FIRST PART OF THE SESSION IN 1965.

THE COMMISSION IS EXPECTED TO END ITS SESSION IN MONACO ON 28 JANUARY.

(FOR FURTHER DETAILS, SEE PRESS RELEASE L/1500.)

HS421P 7 JAN 66

File Legal

20-3-1-6
25-1-

UN3
PRESS RELEASE L/1503
UNITED NATIONS, N.Y.

INTERNATIONAL LAW COMMISSION CONTINUES WORK ON LAW OF TREATIES

(THE FOLLOWING WAS RECEIVED FROM THE INFORMATION SERVICE OF THE EUROPEAN OFFICE OF THE UNITED NATIONS, GENEVA.)

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DURING THE FIRST PART OF THE SESSION, HELD IN GENEVA FROM MAY TO JULY 1965, THE COMMISSION COMPLETED THE DRAFTING OF 28 ARTICLES WHICH INCLUDED GENERAL PROVISIONS RELATING TO THE CONCLUSION OF TREATIES, RESERVATIONS, ENTRY INTO FORCE, REGISTRATION, CORRECTION OF ERRORS AND FUNCTIONS OF DEPOSITORIES.

THE COMMISSION IS NOW EXAMINING THE REMAINING DRAFT ARTICLES WHICH WERE ADOPTED, IN FIRST READING, IN 1963.

THE DISCUSSIONS ARE BASED ON COMMENTS BY GOVERNMENTS ON THE FIFTH REPORT BY SIR HUMPHREY WALDOCK OF THE UNITED KINGDOM, THE SPECIAL RAPPORTEUR OF THE COMMISSION. SIR HUMPHREYS FIFTH REPORT WAS PRESENTED TO THE COMMISSION AT THE FIRST PART OF THE SESSION IN 1965.

THE COMMISSION IS EXPECTED TO END ITS SESSION IN MONACO ON 28 JANUARY.

(FOR FURTHER DETAILS, SEE PRESS RELEASE L/1500.)

HS421P 7 JAN 66

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UN1
PRESS RELEASE L/1500
UNITED NATIONS, N.Y.

LAW COMMISSION BEGINS SESSION IN MONACO

(THE FOLLOWING WAS RECEIVED FROM THE UNITED NATIONS INFORMATION CENTRE IN PARIS.)

THE INTERNATIONAL LAW COMMISSION BEGAN ITS SPECIAL SESSION YESTERDAY IN THE PRINCIPALITY OF MONACO.

THE COMMISSION HAD BEEN INVITED BY THE GOVERNMENT OF MONACO AND WAS WELCOMED ON BEHALF OF PRINCE RAINIER BY THE MINISTER OF STATE, JEAN-EMILE REYMOND.

THE CHAIRMAN, MILAN BARTOS (YUGOSLAVIA), THANKED THE GOVERNMENT OF MONACO FOR ITS INVITATION AND ALLUDED TO THE ROLE PLAYED BY THE PRINCIPALITY IN THE UNITED NATIONS SPECIALIZED AGENCIES, PARTICULARLY IN THE SCIENTIFIC AND HUMANITARIAN FIELDS.

CONSTANTIN BAGUIGNIAN, OF THE UNITED NATIONS LEGAL DEPARTMENT, ALSO THANKED THE MONACO GOVERNMENT ON BEHALF OF THE SECRETARY-GENERAL BOTH FOR THE INVITATION AND THE ORGANIZATION OF THE SESSION.

THE COMMISSIONS SESSION, WHICH WILL CONTINUE THE WORK ON CODIFICATION OF THE LAW OF TREATIES, IS EXPECTED TO LAST UNTIL 28 JANUARY.

APART FROM THE CHAIRMAN, MR. BARTOS, OTHER OFFICERS OF THE COMMISSION ARE EDUARDO JIMENEZ DE ARECHAGA (URUGUAY), FIRST VICE-CHAIRMAN; PROFESSOR PAUL REUTER (FRANCE), SECOND VICE-CHAIRMAN; AND TUSLIM OLAWALE ELIAS (NIGERIA), RAPPORTEUR.

HS509P 4 JAN 66

(Law of treaties)

20-3-1+6
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UN1
PRESS RELEASE L/1500
UNITED NATIONS, N.Y.

LAW COMMISSION BEGINS SESSION IN MONACO

(THE FOLLOWING WAS RECEIVED FROM THE UNITED NATIONS INFORMATION CENTRE IN PARIS.)

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HS509P 4 JAN 66

CONFIDENTIAL

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COMMENTARY

FOR USE AT THE

2ND PART OF THE 17TH SESSION

OF THE

INTERNATIONAL LAW COMMISSION

LAW OF TREATIES: Part II

ARTICLES 30-54

Background Documents

- Report of the International Law Commission on the work of its 15th Session (6 May - 12 Jul./63) General Assembly Official Records: 18th Session supplement 9 (A/5509) 7/
- Comments by Mr. Marcel Cadieux on the work of the 15th Session of the International Law Commission. (May - July/1963).
- Comments by Governments on Parts I and II of the Draft Articles on the Law of Treaties. (A/CN.4/175 of 23 Feb./65; A/CN.4/175/Add.1 of Mar. 3/65).
- Text of Draft Articles adopted by the Commission. (A/CN.4/L. 107 of Jan. 7/65).
- Fifth Report on Law of Treaties by Sir Humphrey Waldock (A/CN.4/183 of Nov. 15/65).
- Fifth Report on Law of Treaties by Sir Humphrey Waldock (A/CN.4/183/Add.1 of Dec. 4/65).*

* Further comments by Sir Humphrey Waldock not yet in print.

Introduction

The following commentary, which deals with Part II of the Draft Law of Treaties has been prepared for use at the Second part of the 17th Session of the International Law Commission, which is scheduled to meet in Monaco in January, 1966. It should be read in conjunction with the commentary already prepared for use at the regular 1965 Summer Session of the International Law Commission, which dealt, interalia, with Part I of the Law of Treaties.

The present commentary is intended to replace that part of the earlier commentary which began at page 92 of the text and which covered only Articles 30 - 37 of Part II of the Draft Laws of Treaties. Pressures of work in Legal Division have precluded the provision of as detailed an analysis of the Articles in Part II as was prepared for those in Part I. In each case however the actual text of each of the Articles, numbered in accordance with the text of the Report of the 14th Session, has been set out separately.

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Following that there is a brief statement on the treatment which the Article received when it was earlier discussed by the Commission, and then, if necessary, a summary of the position adopted by the Canadian representative with regard to the particular Article. The text of any official Canadian Government comment provided to the Secretary General on the Article is then reported and that is followed by a brief reference to such comments by other states as may seem to be of particular interest. Finally, there is a section suggesting the position which might be adopted at the present Session with regard to the Article concerned.

The Draft Articles dealing with Part II of the Law of Treaties based on Sir Humphrey Waldock's Second Report (A/CN.4/156 and Add. 1-3), on the essential validity, duration and termination of treaties, were the result of discussions in the International Law Commission during its 15th Session. The Draft Articles in this section did not contain any provisions concerning the effect of the outbreak of hostilities on treaties, or the effect of the extinction of the international personality of a State, both matters which the Commission considered could not conveniently be dealt with in its present context on the Law of Treaties. The draft articles have been provisionally arranged in six sections comprising: (i) a general provision, (ii) invalidity of treaties, (iii) termination of treaties, (iv) particular rules relating to application of sections (ii) and (iii), (v) procedure, (vi) legal consequences of nullity, termination of suspension of the operation of a treaty. The definitions contained in Article 1 of Part I are applicable also to Part II.

From Mr. Cadieux' comments on the 15th Session of the International Law Commission it would appear that the meetings that year were more harmonious than had been the case previously. It would appear that the Agenda was approached in a workmanlike and co-operative spirit by the members, as a result of which, in his opinion, "the Commission was outstandingly successful in resolving all differences and in drawing up a comprehensive set of rules" relating to the Law of Treaties. Sir Humphrey's draft articles would appear to have been often long and involved and they underwent major changes at the hands of the Drafting Committee. From detailed formulations of the law they became exceedingly short propositions embodying only the essential aspects of the problem concerned. On items of politically controversial rules there was a wide similarity of views on the part of most members of the Commission which led to almost all decisions being adopted unanimously.

As to the draft articles on the Law of Treaties, they "were largely of a technical nature and the majority of them" had "little political content". A large part of the Articles merely formulated rules flowing from the agreement of the parties, although there were also important rules adopted concerning the termination of treaties by operation of law.

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Final Form of Articles

One of the matters to which the Commission will have to give consideration either at the resumed 17th Session or, if it prefers to, the 18th Session, is that of the order in which the articles should ultimately be set out.

The Committee has already recognized that some changes will be necessary in this regard, and it has referred to this in paragraph 27 of its report on the work of the first part of its 17th Session. The special rapporteur in paragraph 7 of this 4th Report, dealt with this matter also. He refers to it again in paragraph 6 of his 5th Report, where he states that "in approaching the re-examination of Parts II and III it seems desirable for the Commission to have in mind a general perspective, however provisional, of the probable structure and order of the articles which it will ultimately adopt; for in these Parts the arrangement of the drafted topics may in some cases influence the drafting of the articles.

The general arrangement of the draft articles which he tentatively envisages would be one in which the draft Law of Treaties was divided into six Parts. Part I would cover general provisions; Part II, entry in force and registration; Part III, observance and interpretation; Part IV, application; Part V, invalidity, termination and suspension etc; and part VI, modification of treaties. These matters are set out in detail in paragraph 7 of A/CN.4/183 L page 6. It will be noted that Part V, "invalidity, termination and suspension of the operation of treaties" would comprise the whole of the present Part II (Articles 30 - 54) with the exception of Article 48, which is now Article 3 (bis).

In paragraph 7 of his 4th Report the Special Rapporteur had considered dividing Part II into four separate parts. However, after further reflection and in the light of comments received from governments, he now considers it preferable to adhere to the present structure under which these four topics are all included in one part.

He still has in mind, however, rearranging certain of the articles within Part II. He therefore suggests that it should now begin with a section entitled "General Rules" which would comprise Article 30, Article 49, Article 46, and Article 47.

Since a number of governments had underlined the importance they had attached to the possibility of independent ajudication with regard to the matters dealt with in certain of the articles in Part II there is also for consideration the question whether the general provision in Article 51, regarding procedures for invoking grounds for invalidity, termination etc. is of such a nature that the article itself should not be transferred to Section I of Part II.

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PART II

INVALIDITY AND TERMINATION OF TREATIES

SECTION I: GENERAL PROVISION

ARTICLE 30

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

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

Change of Title of the Part

Section I: The Title

The Special Rapporteur proposes that this Section should now be entitled "General Rules" and that it should include four Articles (the present Articles 30, 49, 46 and 47).

ARTICLE 30

The substance of this article was set out in Article 2 in the Special Rapporteur's Second Report. According to the Special Rapporteur its main purpose was to indicate that the burden of proof is on whichever party alleges that a treaty, brought into force in accordance with Part I, is invalid. After considerable discussion this article was referred to the Drafting Committee and revised along the lines of the present one. It was then adopted by 16 votes in

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favour, none against, with one abstention (Parades, who abstained in this and other instances as a protest against the unavailability or late issuance of the Spanish text).

The inclusion of a general provision of the kind contained in Article 30 appeared to be endorsed in the comments of governments and delegates, although the United States observed that it could be dispensed with if the draft articles were formed on a more selective basis. In his commentary on this article set out on page 4, A/CN.4/177/add 2, the Special Rapporteur admits that the need for this article was perhaps more acute under the arrangement of the articles provisionally adopted in the 1963 report than it is at present. He suggests that the Commission may therefore wish to re-examine the arguments for and against the inclusion of a general provision on the lines of Article 30.

If the article is to be retained, the Special Rapporteur considers that it should be placed at the beginning of the present Part II but that the text should be modified in accordance with the recommendations of governments.

In the light of those recommendations, he suggests the following re-wording of Article 30:

> "Every treaty concluded and brought into force in accordance with the provisions of Part II shall be considered as being valid, in force and in operation with regard to any party to the treaty, unless the invalidity, termination or suspension of the operation of the treaty or the withdrawal of the party in question from the treaty results from the application of Articles 31 to 51 inclusive."

Recommendation:

Subject to a decision by the Commission to retain Article 30, the new wording proposed appears acceptable.

SECTION II: INVALIDITY OF TREATIES

ARTICLE 31

Provisions of internal law regarding competence to enter into treaties

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

This article was based upon Article 5 of the Second Report of the Special Rapporteur, and was originally entitled "Constitutional limitations on the treaty making power". The Commission devoted three meetings to its first reading, where "it was almost immediately apparent that there was a wide consensus in favour of the 'internationalist' approach proposed by Waldock". Only Messrs. Yasseen, Paredes and Tabibi opposed it to some slight degree. Also Tunkin favoured the alternative view that, as a general rule, constitutional limitations could be binding on the international plane. Debate apparently focussed largely on drafting considerations and the article was twice referred to the Drafting Committee before being adopted unanimously in its present form.

A considerable number of Governments commented on this article, including Czechoslovakia, Denmark, Israel, Portugal, Uganda, the United Kingdom and the United States of America. Of these comments one, that of Denmark (A/CN.4/175, pp 36-40) has some relevance to Canada. It stresses that "if its consent has been validly expressed, a State cannot rely on its internal law, not even its constitution, as an excuse for not giving effect to a treaty."

Denmark was nevertheless satisfied that "the wording of Article 31 seems to be entirely compatible with this point of view insofar as it refers to provisions of the internal law regarding 'competence to enter into treaties'".

Israel wished to relate Article 31 more closely to Article 47 (loss of a right to allege nullity of a treaty, etc) and proposed substantive changes to the text (which are set out in A/CN.4/175, pp. 54-55). Portugal, though it commented at great length on the article, was prepared to accept the present text. The permanent representative of Uganda considered that, though "the other contracting parties would wish to have some sort of assurance that the treaty they have signed would not be declared null and void", still it was "a dangerous principle which leaves room for international concluded treaties to bypass constitutional procedures of a Member State".

In its comment the United Kingdom considered that the proviso "unless the violation of its internal law was manifest" it might be difficult to apply in practice without further clarification, while the United States of America considered that the article would prove to be self-enforcing in the course of time.

In commenting on this article, the Special Rapporteur pointed out (A/CN.4/177/add.2, p. 15 paragraph 2) that a large majority of the governments had expressed themselves in favour of the rule proposed by the Commission while making suggestions for improving its formulations. The Special Rapporteur therefore sought to improve the wording of Article 31 in the light of the points made in the comments of governments and delegations. Among other matters he accepted the suggestion of the Government of Denmark

referred to above. He further dropped the cross-references to the provisions of Article 4.

The suggested revised text of Article 31 is as follows:

"Violation of internal law

The fact that a treaty has been concluded in violation of its internal law may be invoked by a State as invalidating its consent to be bound by the treaty only if the violation of its internal law was known to the other States concerned or was so evident that they must be considered as having notice of it".

Recommendation:

The new formulation is a distinct improvement over the earlier one, but it is obvious that this wording too will have to be given particularly careful consideration in the light of Canada's pre-occupation with the relationship between the constitutional powers of the provinces and of the federal government.

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ARTICLE 32

Lack of authority to bind the State

1. If the representative of a State, who cannot be considered under the provisions of article 4 as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

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

This article was based on Article 6 of the Special Rapporteur's Second Report. The brief debate which apparently took place on it revealed three views:

a) that the contents of the article were so obvious as to need no statement;

b) that because the article related to formal validity it should be placed in conjunction with Article 4;

c) (favoured, among others, by Mr. Cadieux), that it was useful and should be retained subject to drafting changes.

In its present form it was adopted unanimously with virtually no debate.

Only the United States of America offered any substantive comment on this article, linking it to the comments offered on Article 4 and suggesting the following revision:

> "1. If the representative of a State, who cannot be considered under the provisions of article 4 or in the light of the surrounding circumstances as being furnished with the necessary authority to express the consent of

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> his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative may be considered by any of the parties to be without any legal effect, unless it is afterward confirmed, either expressly or impliedly, by his State."

They also wished to add the phrase "prior to his expressing the consent" at the end of paragraph 2.

In commenting on this article, the Special Rapporteur was not convinced by the arguments put forward by the Government of the United States of America but suggested that it would be desirable to use a formulation which would be re-worded in terms of a right to invoke the lack of authority as invalidating the expression of a State's consent to be bound by the treaty. He also proposes certain changes in both the title of the article and the wording of a second clause of it.

In its revised form the article would read as follows:

"Unauthorized act of a representative

> 1. Where a representative, who is not considered under article 4 as representing his State for the purpose or as furnished with the necessary authority, purports to express the consent of his State to be bound by a treaty, his lack of authority may be invoked as invalidating such consent unless this has afterwards been confirmed, expressly or impliedly, by his State.
>
> 2. Where the authority of a representative to express the consent of his State to be bound by a treaty has been made subject to a particular restriction, his omission to observe that restriction may be invoked as invalidating the consent only if the restriction was brought to the notice of the other contracting States prior to his expressing such consent."

Recommendation:

This revised formulation appears acceptable.

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ARTICLE 33

Fraud

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

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

This article was based on Article 7 of the Special Rapporteur's Second Report. In his commentary on the article he had pointed out that "there does not appear to be any recorded instance of a State claiming to annul or denouce a treaty on the ground that it had been induced to enter into the treaty by the fraud of the other party". In his draft he had attempted to strike a balance between the "somewhat laconic" draft of Sir Hersch Lauterpacht and the very elaborate draft of Sir Gerald Fitzmaurice.

In his commentary on the 15th Session Mr. Cadieux points out that the article "produced one of the lengthiest discussions during the Session, perhaps because it is largely theoretical". After two meetings the Commission reached a consensus, referring the article to the Drafting Committee for substantive revision; later a clause on separability was added; and it was finally adopted almost unanimously with only Parades abstaining (for reasons earlier stated).

Several States commented on the article, but the only ones of importance would seem to be those of Israel, Jamaica, the United Kingdom and the United States of America.

Israel would have preferred this article to follow Article 34 in order to distinguish between varying degrees of calumnous conduct,

and also wished to make minor amendments to the text. Jamaica suggested that, once aware of the situation, the party alleging that it has been defrauded should be under an obligation to take steps to invalidate its consent within a stated time. Otherwise it "should be precluded from invoking such fraud as a reason for terminating the treaty 'unless the conditions of termination are agreed upon by both parties'".

The United Kingdom doubted any need for this article, but believed that, if it is to be included, there should be a provision in it for independent adjudication on its interpretations and application. The United States of America also considered that there was a requirement that at least the question of fraud should be determined judicially.

Referring to the views of governments, the Special Rapporteur recalls that at its 15th Session some members of the Commission would have preferred to amalgamate fraud and error in a single article but that the Commission had then concluded that, on balance, and despite the rarity of fraud, it should be kept distinct from error in a separate article. It had said:

> "Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely nullify the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties."

The Special Rapporteur considers that if this article is to be retained these Israeli Government suggestions of reversing the order of this article and the following article, so as to place fraud after error, should be adopted. He did not, however, agree with the suggestion of certain governments that a specific time limit should be

stated, within which the right to invoke the grounds of invalidity must be exercized.

As in the case of Article 47 which, if it appears in Section I of the revized present Part II, will cover this article among others, it is his view that "it does not seem either possible to lay down a general limit for all cases or advisable to attempt to lay down a particular time limit for each ground.

The Special Rapporteur suggests the article be revised to read as follows:

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

Recommendation:

This modification would appear to be acceptable, even though it is obvious that the failure to lay down time limits, other than by reference in Article 47 to "undue delay" would probably be used in future by some State or other in an attempt to justify action which under a more specific time limit would be precluded.

The Special Rapporteur in discussing this article and the following article did not comment on the suggestion by the United Kingdom that there should be a provision for independent ajudication. on their interpretation and application. Given the fact that the whole of the Draft Law of Treaties is to be re-considered prior to the 2o 21st United Nations General Assembly, the Commission may not wish to go into this matter at the present time. However, the question is one which would appear worthy of consideration at some future time.

ARTICLE 34

Error

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

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

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

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

The substance of this article was set out originally in the texts of Articles 8, 9 and 10 of the Special Rapporteur's Second Report, in which he distinguished between mutual error and error by one party only respecting the substance of a treaty, and further between such errors as to substance and those other errors clearly textual in nature.

When it considered these articles the Commission was virtually unanimous in agreeing that at least the first two should be combined. Though a majority of the Commission were moreover in favour of deleting Article 10 altogether, Sir Humphrey Waldock stood his ground on retaining it and the Drafting Committee decided to incorporate its provisions into the further combined draft. Later a new paragraph on separability was added and, in its present form, the article was adopted unanimously (Parades abstaining).

In the Commission's Report on this article it is pointed out

that while "the Commission recognized that some circumstances of law distinguish between mutual and unilateral error ... it did not consider that it would be appropriate to make this distinction in international law. Accordingly the present article applies no less to an error made by only one party than to a mutual error made by both or all the parties". [Ref: Supp. 9 (A/5509.p.9)]

Few substantive comments were offered by Governments on this article. Israel suggested a redraft of paragraph 4 to bring it more into line with paragraph 7 of the commentary, which would read as follows:

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

If adopted this would require additional changes, as appropriate, elsewhere in the draft to substitute the word "mistake" for the word "error". It offered other minor textual revisions of the article as well.

Portugal again commented at length on this article, though it expressed no formal conclusions for or against it, while the United Kingdom favoured provision for independent adjudication as in the case of Article 33. The United States of America also considered that a provision to provide for judicial determination of the fraud was necessary. In addition it stated that there should be a time limit beyond which the State affected by such fraud could not act.

In his comment on the observations of States, the Special Rapporteur disagreed with those governments which have expressed doubts as to the advisability on including an article on error. He felt that the ommission of any provision regarding cases of error

would leave an unacceptable gap in the draft articles. He noted, however, that the Commission, to his knowledge, had had no intention of putting errors of law on the same footing as errors of fact. In this connection, he regarded its intention in paragraph 7 of the Commentary on this article (quoted again at page 33 of A/CN.4/183) as having been to enter a caveat that, in certain circumstances, an error "which may be said to involve an error as to a matter of law may constitute an 'error related to a fact or state of facts' and for that reason fall within the article". Because each case would depend upon the special facts relating to it he did not consider it advisable to attempt to expand paragraph 1 of this article. In his opinion it might, however, be as well to modify paragraph 7 of the Commentary to make this clearer.

In the light of the Special Rapporteur's proposal for the revision of Article 46 and its transfer to Section I of the present Part II as a general rule, paragraph 3 of the present article will no longer be necessary because separatability will have been covered in Article 46.

The Special Rapporteur therefore proposes first, that this article and Article 33 be transposed (as already noted) and second, that the wording of the second article be revised as follows:

"Error

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

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

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

Recommendation:

It is recommended that it would be preferable if the order of Articles 33 and 34 were indeed to be transposed as suggested by Israel. The revised wording appears to be acceptable. The question of a provision for judicial determination, referred to in connection with the previous article, also arises in the case of this article.

ARTICLE 35

Personal coercion of representatives of States

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

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

Article 35 was based on Article 11 of the Special Rapporteur's Second Report. It and the following article, originally numbered 12, were dealt with at the same time in the Commission. Notwithstanding the general recognition of their cardinal importance, discussion of these articles would appear to have been restrained and Sir Humphrey's approach received wide support. Such debate as took place was mainly as to whether the nullity of consent should be absolute or relative.

When it commented on its redraft of Article 11 the Drafting Committee explained that in its view personal coercion should make consent void and not merely voidable. In its present form the article was adopted with no abstentions and only Parades voted against it.

Several governments offered substantive comments on this article. The United Kingdom stated that "it is not clear whether paragraph 1 of this article would cover signature of a treaty which was subject to ratification, and, if so, whether a signature procured by coercion is capable of being ratified". The United States of America indicated that, in its opinion, paragraph 1 of the article goes too far "in providing that an expression of consent obtained by means of coercion 'shall be without any legal effect'". In the American view it would be better that the phrase read "such expression of consent may

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be treated by the State whose representatives were coerced as being without any legal effect". In their view this revision would accomplish three things.

> "First, it would prevent the State which applied the coercion from asserting that coercion as a basis for considerting the treaty invalid; we do not think that the coercing State should have this right. Second, the State against which coercion was applied should not be required to take the view that the treaty is 'without any legal effect'; the coerced State conceivably may wish to avail itself of the option of ignoring the coercion if its interest in maintaining the security of the treaty is dominant. Third, a revision along the lines suggested would tend to prevent third States from attempting to meddle in a situation where the parties immediately involved were satisfied to continue with the treaty."

In his comments on this article, the Special Rapporteur referred to the fact that four governments had suggested that paragraph 1 should be revised so as to give a State the right to invoke coercion as invalidating consent, rather than automatically to render the expression of consent obtained by coercion "without legal effect". He expresses himself as inclined to doubt "whether the absolute nullity of the consent is necessarily called for in cases covered by the present article". He points out that the following article covers the cases where a State itself is coerced and he considers that it would be quite justifiable, in the cases of coercion exercized on a representative in his individual capacity, to treat these as more akin to cases of fraud and therefore, as in such cases, it is his opinion the State whose representative had been coerced should itself have the option to accept the treaty as valid, or to reject it as invalidated by the coercion or, in appropriate cases, to regard as invalid only the particular clauses to which the particular coercion might relate.

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In order to deal with the point raised by the United Kingdom relating to the words "expression of consent to be bound" he proposed the deletion of that phrase and its replacement with a reference to signature procured by coercion. He further pointed out that the transfer to Section I of Part II of Article 46 would make paragraph 2 of the present Article unnecessary.

The Special Rapporteur proposed that the article be redrafted as follows:

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

Recommendation:

The revised wording of the present article appears to be a distinct improvement over the original draft. It therefore appears acceptable.

It is for consideration whether the words "the State" in the third line might not, however, be changed to "that State". This would make for even greater clarity.

ARTICLE 36

Coercion of a State by the threat or use of force

Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.

As had been indicated in the commentary on the previous article, this article, which was number 12 in the Special Rapporteur's Second Report, was considered by the Commission in conjunction with Article 11 (the present Article 35). As formally adopted the article adds "an important element of progressive development" in international law. (Ref: Mr. Cadieux' Report, p. 4).

During the discussion of this article Tunkin's theory of total invalidity rather than voidability was strongly supported, and discussion was harmonious. It was suggested at one stage that the wording of Article 2(4) of the United Nations Charter should be incorporated in the text of the article. The Drafting Committee considered, however, that to do so would be too narrow an approach and that the article should not indicate what particular principles of the Charter were involved. In its present form the article was adopted by a vote of 19 in favour, none against, and with one abstention (Bartos, who apparently thought that the article should not be limited only to coercion in violation of the principles of the Charter and would have preferred that, as in the case of previous article, it be broader). A number of States, including Czechoslovakia, Jamaica, Poland, Portugal, Turkey, Uganda, the United Kingdom and the United States of America, commented on this article. While these comments cannot be reproduced here at length, several are worth noting briefly.

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Czechoslovakia (perhaps in support of the same principles which led Bartos to abstain on the article) would have preferred that the article "contain explicitly the principle of the invalidity of international treaties imposed by such forms of coercion as, for example, economic pressure (A/CN.4/175, p.28). Poland was also of this opinion.

Jamaica considered that the nature of the coercion could be broader, though it felt that a distinction could be made in that perhaps only violations of the principles of the Charter of the United Nations should be void, while other circumstances could lead to the treaty being voidable. Turkey also considered that the restriction to the principles of the United Nations Charter was too narrow.

The United States of America pointed out that the article should not, in any event, be made retroactive, as to do so "would create too many legal uncertainties".

The Government of Israel suggested that the article should be completed by adding a provision to the effect that it would also apply where participation of a State in an existing treaty was procured by the threat or use of force. The Netherlands on the one hand, and the Poles on the other, took different views as to whether or not the concept of "use of force" should include all forms of coercion of economic or psychological nature. Turkey, stressing the sort of conflict which the intended meaning of the term might give rise to, suggested that it would be helpful to define the threat or use of force envisaged. In his comments on the observations of governments, the Special Rapporteur repeats the views of the Commission as set out in paragraph 3 of its

Commission should attempt to go beyond the broad implication of the time element contained in the reference to "the principles of the Charter of the United Nations".

He was, however, prepared to accept the proposal of the Israeli Government that the article should be revised to cover participation in an existing treaty. He therefore suggested that the article should be re-worded to read as follows:

> "Any treaty and any act expressing the consent of a State to be bound by a treaty which is procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void."

Recommendation:

It would seem desirable to maintain the distinction between void and voidable treaties set out in this and the preceeding article. In its revised formulation the article appears acceptable.

commentary, where "threat or use of force" is linked directly to "violation of the principles of the Charter". It He understood however, that the Commission was unanimous in thinking that it should not seek to pronounce upon the precise scope and effect of the relevant provisions of the Charter and that the full content of the principle contained in the present article should be left to be determined in practice by interpretation of the provisions of the Charter. He then went on to refer to the relationship between this aspect of Article 36 and the work of the Special Committee on Friendly Relations, which he noted, had so far failed to reach a conclusion on the question on the meaning of "threat or use of force".

In the circumstances, the Special Rapporteur felt that the Commission should retain the general formulation of the rule which now appears in the Draft Article.

As regards the question of the actual date from which the rule in the present article could be considered to govern the conditions for the conclusions of a valid treaty, he considers that the precise date at which the rule contained in the article may be said to have become accepted as a general rule of international law "is a matter on which, perhaps, different opinions may be held". However, he considers it beyond question that the entry into force of the Charter marked a new era of international relations and that the Commission itself by formulating the present article as it did, had by implication recognised that the present article would be applicable at any rate to all treaties concluded since the entry into force of the Charter. He doubted, however, whether the

ARTICLE 37

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

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

This article was numbered 13 in the Special Rapporteur's Second Report. As he pointed out therein, "the question how far international law recognizes the existence within its legal order of rules having the character of jus cogens is controversial". The definition embodied in the article in its first draft was considerably broader than is its present form. When he considered the matter Sr. Hersch Lauterpacht considered that a treaty would be void if its performance involved an act "illegal under international law". Sir Humphrey considered this definition too wide, since it would seem open to the interpretation that any treaty infringing the prior rights of another State would be ipso facto void. Sir Gerald Fitzmaurice had expressed the rule in terms limiting illegaility "to infringement of rules of the nature of jus cogens." The Special Rapporteur followed this approach, though he appreciated that it might leave some room for argument "as to exactly what rules of international law institute jus cogens". In paragraph 2 of his draft he set out certain examples. He provided for an exception with regard to general multilateral treaties which expressly abrogate or modify a rule having the character of jus cogens.

In the opinion of Mr. Cadieux "perhaps this was the most important rule which the Commission adopted". It devoted nearly three

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meetings to its consideration and "rather surprisingly" there was general approval of Waldock's approach, though there were also quibbles about drafting. The debate centred on two matters: the theory or concept behind the new notion of a public international order from which States cannot derogate even by treaty, and the question whether the specific examples in paragraph 2 of the original draft should be expanded or omitted altogether. In its first revision of the text the Drafting Committee decided that it would be better to drop the list of examples rather than to expand it (which they considered their only alternative, since it was not acceptable as originally set out). After further discussion and minor drafting changes the article in its final form was adopted unanimously.

Czechoslovakia, Israel, Luxembourg, Portugal, Turkey, the United Kingdom and the United States of America all commented on this article. Those countries which offered substantive criticism included both Luxembourg and Turkey. The former commented that it was "likely to create a great deal of legal uncertainty" (for reasons set out in A/CN.4/175, pp. 99-100), and "much to its regret" concluded that "in the present state of international relations it is not possible to define in judicial terms the substance of peremptory international law". Turkey's views were not dissimilar. It considered the examples cited in the commentary as "not compatible with reality", and that it would lead to "new misunderstandings". The United Kingdom considered that the application of the article "must be very limited" and that it called "for a great deal of elucidation". It also wanted it to contain a clause requiring independent adjudication. The United States of America, although

it agreed with the merit of the article, suggested that "the Commission reconsider the provisions of that article and all aspects of the manner in which it might be applied, particularly the question as to who would decide when the facts justify application of the rule".

In his comments on this article, the Special Rapporteur noted that certain governments had expressed doubts as to the advisability of the inclusion of this article unless it were to be backed by a system of independent adjudication. On the other hand, he noted that the principle contained in the article met with a large measure of approval. He then went on to deal with two matters in particular. Firstly, the Netherlands suggestion that to say "a peremptory norm from which no derogation is permitted" might be pleonastic. He pointed out that the matter received careful consideration at the 15th Session but that it is probably necessary, in view of the fact that there exists no usage at present clearly giving meaning to the concept of jus cogens.

"A general rule possesses a jus cogens character only when individual States are not permitted to derogate from the fule at all - not even by agreement in their mutual relations. In short, a jus cogens rule is one which cannot be derogated from but may only be modified by the creation of another general rule which is also of a jus cogens character. Accordingly, in formulating the article, the Commission considered it essential to speak not merely of a "peremptory" norm but of one "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

He also dealt at some length with the United States government's view that it would not be desirable to allow any retroactive operation to the rule enunciated in the article. Taking this view into consideration he felt that it would be desirable, in order to leave no possibility of misunderstanding, to make explicit in the text the fact that the article relates to treaties which conflict

with a rule of jus cogens existing at the time of their inclusion.

He therefore suggested that the opening phrase of the article should be revised so as to read as follows:

"A treaty is bound ab initio if at the time of its conclusion it conflicts..."

Recommendation:

It cannot be denied that, because of the present lack of content of the rule of jus cogens (spelt out by the Special Rapporteur in some detail in paragraph 6 on p. 25 of A/CN.4/183/Add.1) this article might be subject to abuse. It bears in particular a close relationship to pacta sunt servanda, which is to be dealt with again by the Commission when it comes to Article 55 of the present draft. On the other hand, it is clear that, however imprecise the content of the concept may be, it is generally recognized today in international law. It would therefore seem advisable that the present article, either in its current form or as it may come to be modified, should be included in the Draft Law of Treaties.

For the same reasons, it would seem well worth the Commission's while to consider whether or not it might be possible to include in this article some provision, as suggested by the United Kingdom, for independent adjudication.

SECTION III: TERMINATION OF TREATIES
ARTICLE 38

Termination of treaties through the operation of their own provisions

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

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

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

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

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

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

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

This article was based upon Article 15 in the Second Report of the Special Rapporteur. At the 15th Session the entire Commission was of the view that, as originally presented, the entire article was both too long and largely superfluous. The Drafting Committee was therefore instructed to substantially simplify the article. In due course it was adopted unanimously in the present form.

Various governments commented on the present article, some to the effect that even as now drafted it still was largely superfluous. Most, however, recognized that paragraph 3B in itself was of importance.

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In his comments on the article the Special Rapporteur admitted that, "as it is at present formulated", it still reflects "the code" concept of the Commission's work on the Law of Treaties. He noted the general acceptance of paragraph 3b, however, and he went on to comment that the article in its present form is limited to the termination of a treaty under its own provisions, whereas the suspension of its operation or the conditions for the withdrawal of individual parties may equally be managed in the treaty. He considered that the article should therefore cover both these possibilities. Accordingly, he proposed the following revision:

"Termination or suspension of the operation of a treaty under its own provisions

"1. A treaty terminates or its operation is suspended or the withdrawal of a party from the treaty takes effect on such date or on the fulfilment of such condition or on the occurrence of such event as may be provided for in the treaty.

2. A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force."

Recommendation:

Paragraph 1 of the proposed revised text is preferable to the longer version of paragraphs 1 and 2 of the present text, and appears acceptable. Paragraph 2 of the proposed revised text is also an improvement over the earlier paragraph 3b. Its inclusion would appear useful and would presumably assist in the avoidance of controversy in the absence of any specific provisions in a given treaty.

The revised text of the article as a whole therefore appears acceptable.

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ARTICLE 39

Treaties containing no provisions regarding their termination

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

This article was the original Article 17 of the Special Rapporteur's Second Report.

In Mr. Cadieux' commentary on the 15th Session it is pointed out that it was an important article "where Waldock's general view was not generally supported". He, while recognizing it as a general residuary rule, though in a rather indefinite way, that treaties can not be terminated by mutual consent, went considerably further than the previous Rapporteurs. He had provided for a number of exceptions where treaties could be terminated unilaterally. His general position was that certain types of treaties (Commercial treaties, treaties of alliance, technical co-operation and arbitration treaties) almost always contained clauses for unilateral termination and that therefore such a clause could generally be implied. Only a few members supported that view, though those opposed to it were themselves divided. Ultimately, the line taken by Ago, Tunkin and Lachs, that the article would have to be considerably re-drafted, to place the residuary rule in a clear and categorical way at the beinning of the article, prevailed. After being re-drafted twice

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the article in its present form was finally adopted by a vote of 16 in favour with two opposed (including Briggs). A number of governments commented on this article, making specific proposals for altering its provisions. Among these were Israel, which suggested that provisions should be made for the possibility for suspending the operations of a treaty in the circumstances mentioned, as an alternative to terminating it; the Netherlands, which considered that contracting parties usually fail to provide for termination or denunciation only deliberately and proposed a re-drafting to make the article suitable for existing and future treaties and the United States of America which wished to have the word "clearly" inserted in the first sentence before the word "appears" in order to emphasize that the intention to permit denunciation or withdrawal shoud be a clear one.

In his comments on this article the Special Rapporteur noted that the great majority of governments appears to approve of the principles of the article. He did not agree with the specific comments made by either the United States of America or the Netherlands but, bearing them in mind, he considered that some revision of the first sentence of the article was nevertheless desirable. He pointed out that the text of the present article had drawn up before Article 69 and 70 had been formulated, both of which have some relevance to it. These considerations are set out in detail on page 33 A-CN.4-183-Add.1. Noting that it will be, in due course, desirable for the Commission to review all the provisions of the draft Law of Treaties where phrases such as "unless it appears from the treaty or from the circumstances of its conclusion" occur, in order to co-relate their language with the provisions of Articles 69 and 70, he nevertheless pointed out that during the first part of the 17th Session the Commission in revising

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Article 12 had selected phrases which it thought most suitable for the particular case being considered, rather than merely relying on the operation of Articles 69 and 70. He therefore has retained the mention of the circumstances of the conclusion of the treaty of the present article. With regard, however, to the separate mentione of Article 70 of "preparatory work" and the circumstances of the conclusion he though it necessary to make specific mention of "preparatory work", to ensure that references to such work, to ascertain the intention of parties, is clearly admissable under the present article.

In the light of the foregoing he proposed the following revised formulation:

> "Treaties containing no provisions regarding their termination or the suspension of their operation
>
> 1. When a treaty contains no provision regarding its termination and does not provide for denunciation or withdrawal or for the suspension of its operation, a party may denounce, withdraw from or suspend the operation of the treaty only if it appears from the treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended to admit the possibility of such denunciation, withdrawal or suspension of the treaty's operation.
>
> 2. A party shall in every case give not less than twelve months' notice of its intention to denounce, withdraw from or suspend the operation of the treaty under the provisions of paragraph 1."

Recommendation:

The revised text of the article appears to present no problems and is therefore considered acceptable.

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ARTICLE 40

Termination or suspension of the operation of treaties by agreement

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

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

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

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

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

Article 40 was originally Article 18 of the Second Report of the Special Rapporteur. Although it was not apparently of great importance a lengthy discussion took place on it at the 15th Session. There was general support for Waldock's proposal that all the parties to the earlier treaty would have to agree to the subsequent instrument if it were to have a terminating effect. His proposal, de lege ferenda, to allow non-parties who drew up the treaty to have a say in any subsequent agreement to terminate was opposed by one or two members but was also widely supported. Contrary to his original proposal, it was however the general view that all of the States parties should have to agree to any terminating treaty, even if it were adopted within an international organisation. The question of third party rights was to be dealt with by Waldock later.

After further modifications and re-drafting the article was accepted in its present form unanimously.

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This was one of the articles on which Canada offered written comments to the Secretary-General. These comments were as follows:

> "Termination or suspension of the Operation of treaties by Agreement
>
> In clause 2 of this article the period of time set out in the second to last line has been left open to further consideration. Since it is not clear from the present text from when this period of time should run, it is suggested that as in Article 9, it be from the date of adoption, (i.e. that it be from the time the treaty in question has been opened for signature).
>
> It is to be noted that in Article 9 of Part I of the draft Law of Treaties, drawn up at the 14th Session of the International Law Commission, in clause 1(a) and clause 2 there also exist similar as yet unspecified time periods. Consideration might be given to having the same period of time apply in all three cases. In his commentary on clause 2 of Article 40 the Special Rapporteur, Sir Humphrey Waldock, envisaged a period of ten years[1]. This would seem a reasonable choice."

The comments of other goverhments on this article related almost exclusively to the question of the specific number of years which might be inserted in clause 2 of the article. These range from a maximum of 25 years, suggested by Australia, to as short a period as 3 to 5 years proposed by Finland. A few governments, however, made more substantive proposals. Among these were Luxembourg which considered that the rule in paragraph 2 was too complicated and that the entire paragraph should be deleted. The United States of America pointed out

1 Yearbook of the International Law Commission, 1963, vol. II, p. 71, para. 3 of Commentary on draft article 18.

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that there might be great difficulty in deciding upon the period of years which would be practicable with respect to all treaties. It therefore suggested that the final clause of Article 2 be amended to read as follows:

> "However, after the expiry of years, of such other period as the treaty may provide, the agreement only of the States parties to the treaty shall be necessary"

The Netherlands made a similar suggestion.

In his comments on this article, the Special Rapporteur admitted that, while he was inclined to agree that the two sub-paragraphs in paragraph 1 might not be necessary, the rule in the opening sentence requiring the agreement of all the parties for the termination of the treaty contained a point of substance which should be retained. The primary purpose of sub-paragraphs (a) and (b) of paragraph 1 was in his opinion to discountenance the thesis favoured by some jurists that an agreement terminating a prior treaty must take the same form as the treaty, or at least be in a treaty form of equal weight. The Commission, he believed, considered that it was for the parties in each case to select the appropriate instruments or procedure for bringing a treaty to an end. It was not their intention to exclude the possibility both of terminating a treaty by oral agreement or of doing so on the basis merely of tacit consent. In order to avoid any ambiguity, he suggested that the best solution would be to delete the two sub-paragraphs, to limit paragraph 1 to the first sentence, and to amend the commentary to this article in view of the above-mentioned considerations. He also accepted the Israeli suggestion that the words "in whole or in part" should be inserted in paragraph 1.

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With regard to paragraph 2, he noted that the majority of governments endorsed the general principle embodied therein. However, he stressed in re-examining the present article the Commission should bear in mind the similar problem in Article 65 relating to the role of States involved in drawing up a treaty but not yet parties to it.

He accepted the suggestion of the United States of America and The Netherlands governments that the article be amended to include the phrase "or such other period as the treaty may stipulate" and suggested a compromising period of time of six years for " — ". As regards paragraph 3, he considered that it was no longer necessary since it did not seem necessary to obtain the consent of anyone other than the parties for the suspension of the treaty. Paragraph 1 could be widened instead and paragraph 2 would then apply only to termination.

He therefore suggested the following revised text:

> "1. A treaty may at any time be terminated or its operation suspended, in whole or in part, by agreement of all the parties, subject to paragraph 2.
>
> 2. Until the expiry of six years from the adoption of its text, or such other period as may be specified in the treaty, the termination of a multilateral treaty shall also require the consent of not less than two-thirds of all the States which adopted the text."

Recommendation:

The period of 10 years, referred to in the Canadian observation, was suggested as the maximum figure and a shorter period of perhaps 5 or 6 years would not seem unreasonable if the principle of adopting a uniform period of time in this and other similar articles is not followed. As a matter of equity, it does not seem unreasonable so to limit the right of States, not parties to a

treaty, to participate in actions relating to it and initiated by the parties.

The Special Rapporteur's revised text therefore appears acceptable.

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ARTICLE 41

Termination implied from entering into a subsequent treaty

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

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

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

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

This article was based on Article 19 in the Special Rapporteur's second draft.

There was some discussion at the 15th Session on the terminology employed in the first and revised versions but the Article was dealt with in a non-controversial fashion. It was adopted with 15 in favour, none against, with one abstention.

Only a few governments commented on the article in its present form, and of those the only substantive suggestions were made by the Israeli, which considered that the article contained an inherent contradiction. It observed that if a later treaty was intended to terminate an earlier one then the termination of the later treaty would not bring about the revival of the earlier one; but that, if the later treaty was intended only to suspend the operation of the earlier treaty, the termination of the later one would, following Article 54, bring about the revival of the earlier treaty.

However, the Special Rapporteur could not see the inherent contradiction either in the text or in the Israeli Government's

comments on the article. In his commentary he stressed that the "real problem in the present article is its relation to, and possible overlap of, Article 63 governing the application of treaties having incompatible provisions", Paragraph 3 of which contained a cross reference to the present article. He quoted paragraph 12 of the commentary on Article 3 [Supplement No. 9 (A/5809) pp. 15-16] and concluded that the Commission had been inclined at its 64th Session to delete the words "in whole or in part" from the opening phrase of the present article.

In analysing the relationship between the two articles the Special Rapporteur concludes that Article 63 comes into play "only after it had been determined under the present article that the parties did not intend to abrogate or to suspend the operation of the earlier treaties". He stresses that the present article is not concerned with the priority of treaty provisions which are incompatible (and that it deals with cases where it clearly appears that the intention of the parties in concluding the later treaties was either definitively or temporarily to supersede the régime of the earlier treaty by that of the later one). He considered that the dividing line between cases of termination falling under paragraph 1 of the present article and cases falling under Article 63 was clear enough.

However, quite apart from the question whether the words "in whole or in part" should be retained, some revision of the present article appeared to the Special Rapporteur to be desirable in order to improve the text and co-ordinate the article more fully with Article 63. The basis for his decisions are set out in some detail in paragraph 6 of that section of his observations which deal with the article.

He proposed that the article should be reformulated along the following lines:

"Termination of suspension of the operation of a treaty implied from entering into a subsequent treaty

1. A treaty shall be considered as terminated if all the parties to it enter into a further treaty relating to the same subject-matter and:
(a) it appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that the parties intended that the matter should thenceforth be governed exclusively by the later treaty; or
(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. However, the earlier treaty shall be considered as only suspended in operation if it appears from the later treaty, from its preparatory work or from the circumstances of its conclusion that such was the intention of the parties when concluding the later treaty.

3. Under the conditions set out in paragraph 1 and 2, if the provisions of the later treaty relate only to a part of the earlier treaty and the two treaties are otherwise capable of being applied at the same time, that part alone shall be considered as terminated or suspended in operation."

He also proposed a further revision of paragraph 3 of Article 63.

Recommendation:

Although the choice of arguments put forward by the Special Rapporteur is extremely complex, the substantive changes which he has proposed are in themselves clarificatory in nature and the article, revised as suggested, would appear acceptable.

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ARTICLE 42

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

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

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

(a) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by common agreement either:

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

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

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

(a) The unfounded repudiation of the treaty; or

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

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

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

This article is based upon the original Article 20 in the Special Rapporteur's second draft.

Discussion of this lengthy article extended over three meetings, though most of the innovations were apparently of a minor nature. There would have appeared to have been a definite consensus

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first in favour of Waldock's original draft and later of Castren's simplified version of it. In its present form, the article was eventually adopted at a second vote by 18 in favour with one abstention (Briggs).

Many governments, including Canada, commented on this article. The Canadian comment was as follows:

> "The Canadian Government observes that the article does not provide, where there is a material breach, that another party shall have the right unilaterally (and not merely by common and perhaps unanimous agreement) to withdraw from the treaty. It interprets the commentary as indicating that the Commission considered a right of suspension to afford adequate protection to a State directly affected by such a breach. It does not, however, feel that the recourse allowed to the individual State under paragraph 2 is sufficient in the case of a treaty where the parties agree to refrain from some action; for the individual State could not suspend its obligations vis à vis the violater (by doing what it had agreed not to do) without violating its own obligations to the other parties. It suggests that the article should be amended so as to allow an individual party to suspend the operation of the treaty erga omnos without first obtaining the common agreement of the other parties. In support of this suggestion it recalls that the texts proposed by Sir G. Fitzmaurice[1], the present Special Rapporteur[2], and by Mr. Castren[3] envisaged a unilateral right of withdrawal in these cases."

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1 Second Report, draft article 19, paragraph 1(iii), Yearbook of the International Law Commission, 1957.

2 Second Report, draft article 20, Yearbook of the International Law Commission, 1963, Vol.II, p. 77

3 Fifteenth session, 691st Meeting, ibid., Vol. I, p. 120

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Among the other comments of interest were the following:

(i) Australia was of the opinion that paragraph 2(b)(ii) gave a very large power which might be out of proportion to the breach. It felt that either the paragraph should be expanded to circumscribe the right more precisely or if "common consent" was to mean "unanimous consent" that at least this change should be made.

(ii) The Netherlands pointed out that, as worded, paragraph 2(a) did not seem fully to express the Commission's intention (set out in paragraph 7 of the commentary). That intention, as the Netherlands' Government saw it, was to restrict the right to invoke a breach only to an injured party. Paragraph 2(a), however, attributes the right to "any other party". The Netherlands therefore suggested that the paragraph should be revised, as the United States delegation suggested at the 784th meeting of the Sixth Committee, to read, "any other party, whose rights or obligations are adversely affected by the breach...etc.".

(iii) Sweden, as had Canada, pointed out that under paragraph 2 an injured party is limited to the same right to suspend or to terminate a treaty only in relation to the party which has violated it, and it may seek the agreement of the other parties before it can wholly free itself from the treaty. In its view there might be circumstances however, in which an injured party ought to be allowed to suspend or even terminate 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 to the treaty".

(iv) The United Kingdom was afraid that the article might be open to abuse in that a State could invoke an alleged breach merely in order to have a ground for terminating the treaty. Despite the safeguards, such as they are, afforded by Article 51 it considers that a State accused of a breach should be able to call upon the other State to establish objectively that such a breach had, in fact, occurred before that other State might invoke the breach in the manner proposed in the Article. In its view, therefore, provision for independent adjudication is required in the article.

(v) The United States Government, while prepared to endorse the principles set out in paragraph 1, considers that the Commission's text in paragraph 2 to a certain extent ignores the differing varieties of the multilateral treaties. In its view, it is questionable whether a multilateral treaty (such as the Vienna Convention on Consular Relations), which is essentially bilateral in its applications, should be subjected to the rules in paragraph 2 in its present form. It therefore proposed that paragraph 2 should be revised as follows:

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

(a) Any other party, whose rights or obligations are adversely affected by the breach, to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties, whose rights or obligations are adversely affected by the breach, either:

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

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

The Special Rapporteur, in his observations, noted that most of the points made by governments on this article were directed at the provisions of paragraph 2 regarding the rights of the parties to a multilateral treaty in case of a material breach.

He comments favourably on the Netherlands and United States suggestion that paragraph 2(a) should be specifically limited to parties whose interests are affected by the breach. However, he did not specifically agree with the wording proposed and would have preferred, instead of "any other parties, whose rights or obligations are adversely affected by the breach" to refer to "any other parties whose interests are affected by the breach". This, on the grounds that the basic hypothesis underlying the present article is that the offending state would have committed a material breach, and that therefore "it would seem undesirable to go too far in discouraging the other parties from showing solidarity with the party directly injured by the breach."

The Special Rapporteur shared the doubts expressed by the Netherlands Government regarding the United States' Government's proposal to revise paragraph 2(b) so as also to limit the applica-

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tion of that paragraph to States whose rights or obligations were adversely affected, while at the same time removing the need for the agreement of the other States parties for the termination or suspension of the treaty. He pointed out that at the 15th Session members of the Commission had attached particular importance to ensuring that the breach of a multilateral treaty by one party should not jeopardize the security of the rights and obligations of the other parties as between themselves.

In commenting on the Canadian Government's suggestion, he suggests that it would only be in special types of treaties such as disarmament treaties, "where a breach by one party tends to underline the whole régime of the treaty" that the interests of an individual party might not be adequately protected by the rules proposed by the Commission. He concluded that the exception suggested by the Canadian Government had been too widely stated, but that the Swedish Government might have had such special type of treaty in mind when it made its suggestion for unilateral termination if the participation of a State committing the breach was an essential condition for the adherence of the other State to the treaty.

[It is worth noting here that the intention of the Canadian comments was in fact directed implicitly to disarmament and nuclear suspension treaties, though this was not spelt out specifically in the Canadian comment for presentational reasons]

Taking the Canadian and Swedish comments into consideration the Special Rapporteur therefore proposed a new paragraph 2 (bis).

He also suggested two other changes to the Article. One, to provide under Paragraph 2(b) for the possibility of expelling a

defaulting State from the treaty and, the other, relating to the fact that paragraph 4 would not longer be necessary since the question of separability will have been covered in Article 46. The Special Rapporteur's revised draft text is as follows:

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

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

(a) Any other party whose interests are affected by the breach to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by unanimous agreement to suspend or terminate the operation of the treaty either (i) only in the relations between themselves and the defaulting State or, (ii) as between all the parties.

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 from the treaty.

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

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

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

Recommendation:

Although support for spelling out the consequences of the violation of a disarmament treaty, in the manner suggested in the new clause 2(bis), may not be forthcoming in the Commission, it would

appear that the idea is worth examination. It would seem almost certain any violation of the sort it is intended to cover would, in any event, result in the States similarily interested suspending their obligations ergo omnes or withdrawing. The failure to provide for this sort of action in the draft Law of Treaties would, therefore, only lead to a weakening of the concept of Pacta sunt servanda.

The other changes proposed by the Special Rapporteur appear acceptable.

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ARTICLE 43

Supervening impossibility of performance

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

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

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

This article resulted from a decision taken by the Commission at its 15th Session to delete the original Article 21 prepared by Waldock in his Second Report and to replace it by a new Article 21 bis, which would deal with supervening impossibility of performance but not through extinction of one of the parties, since the latter case involved problems of state succession.

There was little discussion on the Article at the 15th Session, except as regarded essentially drafting considerations, and it was adopted by a vote of 17 to 1 (Paredes).

Few governments commented on this Article. Israel, however, suggested that paragraph 2 be redrafted to read:

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

Israel wanted it clarified that this provision would not apply when the impossibility was the consequence of a breach of the treaty by the party invoking the impossibility.

The Special Rapporteur's views on the Israeli suggestion were not available at the time when this commentary was being prepared.

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Recommendation:

In view of the fact that the Special Rapporteur's views on the Israeli suggestion are not available, it is difficult to recommend any specific action in regard to this Article. However, the proposed Israeli amendment, which relates the Article more directly to the physical subject-matter of the treaty, in cases of suspension, would appear to have merit.

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ARTICLE 44

Fundamental change of circumstances

1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as a ground for terminating or withdrawing from a treaty under the conditions set out in the present article.

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

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

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

3. Paragraph 2 above does not apply:

(a) To a treaty fixing a boundary; or

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

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

This Article is based upon the original Article 22 prepared by Waldock in his Second Report.

The suggestion made was treated with great care in the 15th Session and discussion of it occupied four meetings. According to Mr. Cadieux' report, while there was support for the inclusion of an article on this subject and for the Special Rapporteur's novel proposal to apply the rebus sic stantibus to all treaties, rather than just those of unlimited duration (as Fitzmaurice had proposed), beyond that point the areas of agreement were less clear. It would appear that the basic difference was as to whether the doctrine should be limited (as the Special Rapporteur proposed) to changes of facts, the continued existence of which had been assumed by the parties to be an essential foundation of the treaty.

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(2) Turkey suggested that the Article should be amended to provide that "the parties concerned should first enter into discussion among themselves and, subsequently, refer the dispute to the International Court of Justice should they fail to reach an agreement.

(3) The United Kingdom foresaw the possibilities of abuse in the absence of proper safeguards not only in respect of this Article but, in addition, in relation to Articles 36, 41, 42 and 43. They considered that these Articles would only be acceptable if coupled with the protection of ultimate appeal to an independent judicial tribunal.

(4) The United States stressed that the concept of rebus sic stantibus "has long been of so controversial a nature and regarded as being so liable to the abuse of subjective interpretation that, in the absence of accomplished law, it seems highly questionable whether this subject is capable of qualification." It recognized that the doctrine would have unquestionable utility of adequately qualified and circumscribed to guard against the abuses to which it lends itself. It considered that if "an international court or arbitral body were entrusted with making a binding, second-party determination of the applicability of the doctrine to a particular treaty, then the doctrine would be acceptable. It ended, however, by putting on record its opposition to Article 44 in its present form.

(5) The Netherlands proposed that it would be more rational not to exclude in their entirety from paragraph 3(a) treaties, the main purpose of which is to determine territorial boundaries, but only insofar as they regulate transfers of territory or the settlement of boundaries. They therefore proposed that paragraphe 3(a) might be modified as follows:

"To stipulations of a treaty which effect a transfer of territory or the settlement of a boundary, alternatively."

or whether a broader test should be applied referring mainly to the frustration of the object and purposes of the treaty. In the light of the discussion at the 15th Session, the first re-draft which was prepared received general support from all members except Bartoš, Paredes, Tabibi, Pal and Verdross, who were particularly critical of the balance which had been struck by the drafting committee between pacta sunt servanda and the need for change.

A further re-draft, resulting in the present version, was approved by a vote of 15 in favour, with only one abstention.

Many countries, including Canada, offered substantive comment on this Article. The Canadian comment was as follows:

> "The exclusion established under section 3(a) of this article, whereby a fundamental change in circumstances would not affect a treaty fixing a boundary, would appear to have been formulated without the Commission having taken into consideration such treaties (if any) under which a boundary has been established by reference to a thalweg. Since it is conceivable that such boundary treaty provisions do exist and that a fundamental change in circumstances could indeed radically affect the boundary in question (to an extent not contemplated when it was originally delineated), it is at least arguable that article 44(3)(a) should be modified to cover such a case. "

The modification might be along the following lines:

> "To a treaty fixing a boundary, except if such a boundary is based directly on a thalweg or other natural phenomenon the physical location of which is subsequently significantly altered as the result of a natural occurrence; or". "

Among the other comments received from governments, the following are perhaps particularly noteworthy:

(1) Denmark suggested an additional provision to the effect that "a state should not be entitled to withdraw from a treaty under this Article unless it is ready to submit any controversy on this point to the decision of an arbitral or judicial tribunal.

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No comments were available from the Special Rapporteur on this Article.

Recommendation:

Again, it is difficult to anticipate what changes the Special Rapporteur may propose to the text of this Article.

However, in view of the almost unanimous view of the governments which commented on it that the provision should be included for some form of independent judicial interpretation, or arbitration in the case of dispute, the Commission would appear well advised to attempt to formulate a further clause which would cover that point.

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ARTICLE 45

Emergence of a new preremptory norm of general international law

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

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

The article was based on Article 22(bis) in the Special Rapporteur's Second Draft, which was discussed at the 15th Session of the International Law Commission.

Relating to jus cogens (the present Article 37) this particular article, which deals with jus cogens super veniens, would not appear to have been discussed at any great length at the 15th Session of the International Law Commission. There was instead a general agreement on the necessity of an article such as this to cover the effects upon treaties of the subsequent evolution of principles of customary international law.

Only a few countries had observations to make on this article and of these the views of Portugal and the United States are perhaps of the greatest interest. Portugal reverted to the possibility, originally discussed at the 15th Session, of incorporating the provisions of this article in Article 37 itself. It also pointed out the relationship which paragraph 2 of the article may have with Article 53,paragraph 2. In its comments the United States referred to the doubts it had already on Article 37. It pointed out that "the determination as to just when a new rule of international law has

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become sufficiently established to be a peremptory rule is likely to be extremely difficult". In its view "it appears th t the article could not be accepted unless agreement is reached as to who is to define a new peremptory norm and determine how it is to be established".

The comments and observations on this article of the Special Rapporteur were not available.

Recommendation:

In view of the fact that the Special Rapporteur will undoubtedly wish to comment on the observations made by governments on this article, it does not seem feasible to make any recommendation at this time. Obviously, however, the considerations already outlined with respect to Article 37 on jus cogens are equally relevant to this article.

SECTION IV: PARTICULAR RULES RELATING TO THE APPLICATION OF SECTIONS II AND III

ARTICLE 46

Separability of treaty provisions for the purposes of the operation of the present articles

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

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

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

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

This article is based on Article 26 of the Special Rapporteur's Second Draft, which became Article 3 in the draft of the 15th Session. A discussion of it at that stage was apparently impeded by the somewhat vague and thereforeunclear manner in which it had been drafted. There was general support at the 15th Session for Waldock's desire to approach the principle of obligatory severence. A few members, however, including Pal and Rosenne, favoured stating as a general principle that normally a treaty is an indivisable whole. Rosenne,moreover, adopted a cautious approach and wished to avoid a general article which would attempt to cover the whole field of separability. Mr. Cadieux suggested that the most important criterion was the intention of the parties and that therefore there should be a presumption that, if a part of a clause was not an essential part, it must be severed unless the parties intended otherwise. The present article in its current form, submitted by Waldock as a revised draft based on the discussions, was adopted unanimously.

Only a few governments commented substantively on this article. In the majority of cases their comments related to the applicability of the article

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and considerations as to which specific articles in the draft Law of Treaties should be covered by it. The Netherlands dealt with this matter at considerable length. Their views are set out in A/CN.4/175/Add.1 of March 3, 1965 at page 22 and at pages 24 and 25.

As he suggests in paragraph 10 of the introduction to his 5th Report, the Special Rapporteur now suggests that this article should be included in Section I of Part II of the draft Law of Treaties as a "general rule". He agrees with the suggestion of several governments that it should be extended to cover Article 31 and Article 32. However, he leaves the question whether the rule should also be made applicable to cases falling under Article 37 open for further consideration by the Commission. He sees no objection in principle why it should not also cover cases falling under Article 39.

As far as concerns the reformulation of the article proposed by the Netherlands Government, however, he considered that the latter had gone too far in implying that the "directives" contained in the article could only serve a useful purpose where the question of separability were to come before a Court. In his view, the Commission formulating the draft article "is entitled to assume that the parties will accept the rule pacta sunt servanda and that in applying the provision of the present article the parties would equally act in good faith.

It was nevertheless necessary for him to reformulate the article since, in its present form, the rule regarding separability is stated partly in the article itself and partly in the individual articles which lay down whether separation is admissable with respect to particular grounds of invalidity, termination, etc. If the article is to be transferred to Section I and made into a general rule it will clearly be necessary that it state both the general conditions and the specific cases in which separation is or is not admissable. He also believed that the existing provisions are somewhat equivocal-able on the question whether separation is in each case an option or a rule.

The Special Rapporteur considered that in the interests of the security and stability of treaties, "the general principle should be that, whenever the conditions for separability exist, the scope of a ground of invalidity, termination, etc. should be limited to the particular clauses to which it relates". To this principle there would be, however, certain exceptions.

In the light of the above mentioned considerations, Sir Humphrey Waldock suggests that the Article be transferred to Section I and revised to read as follows:

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

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

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

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

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

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

Recommendation:

The incorporation of Article 46 among the general rules is unobjectionable and, as reformulated, it would appear to cover more accurately the matters with which it is intended to deal. The exceptions to it are now only those specific articles referred to in paragraphs 2 and 3.

ARTICLE 47

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

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

(a) Waived the right; or

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

The article is based on the original Article 4 of the Special Rapporteur's Second Report. In introducing the article at the 15th Session Sir Humphrey himself proposed certain changes and deletions from the original draft which he had prepared, thereby avoiding, in the opinion of Mr. Cadieux, a lengthier debate on the article. As revised in the light of discussions at the 15th Session, the article, in its present form, was adopted unanimously.

A number of governments commented on this article. Among them were Israel, the Netherlands and the United States. Several governments expressed the opinion that the provisions of this Article should be extended to cover Article 31, while others suggested that specific time limits for invoking fraud or error should be laid down in it. Israel commented inter alia on the use of the word "nullity" in the opening phrase of the article (a word not in fact found in any of the articles to which the article makes reference). It also drew attention to the fact that "the case of a right to require the suspension of the operation of a treaty" is not covered by the article.

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This is another article which the Special Rapporteur has now proposed be placed in Section I of this part of the draft Law of Treaties as "a general rule". His reason is "that the article appears to affect the operation of all the articles which recognise rights to invoke particular grounds of invalidity or termination. He agreed too that it should cover Article 31 and he supported Israel's contention relating to the use of the word "nullity" and respecting a provision for suspension of the operation of a treaty. He was not, however, in sympathy with the proposal of certain governments relating to the imposition of time limits, since in his opinion the article is intended to cover a variety of cases and "moreover, even in each class of case the circumstances may vary almost infinitely. Accordingly, it does not seem either possible to lay down a general time limit for all cases or advisable to attempt to lay down a particular time limit for each ground of invalidity, termination or suspension".

In the light of the foregoing the Special Rapporteur therefore proposes the following revised formulation of the Article:

> "Relinquishment of the right to invoke a ground of invalidity, termination, withdrawl or suspension
>
> "A State may not invoke any ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 31 to 35 inclusive or Articles 42 to 44 inclusive if, after becoming aware of the facts giving rise to such ground, the State:
>
> "(a) shall have agreed to regard the treaty as valid or, as the case may be, as remaining in force; or
>
> "(b) must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid or, as the case may be, as remaining in force."

Recommendation:

The incorporation of this article in Section I, as a general rule, appears acceptable. So does the revised text. It is worth noting, however,

that the phrase "or its undue delay"in clause (b) is in itself somewhat imprecise and could therefore lead to further dispute. This might be avoided if, in due course, the Commission were to adopt a general article dealing with independent adjudication of disputes arising out of the draft Law of Treaties,which might specifically refer to this clause.

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ARTICLE 48

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

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

This article was based on Article 2(bis) of the Second Report of the Special Rapporteur, as discussed at the 15th Session of the International Law Commission.

The Canadian commentary, as well as the official commentary [18th Session Supplement No. 9 (A/5509)] imply that very little discussion took place on it. It was adopted by a vote of 15 in favour with none opposed and one abstention (Paredes, presumably for the usual reason of a delay in the preparation of the Spanish text).

A number of governments commented substantively on this article. Israel considered that, though in principle it is correct, it might be formed in more general terms and placed after the present Article 2, which would lead to a simplification of both Part I and Part II of the draft articles. It proposed minor drafting changes as well. Luxembourg, while also approving of the fundamental idea behind Article 48, considered that it should apply "only in cases where a connecting link is established between a treaty and the statute of the organization concerned". It foresaw difficulty in defining this connecting link in a sufficiently specific and precise way and therefore suggested that the following second sentence be added to the article:

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

Portugal, in its observations, dealt with another aspect of this problem and pointed out that "it is therefore inevitable that when a treaty is a constitutional act on which such an organization is based, or has been drawn up within such an organization, the clauses of the present draft on the termination of treaties should remain subject to the rules established in the organization concerned." Finally, in its observations, the United States pointed out that, while it also agreed with the principle, "considerable study is apparently necessary to determine whether, and to what extent, a general convention on the Law of Treaties can easily include a provision such as Article 48". It draws attention to the fact that the phrase "subject to the established rules of the organization" might be construed as meaning that the organization was completely free to ignore the provisions covered in Section III, if it chose so to do on the basis of some established rule of the organization.

No observations are yet available from the Special Rapporteur on this article. However, the nature of the comments made by governments to date suggests that he will certainly wish to revise the present article. In view of the foregoing no specific recommendation can be made at this stage. However, the Portuguese suggestion, referred to above, would seem less acceptable than the attitude set out in the United States comments on the article. It would, therefore, seem advisable that, if the article is to be re-drafted, the relationship between the draft Law of Treaties and the respective rules of international organizations be made as clear as possible, so that deregations from the former be subject to clear limitations.

SECTION V: PROCEDURE

ARTICLE 49

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

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

This article was based on Article 23 of the Special Rapporteur's Second report.

There was very little discussion on the article at the 15th Session of the International Law Commission because in it the Commission was seeking to apply the provisions of an article on which it had earlier reached agreement. After minor textual criticisms the article was therefore adopted unanimously in its form without debate.

Hardly any governments chose to comment on the article, though the United Kingdom did make certain specific references to its terminology. These are set out at page 155 of A/CN.4/175.

In his own observations on the article the Special Rapporteur points out that Article 4, to which Article 49 applies mutatis mutandis, has itself now undergone extensive revision, so that Article 49 also requires re-consideration. He suggests, in brief, that it may be necessary to differentiate between on the one hand evidence of authority to invoke a ground of invalidity etc. (which could be regarded as an opening of negotiations for the converse purpose of annulling or terminating a treaty) and, on the other hand, evidence of authority to carry out the definitive act of annulling, terminating etc., a treaty (which may be regarded as the expression of a State's will not to be bound.

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He accordingly proposes that Article 49 should be revised to read as follows:

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

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

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

Recommendation:

The distinction made in clauses 1 and 2 of the revised wording is perhaps excessively detailed, since, even in the case of mutual agreement, it might require two authorities before action could be taken on such a treaty. However, subject to the views of the Commission, it appears acceptable and is in any event clearer than is the article in its present form.

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ARTICLE 50

Procedure under a right provided for in the treaty

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

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

This article is based on Article 24 of the Special Rapporteur's Second Draft. Essentially procedural in its nature, it was not subject to controversy. Debate on the article, as originally drafted, centred on two provisions:

(i) Paragraph 3, which provided a right to revoke a notice of termination;

(ii) Waldock's draft of paragraph 1, which was considered to have been worded too broadly. At the 15th Session, in its present revised form, it was adopted unanimously without substantive debate.

Though only a few countries commented on this article, in order to make specific substantive points about it, Israel considered that the notice required should correspond in principle to the requirements for the instrument regarding participation in a treaty, spelt out in Article 15 paragraph 1(b). It believed that paragraph 1 should be framed as a residual rule, and that Article 29 should be modified accordingly in order to complete the enumeration of the functions of a depositary.

Sweden was of the opinion that the rule formulated in the article "maybe framed in too general terms". It thought that, while it might be

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reasonable in cases such as a breach, it was doubtful whether it was acceptable with regard to normal notices of termination in accordance with the express provisions of treaties. The purpose of such provisions being to enable other parties to take suitable measures in good time to meet the new situation, such measures could not be taken with confidence if such notifications of termination were susceptible to revocation. In the Swedish opinion the rule might have the effect of neutralizing provisions requiring advance notice of termination since it would make it possible for a State to defer its final decision to terminate until the day before the notice which it had given would take effect.

Poland, (see A/CN.4/175 p. 108) apparently with similar situations in mind, suggested that the revocation of the notice of a party to a treaty should be subject to the agreement of the remaining parties.

The United States also expressed doubts about provisions of the article as presently drafted. It suggested that the most reasonable rule appeared to be that, where notice of the termination would bring a treaty to an end with respect to all other parties, the withdrawal of the notice should be concurred in by a least a majority of the parties to the treaty. For this reason it suggested that paragraph 2 of Article 50 should be revised to read as follows:

> "Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect, except in a case in which the notice would have caused the treaty to terminate with respect to all parties. Where the notice would cause the treaty to terminate, with respect to all parties, the notice of withdrawal will not be effected if objected to by the other parties, in the case of a bilateral treaty, or if objected to by more than 1/3 by the other parties in the case of a multilateral treaty".

The Special Rapporteur's observations on this article and on the comments of governments are not yet available. It seems, however, certain that he will wish to make some modifications to the text in the light of them.

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Recommendations:

Subject to the as yet unknown views of the Special Rapporteur, the suggestion that at least the concurrence of some of the parties to a treaty should be obtained in the case of withdrawal of notice of termination seems well founded. The actual proposal made by the United States, however, can probably be improved upon. It is acceptable as regards bilateral treaties, but the concept of a kind of treaty in which the withdrawal of one party would cause the treaty to terminate with respect to all parties, is a somewhat peculiar one. Perhaps, therefore, a more general rule should be formulated, providing that, in the case of a multilateral treaty, where there are a certain number of objections on the part of other parties to the withdrawal of a notification, such withdrawal may not stand.

ARTICLE 51

Procedure in other cases

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

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

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

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

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

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

5. Subject to article 47, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.

This article is based on the original Article 25 which was discussed by the International Law Commission at its 15th Session.

From Mr. Cadieux' commentary it appears that debate on it was somewhat confused. Discussion lasted for two and a half meetings and was partly procedural and partly substantive. The procedural aspect related to a suggestion by Tunkin, which was not accepted by the Commission, that consideration of the article be deferred for a further year. In the substantive debate Tunkin strongly opposed any provision in the article which

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would provide for the compulsory settlement of disputes.

The debate on the article revealed some of the ambiguities which might arise from it. One of these was that, before it could take steps to terminate a treaty on the grounds of the operation of law, a claimant State, under the article, would have to offer a means of peaceful settlement. What would happen if the defendent State were then to propose going to the International Court? Was that to be a rejection of the claimant's offer, allowing the claimant to terminate the treaty? If not, then did not the article in fact allow for compulsory juriddiction via the back door. Some members of the International Law Commission at the 15th Session strongly argued that the defendent State could not insist that its counter-proposal to go to the Court was a rejection of the claimant State's offer to negotiate. Others argued the opposite. The main point on which a consensus seemed to emerge was that there should at least be a provision in the draft Law of Treaties which would require a State, seeking to avoid or declaring void a treaty, to comply with Article 33 of the Charter, i.e. to offer negotiation, conciliation, or arbitration. As Waldock apparently put it, the point of the provision was not to introduce compulsory arbitration but to require the claimant to show proof of its bona fides.

Even after it was first re-drafted, the article was still considered to be unclear and ambiguous. Briggs wanted to ensure that there was no right of unilateral action under paragraph 3 because, if this was not done, then a number of articles in the draft Law of Treaties would be inconsistent with the principle of pacta sunt servanda. Tunkin, on the other hand, wanted to ensure that the Drafting Committee did not go beyond the reference to the United Nations Charter. Others suggested minor changes to the text. In its final form the article was adopted by a vote of 19 in favour, none against, with one abstention (Briggs).

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In the official commentary on the article (Supplement No. 9 (A/5509)) it is pointed out that "many members of the Commission regarded the present article as in some ways a key article for the application of the provisions of Part II, Sections II and III, of the Law of Treaties. The commentary goes on to state that "the Commission considered it essential that the present article should contain procedural safeguards against the possibility that the nullity or termination of a treaty may be arbitrarily asserted on the basis of the provisions of Sections II and III, as a mere pretext for getting rid of an inconvenient obligation". Regarding the reference to Article 33 of the Charter, the commentary further pointed out that "the Commission considered that in dealing with this problem it should take as its basis the general obligations of States under international law 'to settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not in danger'".

Many states commented on this article. They did so either to point out that it was ambiguous, and therefore that it needed to provide for some form of compulsory adjudication or, to the contrary, that the reference to Article 33 was sufficient.

(i) Among the written observations of governments, the Netherlands expressed its whole-hearted agreement with those members of the Commission who had wanted to provide for reference to the International Court of Justice. It considered it desirable "that it be made obligatory for disputes about points of law that cannot be resolved in any other way to be submitted to the International Court of Justice".

(ii) Finland stressed that the draft article "still fails to establish the means which could be resorted to in the event negotiations and other efforts for the settlement of a dispute prove to be unsuccessful". It stressed that "this should not be interpreted to imply that unilateral measures for withdrawing from treaty obligation

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are permissable". Dealing with another matter it also pointed out that sub-paragraph (b) of paragraph 1 seemed inadequate in that it did not fix any period of time within which an answer must be given in urgent cases. It suggested a period of two weeks or one months

(iii) The Government of Luxembourg, in order to avoid the problem of compulsory jurisdiction being stated in Article 51 itself, has suggested (page 103 of A/CN.4/175), that a new provision should be inserted after the articles in Sections II and III which would authorize States parties to a convention of the draft Law of Treaties to make a reservation under which the provisions of Articles 33 to 37 and 42 and 43 could not be invoked against them by States which were not bound in regard to them by the acceptance of arbitration or compulsory jurisdiction. The effect of this new article would be that the provisions of the related articles would have different effects, on the one hand as between States bound by an undertaking of an arbitral or judicial nature (where they would have full legal force) and, on the other hand, as between other States not so bound (where only the general rules of international law would be applicable and the provisions drawn up by the International Law Commission would be for guidance only.)

The article proposed by Luxembourg is as follows:

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

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(iv) Portugal found the article as a whole somewhat vague and paragraph 4 in particular too broad. In its opinion "since this draft comes from an organ of the United Nations the reservation which it makes regarding "the rights and obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes" is too broad". In its opinion "these rights or obligations should have been reserved only when they are incompatible with the Charter".

(v) Sweden, at page 7 of A/CN.4/175/Add.2, questions whether "the procedure prescribed in Article 51 offers an adequate and sufficiently rapid response to the urgent problem of break of a treaty". It found "even more disconcerting" the fact that the article "does not appear to answer whether a treaty is subject to unilateral termination or remains valid, once the means indicated in Article 33 of the Charter have been exhusted without result.

(vi) Both the United Kingdom and the United States favoured that some form of independent international adjudication be provided.

Similar views were also expressed when the article was discussed in the 6th Committee. There Bulgaria noted with apparent approval that, "the authorities which would be competent to decide" were not specified in the article and that the International Law Commission had "very reasonably" confined itself to a reference to Article 33 of the Charter. Iraq and the UAR were against compulsory jurisdiction but Italy and Pakistan favoured some form of it.

Unfortunately, the views of the Special Rapporteur on this important article are not yet available.

Recommendation:

It seems almost certain both that the Special Rapporteur will propose modifications to this article and that Tunkin and others will vigorously resist any effort to provide in it for some form of independent adjudication of a compulsory sort. The Luxembourg proposal therefore, though interesting, would not seem likely to gather sufficient support.

If the foregoing assumptions are correct, it would seem essential that, as an absolute minimum, and in order to clear up the ambiguities pointed out by various governments, the Commission ammend Article 51 in such a way as to make clear what would be the status of a treaty after an unsuccessful recourse to the provisions of Article 33 of the Charter (i.e. in the case spelt out in the Swedish commentary in the first paragraph of page 7 of A/CN.4/175/Add.2). In view of the fundamental importance of the concept of pacta sunt servanda and in light of the general wish not to allow States to take advantage of the provisions of the related articles merely to avoid onerous treaty obligations, it is to be hoped that the Commission could provide that, in such cases, the treaty relationship in question would remain in effect.

ARTICLE 52

Legal consequences of the nullity of a treaty

1. (a) The nullity of a treaty shall not as such affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked.

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

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

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

This article was based on Article 27 of the Special Rapporteur's Second Report.

At the 15th Session of the International Law Commission it was discussed at some length, one proposal being that it be merged with the following article (the present Article 53).

A number of countries have commented on this article:

(i) Sweden suggested that the Article "deals in very general and abstract terms on problems of great complexity. It therefore recommended that "a fuller discussion than that offered in the commentary would seem desirable to illustrate and analyze the various cases that may arise". It also believed that the expression "may be required" in sub-paragraph 1(b) may be inadequate.

(ii) Israel pointed out that the article attempts to deal with two distinct matters, namely: treaties which are null ab initio and treaties consent to which may be subsequently invalidated at the initiative of one of the countries. It recommended that these two

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aspects be more clearly distinguished.

(iii) Portugal commented at length on the article but not in a substantive way.

(iv) In the opinion of the United Kingdom the option of paragraph 1(b) might be difficult in practice since it did not make clear in what manner and by whom the parties might be required to restore the status quo ante.

(v) In the 6th Committee El Salvador commented that the article made no provision for the case where for example, under a bilateral treaty, the fact that one party, having invoked its own error, was no longer bound to execute the terms of the treaty might prevent the other party from executing it as well. It felt that provision should be made to enable the other party to continue to execute the treaty. Moreover, in the case of a treaty which might have produced benefits for the parties, it considered that the question arose whether the other party might demand that the "erring" State should continue to implement those terms of the treaty which produced such benefits, notwithstanding the fact that the nullity of the treaty had been invoked. It considered that since draft Article 52 dealt with the effects of the treaty, it should be placed in Part III rather than Part II.

The views of the Special Rapporteur are not available on this article.

Recommendation:

In the light of the foregoing comments it is probable that the Special Rapporteur will want to modify clause 1(b) of Article 52, and that the Commission itself may wish to consider re-drafting the article in such a way as to make more clear some of the potential ambiguities in the version.

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ARTICLE 53

Legal consequences of the termination of a treaty

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

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

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

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

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

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

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

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

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

This article was based on Article 28 of the Special Rapporteur's Second Report.

At the 15th Session it received general support but the Commission considered that it required re-drafting in order adequately to cover such cases as jus cogens inter veniens. It was adopted unanimously, after revision, without further discussion.

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A number of governments commented on this article:

(i) The Netherlands pointed out that "since some treaties remain in force for a certain period after notice of termination has been given" the text of the second and third lines of clause 3(c) might be modified to read:

> "...prior to the date upon which the denunciation or withdrawal has taken effect and the validity..."

(ii) Sweden, as in the case of the previous article, considered that the delimination between the two articles should be made clearer.

(iii) Israel commented on it at length. In its view paragraph 1(b) should be re-drafted to read:

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

It considered moreover that it would probably clarify matters if the article were to specify those articles in Part II to which it related. It suggested that the commentary should make clear that, once a treaty is terminated, it can only be revived in the future, by some formal treaty (in the sense used in the draft articles). This is necessary because of differences of approach in differing legal systems on the effect of the repeals of a statute which in itself repeals an earlier statute. It pointed out that in Israel there is statutory provision to the effect that where any enactment repealing a former law is itself repealed the last repeal does not revive the law previously repealed unless words be added specifically reviving it. It assumes that the same principle would apply under international law.

(iv) Portugal commented on this article at length at pages 135 and 136 of A/CN.4/175. It considered in brief that the revision made in paragraph 2, dealing with jus cogens as a ground for nullity, does

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not provide a solution free from doubt. In its view it might be more equitable to apply in this case the rule of paragraph 1. In its view the course laid down in paragraph 2 was not completely divorced from the view that does not accept any limitation on the content of the treaty because of a want of norms of international law which could establish such limitations.

(v) The United Kingdom pointed out that, as drafted, the article "does not make provision with regard to the accrued obligations of a State under a treaty at the time of its denunciation by that State".

The observations of the Special Rapporteur on this article are not yet available.

Recommendation:

Again, it is difficult to anticipate what action the Special Rapporteur may wish to take on this article. However, it seems certain that he and the Commission will have to reconsider it in the light of the comments offered. The changes proposed by both the Netherlands and Israel appear acceptable. The comments of Portugal, relating to *jus cogens*, will obviously be considered in the light of the attitudes of the different members of the Commission to the importance of this principle. It is not possible at the present time to anticipate whether the provisions of paragraph 2 should be retained or could be considered redundant.

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ARTICLE 54

Legal consequences of the suspension of the operation of a treaty

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

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

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

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

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

This article was drawn up at the 15th Session of the International Law Commission in response to several suggestions that it might be worthwhile having a separate article dealing with the legal effects of suspension. It was then numbered 29.

There was no substantive discussion on it, and, after minor revisions, it was adopted unanimously. The only substantive comment offered on this article was by the United States of America. It questioned whether the article was intended to apply as broadly as it appeared. As an example it suggested that if one party to the multilateral treaty suspends the application of the treaty with respect to one other party, only the latter party should be relieved of the obligation to apply the treaty (unless the nature of the treaty were such that the suspension affected the immediate interests of all parties). It recommended that paragraph 1(a) might be re-worded as follows:

> "(a) Shall relieve the parties affected from the obligation to apply the treaty during the period of suspension".

The views of the Special Rapporteur are not yet available.

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Recommendation:

The comments by the United States of America appear well founded, as does their proposed amendment. In discussing this matter the Commission may wish to relate it to the considerations made with regard to Article 42, where a not dissimilar problem is analyzed.

Legal - A.W.Robertson - mas

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

MEMORANDUM

TO / À: Under-Secretary of State for External Affairs

SECURITY / Sécurité: RESTRICTED

FROM / De: Legal Division

DATE: December 30, 1965

REFERENCE / Référence: Our Memorandum of December 28, 1965

NUMBER / Numéro: RL

FILE / DOSSIER
OTTAWA: 20-3-1-6
MISSION: 25/ —

SUBJECT / Sujet: Part II of Seventeenth Session of International Law Commission

ENCLOSURES / Annexes

DISTRIBUTION

...

Attached herewith are two copies of the Commentary which has been prepared for your use at the forthcoming Monaco meeting of the International Law Commission.

One of these copies is for you and the other is the copy which you have agreed to take for Beesley.

A. W. J. ROBERTSON

Legal Division

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

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MESSAGE

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EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

AFB file

MEMORANDUM

TO / À: Mr. M. Cadieux (thru Legal Adviser)

FROM / De: Legal Division

REFERENCE / Référence:

SUBJECT / Sujet: Commentary for Winter Session of International Law Commission

noted many thanks C

SECURITY / Sécurité: UNCLASSIFIED

DATE: December 28, 1965

NUMBER / Numéro:

FILE	DOSSIER
OTTAWA	20-3-1-6
MISSION	257 —

ENCLOSURES / Annexes

DISTRIBUTION

Work continues on the commentary which is being prepared for you on Part II of the Law of Treaties, which is to be discussed at the forthcoming Winter Session of the International Law Commission.

As you are aware, the general pressures of his work, both in New York and in Ottawa, combined with the delay on the part of Sir Humphrey Waldock in preparing his own 5th Report, precluded Robertson from preparing this work earlier. However, he will have the commentary ready by Friday morning.

I hope it would be possible for you to bring both your own copy and Beesley's copy of this commentary to Monacco with you when you go there. We do not know exactly when Beesley will leave for Monacco and this would seem to be the only way of getting his copy to him in time. Unlike the commentary prepared last year, which covered many other matters, this one is fairly short and therefore not bulky. The relevant background documentation will moreover be provided by Beesley from Geneva.

A E Gotlieb
Legal Division

000857

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

28.12.35 (US)

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FOR WERSHOF:

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ILC: DOCUS FOR JAN 1966 SESSION

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NNNNW

28.12.43/05

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Legal Div./A.W.J. Robertson/mn

EXTERNAL AFFAIRS

AFFAIRES EXTÉRIEURES

RETURN TO LEGAL DIV. DCO

TO / À: PERMANENT MISSION OF CANADA TO UNITED NATIONS GENEVA

FROM / De: UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS OTTAWA

REFERENCE / Référence:

SUBJECT / Sujet: Commentary for I.L.C. Session

SECURITY / Sécurité:

DATE: DECEMBER 23, 1965

NUMBER / Numéro: L- 385

KC

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ENCLOSURES / Annexes:

DISTRIBUTION

-- We attach for Beesley's use at forthcoming Session of ILC, Waldock's commentaries on Articles 40, 41 and 42.

2. It appears unlikely that his comments on any further Articles will be available before the Session.

3. Preparation of the commentary itself is in hand and we hope to be able to send two copies with the USSEA.

A. E. GOTLIEB

for Under-Secretary of State
for External Affairs

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

000859

EXTERNAL AFFAIRS AFFAIRES EXTÉRIEURES

TO / À: The Under-Secretary of State for External Affairs, Ottawa

FROM / De: The Canadian Delegation to the 20th Session of the General Assembly of the U.N., New York

REFERENCE / Référence: Our Letter No. 1006, December 10, 1965

SUBJECT / Sujet: International Law Commission - Documents for the January Session

SECURITY / Sécurité: UNCLASSIFIED

DATE: December 13, 1965

NUMBER / Numéro: 1018

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ENCLOSURES / Annexes: 2

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c.c. Permis Geneva (one enc.)

Enclosed are two copies of Addendum 1 to Document A/CN.4/183, being the second part of Waldock's Fifth Report on the Law of Treaties. The third and presumably final part of the Fifth Report has not yet been received by the Secretariat from Sir Humphrey Waldock.

1 enclosure to library
1 to AMVR, & file

The Delegation

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

Robertson

Done Dec 14
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THAN EXPECTED) AS A/CN. 4/183. COPIES BEING AIRMAILED TO YOU AND GNEVA.

RL

20-3-66

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