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UNITED NATIONS CONFERENCE
ON THE LAW OF TREATIES

ANALYTICAL COMPILATION OF COMMENTS AND OBSERVATIONS MADE
IN 1966 AND 1967 WITH RESPECT TO THE FINAL DRAFT
ARTICLES ON THE LAW OF TREATIES

572

Working paper prepared by the Secretariat.

VOL. II

This volume contains the comments and observations on parts IV
to VII of the draft articles (articles 35 to 75).

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Part IV

PART IV - AMENDMENT AND MODIFICATION OF TREATIES

MEMBER STATES

France

See XXIInd session, 969th meeting, para. 2, quoted supra under Comments and observations on the draft articles as a whole.

Honduras

With regard to the amendment and modification of treaties, an article on additional protocols should be added, since they were the regulatory instruments which made the successful performance of treaties feasible.

(Mr. Cadalso, XXIInd session, 975th meeting, para. 12)

United Kingdom

See XXIInd session, 967th meeting, para. 3, quoted supra under Comments and observations on the draft articles as a whole.

SPECIALIZED AGENCIES

International Labour Organisation

See document A/6827/Add.1, quoted supra under Comments and observations on the draft articles as a whole.

International Telecommunication Union

The Montreux Convention provides:

"51. Administrative conferences shall normally be convened to consider specific telecommunication matters. Only items included in their agenda may be discussed by such conferences. The decisions of such conferences must in all circumstances be in conformity with the provisions of the Convention.

"52. The agenda of a world administrative conference may include:

(a) The partial revision of the administrative regulations listed in 203;

"53. (b) Exceptionally, the complete revision of one or more of those regulations;

"56. (1) The agenda of an administrative conference shall be determined by the Administrative Council with the concurrence of a majority of the Members of the Union in the case of a world administrative conference, or of a majority of the Members belonging to the region concerned in the case of a regional administrative conference, subject to the provisions of 76.

"57. (2) This agenda shall include any question which a plenipotentiary conference has directed to be placed on the agenda.

"70. (1) The agenda, or date or place of an administrative conference may be changed:

(a) At the request of at least one-quarter of the Members and Associate Members of the Union, in the case of a world administrative conference, or of at least one-quarter of the Members and Associate Members of the Union belonging to the region concerned in the case of a regional administrative conference. Their requests shall be addressed individually to the Secretary-General, who shall transmit them to the Administrative Council for approval; or

"71. (b) On a proposal of the Administrative Council.

"72. (2) In cases specified in 70 and 71, the changes proposed shall not be finally adopted until accepted by a majority of the Members of the Union, in the case of a world administrative conference, or of a majority of the Members of the Union belonging to the region concerned, in the case of a regional administrative conference, subject to the provisions of 76.

Part IV

"74. (2) The convening of such a preparatory meeting and its agenda must be approved by a majority of the Members of the Union in the case of a world administrative conference, or by a majority of the Members of the Union belonging to the region concerned in the case of a regional administrative conference, subject to the provisions of 76.

"76.9 In the consultations referred to in 56, 64, 69, 72 and 74, Members of the Union who have not replied within the time-limits specified by the Administrative Council shall be regarded as not participating in the consultations, and in consequence shall not be taken into account in computing the majority. If the number of replies does not exceed one-half of the Members consulted, a further consultation shall take place."

The general regulations annexed to the convention contain the following:

"CHAPTER 4

"Time-limits for presentation of proposals to
conferences and conditions of submission

"624.1. Immediately after the invitations have been despatched, the Secretary-General shall ask Members and Associate Members to send him, within four months, their proposals for the work of the Conference.

"625.2. All proposals, the adoption of which will involve revision of the text of the convention or regulations, must carry references identifying by their marginal numbers those parts of the text which will require such revision. The reasons for the proposal must be given, as briefly as possible, in each case.

"626.3. The Secretary-General shall communicate the proposals to all Members and Associate Members as they are received.

"627.4. The Secretary-General shall assemble and co-ordinate the proposals received from administrations and from the Plenary Assemblies of the International Consultative Committees and shall communicate them, at least three months before the opening of the conference, to Members and Associate Members. The General Secretariat and the specialized secretariats shall not be entitled to submit proposals."

(Letter of 24 July 1967 from the Secretary-General ad interim of the International
Telecommunication Union (A/6827/Add.1, pp. 37-39))

ARTICLE 35

General rule regarding the amendment of treaties

SPECIALIZED AGENCIES

Food and Agriculture Organization of
the United Nations

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

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

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

(Letter of 7 July 1967 from the Legal Counsel of the Food and Agriculture
Organization of the United Nations (A/6827/Add.1, p. 25))

Part IV, article 36

ARTICLE 36

Amendment of multilateral treaties

MEMBER STATES

Czechoslovakia

It would follow from the provisions of paragraph 5 [of article 36] that an expression of a different intention by a State would be practicable only in so far as the provision under paragraph 2 (a) is concerned. It is recommended therefore that paragraph 5 be formulated as follows:

"5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall be considered as a party to the treaty as amended failing an expression of a different intention. In relation to a party not bound by the amending agreement it would be considered as a party to the unamended treaty."

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 12))

SPECIALIZED AGENCIES

Food and Agriculture Organization of
the United Nations

See document A/6827/Add.1, quoted supra under article 35.

International Labour Organisation

See document A/6827/Add.1, quoted supra under Comments and observations on the draft articles as a whole.

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ARTICLE 37

Agreements to modify multilateral treaties between
certain of the parties only

MEMBER STATES

Czechoslovakia

The condition expressed in paragraph 1 (b) (iii) [of article 37], i.e. the conclusion of an agreement to modify the treaty is not prohibited by the treaty, is undoubtedly valid also in respect of the application of provisions under (i) and (ii). It is recommended also that paragraph 1 (b) be formulated as follows:

- "(b) provided the change is not prohibited by the treaty, and
(i) (present wording)
(ii) (present wording)."

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 12))

Japan

See document A/6827 and Corr.1 quoted infra under article 62.

United States of America

[Some] sections of the draft convention are replete with provisions which will result in disputes. To list but a few:...

Part IV, articles 37 and 38

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

(Note verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, p. 12))

ARTICLE 38

Modification of treaties by subsequent practice

MEMBER STATES

Bulgaria

See XXIInd session, 979th meeting, para. 3, quoted supra under article 1.

See document A/6827/Add.1 quoted supra under article 2.

Czechoslovakia

It is recommended that a clear expression be made of the fact that the treaty in its application may be modified on the basis of subsequent practice expressing the agreement of all parties to modify the treaty provisions.

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 13))

/...

Japan

Although there can possibly be cases where a treaty is modified by subsequent practice, the Government of Japan cannot agree to the inclusion of the explicit provision on this matter in the draft articles because of its constitutional problems. It is, therefore, suggested that this article be deleted.

(Note verbale of 19 July 1967 from the Permanent Representative to the United Nations (A/6827 and Corr.1, p. 22))

Part V

PART V - INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

MEMBER STATES

Australia

The part of the draft articles that was most significant in substance was part V, dealing with the invalidity, termination and suspension of treaties. That branch of the law, including as it did such controversial subjects as jus cogens and the rebus sic stantibus clause, had never become amenable to settlement by the customary law of nations; its codification would therefore be the crowning achievement of the Vienna conference.

(Sir Kenneth Bailey, XXIIInd session, 981st meeting, para. 13)

Belgium

The problem of the termination, suspension and invalidity of treaties, to which the Commission had devoted a comparatively large number of articles, was evidently receiving the most attention from States. His delegation understood the preoccupations of those States which urged that detailed provisions should be formulated and new principles stated in the convention with respect to the extinction and invalidity of international agreements. It had often been contended in the Sixth Committee itself that the sovereignty of States must be strengthened in various ways, including the limiting of their treaty obligations. That concern was legitimate only in so far as the present state of the law actually bound certain countries to agreements which were contrary to elementary notions of justice, or where States were required, even when it was clearly incompatible with good faith, to respect their treaty commitments absolutely. He wondered, however, whether there really were, in practice, many international conventions comparable to the leonine contracts of civil law. A study of international practice would

undoubtedly show that the number of existing international agreements actually considered unacceptable by the parties was far smaller than some statements and theoretical commentaries would lead one to believe.

Thus, in a great many cases newly independent countries had preferred the adaptation and modification of existing agreements to the rejection of treaties which had been concluded on their behalf by other Powers. Those countries did not seem to consider that the defence of their interests required systematic insistence on the invalidity of such conventions. In the light of those facts, it was doubtful that the need for the formulation of a large number of precise rules on the extinction of treaty obligations was really as urgent as some thought. Moreover, too great emphasis on the termination of international agreements would certainly encourage certain States to take measures which, while intended to strengthen sovereignty, would in fact be contrary to their own interests.

In so far as it was nevertheless agreed to devote a large part of the convention to the termination and invalidity of treaty obligations, another question arose, namely, what were the means best calculated to protect both the interests of States and the interests of the international community. Whatever rules the Conference adopted must assure a satisfactory balance between the legitimate concern of sovereign States for freedom and the stability that was indispensable to international legal relations. Most of the previous speakers, representing countries with very different social and political systems had stressed that point.

It was sometimes contended that the convention ought to give small States the means to defend their freedom against the great Powers. However, in determining their attitude towards the law of treaties, the small countries should think not only of their treaty relations with stronger partners but also of contractual relations among themselves, to which they normally wished to assure a certain stability. During the debates on the principles of international law concerning friendly relations and co-operation among States, his delegation had repeatedly stressed the need for every State to consider all its international relations, and not to base its attitude on considerations drawn from a few problems in its relations with a small number of countries with which it was connected at a given time in its history. That observation was equally essential with respect to the law of treaties.

(Mr. Schuurmans, XXIInd session, 982nd meeting, paras. 1-4)

Part V

Bulgaria

See XXIst session, 910th meeting, para. 6, quoted supra under Comments and observations on the draft articles as a whole.

Byelorussian Soviet Socialist Republic

Part V of the draft article, dealing with the invalidity and termination of treaties and their resulting consequences, would inevitably help to strengthen friendly relations among nations and improve the international climate, as it would prevent the conclusion of agreements which were void ab initio. He thought, however, that it should have been imperative to state explicitly in the articles of part V that void treaties were invalid from the very moment of their conclusion, instead of merely referring to it in the commentary. That would have made it possible to avoid the conclusion of treaties by which certain States illegally exploited the resources of other countries.

(Mr. Stankevich, XXIst session, 908th meeting, para. 16)

China

His Government was well aware of the risks presented by article 59 and by part V generally. However, on the grounds of equity and justice and for the sake of peaceful change, it believed that the risk would be worth taking if more adequate procedural checks than those provided in article 62 were afforded. The risk could be further reduced if more precise definitions of such terms as "fraud" in article 46 and "corruption" in article 47 could be devised.

(Mr. Chen, XXIIInd session, 976th meeting, para. 31)

Czechoslovakia

See XXIIInd session, 976th meeting, para. 26, quoted infra under article 49.

Part V

Ecuador

Part V of the draft articles, relating to the invalidity, termination and suspension of the operation of treaties, raised to the level of juridical norms the general legal principles by which the international community was governed. A legal instrument might be absolutely void in the case of a defect which could not be remedied; relatively void if the defect could be remedied; or void ab initio if certain constituent elements were lacking.

(Mr. Alcívar, XXIInd session, 981st meeting, para. 30)

See also ibid., para. 26, quoted supra under article 2.

Finland

See XXIInd session, 980th meeting, para. 50, quoted infra under article 62.

France

See XXIInd session, 969th meeting, para. 6, quoted infra under article 62.

Japan

His delegation believed, as did many other delegations, that part V of the draft articles demanded particular attention. Some of the provisions might have very serious repercussions on the stability of treaty relationships among States, because the rules determining the grounds for invalidity, termination and suspension of the operation of treaties always involved risks of abuse.

(Mr. Togo, XXIInd session, 981st meeting, para. 38)

Part V

Netherlands

...a category of modern "community" rules... were beginning to compensate for the weaker aspects of traditional international law based on the sovereignty of States. The consent of the parties was not the central issue in those rules, which came more properly within the purview of the progressive development of international law than of its codification. They were to be found in the draft articles on provisions of internal law regarding competence to conclude a treaty (article 43), on the coercion of a State by the threat or use of force (article 49), on jus cogens (article 50) and on the fundamental change of circumstances or the principle of rebus sic stantibus (article 59). They were all grouped in part V, sections 2 and 3, of the draft articles (see A/6309) and, in the Secretary-General's memorandum, tentatively allocated to the second of the proposed committees (A/C.6/371, para. 16).

In drawing up those articles, the Commission had been very careful to minimize the risk of abuse by strictly defining and circumscribing the conditions under which recourse might properly be had to the principle contained in each article. The context, however, in which that definition was made, in the commentary on article 59 on fundamental change of circumstances, made it likely that the question of the necessity of independent adjudication would arise, particularly in connexion with the articles involving progressive development of the law of treaties. That tendency would be strengthened by the fact that the draft often had to rely on the concept of good faith. The obligation of the State not to frustrate the object of a treaty prior to its entry into force (article 15), the basic norm of pacta sunt servanda (article 23), the general rule of interpretation (article 27, para. 1) and the exception to the general rule that violation of internal law could not be invoked as invalidating a State's consent to a treaty (article 43) - all those much discussed provisions were expressions in one way or the other of the principle of good faith.

(Mr. Tammes, XXIst session, 903rd meeting, paras. 14-15)

Part V

Despite the improvements on the former draft, the terms used in part V did not always seem to be clear. For instance, the term "void" encompassed three situations with substantially different consequences. Article 65 provided that a treaty which was void under articles 46-49 might nevertheless have certain effects, while article 67 (1) provided that the effects of any treaty which was void under article 50 should be eliminated and article 67 (2) concerning treaties which were void under article 61 concerned only future consequences. In addition, other terms could be found, such as "nullity" in the heading of article 67, "invalidity" in the heading of articles 62 and 65 "invalidating a consent" in article 44, and "without any legal effect" in article 48. In the last instance, it might be mentioned that article 65 clearly indicated that a treaty which was void under article 48 might have certain effects, though not on the ground of the expression of the consent of the State but on that of the principle of the protection of acts performed in good faith. In view especially of the scope of article 62 and the prohibition of unilateral action, it seemed necessary to use a consistent and unambiguous terminology.

(Mr. Kooijmans, XXIInd session, 977th meeting, para. 5)

Romania

Part V of the draft articles reflected the Commission's desire to strengthen the validity and stability of treaties. To that end, penalties had been established for violations of those principles and rules of international law which were intended to ensure the free expression of the will of States at the time of the conclusion of treaties. That was a progressive approach which should be retained.

(Mr. Secarin, XXIInd session, 976th meeting, para. 42)

Turkey

Turkey... considered that part V of the draft articles (Invalidity, termination and suspension of the operation of treaties), and any provisions involving more than the codification of existing rules, should be given especially careful consideration at the forthcoming conference.

(Mr. Miras, XXIInd session, 980th meeting, para. 20)

Part V

United Kingdom

...the conference should devote particular attention to the unification of the terms used in the articles. While the Commission had given much attention to that point, there were still inconsistencies, for example, in the use which had been made of the terms "invalidity", "void", "invalidating... consent" and "without... legal effect" in part V.

(Mr. Darwin, XXIInd session, 967th meeting, para. 7)

United States of America

...the articles relating to the invalidity of treaties established sweeping rules which went far beyond the existing practice and law. As was apparent from article 39, the International Law Commission had wished to lay down rules that covered all cases of invalidity. Thus, there was a series of articles - such as article 45 on error, article 46 on fraud and article 47 on corruption of a representative of the State - in which a rule that had most drastic consequences, the invalidity of a treaty, had been stated in vague and general terms. That vagueness was understandable, because no body of practice or judicial opinion had been developed on those matters; but that same absence of practice and opinion also meant that there were no rules of international law which defined and delimited the operation of the provisions appearing in the articles. Unless it was possible to give greater content to expressions such as "fraud" and "corruption", it was relevant to ask whether it would not be better, rather than seeking to develop international law by including all possible reasons for invalidating a treaty in the draft articles, to avoid jeopardizing the stability of treaties by affording easy excuses to evade treaty obligations.

Furthermore, the reasoning by analogy with municipal law, which could be used to provide a limited degree of protection, at the international level, against misuse of the ideas of fraud or error, became more difficult as soon as it was a question of the peremptory norms of international law which were the subject of article 50.

(Mr. Kearney, XXIInd session, 977th meeting, paras. 20-21)

Part V

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

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

The basic question is whether the requirements for good faith fulfilment of treaty obligations set out in article 23 are not substantially impaired by permitting claims of invalidity to be advanced on insubstantial grounds under certain of the articles in section 2 of part V. The difficulty, in a number of instances, lies not in the fundamental principle giving rise to a claim of invalidity but in the sweeping fashion in which the principle is expressed and the lack of safeguards respecting its application. Articles 45, 46 and 47, for example, are all couched in the most general terms.

(Note verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, pp. 6-7))

Uruguay

See XXIst session, 909th meeting, para. 27, quoted supra under article 23.

Yugoslavia

The proposed rules regarding the validity, invalidity and suspension of treaties did a great deal to clarify a number of classical problems of international law. That was also true, in particular, of the rules relating to the interpretation of treaties, and the commentaries on the subject showed that the interpretation of multilateral treaties had become a task of the first importance since the emergence of many new independent States as a result of the process of decolonization. Those

Part V

rules should take account of the dynamic forces of international life and of the needs of the States that now formed a majority. The greatest attention must also be given to the rules concerning the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty. (Mr. Sahovic, XXIst session, 907th meeting, para. 22)

SPECIALIZED AGENCIES

Food and Agriculture Organization of
the United Nations

To the extent that any problems relating to the subject matters covered by... articles 39 to 68 (invalidity, termination, and suspension of operation of treaties) may arise in connexion with the FAO Constitution or instruments adopted within the Organization, there are good reasons to believe that the relevant articles on the law of treaties would be applied, subject to any rules adopted by the Organization with respect to any of these subject matters. At present, specific rules are in force with regard to the withdrawal from the Organization and the withdrawal from, or termination of, conventions and agreements concluded under article XIV of the Constitution. The procedure for, and effects of, withdrawal from the Organization are governed by the provisions of article XIX of the Constitution. Detailed provisions concerning withdrawal from or denunciation of conventions and agreements are contained in paragraph 14 of the Principles, while the termination of conventions and agreements is dealt with in paragraph 15 of the Principles.

(Letter of 7 July 1967 from the Legal Counsel of the Food and Agriculture Organization of the United Nations (A/6827/Add.1, pp. 25-26))

International Telecommunication Union

The Montreux Convention makes the following provisions for denunciation:

"262 1. Each member and Associate Member which has ratified, or acceded to, this convention shall have the right to denounce it by a notification addressed to the Secretary-General by diplomatic channel through the intermediary of the government of the country of the seat of the Union. The Secretary-General shall advise the other Members and Associate Members thereof."

"263 2. This denunciation shall take effect at the expiration of a period of one year from the day of the receipt of notification of it by the Secretary-General.

"264 1. The application of this convention to a country, territory or group of territories in accordance with article 20 may be terminated at any time, and such country, territory or group of territories, if it is an Associate Member, ceases upon termination to be such.

"265 2. The declaration of denunciation contemplated in the above paragraph shall be notified in conformity with the conditions set out in 262; it shall take effect in accordance with the provisions of 263."

Similar provisions are contained in a number of ITU regional and special agreements.

All such regional and special agreements so far concluded have been concerned with the use of radio. Their basic purpose is to ensure, as far as practicable, that there is an equitable division of the parts of the frequency spectrum with which they are concerned between the relevant services of the parties and that harmful interference is reduced to a minimum. In a number of these agreements **the** parties undertake not to change the characteristics of emissions covered by the agreement nor to establish new stations except under certain conditions. They **also** undertake to endeavour to agree on the action required to reduce any harmful interference caused by the application of the agreement. It is further provided that in the event of failure to agree on action to reduce harmful interference, the dissenting administrations may resort to procedures established in the radio regulations for dealing with cases of harmful interference, which involve **addressing** reports to any specialized agency concerned with the service concerned or a **request** to the International Frequency Registration Board of the ITU to act. These administrations may also use the procedures for settlement of differences laid **down**

Part V and section 1, article 39

in the International Telecommunication Convention, namely, resort to diplomatic channels or to any special procedures established in treaties concluded between them for the settlement of international disputes or, alternatively, to arbitration according to certain procedures contained in the Convention.

In one agreement the foregoing procedure is to be adopted in case of failure to agree on action to reduce harmful interference but is made mandatory, not permissive. Another contains a special arbitration procedure which must be followed should one party to a dispute request it, but the right to denounce is not affected by this provision.

The Montreux Convention contains no stipulations as to the manner in which instruments for denouncing an agreement shall be validated but provides that they shall be forwarded to the Secretary-General of the Union by the diplomatic channel through the intermediary of the Government of the country of the seat of the Union. (Letter of 24 July 1967 from the Secretary-General ad interim of the International Telecommunication Union (A/6827/Add.1, pp. 39-41))

SECTION 1 - GENERAL PROVISIONS

ARTICLE 39

Validity and continuance in force of treaties

MEMBER STATES

Canada

See XXIIInd session, 976th meeting, para. 4, quoted infra under article 62.

Thailand

See XXIInd session, 976th meeting, para. 17, quoted supra under article 28.

United States of America

See XXIInd session, 977th meeting, para. 20, quoted supra under part V.

ARTICLE 40

Obligations under other rules of international law

(No comments relating specifically to this article.)

ARTICLE 41

Separability of treaty provisions

MEMBER STATES

Japan

Since articles 46 and 47 should be deleted... [article 41 (4)]
for which there remains no reason for existence, should also be deleted.
(Note verbale of 19 July 1967 from the Permanent Representative to the
United Nations (A/6827 and Corr.1, p. 22))

Part V, section 1, article 41Netherlands

With regard to the provisions on the separability of treaty provisions and on treaties and third States, his delegation wished to reserve its position.

(Mr. Kooijmans, XXIIInd session, 977th meeting, para. 7)

Sweden

His delegation was somewhat puzzled about the effect of the provisions on separability. Separability could be important in the case of a breach of a clause which was separable and the acceptance of which was not an essential basis of consent. However, article 57 referred only to a material breach - in other words, the breach of a provision that was essential for the accomplishment of the object or purpose of the treaty. While any material breach should be allowed to constitute a ground for terminating the treaty as a whole, it should be specified that a lesser breach justified termination of the articles breached, provided that they were separable.

(Mr. Blix, XXIIInd session, 980th meeting, para. 14).

United Kingdom

See XXIIInd session, 976th meeting, para. 3, quoted supra under Comments and observations on the draft articles as a whole.

Venezuela

Under article 41, paragraph 3, if a ground for invalidating a treaty related to particular clauses alone, it might only be invoked with respect to those clauses where: (a) the said clauses were separable from the remainder of the treaty with regard to their application; and (b) acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole. That

would call for a system of acceptance and rejection; some procedural provision along those lines would be very helpful, and his delegation would attempt to suggest a practical criterion in due course.

(Mr. Molina, XXIst session, 914th meeting, para. 3)

ARTICLE 42

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

MEMBER STATES

Czechoslovakia

In view of the fact that the creation of grounds preventing the implementation of the treaty ceases to exist independently of the expression of the intention of the parties, article 42 cannot be applied to the cessation of the existence of the treaty under article 58. It is therefore recommended to state in the introductory sentence instead of "or articles 57 to 59 inclusive", "or articles 57 and 59".

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 13)

Ecuador

See XXIst session, 914th meeting, para. 22, quoted infra under article 47.

Honduras

Article 42 should include a provision specifying the time-limit within which the invalidity of a treaty could be claimed by any of the parties. A period of two

Part V, section 1, article 42

to five years would be sufficient for the detection of any error or fraud which might give rise to such a claim. After the expiry of the period laid down, any claim of invalidity would be considered illegal.

(Mr. Cadalso, XXIIInd session, 975th meeting, para. 12)

Netherlands

A praesumptio juris et de jure was also to be found in the application, under article 42, of the principle of estoppel or acquiescence to deprive a State of its right to invoke grounds for invalidating, terminating, withdrawing from or suspending the operation of a treaty.

(Mr. Tammes, XXIst session, 903rd meeting, para. 13)

As the Commission had already indicated in its commentary (5) on article 42, the foundation of the principle of estoppel was essentially good faith and fair dealing.

(Mr. Kooijmans, XXIIInd session, 977th meeting, para. 3)

Spain

The inclusion in draft article 42 of the common-law notion of estoppel confirmed the importance that the Commission had attached to good faith.

(Mr. de Luna, XXIst session, 912th meeting, para. 40)

Thailand

The application of article 42, concerning loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty, had rightly not been extended to cases coming under article 49, so that the

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illegal use of force could not be subsequently rewarded by validation of an otherwise invalid treaty on the ground of acquiescence or of the subsequent conduct of the parties.

(Mr. Sucharitkul, XXIIInd session, 976th meeting, para. 16)

SECTION 2 - INVALIDITY OF TREATIES

MEMBER STATES

Finland

In general, the draft articles had been based on experience gained by following customary law. Where the Commission had been satisfied with the existing rules of international law as established by custom, there did not appear to be grounds for dissatisfaction with the results. There were some instances, however, where the Commission had gone beyond what could be described, at the present time, as valid principles of customary international law. Part V of the draft articles also included provisions concerning the invalidity of treaties which, although fully established in the municipal law of different States, were at least to some extent new ideas in international law. Criticism of such provisions was in some cases quite understandable. While that approach was in itself quite acceptable in codifying such a topic, insurmountable difficulties might easily arise in procuring the consent of individual Governments to a convention based on provisions of that kind.

(Mr. Broms, XXIIInd session, 980th meeting, para. 47)

France

On some matters,... the International Law Commission, going beyond a task of codification properly speaking, had devoted a part of its effort to the development of the law of treaties. That was the case with the provisions of part V dealing

Part V, section 2

with the invalidity of treaties and in particular article 43 (Provisions of internal law regarding competence to conclude a treaty), article 45 (Error), article 46 (Fraud), article 47 (Corruption of a representative of the State) and article 49 (Coercion of a State by the threat or use of force). Without being necessarily open to criticism in themselves, the principles thus laid down nevertheless attracted attention by their subjective nature and, consequently, by the rigour and impartiality which must govern their implementation.

(Mr. de Bresson, XXIIInd session, 969th meeting, para. 3)

Guinea

Articles 45-48, dealing with error, fraud, corruption and coercion, the factors vitiating consent, provided the most striking evidence of the courage and sense of justice of those who had drafted the text. They had shown no hesitation in doing away with certain practices whose continued existence was a disgrace to mankind. Only the freely expressed will of the parties to a treaty, guided by genuine respect for each other's sovereignty, could truly dignify an agreement and make it a means of ensuring sounder international relations. His delegation therefore fully approved of those articles.

(Mr. Savane, XXIIInd session, 982nd meeting, para. 28)

Netherlands

Many... provisions,... were... based on the principle of consent, including those where the lack of initial consent was later invoked to invalidate the treaty in the case of error, fraud or the corruption or coercion of a representative (articles 45-48).

(Mr. Tammes, XXIst session, 903rd meeting, para. 13)

Nicaragua

He was particularly glad to note the important provisions concerning the need for the free consent of the parties which upheld that principle by providing that the invalidation of consent made the treaty void. His delegation hoped that those provisions would make it possible to avoid in the future the repetition of abuses from which the small countries had had to suffer following errors which had marred certain treaties affecting them.

(Mr. Montenegro Medrano, XXIInd session, 978th meeting, para. 9)

Nigeria

See XXIInd session, 978th meeting, para. 11, quoted supra under Comments and observations on the draft articles as a whole.

Poland

See XXIInd session, 977th meeting, para. 11, quoted infra under article 62.

Sierra Leone

Articles 45-49 stated that fraud, error, corruption or coercion vitiated that free consent and rendered the treaty in question null and void ab initio. That point was particularly important for former colonial countries which had long been bound - some indeed were still bound - by one-sided agreements that were nothing more than "gin-bottle" agreements.

(Mr. Koroma, XXIst session, 911th meeting, para. 45)

Part V, section 2

Ukrainian Soviet Socialist Republic

The Commission had acted wisely in endeavouring to formulate precisely all the rules regulating the entry into force, the termination and the suspension of treaties and in stating in draft articles 43 to 50 all the causes of the invalidity of treaties, for example, error, fraud, corruption of a representative of the State, coercion of a representative of the State, coercion of a State by the threat or use of force and, conflict with a peremptory norm of general international law.

(Mr. Yakimenko, XXIst session, 905th meeting, para. 3)

Yugoslavia

With regard to the details of the text now before the Committee, his delegation approved in principle the mention of jus cogens in part V, section 2, of the draft articles, relating to the invalidity of treaties. The provisions contained in article 50, and also in articles 49 and 61 were most valuable, in that they represented an adaptation of the traditional law of treaties to contemporary international law. Jus cogens laid down the general legal limits for the conclusion and life of treaties based on the obligation to respect the Charter of the United Nations, and underlined the fact that the law of treaties was not independent of general international law.

(Mr. Sahovic, XXIIInd session, 975th meeting, para. 18)

ARTICLE 43

Provisions of internal law regarding competence to conclude a treaty

MEMBER STATES

Ceylon

...some of the draft articles dealt with very complex questions and, as drafted would leave too much uncertainty to gain general acceptance. In the case of article 43 (Provisions of internal law regarding competence to conclude a treaty), which referred to the "manifest" violation of the internal law of a State, it could well be asked to whom the violation should be manifest, and at what point in time, and whether the violation could be remedied, for example, through ratification by the State concerned.

(Mr. Pinto, XXIIInd session, 969th meeting, para. 11)

Cyprus

His delegation endorsed the basic principle of article 43, namely, that the non-observance of a provision of internal law regarding competence to enter into treaties did not affect the validity of a consent given in due form by a State organ or agent competent to give that consent. In fact, his delegation was on record as going further than the Commission and sharing the view of some members of the Commission that it would be undesirable to weaken that basic principle by admitting any exceptions to it. As his delegation had explained, the distinction between "manifest" and "non-manifest" violations of internal law presented difficulties, both from the viewpoint of legal theory and in actual practice.

(Mr. Jacovides, XXIIInd session, 980th meeting, para. 57)

Part V, section 2, article 43Czechoslovakia

It is recommended to amend... article 43 to say that the violation of internal law may be invoked also in cases when it becomes known that other parties had been aware of the fact. It is recommended to tie the application of that objection to an appropriate time-limit.

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 13))

France

See XXIIInd session, 969th meeting, para. 3, quoted supra under part V, section 2.

Japan

It is a matter for the State concerned to avoid, in concluding treaties, any violation of its internal law regarding competence to conclude them. Therefore, the phrase in article 43 beginning with "unless" should be deleted.

(Note verbale of 19 July 1967 from the Permanent Representative to the United Nations (A/6827 and Corr.1, p. 22))

Netherlands

See XXIst session, 903rd meeting, paras. 14-15, quoted supra under part V.

Spain

See XXIst session, 912th meeting, para. 41, quoted supra under article 2.

Sweden

A second paragraph might be added to article 43, indicating that violations of provisions of internal law regarding the treaty-making capacity of a State member of a federal union could not be invoked to invalidate an agreement unless the violation was manifest.

(Mr. Blix, XXIIInd session, 980th meeting, para. 11)

ARTICLE 44

Specific restrictions on authority to express the consent of the State

MEMBER STATES

Czechoslovakia

In view of the fact that the provision contained in... article [44] is loosely connected as far as its contents is concerned with article 6, it is recommended to place the article immediately following article 6 or article 7.

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 13))

Honduras

...the Commission had touched only lightly on the question of excess of power, but it was a factor which could badly disrupt international negotiations, and always required special attention.

(Mr. Cadalso, XXIIInd session, 975th meeting, para. 12)

Part V, section 2, article 44

Netherlands

See XXIIInd session, 977th meeting, para. 5, quoted supra under part V.

SECRETARY-GENERAL OF THE UNITED NATIONS

It is suggested that the end of... article [44] be modified to read as follows: "...his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was brought to the knowledge of the other negotiating States or of the depositary prior to his expressing such consent". A common way of making specific restrictions in regard to the expression of consent of a State to be bound is in the full powers of its representative. In the circumstances of modern multilateral conventions, the full powers of a representative can hardly ever be brought to the notice of the other States concerned, but only of the depositary. If a State, in drawing up full powers to authorize its representative to make a binding signature or to execute and deposit an instrument expressing consent to be bound, makes specific restrictions upon his authority, it seems only just to allow that State to invoke those restrictions if its representative fails to observe them and if the depositary has examined the full powers. Indeed, a number of cases have occurred where representatives have had full powers to sign a treaty only subject to acceptance, and by mistake they signed without mentioning the need of acceptance. In such cases the Secretary-General has not considered that the States were bound unless they confirmed it, and has taken the initiative to clarify the matter before making notification of the signature.

(A/6827/Add.1, p. 17)

ARTICLE 45

Error

MEMBER STATES

Ecuador

See XXIInd session, 981st meeting, para. 30, quoted infra under article 58.

Finland

Articles 45, 46 and 47, concerning error, fraud, and corruption of the representative of the State, might, if accepted in their present form, prove detrimental to the sanctity of treaty commitments and might also open new possibilities for mala fide interpretations contrary to the purpose of a treaty and to the intentions of the other parties to it.

(Mr. Broms, XXIInd session, 980th meeting, para. 48)

France

See XXIInd session, 969th meeting, para. 3, quoted supra under part V, section 2.

Japan

See XXIst session, 911th meeting, para. 3, quoted supra under Comments and observations on the draft articles as a whole.

Part V, section 2, article 45

Netherlands

See XXIIInd session, 977th meeting, para. 3, quoted infra under article 62.

Peru

[An] aspect of the time factor that deserved more thorough study was its application to the actual circumstances surrounding the conclusion of a treaty. Thus, an error, fraud or the use of force could occur only in time; accordingly, the question of the time of reference arose, since, depending on what that time was, one could establish that error, fraud or coercion had actually occurred or that, on the contrary, the error had been corrected, the fraud had ceased or the situation imposed by force had been replaced by a situation resulting from mutual consent. (Mr. Belaunde, XXIst session, 907th meeting, para. 29)

United States of America

See XXIIInd session, 977th meeting, para. 20, quoted supra under part V.

Under article 45 any error in a treaty, relating to a fact assumed by a State to exist when it concludes a treaty, may then support a claim of invalidity by that State if the fact "formed an essential basis of its consent to be bound by the treaty". The requirements set up are highly subjective. Whether a State assumed a fact to exist and whether that fact formed an essential basis of consent are matters primarily within the knowledge and control of the State claiming that the treaty should be terminated. There is not even the requirement that the erroneous fact be of material importance to the treaty or its execution, which would supply at least one objective test.

(Note verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, p. 7))

See also ibid., quoted supra under part V.

ARTICLE 46

Fraud

MEMBER STATES

Afghanistan

See document A/6827/Add.1, quoted infra under article 49.

Byelorussian Soviet Socialist Republic

See XXIst session, 908th meeting, para. 10, quoted supra under Comments and observations on the draft articles as a whole.

China

See XXIIInd session, 976th meeting, para. 31, quoted supra under part V.

Finland

See XXIIInd session, 980th meeting, para. 48, quoted supra under article 45.

France

See XXIIInd session, 969th meeting, para. 3, quoted supra under part V, section 2.

India

See XXIInd session, 979th meeting, para. 13, quoted supra under Comments and observations on the draft articles as a whole.

Japan

See XXIst session, 911th meeting, para. 3, quoted supra under Comments and observations on the draft articles as a whole.

...article 46 relating to fraud and article 47 relating to corruption, did not seem to his delegation to be ready for adoption. Comparative study of the various domestic laws showed that the concepts of fraud and corruption varied from country to country and that they were sometimes not defined with precision even though to some extent an objective judgement on that concept could be secured from an independent judicial organ. In international law, the concepts of fraud and corruption were not defined, either in theory or in practice, nor was there any independent judicial organ with compulsory jurisdiction to safeguard against abuse of these concepts. In such circumstances, his delegation believed that Governments should wait until international custom on those concepts developed and a well-established rule of international law had thus been formed before they laid down any rules on them in the law of treaties.

(Mr. Togo, XXIInd session, 981st meeting, para. 38)

As the commentary to... article [46] also admits, fraud lacks both the theory and precedents in international law and, even in the field of domestic laws of various countries the concept of fraud (or those similar to it) is not the same. Such being the case, it is likely to disturb international legal order to provide for fraud in an international convention before any international custom

concerning it develops and constitutes a well-established rule of international law. This article should, therefore, be deleted.

(Note verbale of 19 July 1967 from the Permanent Representative to the United Nations (A/6827 and Corr.1, p. 22))

See also ibid., quoted under articles 41, 47 and 65.

Netherlands

See XXIIInd session, 977th meeting, para. 3, quoted infra under article 62, and ibid., para. 5, quoted supra under part V.

Sweden

The practical importance of the draft rules concerning invalidity on the grounds of fraud, corruption or coercion hardly seemed to warrant the effort that had been expended on them, and it would be a pity if more practical parts of the draft were denied appropriate attention on that account.

(Mr. Blix, XXIIInd session, 980th meeting, para. 15)

United States of America

See XXIIInd session, 977th meeting, paras. 20-21, quoted supra under part V.

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

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Part V, section 2, articles 46 and 47

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

(Note Verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, p. 7))

See also ibid., quoted supra under part V.

ARTICLE 47

Corruption of a representative of the State

MEMBER STATES

Afghanistan

See document A/6827/Add.1, quoted infra under article 49.

China

See XXIIInd session, 976th meeting, para. 31, quoted supra under part V.

Ecuador

Draft article 47 dealt with the corruption of a representative of the State, which was in reality a form of fraud, and his delegation considered that the introduction of that new draft article would clarify the concept of defective consent. His delegation had serious doubts, however, about the application of the rule allegans contraria non audiendus est, contained in draft article 42, to error and fraud. Defects vitiating consent made the treaty void ab initio, and that nullity could not be remedied.

(Mr. Alcívar, XXIst session, 914th meeting, para. 22)

Finland

See XXIIInd session, 980th meeting, para. 48, quoted supra under article 45.

France

See XXIIInd session, 969th meeting, para. 3, quoted supra under part V, section 2.

Honduras

Article 47, concerning the corruption of a representative of a negotiating State, should perhaps be omitted, because it was almost tantamount to a recognition and acceptance of an ignominious action which by its nature was a very rare occurrence and should therefore not be taken note of in a convention of such nobility as the one under discussion. States would undoubtedly be careful to select as delegates men with high ethical standards; if they failed to do so, it was just that they should bear the responsibility for their lack of care.

(Mr. Cadalso, XXIIInd session, 975th meeting, para. 12)

Part V, section 2, article 47

Japan

See XXIIInd session, 981st meeting, para. 38, quoted supra under article 46.

The concept of corruption is not established in international law...
article /47/ should also be deleted for the same reason as the one for article 46.
(Note verbale of 19 July 1967 from the Permanent Representative to the
United Nations (A/6827 and Corr.1, p. 22))

See also ibid., quoted under articles 41 and 65.

Netherlands

See XXIIInd session, 977th meeting, para. 5, quoted supra under part V.

Poland

See XXIIInd session, 977th meeting, para. 10, quoted infra under article 49.

Spain

Draft article 47, which referred to the corruption of the negotiator, was
logical, inasmuch as corruption would, in the future, be a more frequent cause
than coercion of falsifying the expression of the State's will.

(Mr. de Luna, XXIst session, 912th meeting, para. 42)

Sweden

See XXIIInd session, 980th meeting, para. 15, quoted supra under article 46.

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United States of America

See XXIIInd session, 977th meeting, paras. 20-21, quoted supra under part V.

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

(Note verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, p. 8))

See also A/6827/Add.2, quoted supra under part V.

ARTICLE 48

Coercion of a representative of the State

MEMBER STATES

Bulgaria

See XXIIInd session, 979th meeting, para. 4, quoted supra under article 12.

Byelorussian Soviet Socialist Republic

See document A/6827/Add.1, quoted supra under Comments and observations on the draft articles as a whole.

Part V, section 2, article 48

Finland

The provision in article 48,... corresponded to existing customary law and was acceptable in its present form.

(Mr. Broms, XXIIInd session, 980th meeting, para. 48)

India

See XXIIInd session, 979th meeting, para. 12, quoted supra under article 23.

Netherlands

See XXIIInd session, 977th meeting, para. 5, quoted supra under part V.

Philippines

See XXIIInd session, 981st meeting, para. 22, quoted infra under article 49.

Poland

See XXIst session, 913th meeting, para. 10, quoted supra under Comments and observations on the draft articles as a whole.

Spain

In traditional international law, the only defect invalidating a State's consent to a treaty had been coercion of that State's representative. Coercion of a State by the threat or use of force had been regarded as a normal characteristic

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of sovereignty. Draft article 48 set forth the traditional rule concerning coercion of a representative of the State, but draft article 49 went beyond traditional international law and declared that a treaty was void if its conclusion had been procured by the threat or use of force in violation of the principles of the United Nations Charter.

(Mr. de Luna, XXIst session, 912th meeting, para. 42)

Sweden

See XXIIInd session, 980th meeting, para. 10, quoted infra under article 50.

See also ibid., para. 15, quoted supra under article 46.

Union of Soviet Socialist Republics

See XXIIInd session, 971st meeting, para. 7, quoted supra under Comments and observations on the draft articles as a whole.

Attention should be given to draft articles 48 and 49, which formulate the existing principle of international law that a treaty is void if its conclusion has been procured by the threat or use of force.

(Note verbale of 21 July 1967 from the Permanent Mission to the United Nations (A/6827, p. 25))

Part V, section 2, article 49

ARTICLE 49

Coercion of a State by the threat or use of force

MEMBER STATES

Afghanistan

The Government of Afghanistan notes with satisfaction that... draft articles /40, 47 and 49/ have laid down the principles of justice and declare that international treaties concluded through personal coercion of representatives of a State or through coercion of a State by the threat or use of force are null and void.

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

(Note verbale of 29 August 1967 from the Permanent Mission to the United Nations (A/6827/Add.1, p. 3))

Algeria

In article 49,... rather than the words "the threat or use of force", /his delegation/ would have preferred a categorical and imperative formula excluding any form of coercion. Other forms of pressure, such as economic forms, should be mentioned as covered by the idea of coercion.

(Mr. Haddad, XXIst session, 908th meeting, para. 33)

Australia

See XXIIInd session, 981st meeting, para. 12, quoted supra under article 23.

Belgium

See XXIIInd session, 982nd meeting, para. 1, quoted supra under part V.

Bolivia

The welfare of the international community admittedly took precedence over the welfare of individual States, but it must be based on respect for the essential rights of each State. His delegation therefore opposed any treaty the conclusion of which had been procured by the threat or use of force and hoped that the United Nations would always be able to call upon those who benefited from such treaties to accept the principles of justice, which were the only possible basis for international peace. His delegation consequently supported article 49, but felt that the definition of force should not be limited to armed force alone, but should be widened to include moral coercion, economic pressure, obstruction of communications and any act which might influence the free will of a State and thus prevent that equality between the parties which was essential to the conclusion of a valid treaty.

(Mr. Terceros Banzer, XXIst session, 909th meeting, para. 32)

He whole-heartedly supported article 49 of the draft, declaring any treaty void the conclusion of which had been procured by the threat or use of force, on the understanding that that rule necessarily applied to all treaties extorted or imposed by the threat or use of force, whether before or after the adoption of the United Nations Charter, since it would be inconceivable, at a time when the

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Part V, section 2, article 49

peoples of the world were approving and proclaiming a new law of equity and justice, that treaties which were iniquitous and void ab initio should be upheld. In that connexion, he disagreed with commentary (7) on article 49, which he considered incompatible with commentary Nos. (1), (2), (4), (5) and (6) and which would also be inconsistent with the rules laid down in articles 50 and 59. While fully agreeing with commentary Nos. (1), (2), (4), (5) and (6) on article 49, his delegation considered that the reference in commentary (3) to "threat or use of force" included not only armed force, but any other form of coercion which was aimed at violating the free will of a State or which induced fear in a State and seriously jeopardized its economy, its freedom and its right of self-determination. (Mr. Morales Aguilar, XXIInd session, 980th meeting, para. 29)

See also ibid., para. 28, quoted supra under article 23.

Bulgaria

See XXIInd session, 979th meeting, para. 4, quoted supra under article 12.
See also ibid., para. 6, quoted infra under article 59.

Byelorussian Soviet Socialist Republic

See XXIst session, 908th meeting, para. 10, quoted supra under Comments and observations on the draft articles as a whole.

See document A/6827/Add.1, quoted supra under Comments and observations on the draft articles as a whole.

Ceylon

See XXIst session, 908th meeting, para. 4, quoted supra under article 12.

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Chile

See XXIst session, 912th meeting, para. 27, quoted supra under Comments and observations on the draft articles as a whole.

China

His delegation had noted with interest the inclusion in article 49 of the principle that a treaty was void if its conclusion had been procured by the threat or use of force in violation of the principles of the Charter of the United Nations. That idea, which was comparatively new, was quite different from the traditional concept. His delegation had not reached any decision on that article but would be only too happy to see would-be aggressors deprived of any advantage acquired through the illegal threat or use of force.

(Mr. Chen, XXIst session, 909th meeting, para. 3)

His delegation had already signified its approval of article 49 and would merely endorse the Commission's view that the invalidity of a treaty concluded by force was a principle that was lex lata in contemporary international law.

(Mr. Chen, XXIInd session, 976th meeting, para. 32)

Cuba

...article 49, declaring a treaty void if its conclusion had been procured by the threat or use of force in violation of the principles of the Charter of the United Nations, was exceptionally important. Before the First World War, positive international law had disregarded coercion employed against States for the purpose of extracting their consent. With the advent of the United Nations Charter, however, the principle that a treaty procured by the use of force was void ab initio had been vigorously established. That fundamental principle

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Part V, section 2, article 49

had met with resistance in practice, particularly in respect of the definition of the forms of coercion. It had been contended, for example, that the word "force" in Article 2 (4) of the Charter meant only armed force and did not cover other forms of coercion, such as political or economic pressure. In his delegation's view, that restrictive interpretation was incompatible with the spirit of the Charter; in particular, any measure aimed at strangling a country's economy should be expressly included in the idea of coercion. In that connexion, he recalled that the forty States represented at the Second Conference of Heads of State or Government of Non-Aligned Countries at Cairo in 1964 had condemned the application of political and economic pressure and had asserted that the word "force" as used in the Charter included such pressure. Political and economic pressure must be condemned if international relations and international law were to be placed on a solid foundation.

(Mr. Alvarez Tabio, XXIIInd session, 974th meeting, para. 20)

Cyprus

See XXIst session, 910th meeting, para. 48, quoted infra under article 50.

With respect to article 49, his delegation fully supported the Commission's categorical and clear recognition of the fact that the invalidity ab initio of a treaty procured by the illegal threat or use of force was a principle which was lex lata in modern international law. His Government, in its previous statements and written comments on the principles of international law concerning friendly relations and co-operation among States, had taken a certain position regarding the meaning of the term "force", but whatever differences might exist on that point there was no doubt that the term did encompass armed force, and the recognition by the Commission and by most States of the principle set out in article 49 had great significance.

(Mr. Jacovides, XXIIInd session, 980th meeting, para. 58)

See also ibid., para. 54, quoted supra under article 23.

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Czechoslovakia

See XXIst session, 906th meeting, para. 15, quoted supra under article 23.

His delegation attached great importance to part V of the draft articles (Invalidity, termination and suspension of the operation of treaties) and was pleased to note that inclusion of provisions for the annulment of treaties concluded as a result of coercion. Czechoslovakia would recommend that article 49 should be amplified to provide that coercion, for the purposes of the article, should include other pressures, such as economic pressure, including economic blockade.

(Mr. Smejkal, XXIIInd session, 976th meeting, para. 26)

It is recommended to modify the wording of... article [49] as follows:

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

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 13))

Ecuador

His delegation was particularly interested in draft article 49 on the coercion of a State by the threat or use of force. Before the Covenant of the League of Nations, the use of force had not been formally proscribed. From the justum bellum of the scholastics to the justus hostis of the modern era the legality of war had been accepted; as late as 1904, Hall in the fifth edition of A Treatise on International Law had said that international law had no choice but to accept

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war, without regard to the justice of its origin. The two Hague Conferences had succeeded in regulating jus in bello, but the institution of jus ad bellum had remained intact until the Treaty of Versailles.

The first attempt to make the use of force illegal was to be found in Articles 10-15 of the Covenant of the League of Nations which had established a system for the prevention of war. Despite the gaps resulting from the application of Article 12 and from the restrictive interpretation which, for political rather than legal reasons, was given to the word "war", the Covenant had represented the start of the process of prohibiting force as a means of solving international disputes and the birth of the "modern law" to which the Commission had referred in its commentary on draft article 49.

In the Briand-Kellogg Pact, which had been the second step in the process, the contracting States had condemned recourse to war for the solution of international controversies and had renounced it as an instrument of national policy in their relations with one another. Unfortunately, that instrument had not been provided with the machinery that would make it effective. Both the Covenant and the Briand-Kellogg Pact had been created to preserve the peace but had lacked the power to impose it. The obligations assumed in the Briand-Kellogg Pact were still in force, and their violation had been one of the principal charges at the Nuremberg trials.

Unlike the League of Nations, the United Nations had been formed and had acquired legal personality in a Charter, the provisions of which had been transformed into constitutional precepts that were binding throughout the world. The League had been merely an association composed of States which were its members, but the United Nations was the international community legally organized.

Article 2, paragraph 4, was unquestionably the main principle of the Charter, on which the system of international security rested. Under that provision war and the threat or use of force in general were prohibited absolutely and without any exception. Although Article 51 of the Charter recognized the right of self-defence and Chapter VII established the measures which the Organization could take with respect to threats to the peace, breaches of the peace, and acts of aggression, those provisions did not constitute exceptions to the principle of the prohibition of the threat or use of force. Self-defence, which had been drawn from penal law,

exempted the offender from liability and must have that meaning in the Charter, because, furthermore, there must be a relation between the scale of the armed attack and the means used in defence. The measures contemplated in Chapter VII were inherent in the authority which the United Nations exercised over the Members of the international community.

Despite the clear wording of Article 2, paragraph 4, of the Charter, efforts had been made to give it a narrow construction based on the phrase "against the territorial integrity or political independence of any State". It had been contended that the threat or use of force was prohibited only if it was directed against the territorial integrity or political independence of a State. If that view was adopted, the "protective landings" of classical international law - defended even now by certain writers who considered them a contribution to the purposes of the United Nations, especially with respect to human rights - would continue to be lawful. However, the proponents of that interpretation forgot the final phrase of that paragraph of the Article: "or in any other manner inconsistent with the Purposes of the United Nations". The Committee dealing with that wording at San Francisco had said that the unilateral use of force or similar coercive measures was not authorized or allowed, and that consequently the use of force was only lawful to support the Organization's decisions. Any use of force which was not a collective measure was prohibited by the Charter.

Under draft article 49, nullity arose not only because the conclusion of the treaty had been procured by the threat or use of force but because of the violation of the principles of the Charter. Those principles were binding on Members of the United Nations, and even on non-members under Article 2, paragraph 6. It was entirely logical that treaties that violated those principles should be void.

Article 103 of the Charter was applicable to four distinct cases: (1) treaties concluded between States Members of the United Nations before the Charter had come into force; (2) treaties concluded between States Members of the United Nations since the Charter had come into force; (3) treaties concluded between States Members and States non-members of the United Nations before the Charter had come into force, and (4) treaties concluded between States Members and States non-members of the United Nations since the Charter had come into force. Article 103 did not make any change in the rule governing the first case. Traditionally, when there had been a conflict between two incompatible treaties with identical parties,

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international law had applied the rule lex posterior derogat priori. Therefore, the authors of the text of the Charter had unanimously maintained that even if Article 103 had not been included in the Charter the obligations under the Charter would have prevailed over those entered into by Members before the Charter came into force. The same principle had been included in Article 20, paragraph 1, of the Covenant of the League.

The second case gave rise to the application of the rule lex prior derogat posteriori, which was the opposite of the traditional rule of international law. In that case, Article 103 clearly brought out the constitutional character of the Charter. Professor Kelsen had attributed the nullity of such subsequent treaties to Articles 108 and 109, which provided for amendments to the Charter. A similar principle had been included in Article 20, paragraph 1, of the Covenant.

It was the third case that radically changed the precepts of international law by disregarding the principle pacta tertiis nec nocent nec prosunt. Many publicists, such as Ross, had been distressed by that revolutionary formula; others, such as Jiménez de Aréchaga, had welcomed it. The reason for the change, as stated in the proceedings of Committee IV at the San Francisco Conference, was that when obligations under treaties concluded with non-member States and obligations of Members under the Charter conflicted the latter should prevail.

In the fourth case, the rule lex prior derogat posteriori applied.

He concluded that any treaty imposed by the threat or use of force, before or after the Charter had come into force, was absolutely void ab initio, for the defect vitiating consent violated the constitutional principles of the Charter.

(Mr. Alcívar, XXIst session, 914th meeting, paras. 23-34)

With regard to article 49 under which a treaty was invalidated if its conclusion had been procured by the threat or use of force in violation of the principles of the Charter of the United Nations, he remarked that since the use of force was prohibited, any treaty whose conclusion was imposed upon a contracting State by force was absolutely invalid by reason of lack of consent. In its commentary (7) on article 4 (ibid., p. 76) the International Law Commission considered that there was no question of the article having retroactive effects

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on the validity of treaties concluded prior to the establishment of the modern law regarding the threat or use of force. Article 49 would therefore be incomplete if it failed to mention the multilateral agreements which had been concluded to ensure respect for the principles of modern international law concerning the threat and use of force.

(Mr. Alcívar, XXIIInd session, 981st meeting, para. 31)

France

See XXIIInd session, 969th meeting, para. 3, quoted supra under part V, section 2.

Guinea

See XXIIInd session, 982nd meeting, para. 26, quoted supra under Comments and observations on the draft articles as a whole.

Honduras

As a small country, Honduras strongly supported the prohibition of the threat or use of force to procure the conclusion of a treaty, contained in article 49. (Mr. Cadalso, XXIIInd session, 975th meeting, para. 12)

Hungary

Article 49 (coercion of a State by the threat or use of force) and article 50 on jus cogens constituted in his view the most important element of the progressive development of international law through the codification of the law of treaties. His delegation would prefer a separate article dealing with the invalidity of unequal treaties since that would usefully complement those articles... He agreed

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with the very accurate observations made by the Cuban delegation on the subject of the prohibition of the use of force in its effects on treaties concluded before the establishment of that modern principle.

(Mr. Prandler, XXIInd session, 978th meeting, para. 6)

India

See XXIst session, 906th meeting, para. 4, quoted supra under Comments and observations on the draft articles as a whole.

Iraq

His delegation welcomed also articles 47, 48 and 49 on defective consent. It regretted, however, that the draft articles did not make it clear that economic and political pressures also constituted coercion and, as such, vitiated consent, inasmuch as they were currently as frequent and as dangerous as the threat or use of force.

(Mr. Al-Anbari, XXIst session, 913th meeting, para. 7)

Japan

See XXIst session, 911th meeting, para. 3, quoted supra under Comments and observations on the draft articles as a whole.

Libya

His delegation noted with satisfaction the provision, in article 49, that a treaty was void if its conclusion had been procured by the threat or use of force in violation of the principles of the Charter of the United Nations. However, an accurate definition of the term "force" in that context should be given, in order

to include in its scope the use not only of armed force but also of other forms of coercion, such as economic pressure, which, was, in fact, a mode of persuasion used only too frequently against small and poor nations.

(Mr. El Sadek, XXIIInd session, 980th meeting, para. 23)

Mali

His delegation agreed with the Algerian representative's suggestion that in draft article 49 the concept of the threat or use of force should be widened to include economic and other forms of pressure.

(Mr. Koita, XXIst session, 914th meeting, para. 39)

Mongolia

Draft articles 49 and 50, whose main effect was to declare unequal treaties null and void, were particularly important, because their provisions recognized the collapse of the system of colonial law and should enable countries recently liberated from colonialism to develop in independence.

(Mr. Khashbat, XXIst session, 911th meeting, para. 35)

Netherlands

See XXIst session, 903rd meeting, para. 14, quoted supra under part V.

See also ibid., para. 16, quoted supra under article 26.

See XXIIInd session, 977th meeting, para. 5, quoted supra under part V.

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Peru

See XXIst session, 907th meeting, para. 29, quoted supra under article 45.

Philippines

With reference to article 49 (Coercion of a State by the threat or use of force) he said his delegation welcomed the fact that the prohibition applied to coercion practised on a State, and not only to coercion practised on the representative of a State. He would like to believe that the coercion referred to in that article included economic coercion, because the economic strangulation of one country by another was a not infrequent phenomenon.

(Mr. Espejo, XXIInd session, 981st meeting, para. 22)

Poland

See XXIst session, 913th meeting, para. 10, quoted supra under Comments and observations on the draft articles as a whole.

It was also very important that the Commission should have affirmed formally that coercion of a State by the threat or use of force rendered a treaty void, according to the wording of article 49; that article embodied one of the results of the progressive development of international law, of which articles 47, 50 and 61 provided further examples. In the view of his delegation, however, the provisions of article 49 should be broadened to cover all forms of coercion....

Since war had been outlawed, it now remained to eliminate the second means whereby powerful States legally imposed their will on weak ones, i.e. unequal agreements.

(Mr. Osiecki, XXIInd session, 977th meeting, paras. 10 and 12)

Romania

...in draft article 49, which derived from the basic legal principle prohibiting the threat or use of force in international relations, the definition of the term "force" should specifically include not only armed force but all other types of coercion, including economic and political pressure. With regard to coercion generally, it was obvious that treaties were valid only if States concluded them freely and in good faith. However, the imperialist States had in the past imposed unequal treaties on other countries through various types of pressure, and some of those States were still pursuing that policy, particularly with regard to the newly independent States, with a view to maintaining colonial domination in one form or another, in defiance of the principles of the Charter and the General Assembly resolutions on the abolition of colonialism. Accordingly, article 49 should explicitly cover all types of pressure, including economic and political pressure.

(Mr. Flitan, XXIst session, 914th meeting, para. 14)

Article 49 declared a treaty void if its conclusion had been procured by the threat or use of force in violation of the principles of the Charter of the United Nations; in his delegation's view, the draft articles should penalize all acts, including economic and political pressure, which were such as to tarnish the consent of States to be bound by treaties. The international community had taken a strong position against such manifestations of force in General Assembly resolution 2131 (XX), which declared in operative paragraph 2 that no State might use or encourage the use of economics, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.

(Mr. Secarin, XXIIInd session, 976th meeting, para. 42)

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Spain

See XXIst session, 912th meeting, para. 42, quoted supra under article 48.

Sweden

Sweden still considered it logical that, when the threat or use of force was prohibited under the Charter of the United Nations, a treaty procured by such means should be denied validity.

(Mr. Blix, XXIIInd session, 980th meeting, para. 15)

See also ibid., para. 10 quoted infra under article 50.

Thailand

Article 49, concerning invalidity of a treaty owing to coercion of a State by the threat or use of force, was a further safeguard for the weaker nations and could be said, in most practical cases, to provide another illustration of the application of the rule jus cogens.

(Mr. Sucharitkul, XXIIInd session, 976th meeting, para. 16)

See also ibid., para. 16, quoted supra under article 42.

Tunisia

...the scope of some other concepts had been limited, in particular that of coercion, which in article 49 had been reduced to the threat or use of force. The draft articles should have mentioned other cases of coercion that constituted grounds for the nullity of treaties.

(Mr. Ben Aissa, XXIst session, 913th meeting, para. 38)

...article 49 on coercion as a factor vitiating consent should cover not only the threat or use of force but also other forms of pressure, such as economic pressure.

(Mr. Gastli, XXIIInd session, 981st meeting, para. 8)

Ukrainian Soviet Socialist Republic

...the Commission had been right to state in article 49 that the threat or use of force only invalidated a treaty when it was resorted to in violation of the principles of the Charter of the United Nations.

(Mr. Yakimenko, XXIst session, 905th meeting, para. 4)

Article 49, which declared any threat void if its conclusion had been procured by the threat or use of force, and article 50, which embodied the concept of jus cogens, were... important.

(Mr. Yakimenko, XXIIInd session, 978th meeting, para. 18)

The provision of the draft articles that treaties concluded as a result of the threat or use of force in violation of the principles of the Charter of the United Nations are void (article 49) and the provision concerning the invalidity of treaties which conflict with a peremptory norm of general international law are extremely important.

(Letter of 27 June 1967 from the Ministry of Foreign Affairs (A/6827, p. 24))

Union of Soviet Socialist Republics

The thesis of draft article 49 was in accord with the radical changes that had taken place in international law during the last fifty years. Although it

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would be difficult at the current time for anyone to oppose the principle that coercion must not be used to impose treaties, some jurists and the representatives of a number of imperialist States contended that the principle did not extend to treaties concluded before the signing of the Charter. That would mean that the unequal treaties imposed on colonial and dependent countries before 1945 could not be deemed invalid. The United States, in its comments, took such an approach (see A/6309/Add.1, article 36). That position was not in accord with Article 103 of the Charter, which made no distinction between treaties concluded before and those concluded after the signing of the Charter. Under that Article, obligations of Member States under all other international agreements were invalid if they conflicted with their obligations under the Charter.

(Mr. Khlestov, XXIst session, 910th meeting, para. 26)

See also ibid., para. 18, quoted supra under Comments and observations on the draft articles as a whole.

See XXIIInd session, 971st meeting, para. 7, quoted supra under Comments and observations on the draft articles as a whole.

United Arab Republic

...not all the changes made in the provisional draft were equally satisfactory. Thus, on the subject of the effect of coercion by the use of force (article 49), the Commission had dealt with a very controversial question by dismissing, in its commentary, the principle of the retroactivity of the provisions set out. Yet in that commentary it also referred to the retroactive effect of certain norms, so that implicitly it contradicted itself. The same remark applied, incidentally, to the retroactivity of the provisions of article 50 (jus cogens).

(Mr. El-Erian, XXIst session, 911th meeting, para. 27)

See also ibid., para. 25, quoted supra under Comments and observations on the draft articles as a whole.

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The fact that the sovereignty and equality of all States were now the basic pillars of international law necessitated a new approach to unequal treaties, treaties concluded by coercive means, and treaties whose provisions conflicted with the peremptory norms of general international law (jus cogens)

... The provisions of article 49, declaring a treaty void if its conclusion had been procured by the threat or use of force in violation of the principles of the United Nations Charter, were most timely. A treaty should be binding only when it emanated from the free will of the parties. He whole-heartedly endorsed the views expressed by the representative of Thailand concerning unjust colonial treaties.

(Mr. El Araby, XXIIInd session, 980th meeting, paras. 42 and 43)

See also ibid., para. 43, quoted supra under article 23.

United States of America

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

(Note verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, p. 8))

Part V. section 2, article 49Yugoslavia

In its comment on article 49, his Government had pointed out that, in the case of economic or political coercion, a treaty might be void as a result of the violation, not only of the principles of the Charter, but of other generally recognized principles of international law. That question should be studied more closely.

(Mr. Sahovic, XXIIInd session, 975th meeting, para. 18)

See also ibid., para. 18, quoted supra under part V, section 2.

There are legal grounds for providing that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the United Nations Charter.

The Yugoslav Government considers, however, that it would be desirable to make the same provision for international treaties concluded in the circumstances mentioned in violation of other generally recognized principles of international law and not solely of the principles of the United Nations Charter, whenever any form of economic or political coercion is involved.

(Letter of 28 June 1967 from the Chief Legal Adviser of the Ministry of Foreign Affairs (A/6827, p. 30))

ARTICLE 50

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

MEMBER STATES

Afghanistan

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

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

(Note verbale of 29 August 1967 from the Permanent Mission to the United Nations (A/6827/Add.1, p. 3))

Algeria

Unequal treaties which were a source of conflict and inherently invalid, could not serve the cause of peace and progress. As they conflicted with a peremptory rule of general international law they should be expressly defined as void. Equality of the parties to treaties was, after all, a corollary of the sovereign equality of States.

(Mr. Haddad, XXIst session, 908th meeting, para. 33)

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Australia

A conspicuous instance in which the Commission had recommended a specific provision in a field in which some international lawyers would definitely reject its text, considered as lex lata, and some would also reject it even as a proposal de lege ferenda, was to be found in the articles dealing with jus cogens, in particular articles 50, 61 and 67. Those articles were only one illustration of the extent to which the draft articles as a whole reflected and recorded an emergent public order of the international community from which States might not depart or derogate even by agreement.

The view that there existed in international law certain peremptory norms from which no derogation was permitted and from which accordingly States could not at their own free will contract out had found increasing acceptance since the close of the Second World War, although in essence it had been foreshadowed much earlier. One illustration was to be found in Hall's A Treatise on International Law, the eighth edition of which in 1924 (p. 382) had stated: "The requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications". However, to accept the existence of the peremptory legal norms from which no treaty could validly derogate was, as the Commission had so plainly indicated in its commentary on article 50, to state the problem rather than to solve it. The basic question was to identify such peremptory norms as already existed to determine how new peremptory norms might come into existence, become established and secure recognition as such. In that connexion, there was a strong likelihood of divergent, not to say conflicting, views. For example, in Hall's work, from which he had just quoted, the author had gone on to identify the legal rules establishing the traditional freedom of the sea as having such decisive effect as to invalidate any attempt to derogate from them by treaty - a proposition which, if accepted, would have condemned to death much of the work of the 1958 Geneva Conference on the Law of the Sea.

The problem might be further illustrated by reference to the Charter of the United Nations itself. The question had been raised, for instance, whether those general provisions expressed in Chapter I as the Purposes and Principles of the United Nations could, or could not, be regarded in their entirety as jus cogens.

The Commission had, indeed, singled out one of those principles, namely, that stated in Article 2, paragraph 4, concerning the use of force in international relations, as "a conspicuous example of a rule in international law having the character of jus cogens" (see A/6309, article 50, commentary, para. 1). It was by no means clear, however, how far the Commission regarded other Charter principles as also possessing the character of jus cogens, because in paragraph 2 of the commentary on article 50, it stated: "the majority of the general rules of international law do not have that character, and States may contract out of them by treaty. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law. Nor would it be correct to say that a provision in a treaty possesses the character of jus cogens merely because the parties have stipulated that no derogation from that provision is to be permitted".

Article 26 of the draft articles dealt with the rights and obligations of States parties to successive treaties relating to the same subject-matter. The rules it laid down were expressly introduced by the qualification that they were "Subject to Article 103 of the Charter of the United Nations", although the commentary on the draft article did not attempt to spell out the effects on it of Article 103. The records of the San Francisco Conference, however, made it clear that under Article 103, States Members of the United Nations could not have effective treaty obligations inter se subsequent to signing the Charter that were in conflict with their Charter obligations. In the light of those and other difficulties, therefore, the Commission had wisely declined to supply anything like a comprehensive list of the provisions of the jus cogens and had been satisfied to formulate the doctrine in general terms, leaving its content "to be worked out in State practice and in the jurisprudence of international tribunals" (see A/6309, article 50, commentary, para. 3).

(Sir Kenneth Bailey, XXIst session, 912th meeting, paras. 21-24)

See also ibid., para. 25, quoted infra under article 62.

See XXIInd session, 981st meeting, para. 13, quoted supra under part V.

Austria

Mr. Verosta observed that in the draft articles (see A/6309) the International Law Commission envisaged the international juridical order as consisting of rules belonging to three categories: norms and obligations based on treaties, which constituted conventional or contractual law; rules of general international law based on international custom or on multilateral treaties, from which derogation, by changing customary law or by new treaties, was permitted; and finally, peremptory norms of general international law, from which no derogation by treaty was permitted. That threefold division was not, of course, expressly indicated in the draft articles, inasmuch as they were not concerned with either an analysis of the international legal order or the codification of the constitution of the international community of States. However, the concept of such a division was first enunciated in article 50, namely, treaties conflicting with a peremptory norm of general international law (jus cogens) and in articles 61 and 67. The question thus arose whether that hierarchy, with all its legal consequences as indicated in the articles in question, represented a codification of already-existing general international law or a progressive development of general international law. The commentary on article 50 showed that the International Law Commission had at first hesitated but that, having noted that Governments with one exception did not question the existence of peremptory norms in contemporary international law, it had formulated article 50, in accordance with which a treaty was void if it conflicted with a peremptory norm of general international law from which no derogation was permitted, and then article 61, which provided that any treaty that was in conflict with a new peremptory norm of general international law would become void, and article 67, which dealt in detail with the consequences of the nullity of termination of a treaty conflicting with a peremptory norm of general international law.

Those imperative norms, to which the International Law Commission had attached sufficient importance to devote three full articles to them, certainly merited the Committee's attention, even at the present stage of the discussion. A formal definition of peremptory norms was given in article 50 of the draft articles, but the International Law Commission had had difficulty defining the subject-matter to which such norms applied (see A/6309, article 50, commentary).

Having failed to produce a definition of the nature of peremptory norms, it had cited examples to illustrate the concept, such as unlawful use of force contrary to the principles of the Charter, the prohibition of any act deemed criminal under international law, the protection of human rights in general, respect for the equality of States, and respect for the principle of self-determination. The examples cited in the commentary on article 50 showed the wide range of subjects to which the rules considered by the International Law Commission or some of its members to constitute peremptory norms of international law could be applied. It was not easy to find a peremptory norm of international law from which States would openly and expressly decide to derogate in a bilateral treaty. For example, the rules concerning the inviolability of diplomats enunciated in the 1961 Vienna Convention on Diplomatic Intercourse and Immunities were certainly peremptory norms within the meaning of article 50. Any provisions of a bilateral treaty stipulating that the diplomats of the contracting parties could be arrested in the receiving State would be void under article 50 of the draft. The International Law Commission had decided, for good reasons, not to include examples of peremptory norms in article 50 of its draft, in order not to become engaged in a prolonged study of matters which fell outside the scope of the draft article.

It could be asked, however, whether the Commission's draft articles did not, in fact, contain one or more peremptory norms of international law. The first such norm, pacta sunt servanda, was formulated in article 23. An international legal order without that peremptory norm was unthinkable. It was possible that in order to avoid discussion of that problem the International Law Commission had preferred not to include that example among those given in the commentary on article 50. The second article in the draft which could be considered to embody a peremptory norm was article 50 itself. Even if that article was adopted in a milder form, the rule embodied in it would be a peremptory norm; otherwise there would be no peremptory norms at all, and States could contract out from all norms of international law.

He found it difficult to accept the idea, in the International Law Commission's commentary on article 61, that if a new peremptory rule emerged its effect must be to render void not only future but existing treaties, in consequence of the fact that it was an overriding rule depriving of legality any act or

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situation conflicting with it. He wondered how this was possible inasmuch as it involved a rule of law of the highest level, i.e., a peremptory norm.

It followed from the foregoing that peremptory norms of international law were of two kinds: on the one hand, the general principles of law on which any legal order must rest, and the general principles of international law, e.g., the principle of State sovereignty; and, on the other hand, the rules and principles that represented, as it were, a "constitution of the international community", an expression used by the Vienna School since 1920. A part of that constitution of the international community had been codified in the Covenant of the League of Nations and later redrafted in the Charter of the United Nations. Another part had been codified in the Vienna Conventions on Diplomatic Relations and on Consular Relations, both of which contained very important peremptory norms, such as the inviolability of diplomats and the inviolability of diplomatic and consular archives.

Nevertheless, the bulk of the constitutional law was still made up of customary law. The constitutional and peremptory norms were formulated in all private codifications of international law and all textbooks of international law. The constitution of the international community was composed of principles that very often needed substantiated rules of law for their implementation. Some of the examples of rules of jus cogens cited in the International Law Commission's commentary were not so much rules of law as principles, and, therefore, were not very convincing. The constitution of the international community had existed, at least in rudimentary form, ever since relations had been established between independent political units and sovereign States; and the assertion in the commentary on article 50 that the emergence of peremptory rules was comparatively recent was valid only in so far as there had been, until the nineteenth century, various regional international legal orders, whereas today there was only one.

The draft articles and the commentary spoke of peremptory norms but contained no reference to a constitution of the international community. But the international legal order formed so coherent a whole that the codification of the law of a part of that order - the law of treaties - necessarily led to the formulation of peremptory norms, i.e., constitutional norms of the international community.

In comparing the peremptory rules set forth in the International Law Commission's draft articles 50, 61 and 67 with constitutional norms, he had tried to clarify the three-level concept of peremptory norms contained in the draft. He was aware, however, that in introducing into the debate the idea of a constitution of the community of States, he, too, had been unable to give a substantive definition of peremptory norms, because the international community had as yet no procedure for creating peremptory or constitutional norms and because international conferences, which were often compared with legislative bodies, although they created general rules of international law in adopting multilateral treaties, had never yet defined specific articles of a convention as peremptory norms.

In adopting articles 50, 61 and 67, the International Law Commission had certainly been inspired by Article 103 of the Charter of the United Nations, which stressed the peremptory character of the Charter in relation to any other international treaty. In so doing, the International Law Commission had begun the codification of an important part of the constitution of the international community, the sources of international law in general and the hierarchy of the rules of international law. The Charter stipulated that its provisions must prevail over treaty law, and the International Law Commission proclaimed that peremptory norms prevailed over treaty law. But if articles 50, 61 and 67 were adopted by a conference of plenipotentiaries, the question would remain whether a particular rule was a peremptory norm of general international law or only a second-level rule from which derogation was possible by consent of the parties to a treaty. In its commentary, the International Law Commission stressed the difficulty of applying an article such as article 50 unless there was provision for an authoritative determination of those rules that were rules of jus cogens. He wondered whether the forthcoming conference on the law of treaties should not endeavour to define certain rules contained in the draft articles as peremptory rules, since it would have the necessary authority to do so.

(Mr. Verosta, XXIst session, 911th meeting, paras. 6-14)

Part V, section 2, article 50

Article 50 of the draft articles on the law of treaties provided:

"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."

It could be inferred from that article and from the commentary on it that a peremptory rule of international law was a rule from which States could not derogate at all by a treaty arrangement, but the International Law Commission had rightly decided not to give examples, explaining that if it were to attempt to draw up, even on a selective basis, a list of the rules of international law which should be regarded as having a peremptory character, it might find itself engaged in a prolonged study of matters which fell outside the scope of the draft articles.

(Mr. Verosta, XXIInd session, 967th meeting, para. 11)

Belgium

If the rules of jus cogens were to be introduced into a convention of positive law, an attempt must be made to establish the scope of those rules and the authority that would be competent to settle problems of interpretation.

(Mr. Bal, XXIst session, 917th meeting, para. 3)

Among the methods proposed in the draft articles for reconciling the stability of legal relations with the need for evolution, jus cogens deserved particular attention. It was natural that jurists should have had visions of introducing at the international level, by analogy to the structure of internal law, substantive rules concerning the invalidity of certain obligations, and that they should have been inspired by the concept of public policy (ordre public) which occupied an essential place in many national legal systems. The question was, however, to what extent it was possible and desirable to apply to international law

formulae borrowed from municipal law. Many jurists had concluded that at the present stage of the development of international law it was unlikely that the notion of the peremptory norm could be satisfactorily transplanted from municipal law. In a recent study of the draft articles, the Belgian jurist, Joseph Nisot, had said that jus cogens was acceptable in the internal order, where law was made by a higher authority, but was less so where law was ascribable directly to the subjects of the law themselves. Because it had been aware of that difficulty, the Commission had sought to reduce the risk of instability which a subjective appreciation by States of the important concept of jus cogens would naturally involve.

On that point, however, the Commission's efforts had not had very satisfactory results. Thus, the draft articles did not specify objective criteria by which to identify a rule as having the character of a peremptory norm of international law. The debates in the Committee had shown that on that point there was considerable divergence of opinion, which was not likely soon to be bridged. At the 979th meeting, the representative of Bulgaria had expressly referred to the disagreement concerning the nature of certain principles which the representative of Bulgaria considered to be legal rules and peremptory norms of international law, but which many other representatives considered to be essentially political principles that could not usefully be resorted to for the settlement of disputes of a juridical nature....

The Commission had been guided by a strong desire to subject the international community to certain peremptory norms applicable to the law of treaties. International disputes were too numerous and dangerous for jurists not to wish to create fundamental norms from which States could not derogate. Undoubtedly every effort should be made to ensure that in the future such rules were established and universally recognized, but that unfortunately was still only an idea. It would prove very difficult to incorporate specific and satisfactory rules on peremptory norms into an instrument of positive law which by definition was intended to be applied by the entire international community.

(Mr. Schuurmans, XXIInd session, 982nd meeting, paras. 5, 6 and 8)

Part V. section 2, article 50Bolivia

He... particularly supported article 50, concerning the invalidity of treaties which conflicted with a peremptory norm of general international law, or jus cogens, and article 57, concerning the termination or suspension of the operation of a treaty as a consequence of its breach.

(Mr. Morales Aguilar, XXIInd session, 980th meeting, para. 30)

See also ibid., para. 29, quoted supra under article 49.

Brazil

The major problem, that of the treatment to be given to peremptory norms, had arisen once the idea had been accepted of making the articles on the law of treaties a code designed simply as a guide for States. The concept of jus cogens had been introduced into the draft articles because there was the question of how to ensure that States would hallow certain dominant contemporary principles.

(Mr. Amado, XXIInd session, 969th meeting, para. 17)

Bulgaria

See XXIst session, 910th meeting, para. 6, quoted supra under Comments and observations on the draft articles as a whole.

Some delegations had expressed concern and doubts about the scope to be given to the peremptory norms of general international law, their effect on the validity of treaties and their formulation. While his delegation agreed that the application of jus cogens required great caution and precision, since, as the Special Rapporteur had said at the 964th meeting, it related to "difficult and delicate questions", it did not feel that the identification of the peremptory

norms would prove an impossible task. Peremptory norms of international law originated in the common consent of States, which constituted the legal basis of any rule of international law. Examples of generally recognized rules admitting of no derogation were to be found, first of all, embodied in the United Nations Charter as fundamental guiding principles of the Organization. Those principles were well known and were generally recognized as the basic tenets for the conduct of States in their international relations. The direct reference, in the draft articles, to peremptory norms of general international law as prevailing over a conflicting treaty marked an important step in the evolution of modern international law. The broader the scope and application of jus cogens, the greater would be the stability of the international legal order.

(Mr. Yankov, XXIInd session, 979th meeting, para. 7)

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

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

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

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

(Note verbale of 17 August 1967 from the Permanent Mission to the United Nations (A/6827/Add.1, pp. 6-7))

Part V, section 2, article 50

Byelorussian Soviet Socialist Republic

See document A/6827/Add.1, quoted supra under Comments and observations on the draft articles as a whole.

...the draft articles confirmed the existence in international law of peremptory norms - in other words, basic principles that States must respect and could not evade by means of bilateral agreements. Only a general treaty could abrogate or alter the principles of jus cogens. Unequal treaties were a typical violation of those principles, and the recognition that such treaties were invalid from the moment of their conclusion was a great victory for the peoples newly liberated from colonial rule and was quite rightly reflected in the draft articles. (Mr. Stankevich, XXIIInd session, 975th meeting, para. 2)

Canada

Among the articles which would require particular attention in that respect were articles 50 and 61 concerning jus cogens. Canada was wholly in agreement with the important and significant principles embodied in those two articles. However, in the absence of any provision for the adjudication of differences relating to the application of the articles in particular cases, the conference would have either to attempt to define criteria for applying jus cogens or consider carefully the implications of failure to do so.

(Mr. Gotlieb, XXIIInd session, 976th meeting, para. 4)

Ceylon

His delegation was pleased to note that the International Law Commission had explicitly affirmed that a treaty was void if it conflicted with a peremptory

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norm of international law. Articles 50 and 61 represented a bold attack on difficult problems connected with the very structure of international society, and the application of the concept of jus cogens embodied in those provisions would substantially further the rule of law in international relations. At the same time, his delegation doubted whether that concept had been formulated in such a way that it could be usefully applied in practice. The Commission's failure to define jus cogens was unfortunate, since no mechanism of compulsory jurisdiction existed as yet in international law.

(Mr. Sanmuganathan, XXIst session, 908th meeting, para. 7)

With regard to article 50 on treaties conflicting with a peremptory norm of general international law, the international community was insufficiently developed for the concept of peremptory norm to be used without further clarification. As such clarification in the body of the convention was no doubt now impossible, it would seem necessary to establish a procedure whereby, in any given case, it could be determined whether a peremptory norm existed. In any event, ascertainment, for the purposes of draft article 61, of the establishment of such a norm was never likely to be a simple matter.

(Mr. Pinto, XXIIInd session, 969th meeting, para. 11)

Chile

See XXIst session, 912th meeting, para. 27, quoted supra under Comments and observations on the draft articles as a whole.

China

There were two schools of thought concerning the applicability of jus cogens in the law of treaties. China supported the International Law Commission's view

Part V, section 2, article 50

that there were certain rules from which no State could derogate and which could be changed only by the introduction of new rules of the same character. The provisions of articles 50 and 61 were therefore correct. However, the difficulty lay in selecting the criteria for determining whether a rule had the character of jus cogens. Unfortunately, the draft articles provided no key to the problem, other than a reference in article 62 to Article 33 of the United Nations Charter. (Mr. Chen, XXIInd session, 976th meeting, para. 33)

Cuba

See XXIInd session, 974th meeting, para. 21, quoted infra under article 61.

Cyprus

His delegation had... stressed the significance of the rules set forth in draft articles 49, 50 and 61, which represented important steps forward and marked the transition from classical international law to the modern law of the United Nations. Those rules should be strengthened and any attempt to vitiate their meaning resisted. In view of the circumstances in which it had worked, the Commission might have acted wisely in leaving the full content of the rule in draft article 50 to be worked out in State practice and in the jurisprudence of international tribunals, but it was regrettable that the difficulties encountered had prevented it from spelling out the content of the principle concerned. In his delegation's view, there were elements that made it possible to determine with a reasonable degree of accuracy whether a given rule of international law constituted jus cogens. Several of those elements were cited in the Commission's commentary, and there were certain principles - such as the principle that States should refrain from the threat or use of force in their international relations, the principle of the peaceful settlement of international disputes, the principle of non-intervention in the internal affairs of States and the principle of sovereign equality of States - that must certainly be included among the

peremptory norms from which no derogation was permitted by treaty, particularly in view of recent developments in international law.

(Mr. Jacovides, XXIst session, 910th meeting, para. 48)

The principle of jus cogens embodied in draft articles 50 and 61 was likewise of fundamental importance. The general rule of the law of treaties that States were competent, by agreement inter se, to conclude treaties on any subject whatsoever had not remained unchallenged. As early as the eighteenth century, writers such as Wolff and Vattel had distinguished between the necessary law, which nations could not alter by agreement, and the voluntary law created by the will of the parties. In more recent times, the adoption of the Covenant of the League of Nations and the Charter of the United Nations and the recent transformation of the community of nations had helped to revive and reinforce the notion of jus cogens. The rules of jus cogens existed, not to satisfy the needs of individual States, but to serve the higher interests of the international community as a whole; the ultimate justification for their existence was that they were the common expression of the conscience of the international community. The acceptance of the jus cogens doctrine had been aided by the writings of Verdross, Kelsen and Tunkin, had received support from obiter dicta in the decisions of international tribunals, and had been promoted through the work of the successive Special Rapporteurs of the International Law Commission. A close study of the records of the Commission, the commentaries on the draft articles, the records of the debates in the Sixth Committee, and the comments of Governments demonstrated convincingly that the principle as stated in article 50 met with general approval, if not with complete unanimity. The smaller and weaker States, in particular, had an interest in the recognition of the existence of a public order which placed checks on unlimited freedom of contract and so protected them from the real danger of unequal and inequitable treaties.

On the other hand, the Commission had been unable to arrive at any generally recognized criterion by which to identify a general rule of international law as having the character of jus cogens. Certain examples of the best-settled rules

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Part V. section 2. article 50

of jus cogens had appeared in an earlier version of the draft articles, but in the end the Commission, bearing in mind the comparatively recent emergence of those rules and the rapid development of international law, had decided against including specific examples, first, because that might lead to misunderstanding as to the position concerning cases not expressly mentioned and, secondly, because drawing up such a list might involve it in a prolonged study of matters which fell outside the scope of the law of treaties. While the first reason was not very convincing, the second reason reflected a real problem. The task of defining illegality in international law was indeed formidable. At the same time, the impression must not be created that the notion of jus cogens was merely a philosophical or theoretical idea devoid of real meaning. The almost unanimously favourable reception of the principle by representatives of Governments militated against any such cynical evaluation of the Commission's work on the subject. It was therefore regrettable that the difficulties mentioned had prevented the Commission from spelling out the content of the principle of jus cogens....

In any event, his delegation was convinced that there were elements which made it possible to determine with a reasonable degree of accuracy whether or not a given rule constituted jus cogens. Some principles which his delegation considered to be rules of jus cogens were the prohibition of the threat or use of force in international relations, the peaceful settlement of international disputes, non-intervention in the internal affairs of any State, and the sovereign equality of all States including the self-determination of States in accordance with the wishes of the majority of the population.

It had been argued that recognition of the existence of rules of jus cogens would enable any State wishing to renounce a treaty to put forward a plea of nullity. While the principle of jus cogens could indeed be abused, the danger could and should be minimized, if not completely eliminated, by defining exactly the rules of international law falling within the category of jus cogens.

There was much to be said in favour of making the determination of whether or not a given situation was covered by a rule of jus cogens subject to the decision of an impartial tribunal, as Lauterpacht and Verdross had suggested. If the rule of law among nations was to acquire its full meaning, the jurisdiction of the International Court of Justice must be universal, and means for the enforcement of its decisions should be provided. In the present imperfect state of

international society, however, with the Court's jurisdiction dependent on the consent of States and affected by other inhibiting factors, it would be unrealistic to tie the principle of jus cogens to adjudication by the Court.

The absence of compulsory adjudication did not mean that international law in general, or jus cogens in particular, lacked binding legal force. Moreover, there were a number of other means for the peaceful settlement of disputes between States, including recourse to the Security Council and the General Assembly. Article 14 of the Charter of the United Nations, which empowered the General Assembly to recommend measures for the peaceful adjustment of any situation, regardless of origin, was sufficiently broad to enable the General Assembly to pronounce on disputes between Member States involving the inconsistency of treaty provisions with rules of jus cogens, especially if such disputes were basically political, rather than purely legal.

His delegation shared the Commission's unanimous view that a treaty which conflicted with a rule of jus cogens was void ab initio, rather than simply voidable.

(Mr. Jacovides, XXIInd session, 980th meeting, paras. 59-60, 62-66)

See also ibid., para. 54, quoted supra under article 23, and ibid., para. 69, quoted infra under article 61.

Czechoslovakia

According to article 50, the principle pacta sunt servanda likewise did not apply to treaties which conflicted with a peremptory norm of general international law. In his delegation's view, those norms should include the prohibition of the threat or use of force in international relations, the principle of peaceful settlement of disputes, the duty not to intervene in matters within the domestic jurisdiction of a State, the principle of sovereign equality of States and the principle of self-determination of peoples. In that connexion, he referred to the notorious Munich Agreement, which had ruthlessly violated the territorial integrity and political independence of Czechoslovakia, in flagrant violation of

Part V, section 2, article 50

peremptory norms of international law, the Covenant of the League of Nations and the Briand-Kellogg Pact....

(Mr. Potocny, XXIst session, 906th meeting, para. 16)

...[a] very important development was the inclusion of an article - article 50 - ruling invalid those treaties whose contents conflicted with a peremptory norm of international law. Czechoslovakia found that there were peremptory norms of international law which States must respect. A similar finding was recorded in the report of the International Law Commission on the subject. Examples of jus cogens were the right to self-determination, and the pacific settlement of disputes. Generally speaking, treaties should not be incompatible with those norms, and the States which had helped to institute the norms as a part of the international order should uphold them. The Commission had rightly refrained from enumerating examples of jus cogens in order to avoid giving rise to any misunderstanding. He recalled the late Mr. de Luna's comment, during the discussions of that provision, that the contractual conception of international law, which did not recognize jus cogens, belonged to the time when international law had been only a law for the great Powers. Modern international law had become universalized and socialized, and article 50 therefore enunciated one of the major legal rules of contemporary international life.

(Mr. Smejkal, XXIIInd session, 976th meeting, para. 26)

See also ibid., para. 23, quoted supra under article 23, and ibid., para. 27, quoted infra under part V, section 4.

The inclusion of article [50] is of great significance; it excludes the validity of treaties the contents of which is not permitted by international law, and it also removes any doubts in that respect.

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 13))

See also ibid., quoted infra, under part V, section 4.

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Ecuador

See XXIst session, 914th meeting, para. 35, quoted supra under Comments and observations on the draft articles as a whole.

It had long been recognized that the norms of international law constituted a jus dispositivum and not a jus cogens. As, however, the international legal order had become more and more centralized, it had become obvious that there were imperative norms of general international law which could not be derogated from a contrary agreement because their violation would endanger international public order. Those were the norms of jus cogens which Sir Humphrey Waldock had defined in his second report to the International Law Commission. Those two articles covered different situations, for the first voided a treaty if it conflicted with an existing peremptory norm, whereas the second invalidated an existing treaty by reason of the emergence of a new norm of jus cogens. Both articles seemed to be encountering considerable opposition. His delegation, for its part, energetically reaffirmed that the principles of the Charter were clearly in the nature of jus cogens as also of constitutional norms.
(Mr. Alcívar, XXIInd session, 981st meeting, para. 32)

Ethiopia

The Commission had given a new dimension to treaty law by introducing peremptory rules of jus cogens thus recognizing the inalienable right of States to live in independence and dignity.

(Mr. Kibret, XXIst session, 917th meeting, para. 14)

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Part V. section 2, article 50Finland

See document A/6827, quoted supra under Comments and observations on the draft articles as a whole.

France

In general the Commission was to be congratulated on the commendable precision with which it had formulated the draft articles; if some articles were unsatisfactory in that regard, it was because there had been an irreconcilable difference of opinion in the Commission regarding the rules concerned. Such had apparently been the case with regard to article 50, dealing with the principle of jus cogens. It was true that the examples of peremptory norms given in the commentary on that article seemed to be incontestable, and his country, for its part, would continue to apply them; but that enumeration, which could not take the place of a definition, gave rise to uncertainty. It would seem to imply that some provisions of the United Nations Charter were peremptory and that others were not, or at least that the provisions of the Charter varied in force. Furthermore, it was clear that the Commission had been unable to agree on a definition of an unwritten peremptory norm. It would be difficult to accept such an imprecisely worded article, for it would leave the door open to widely differing interpretations, and States would thus be committing themselves without being fully aware of their obligations. One of the functions of law was to protect the weak against the strong, but experience had shown that when a difference of opinion occurred with regard to interpretation, it was the views of the strong that prevailed. It would therefore be advisable for the time being to rely on the evolutive flexibility of international practice, until jurists were able to define the criteria that would make it possible to determine with certainty whether a given international rule possessed a general and peremptory character.

(Mr. Jeannel, XXIst session, 910th meeting, para. 54)

...a number of draft articles dealt with the rules of jus cogens from which no treaty should derogate and with the effects on treaties of such rules when they were new. Articles 50 and 61 clearly laid down the principle of the nullity of treaties which conflicted "with a peremptory norm of general international law from which no derogation is permitted". It could not be denied that there were certain principles of international morality to which every State must conform, but it was an entirely different matter to accept the existence of positive law in a field which was so ill-defined and, still more, to recognize that it had such serious legal effects as to nullify an international agreement considered to be contrary to it. The International Law Commission had refrained both from giving any example of those principles and from saying how and by whom they would be determined; that was all the more troubling as the work done in the United Nations, in particular on principles of international law governing friendly relations and co-operation among States, had already clearly shown that there was profound disagreement on the subject. The French delegation had to say that neither the absolute value of such principles nor General Assembly resolutions nor United Nations multilateral conventions could create, in the present state of international law, a universal rule of a peremptory nature.

Finally, it was not stated whether the provisions in question applied only to treaties concluded after their adoption or whether they would also apply to those already in force.

(Mr. de Bresson, XXIIInd session, 969th meeting, paras. 4-5)

Guinea

Article 50, dealing with the principle of jus cogens, had given rise to considerable controversy. In view of the difficulty of establishing the criteria for determining which treaties constituted jus cogens, the Commission had acted wisely in drafting the provision in very general terms. That was clearly the best course to follow until the passage of time and the practical decisions of judicial bodies showed a better means of solving the problem.

(Mr. Savane, XXIIInd session, 982nd meeting, para. 30)

Hungary

See XXIIInd session, 978th meeting, para. 6, quoted supra under article 49.

India

See XXIst session, 906th meeting, para. 4, quoted supra under Comments and observations on the draft articles as a whole.

...in the time remaining before the 1968 conference, Governments should see how the Commission's text could be improved - for instance, by defining more specifically the concepts of fraud and jus cogens.
(Mr. Rao, XXIIInd session, 979th meeting, para. 14)

Iraq

...the Commission's draft articles 50 and 61 were particularly important because they codified existing principles that were vital to a harmonious international legal order.
(Mr. Al-Anbari, XXIst session, 913th meeting, para. 7)

Mr. Yasseen thought that there was a basic misunderstanding over the International Law Commission's approach to the question of rules forming part of jus cogens. The International Law Commission had been asked to prepare draft articles for a convention on the law of treaties, and one of its tasks had been to study whether it would be possible for States to conclude treaties which did not conflict with certain rules within the system of international law. It had not been asked to express an opinion on the substance of the rules of jus cogens,

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but only to determine the implications of the existence of those rules for the law of treaties.

In drawing up the provisions of the draft articles having reference to jus cogens, the International Law Commission had drawn the inevitable conclusions from the existence of such peremptory rules, had taken up the question of the order of precedence of international rules, and had given an affirmative answer to the question whether there were rules of international law from which States could not derogate, even by a convention. It was an undoubted fact that in international affairs there were rules of such importance that any derogation from them was impossible; only two examples need be mentioned - the rule prohibiting slavery and that outlawing the use of force. The International Law Commission had recognized that fact and had duly taken it into account.

On the other hand, the Commission had not been required and would not have been able, to express an opinion on the substance of the rules of jus cogens, still less to seek a criterion for distinguishing between dispositive and peremptory rules. That was a theoretical point of general international law and had no place in a draft on the law of treaties.

(Mr. Yasseen, XXIIInd session, 967th meeting, paras. 12-14)

Japan

See XXIst session, 911th meeting, para. 3, quoted supra under Comments and observations on the draft articles as a whole.

See document A/6827 and Corr. 1, quoted infra under article 62.

Libya

Although the references in articles 50 and 61 to peremptory norms of general international law left no room for doubt as to the existence, in international law,

Part V. section 2. article 50

of such peremptory norms, his delegation shared the view of many others that the forthcoming conference might be an appropriate forum for dealing with the controversial question of the conclusive definition of the rules of jus cogens.
(Mr. El Sadek, XXIIInd session, 980th meeting, para. 23)

Mongolia

See XXIst session, 911th meeting, para. 35, quoted supra under article 49.

His delegation considered that the scope of draft article 50, which declared that a treaty was void if it conflicted with a peremptory norm of general international law, should be defined more precisely on the basis of the main principles of the Charter of the United Nations.

(Mr. Khashbat, XXIIInd session, 976th meeting, para. 46)

Netherlands

See XXIst session, 903rd meeting, para. 14, quoted supra under part V.

See XXIIInd session, 977th meeting, para. 2, quoted supra under Comments and observations on the draft articles as a whole.

See also ibid., para. 5, quoted supra under part V.

Nicaragua

[His delegation]... considered it was essential to apply the norms of jus cogens under pain of nullity, and it hoped that the statement of that

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principle would constitute a valuable contribution to the progressive development and codification of international law.

(Mr. Montenegro Medrano, XXIIInd session, 978th meeting, para. 10)

Nigeria

His delegation felt that the doctrine of jus cogens, embodied in article 50, was one of the corner-stones of the law of treaties. As it was an evolutionary not a revolutionary juridical idea, his delegation supported the suggestion of the International Law Commission to leave the full content of that doctrine to be worked out in State practice and in the jurisprudence of international tribunals. If a subjective appraisal of that rule and consequent unilateral avoidance of treaty obligations was to be feared on that ground, the reinforcement of the procedures in part V, section 4 of the draft articles, as his delegation had presently suggested, should provide an assuring safeguard.

(Mr. Ogundere, XXIIInd session, 978th meeting, para. 14)

Pakistan

With regard to article 50, namely, treaties conflicting with a peremptory norm of general international law (jus cogens), he felt that the principles of the United Nations Charter prohibiting the use of force constituted a conspicuous example of the rule jus cogens. As other members of the Committee had also suggested, the following examples might be given: (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter; (b) a treaty contemplating or conniving at the commission of such acts as trade in slaves, piracy or genocide; (c) treaties violating human rights; the principle of self-determination, and so forth.

(Mr. Huda, XXIst session, 911th meeting, para. 18)

Part V, section 2, article 50

Turning to articles 50 and 61, he observed that, although peremptory norms of general international law were not easy to define, their existence was indisputable. For example, the representative of Iraq had illustrated how a treaty permitting slavery could be regarded as conflicting with a peremptory norm, namely, the internationally recognized prohibition against that institution. Again, the principles prohibiting the use of force embodied in the United Nations Charter constituted a conspicuous example of the rule of jus cogens. It was self-evident that treaties violating those principles ought to be void ab initio. However, the inclusion of article 61 would lead to uncertainty in relations between States, as there would be difficulty in defining and formulating new rules of jus cogens.

(Mr. Sobhan, XXIIInd session, 980th meeting, para. 39)

Peru

It was necessary, with regard to treaties, to study the intellectual process of a certain adaptation to reality, but there was also another element which had to be taken into consideration. That element had been touched upon in connexion with the provisions of jus cogens, which rested essentially on certain fundamental notions of natural law and accepted principles of international morality. To complete the study of treaties it was necessary to take into consideration not only the objective geographical, political and legal situations that they reflected but the higher principles that contributed to their formation. The Latin American peoples attached particular importance to those principles, which they had independently introduced in their mutual relations, as in the case of the principle of self-determination and the principle of non-intervention. He stressed the importance of studying the sociological conditions and the circumstances that had helped to create American jus cogens, as well as the circumstances surrounding the conclusion of treaties on the American continent.

(Mr. Belaunde, XXIst session, 915th meeting, para. 15)

Philippines

His delegation had expressed the opinion at previous sessions that the draft articles on the law of treaties were progressive and challenging. That applied particularly to articles 50, 61 and 67, and by accepting the principles underlying those articles, the conference participants would demonstrate their profound desire that the rule of law should govern relations among sovereign States and their faith in the development of international law. The International Law Commission had refrained from giving examples of peremptory norms of international law in its draft articles; but the conference participants could discuss that thought-provoking question at the appropriate time....

(Mr. Yango, XXIst session, 913th meeting, para. 23)

A growing number of authorities on international law recognized the existence of an irreducible minimum of norms which were binding on all States, which admitted of no derogation and which could be modified only by new norms of general international law having the same character. Examples were to be found in the Charter of the United Nations.

(Mr. Espejo, XXIIInd session, 981st meeting, para. 21)

Poland

...[An] essential issue was recognition of the existence of peremptory norms of general international law, which constituted the frontiers within which States might move freely in determining their mutual relationships. To claim that such limits did not exist and that States were free to conclude international instruments in whatever way they wished would be to abandon international law to the caprice of the strongest. It had long been recognized that free though States were to change their mutual relations they could not, even ad casum or inter se, set aside principles that were binding on all States or raise to the level of a

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Part V, section 2, article 50

legal rule that which had been prohibited. Those rules of jus cogens, which had come to be part and parcel of the corpus juris gentium, did not derive from natural law or from the subjective concerns of States; they existed in the interest of the international community as a whole. By including them in article 50 of the draft, the International Law Commission had implicitly recognized that they were part of lex lata, even though it had not made it sufficiently clear in the commentary exactly which rules were meant. What were involved were, essentially, principles concerning basic issues of peace and war: the use of force, elementary rights of States, the principle of non-intervention and the principle of self-determination. Furthermore, ever new principles would be added to them as the evolution of law continued.

(Mr. Lachs, XXIst session, 913th meeting, para. 17)

His delegation did not believe that the misgivings which had been expressed concerning an alleged lack of precision in the hierarchy of norms in international law or concerning the non-existence of an enumeration of the norms constituting jus cogens were justified, so far as the draft articles were concerned. In any event, the peremptory norms referred to in articles 50 and 61 had not been challenged when the Committee had discussed the question at the twenty-first session. It would be very difficult to conceive that the law of treaties could ignore those questions and fail to adopt a clear position concerning them.

(Mr. Osiecki, XXIInd session, 977th meeting, para. 9)

See also ibid, para. 10, quoted supra under article 49.

Sierra Leone

See XXIInd session, 982nd meeting, para. 24, quoted infra under article 59.

Spain

He would not discuss the principle jus cogens in depth, for the Austrian and Australian representatives had already done that admirably. He would simply explain how the Commission, which represented such diverse cultures and ideologies, had nevertheless been able to agree on the existence of certain peremptory norms. It had succeeded because, instead of going back to fundamental transcendental ideas, it had concentrated on the specific problems raised in current international law. The members of the Commission had agreed that the threat and use of force in violation of the principles of the Charter, intervention in the domestic affairs of States, and unequal or discriminatory treatment of States were incompatible with the existence of the international community. (Mr. de Luna, XXIst session, 912th meeting, para. 43)

Sweden

There was... a further question, namely, whether in addition to the articles expressly dealing with peremptory norms, there were others from which no derogation was permitted and which therefore constituted peremptory norms in themselves. Presumably articles 23, 48, 49 and 59 could not be rendered ineffective or modified by express agreement between States. On the other hand, it could not be assumed that articles were of a peremptory nature simply because they did not expressly stipulate that they might be deviated from. Most articles, although not containing such evidence of their residuary character, must nevertheless be considered residuary rules. Considerable economy of language in the draft could, perhaps, have been achieved if the few articles which might be presumed to be peremptory had been explicitly stated to be so and if a general clause had been inserted indicating that all other provisions were of a residuary character, or jus dispositivum. However, that was merely a reflection and not a suggested revision....

Furthermore, where respect for certain norms was demanded by the international community, treaties conflicting with such norms should be considered invalid; indeed, it was gratifying that the world community was beginning to

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Part V, section 2, article 50

extend its injunctions regarding respect for treaties beyond the primitive principle of pacta sunt servanda and to develop a set of rules with finer distinctions. However, such a set of rules required more highly evolved mechanisms than mere assertions and counter-assertions between the subjects of the law. The more developed and sophisticated the rules, the greater was the need for an impartial organ to ensure their proper administration. Procedures for third-party settlement, such as jurisdiction by the International Court of Justice, must therefore be devised, if the development of rules was to be of service to the world community at large, and especially to the smaller countries. (Mr. Blix, XXIIInd session, 980th meeting, paras. 10 and 15)

Thailand

While his delegation considered that rebus sic stantibus, as stated in the draft, provided adequate protection for smaller and weaker nations, more sweeping and fundamental limitations on the doctrine of pacta sunt servanda were contained in articles 50 and 61, both of which touched upon the essential validity of treaties that conflicted with a peremptory norm of general international law, or jus cogens. Although a number of delegations had considered that the identification of such norms might present difficulties, his delegation did not see any inconvenience in the fact that the rules of jus cogens were not precisely defined or clearly fixed. The existence of such peremptory norms was indisputable, and the commentary on article 50 gave some interesting illustrations of the principle of jus cogens.

(Mr. Sucharitkul, XXIIInd session, 976th meeting, para. 15)

See also ibid., para. 16, quoted supra under article 49.

Tunisia

...the concept of a peremptory norm of general international law (jus cogens), mentioned in article 50, could have been stated more precisely.

(Mr. Ben Aissa, XXIst session, 913th meeting, para. 38)

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Turkey

See XXIst session, 907th meeting, para. 16, quoted infra under article 62.

It was perfectly understandable that there should be frequent borrowings from the law of contracts, since that branch of civil law had long been a source of inspiration for those called upon to codify the law of treaties. His delegation was by no means opposed to the practice, provided that such borrowings were accompanied by the necessary precautions, for an international treaty was a complicated instrument, very different from a mere civil law contract. In the case of the draft articles, however, such precautions did not seem always to have been taken. For example, the mention of a "peremptory norm of general international law", which the draft referred to as "jus cogens", and the terms used in articles 50 and 61, were entirely new. Neither the commentaries on the former articles 37 and 45 nor those on the new articles 50 and 61 contained any really convincing arguments as to the existence in international law of jus cogens. That was hardly surprising, since recognition of its existence would mean establishing a scale of precedence as between norms, which presupposed a similar scale of precedence as between sources of law. In international law, however, the legislators were sovereign and equal States. Even if a few rules were acknowledged to rank higher than others because of their moral force, that was no justification for vague and ambiguous generalizations.

In the view of his delegation, articles 50 and 61 represented an attempt to introduce into international law the notion of ordre public which was to be found in the civil law of contracts. Consequently, the vagueness of the articles in question was due to the fact that the notion of ordre public varied from country to country and from age to age and could only be clarified by an impartial authority, yet the all important question of jurisdiction was not dealt with. Article 62, as it related to the application of the articles on jus cogens, merely indicated the procedure to be followed by a party claiming to be injured, and, in the event of disagreement, referred the parties to Article 33 of the

Part V, section 2, article 50

Charter of the United Nations. However, Article 33 was one of the weakest clauses in the Charter, since it made no provision for compulsory jurisdiction. Accordingly, any party wishing unilaterally to evade its treaty obligations was not subject to the control of any impartial authority.

For those reasons, his delegation could not accept articles 50, 61 and 62, which might give rise to a number of abuses and thus undermine the stability of treaties and disrupt international life. The same reservations applied to all those provisions in the draft, such as article 59, which were subject to the terms of article 62.

(Mr. Miras, XXIIInd session, 980th meeting, paras. 18-20)

Ukrainian Soviet Socialist Republic

He stressed the importance of the principle that any treaty conflicting with a peremptory norm of general international law was void; in his view, those peremptory norms could be defined by reference to the law of the United Nations Charter and included, for example, the principles of the prohibition of the use of force, non-interference in the internal affairs of States, the sovereign equality of States and the equality of rights and self-determination of peoples. Any treaty that violated those principles was automatically invalid, for the law of treaties was based on mutual consent, which could only exist between equals. It must not be forgotten that real equality between States implied mutual respect for each other's sovereignty. It followed that the leonine agreements which some Powers had concluded with their colonies during the period of colonial domination, or as a condition for the granting of independence, or just after those colonies had acquired political independence but before the country had attained real economic independence - agreements which those Powers demanded be respected in the name of the rule pacta sunt servanda - were in reality void, because the very circumstances in which they had been concluded had deprived one of the parties of the free exercise of its sovereignty.

(Mr. Yakimenko, XXIst session, 905th meeting, para. 4)

See XXIIInd session, 978th meeting, para. 18, quoted supra under article 49.

See document A/6827, quoted supra under article 49.

Union of Soviet Socialist Republics

The Commission's discussion on the law of treaties had centred mainly on a few key questions. One such question was jus cogens, the importance of which had been stressed by many delegations at the eighteenth session of the General Assembly. Draft articles 50 and 61 relating to jus cogens deserved very careful study, for they were intended to prevent the use of international treaties as a screen to conceal actions conflicting with the basic principles of contemporary international law. Although the principle of strict observance of international obligations must be upheld, it should be pointed out that not all treaties enjoyed the support of international law. Legal force could be accorded only to such treaties as were in full conformity with the basic principles of international law. At the eighteenth session of the General Assembly, the representative of the United Arab Republic had observed that the United Nations Charter contained several incontestable norms of international public law, which Article 103 of the Charter made obligatory for Member States; and the Algerian representative had said that it was on the basis of those norms that the Organization of African Unity would seek to have annulled the agreements existing between the racist and colonialist States in south Africa. The USSR delegation agreed entirely with that view.

In the discussion in the Commission and the Committee, certain States had attempted to limit the sphere of application of jus cogens and to give it a narrow construction. For example, the United Kingdom in its comments suggested that its application must be very limited (see A/6309/Add.1, article 37). At the eighteenth session of the Assembly, the Syrian representative had opposed attempts to draw up a restrictive list of peremptory norms of international law and had stressed that the articles on jus cogens should be stated in general terms.

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In the light of those statements, the question of the content of jus cogens was extremely significant. The concept itself must be clearly stated, for otherwise it could be used by those States which, hiding behind the term "treaty", tried to impose unequal terms on other States. Jus cogens should cover, first, the most important principles of the Charter, and in particular the principles of the prohibition of aggressive war and any use of force contrary to the purposes of the Charter, the inadmissibility of intervention in the domestic affairs of States, the sovereign equality of States, equal rights and self-determination of peoples. On the basis of those principles, any treaty that provided for the preparation, initiation and conduct of aggressive war, including colonial wars, the use of any form of coercion in inter-State relations, the violation of State sovereignty and intervention in the domestic affairs of States, or the establishment or maintenance of colonial domination should be regarded as invalid. The various neo-colonialist treaties, which were unequal and conflicted with the principle of the sovereign equality of States, must also be regarded as invalid. Such treaties were invalid regardless of the time of conclusion - whether in the present, the past or some decades in the future.

The representatives of the African countries had stressed that the unequal treaties imposed on their countries by the colonizers could not be recognized by current international law and must have no place in international practice. The Bandung Conference of 1955 and the Cairo Conference of Heads of State or Government of Non-Aligned Countries of 1964 had adopted resolutions stating that the condemnation of all forms of coercion in international relations and the elimination of relations based on inequality were essential to peace and progress. Cuba also had cancelled unequal treaties imposed on it by the United States in the past and rightly advocated the cancellation of the one-sided agreements of February and August 1903 concerning the Guantanamo military base.

The struggle of the young States against unequal treaties was just and lawful; it was a fight for the restoration of the inalienable sovereign rights of the developing countries. The draft article on jus cogens would assist the just struggle of peoples against unequal treaties. His delegation thought that it would be advisable to study the possibility of making a more detailed statement of that principle in the convention.

(Mr. Khlestov, XXIst session, 910th meeting, paras. 21-25)

See also ibid., para. 18, quoted supra under Comments and observations on the draft articles as a whole.

See XXIIInd session, 971st meeting, para. 7, quoted supra under Comments and observations on the draft articles as a whole.

Considerable importance attaches to draft article 50, which declares that a treaty is void if it conflicts with a peremptory norm of general international law. This article thus establishes the invalidity of inequitable or colonial treaties. (Note verbale of 21 July 1967 from the Permanent Mission to the United Nations (A/6827, p. 25))

United Arab Republic

See XXIst session, 911th meeting, para. 25, quoted supra under Comments and observations on the draft articles as a whole.

See also ibid., para. 27, quoted supra under article 49.

The reference to jus cogens in articles 50 and 61 was most valuable and represented a basic adjustment to contemporary notions of international law. The United Nations Charter had consolidated the doctrine of jus cogens, and the fragmentary rules of international law in the pre-Charter era had been replaced by an integrated legal system. The place of jus cogens in such an integrated system must therefore be recognized by, and sanctioned in, the law of treaties. Valid examples of jus cogens had been given in the commentary on article 50, and, although it had been asserted during the deliberations of the Commission and of

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Part V, section 2, article 50

the Sixth Committee, as well as in academic circles, that the concept of jus cogens could not, at present, be precisely formulated, that principle should nevertheless be accorded its rightful place in the law of treaties. The task of elaboration and interpretation was not a legislative function, and it should be left to doctrinal enunciation and judicial application.

(Mr. El Araby, XXIIInd session, 980th meeting, para. 44)

See also ibid., para. 42, quoted supra under article 49.

United Kingdom

See XXIst session, 908th meeting, para. 26, quoted supra under Comments and observations on the draft articles as a whole.

With regard to the subject of invalidity, termination and suspension of the operation of treaties, special attention would have to be given to article 50, which concerned treaties conflicting with a peremptory norm of general international law (jus cogens), for the fact that there was no general consent as to the content of peremptory norms and the absence of an agreed definition suggested that the concept of jus cogens was still so little developed that it was not ripe for inclusion in the codification of the law of treaties. The incorporation of that concept, with the uncertain effects which would result, would be a danger to the stability of treaties. Moreover, the retroactive effect of the operation claimed for those norms was uncertain, as was the relationship between article 50 on the peremptory norms and Article 103 of the Charter of the United Nations. Indeed, Article 103 seemed to eliminate the need for any further assertion of the rule of jus cogens in respect of the obligations contained in the Charter.

(Mr. Darwin, XXIIInd session, 967th meeting, para. 4)

United Republic of Tanzania

See XXIst session, 912th meeting, para. 47, quoted supra under Comments and observations on the draft articles as a whole.

United States of America

Article 50 had no well developed counterpart in municipal law. International law, furthermore, did not as yet provide any means of defining those peremptory norms and it seemed difficult, without at the same time opening the door to denunciations of treaties on insubstantial or unsubstantiated grounds, to include articles 50 or 61 in a convention on the law of treaties unless agreement could be reached as to what a peremptory norm was. This prospect, of concern to all, should be of greatest concern to the weaker States which most needed protection against unwarranted unilateral terminations or withdrawal.

(Mr. Kearney, XXIIInd session, 977th meeting, para. 21)

See also ibid., para. 21, quoted supra under part V.

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

There is no such consensus. The ILC commentary gives as an example "a treaty contemplating an unlawful use of force contrary to the principles of the Charter".

Part V, section 2, article 50

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

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

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

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

(Note verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, pp. 8-9))

Uruguay

His delegation held that there was a hierarchy of legal norms which, while already recognized at the domestic level, should also be recognized at the

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international level. That led it to Kelsen's pyramid theory and the assumption of the existence of a series of rules of jus cogens which constituted the foundation of the positive international juridical order. True, it was difficult to enunciate or define them, but they flowed from the very existence of international society governed by a law making order. That had been recognized in paragraph 1 (c) of article 38 of the Statute of the International Court of Justice, which stipulated that in deciding the disputes submitted to it in accordance with international law the Court should apply, inter alia, the general principles of law recognized by civilized nations; those principles in fact derived, at least partially, from jus cogens. Article 49 (Coercion of a State by the threat or use of force) of the draft articles on the law of treaties (A/6309/Rev.1, part II, chap. II), which Sir Humphrey Waldock had cited at the 969th meeting, set forth a basic principle of jus cogens. Article 103 of the Charter of the United Nations, specifying the invalidity of any treaty in conflict with the obligations contracted by a party under the Charter, could also be cited in that connexion. The Uruguayan delegation shared Sir Humphrey's view that a distinction should be made between the norms which involved the responsibility of States and those which could have the effect of invalidating a treaty.

(Mr. Ciasullo, XXIIInd session, 971st meeting, para. 3)

Venezuela

The Commission was to be commended for having incorporated in its draft the controversial principle of jus cogens (article 50). It was obviously difficult to determine when a given rule should be recognized as having the character of jus cogens, but the Commission had done as much as could have been expected, and now that the principle was firmly established, its future development would depend on the practice and experience of States.

(Mr. Molina, XXIst session, 914th meeting, para. 7)

Part V, section 2, article 50
and section 3, article 51

Yugoslavia

See XXIst session, 907th meeting, para. 21, quoted supra under Comments and observations on the draft articles as a whole.

See XXIInd session, 975th meeting, para. 18, quoted supra under part V, section 2.

SECTION 3 - TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

ARTICLE 51

Termination of or withdrawal from a treaty by consent of the parties

MEMBER STATES

Czechoslovakia

See XXIInd session, 976th meeting, para. 27, quoted infra under part V, section 4.

See document A/6827, quoted infra under part V, section 4.

SPECIALIZED AGENCIES

World Health Organization

In... connexion [with cases for which it has no relevant rules], WHO has noted two important points. The first concerns the provisions for withdrawal in draft articles 51 and 53. WHO feels that there is an apparent contradiction between these two articles. The first states in sub-paragraph (b) that a party may withdraw from a treaty at any time by consent of all the parties. The second stipulates that if a treaty does not provide for withdrawal, withdrawal is not allowed unless it is established that the parties intended to admit the possibility of withdrawal. It is clear from the commentaries that it is felt that, in the absence of proof of the parties' intention to admit the possibility of withdrawal, withdrawal is still possible "by consent of all the parties". The text of the articles read in isolation, however, could give rise to confusion. For this reason WHO believes that the wording of these articles should be amended. Moreover, it may not be out of place to mention how this question of withdrawal arose and how WHO dealt with it. In 1949 and 1950 certain countries announced their wish to withdraw from WHO and, in the absence of relevant provisions in the Constitution, the Director-General declared that he could not consider these communications as withdrawals, since the Constitution contained no provision for withdrawal. The Health Assembly, when the matter was put before it by the Executive Board, did not deal with the question of the validity of withdrawal and took no decision expressing its consent or lack of consent to the withdrawal. The attitude it took subsequently, however, when these States resumed active participation would indicate that the Assembly did not believe it was possible for a State to withdraw from WHO in the absence of constitutional provisions covering such action. Accordingly, the provisions of draft article 51 to the effect that withdrawal can take place on certain conditions are not applicable where WHO is concerned.

(Letter of 13 July 1967 from the Head of the Legal Office of the World Health Organization (A/6827/Add.1, p. 42))

Part V, section 3, articles 52 and 53

ARTICLE 52

Reduction of the parties to a multilateral treaty below the number
necessary for its entry into force

(No comments relating specifically to this article.)

ARTICLE 53

Denunciation of a treaty containing no provision regarding termination

MEMBER STATES

Byelorussian Soviet Socialist Republic

The convention should also include an article making it possible to denounce a treaty containing no provision regarding its termination, recourse to which would be very helpful in the case of treaties not freely concluded by a State with the support of the people. The adoption of such a rule was especially important at a time when the colonial system was collapsing. Moreover, contemporary international law made it possible for States not merely to annul an unfair treaty unilaterally but also to declare it invalid from the outset and demand full restoration of the pre-existing conditions.

(Mr. Stankevich, XXIInd session, 975th meeting, para. 2)

Canada

See XXIInd session, 976th meeting, para. 4, quoted infra under article 62.

Cuba

Article 53, which dealt with the question of a treaty containing no provision regarding termination, was incomplete in that it made the permanent nature of agreements dependent on the intention of the parties, without recognizing exceptions of an objective character. The draft article implicitly denied the existence of any kinds of treaties which per se were limited in time. A legal order which was to make a positive contribution to the progressive development of international law must repudiate the old unjust practice of treaties of indefinite duration, which the great Powers were wont to impose on small nations in order to subject them to their oppressive rule. Perpetual treaties were unreasonable and unnatural. According to article 53, a treaty was not subject to denunciation or withdrawal unless it was established that that had been the intention of the parties; under that vague and imprecise wording, the character of a treaty could not exempt it from perpetuity. However, it was not the intention of the parties, but the nature of the agreement, which gave it its character as a treaty of limited duration. Consequently, his delegation preferred, as being more complete, the original wording of article 39 in the 1963 text, which expressly stated the possible exceptions to the general rule, based on the character of the treaty, the circumstances of its conclusion or the statements of the parties. That version harmoniously combined the objective and subjective elements that played a decisive role in determining whether or not a treaty was necessarily of limited duration. On the other hand, it should be stressed that in practice it was difficult for a perpetual treaty to exist, since it could always be terminated under the rebus sic stantibus clause implicit in treaties of indefinite duration. Recent history showed how fundamentally circumstances could change within a relatively short time. His delegation considered that the acceptance of the rebus sic stantibus clause as an objective rule of international law would promote equity and justice without decreasing the security of treaties. Moreover, his delegation did not favour the statement of that rule in negative terms.

(Mr. Alvarez Tabio, XXIInd session, 974th meeting, para. 23)

Part V, section 3, article 53

Cyprus

The normal practice in the case of most categories of treaties was either to fix a short period for their duration or to provide for the possibility of termination or withdrawal. With regard to article 53, dealing with treaties containing no provision regarding termination, his delegation shared the view that it would be unsafe to draw from the mere silence of the parties the conclusion that they had necessarily intended to exclude any possibility of denunciation or withdrawal, particularly since several authorities took the view that a right of denunciation or withdrawal might properly be implied under certain conditions in some types of treaties. In fact, some members of the Commission had considered that in certain types of treaties, such as treaties of alliance, a right of denunciation or withdrawal after reasonable notice should be implied unless there were indications of a contrary intention.

(Mr. Jacovides, XXIIInd session, 980th meeting, para. 67)

Honduras

...a number of comments had been made on the question of so-called perpetual treaties. His country had had painful experiences with such treaties and felt that they not only gave rise to injustices but were inappropriate to the rapidly changing circumstances of modern life. Some national constitutions stipulated that the State could not conclude treaties with a term of more than twenty-five or fifty years. The Commission had shown a clear appreciation of the problem in its commentary on article 59 (Fundamental change of circumstances), but his delegation felt that it should be stated specifically that treaties should never be perpetual, but might be revised or renewed as necessary by mutual agreement of the parties. That principle was tending to become an essential norm of jus cogens.

(Mr. Cadalso, XXIIInd session, 975th meeting, para. 13)

Hungary

He... endorsed the opinion expressed by the Cuban and other delegations regarding the formulation of article 53 (Denunciation of a treaty containing no provisions regarding termination). In order to safeguard the sovereignty of States, the Committee should uphold the right to terminate a treaty of indefinite duration, applying in both cases article 59 (Fundamental change of circumstances).
(Mr. Prandler, XXIInd session, 978th meeting, para. 6)

Netherlands

...article 53, providing that a treaty containing no provisions regarding its termination or denunciation was nevertheless subject to denunciation on twelve months' notice if that was consistent with its character, seemed too rigid. There might be many instances in which the possibility of denunciation or withdrawal was acceptable but in which a period of twelve months would be too short and would be clearly contrary to the intentions of the parties. His delegation was therefore in favour of a more flexible provision, such as the one proposed by the Netherlands Government in its comments on article 39 of the 1963 draft.

(Mr. Kooijmans, XXIInd session, 977th meeting, para. 6)

Venezuela

A treaty could be subject to denunciation or withdrawal, even if it contained no provision to that effect, if it was established that the parties intended to admit the possibility of denunciation or withdrawal (article 53, para. 1). Inasmuch as that introduced a subjective element that was difficult to evaluate, the question required mature reflection.

(Mr. Molina, XXIst session, 914th meeting, para. 4)

Part V, section 3, articles 53 and 54

SPECIALIZED AGENCIES

World Health Organization

See document A/6827/Add.1, quoted supra under article 51.

ARTICLE 54

Suspension of the operation of a treaty by consent of the parties

(No comments relating specifically to this article.)

ARTICLE 55

Temporary suspension of the operation of a multilateral treaty
by consent between certain of the parties only

MEMBER STATES

Ghana

...article 55, on the temporary suspension of the operation of a multilateral treaty by consent between certain of the parties only, was a bold but perhaps dangerous step on the part of the Commission, as it did not seem possible to rely on the practice of States in that matter.

(Mr. Van Lare, XXIst session, 905th meeting, para. 13)

Japan

See document A/6827 and Corr.1, quoted infra under article 62.

Yugoslavia

In paragraph (2) of the commentary on... article [55], the Commission states that the contracting parties concerned have a general obligation to give notice to the other contracting parties in advance of their temporary inter se suspension of the operation of a multilateral treaty.

In view of the importance of the commentary, the Yugoslav Government considers that it should be inserted in the body of the article itself, since that would strengthen the security of international legal relations.

(Letter of 28 June 1967 from the Chief Legal Adviser of the Ministry of Foreign Affairs (A/6827, p. 30))

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Part V, section 3, article 56

ARTICLE 56

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

MEMBER STATES

Canada

See XXIIInd session, 976th meeting, para. 4, quoted infra under article 62.

Czechoslovakia

It is recommended to make the provision of paragraph 1 (a) [of article 56]
more accurate in the following manner:

"(a) If it appears from the treaty or is otherwise established
that the treaty subject should thenceforth be governed exclusively
by a new treaty..."

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the
United Nations (A/6827, p. 13))

Pakistan

The provisions of article 56, concerning termination or suspension of the
operation of a treaty implied from entering into a subsequent treaty, were open to
misinterpretation. The rule stated in paragraph 1 (a) would perhaps be sufficient,
and the deletion of paragraph 1 (b) would prevent misuse of the latter as a means
to escape obligations under an earlier treaty by a purely subjective interpretation
of the term "incompatible". Incompatibility was merely one of the ways of

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determining the intention of the parties to a treaty and was never conclusive of that intention. Sometimes, two treaties might be incompatible in certain respects but both might be binding because the parties intended them to be so.

(Mr. Sobhan, XXIIInd session, 980th meeting, para. 35)

Venezuela

The problem of the termination or suspension of the operation of a treaty as implied from entrance into a subsequent treaty (article 56) also frequently arose among States. In his delegation's view, it should be possible to regard the earlier treaty as supplementing the new one with respect to those matters not covered by the latter.

(Mr. Molina, XXIst session, 914th meeting, para. 5)

ARTICLE 57

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

MEMBER STATES

Bolivia

See XXIIInd session, 980th meeting, para. 30, quoted supra under article 50.

Part V, section 3, article 57

Ceylon

In connexion with article 57, it would often be difficult to determine whether the breach of treaty was "material" or not.

(Mr. Pinto, XXIIInd session, 969th meeting, para. 11)

Cyprus

See XXIIInd session, 980th meeting, para. 54, quoted supra under article 23.

Japan

See document A/6827 and Corr.1, quoted infra under article 62.

Pakistan

...a new clause, (c), should be added to article 57, paragraph 3, to read as follows: "Changes of the circumstances which have not been foreseen by the parties but which have been deliberately brought about or created by one of the parties to the treaty".

(Mr. Huda, XXIst session, 911th meeting, para. 17)

Sweden

See XXIIInd session, 980th meeting, para. 14, quoted supra under article 41.

Yugoslavia

Article 57, paragraph 2, deserves special attention.

This paragraph states the rights of the contracting parties in the event of a material breach of a treaty, while paragraph 3 defines what is meant by a material breach for the purposes of article 57.

It would be more appropriate to give the definition of a material breach first, in paragraph 2, i.e., the present paragraph 3 would become paragraph 2 and vice versa.

The right to suspend the operation of a multilateral international treaty in the event of a material breach of it should perhaps be limited to those of the contracting States which agree that there has been such a breach. In other words, if some States do not consider that there has been a material breach, they should be entitled to consider themselves still in a contractual relationship with the State in question.

If, however, the view is taken that the operation of such treaties must be suspended as between all the contracting States, it would be desirable to indicate the manner in which their agreement on the subject is to be expressed, or, to be more exact, to state whether a specified majority or unanimity is required.

Finally, the Yugoslav Government is of the opinion that in order to avoid arbitrary attempts to terminate multilateral treaties, it would be advisable to stipulate that the operation of a treaty could only be suspended in accordance with draft article 62, since that would be sufficient to prevent any State which breached the treaty from gaining unjustified advantages.

(Letter of 28 June 1967 from the Chief Legal Adviser of the Ministry of Foreign Affairs (A/6827, pp. 30-31))

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Part V, section 3, article 58

ARTICLE 58

Supervening impossibility of performance

MEMBER STATES

Colombia

With regard to the termination of treaties, it would perhaps be advisable to provide for the case of a treaty that expired as the result of the complete fulfilment of the obligations of its signatories. Such a reference would seem to be necessary if the final draft articles were to be complete from the standpoint of doctrine. There were other questions which were no less obvious, but important, such as the statement of the rule pacta sunt servanda in article 23, which were aimed primarily at making the text a complete whole. Part V, section 3, seemed to be complete with respect to what were called "lawmaking treaties"; but in the category of "contract-making treaties" there were treaties under which the parties were obligated to perform only a single action (for example, where the construction of a public building was involved), and it was plain that once the obligation in question had been fulfilled, the treaty lapsed, inasmuch as its purpose had ceased to exist. It would perhaps be desirable to add a sentence (e.g., to article 58 of the draft) concerning the case of the automatic expiration of a treaty.

(Mr. Herran Medina, XXIst session, 907th meeting, para. 10)

Czechoslovakia

See document A/6827, quoted supra under article 42.

Denmark

See document A/6827, quoted infra under article 59.

Ecuador

As to the object of the contractual relationship (thing promised, action to be performed or abstained from), the rule impossibilium nulla obligatio inevitably came into play and extended to moral as well as to material impossibility, and thus to impossibility on grounds of public policy. Furthermore, the parties' immediate reason for contracting, or, in other words, the cause hoc sensu of the concurrence of intentions, must be actual and lawful. Since the draft articles made no mention of the unlawfulness of the object or cause in the section dealing with the invalidity of treaties, that factor should at least be included in the definition of a treaty.

... His delegation wished to point out that the fact that the object of a treaty was impossible of performance was not among the causes invalidating the treaty; that idea was distinct from error and from supervening impossibility of performance. It should be possible to declare a treaty void ab initio or at least invalid when the object of a treaty is impossible of performance.

(Mr. Alcívar, XXIIInd session, 981st meeting, paras. 27 and 30)

Finland

See XXIIInd session, 980th meeting, para. 49, quoted infra under article 62.

See document A/6827, quoted infra under article 62.

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Part V, section 3, article 58

Pakistan

...a paragraph should be added to article 58 to read as follows: "A party to a treaty may not plead impossibility of performance if such alleged impossibility is based on a change of circumstances deliberately brought about by that party. Such a party should restore the status quo and carry out its obligations under the treaty".

(Mr. Huda, XXIst session, 911th meeting, para. 17)

Article 58, concerning supervening impossibility of performance, should be expanded to include a clear statement of the type of case to which it was intended to apply. The examples given in commentary (2) on the article showed that it related to the destruction of the subject-matter of the treaty. Unless that was made clear, article 58 might be misinterpreted and used to justify the non-observance of treaty obligations.

(Mr. Sobhan, XXIIInd session, 980th meeting, para. 36)

Union of Soviet Socialist Republics

The provisions of... article [58] should be clarified in order to exclude the possibility of a party to a treaty, in violation of its obligations, contributing towards the disappearance or destruction of an object indispensable for the execution of the treaty and then invoking the impossibility of performing the treaty.

(Note verbale of 21 July 1967 from the Permanent Mission to the United Nations (A/6827, p. 26))

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ARTICLE 59

Fundamental change of circumstances

MEMBER STATES

Afghanistan

The Government of Afghanistan supports the formulation of... article [59], with the understanding that in conformity with rebus sic stantibus, any treaty may become inapplicable through a fundamental change of circumstance. The Government of Afghanistan fully agrees that a treaty, when concluded between the parties, has a definite object, and when the purposes, object, and circumstances are changed, the treaty certainly becomes inapplicable.

(Note verbale of 29 August 1967 from the Permanent Mission to the United Nations (A/6827/Add.1, p. 4))

Australia

See XXIIInd session, 981st meeting, para. 13, quoted supra under part V.

Bolivia

...he entirely agreed with the doctrine of rebus sic stantibus in relation to a fundamental change of circumstances which had occurred with regard to those existing at the time of the conclusion of a treaty, and which were not foreseen by the parties, and he therefore supported article 59.... He reiterated the principle rebus sic stantibus was especially important in the changing world of today.

(Mr. Morales Aguilar, XXIIInd session, 980th meeting, para. 30)

See also ibid., para. 29, quoted supra under article 49.

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Bulgaria

... it was undeniable that the international community sometimes experienced very deep and radical changes which inevitably affected the application of treaties, and although a great degree of restraint must be exercised in invoking a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, as provided by article 59, the fundamental rule pacta sunt servanda could not and must not serve as a protection with regard, for instance, to unequal colonial treaties.

(Mr. Yankov, XXIIInd session, 979th meeting, para. 6)

See also ibid., quoted supra under article 23.

Canada

See XXIIInd session, 976th meeting, para. 3, quoted infra under article 62.

Ceylon

...the idea of a "fundamental change of circumstances", referred to in article 59, was also bound to present difficulties of interpretation.

(Mr. Pinto, XXIIInd session, 969th meeting, para. 11)

China

See XXIst session, 909th meeting, para. 2, quoted supra under article 23.

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See XXIInd session, 976th meeting, para. 30, quoted supra under article 23.

See also ibid., para. 31, quoted supra under part V.

Cuba

See XXIInd session, 974th meeting, para. 23, quoted supra under article 53.

Cyprus

Particular importance should... be attached to the doctrine of rebus sic stantibus, set forth in draft article 59. That doctrine, if properly delimited and regulated, could provide the law of treaties with an essential safety valve. If the only way to terminate or modify a treaty were for the parties to conclude a new agreement, and if one or more parties unreasonably opposed any such new agreement, an undue burden would be placed upon the dissatisfied party, which in the absence of such a safety valve might have no alternative but to seek relief outside the law.

(Mr. Jacovides, XXIst session, 910th meeting, para. 49)

While it was fully aware of the dangers inherent in the abuse of the doctrine of rebus sic stantibus, to which the Commission had taken a new approach in article 59, his delegation agreed with the Commission that the application of the doctrine, if properly delimited and regulated, provided an essential safety-valve. If the circumstances surrounding a treaty were such that, in the absence of a provision for its termination or suspension, the only legal way for terminating or modifying it was a further agreement between the parties, and if one of the parties was obdurate, the dissatisfied party might have no alternative but to seek relief outside the law.

(Mr. Jacovides, XXIInd session, 980th meeting, para. 68)

See also ibid., para. 54, quoted supra under article 23.

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Part V, section 3, article 59

Denmark

The Government of Denmark must still maintain that if the principle of the binding force of treaties is not to be unduly weakened, it is essential to include in article 59 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.

(Note verbale of 28 July 1967 from the Acting Permanent Representative to the United Nations (A/6827, p. 17))

Ecuador

In connexion with article 59 (Fundamental change of circumstances) he observed that the rebus sic stantibus clause had given rise to two theories. The first held that in concluding a treaty, the parties either expressly or tacitly subjected their consent to the existence of specific circumstances the termination or modification of which nullified the treaty, for the fundamental element - the intention to enter a contract - would then be lacking. The second held that a treaty was invalid if the modification of circumstances made fulfilment of the treaty obligation incompatible with the integrity of one of the parties. The International Law Commission seemed to favour the first theory. In any case, the wording of the rebus sic stantibus rule in the draft articles should be replaced by a positive statement. Moreover, his delegation believed that treaties establishing frontiers should not be exempted from the scope of that rule, for the latter could not remain isolated from the new legal principles at present governing the international community.

(Mr. Alcívar, XXIIInd session, 981st meeting, para. 33)

Finland

See XXIIInd session, 980th meeting, para. 49, quoted infra under article 62.

Honduras

See XXIInd session, 975th meeting, para. 13, quoted supra under article 53.

Hungary

See XXIIInd session, 978th meeting, para. 6, quoted supra under articles 23 and 53.

India

For example, in article 59 (Fundamental change of circumstances) [the Commission] had recognized the existence of a rule on rebus sic stantibus, but it had also recognized the fact that the rule could not affect boundary treaties. (Mr. Rao, XXIIInd session, 979th meeting, para. 13)

Japan

See XXIst session, 911th meeting, para. 3, quoted supra under Comments and observations on the draft articles as a whole.

See document A/6827 and Corr.1, quoted infra under article 62.

Part V, section 3, article 59Libya

The principle of rebus sic stantibus, which was embodied in article 59, also required closer definition, in order to avoid its abuse.

(Mr. El Sadek, XXIIInd session, 980th meeting, para. 24)

Netherlands

See XXIst session, 903rd meeting, paras 14-15, quoted supra under part V.

...in dealing with the rebus sic stantibus clause, the Commission had pointed out that it should no longer be treated as a fiction but should be formulated as an objective rule of law founded on equity and justice.

(Mr. Kooijmans, XXIInd session, 977th meeting, para. 3)

Nigeria

See XXIIInd session, 978th meeting, para. 13, quoted infra under article 62.

Pakistan

Although, the principle pacta sunt servanda was important and essential to orderly relations among States, it could not be denied that public international law recognized the doctrine rebus sic stantibus.

(Mr. Huda, XXIst session, 911th meeting, para. 17)

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His delegation felt, that, in the absence of any general system of compulsory jurisdiction, article 59, concerning fundamental change of circumstances as justifying termination of or withdrawal from a treaty, might also be open to abuse. The inclusion of such an article in a convention on the law of treaties ought to be tied to the acceptance of objective means of interpretation. His delegation noted with satisfaction that article 59 (2) placed certain limitations on the invocation of the principle rebus sic stantibus as a ground for terminating or withdrawing from a treaty.

(Mr. Sobhan, XXIInd session, 980th meeting, para. 37)

Peru

[One of the basic questions which might have been gone into more thoroughly] was the effect of the passage of time on international obligations deriving from treaties. That depended, in turn, on the length of time required for the treaty to produce its effects. In the case of treaties by which the parties agreed to create or ratify a permanent or definitive situation, the length of time in question coincided with the actual process of drawing up and concluding the treaty. Such treaties were said to be subject to immediate execution (a tracto cumplido); they required absolute compliance with their provisions and thus created a permanent obligation. On the other hand, there were treaties which provided for their execution to continue or proceed in stages over a period of time; such treaties, which were described as being subject to future execution (a tracto futuro), created a continuing or periodic obligation. That distinction was of the utmost importance for the application of the rebus sic stantibus clause. As his delegation had already observed at the San Francisco Conference, that clause could never apply to treaties that were subject to immediate execution since it would be absurd to attempt to amend a treaty the very purpose of which was to give legal sanction to a permanent situation. It applied only to treaties that were subject to future execution, regardless of whether the obligation arising from the treaty was a continuing or a periodic one. The draft articles seemed, unfortunately, to deal

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Part V, section 3, article 59

with the rebus sic stantibus clause without considering the time factor, and they required amplification on that point through further study.

(Mr. Belaunde, XXIst session, 907th meeting, para. 27)

Philippines

See XXIInd session, 981st meeting, para. 20, quoted supra under article 23.

Poland

Another factor which the Commission had recognized as important was the time factor in treaty relations. The situations on which law was based were anything but timeless and were constantly evolving. It was the need to take that inevitable evolution into account without destroying the confidence which the law should inspire that was reflected in the relationship clausula rebus sic stantibus versus pacta servanda sunt.

There were two aspects of the problem. First, what kind of changes could justify the termination of, or withdrawal from, a treaty by one of the parties without establishing a precedent which could undermine the stability of all treaties? According to article 59, there must be a fundamental change in an essential basis of the consent of the parties to be bound by the treaty; and even that change could not be invoked in the case of a treaty establishing boundaries or if it was 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.

It might also prove necessary, however, to change, not the attitude of the parties to the treaty, when a fundamental change in circumstances occurred, but the interpretation of the treaty itself. Treaties had to be living instruments and had to be adopted to the process of evolution; otherwise, they would eventually cease to be effective. A striking example of that dynamic approach was the interpretation of the principle of self-determination proclaimed in

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Article 1, paragraph 2, of the Charter, which was contained in the Declaration on the Granting of Independence to Colonial Countries and Peoples.

(Mr. Lachs, XXIst session, 913th meeting, paras. 14-16)

With respect to article 59, concerning the rebus sic stantibus clause, his delegation considered that the just solution found by the International Law Commission took account of its usefulness, which enabled mutual legal obligations to be adjusted to circumstances, while at the same time the admissibility of the application of the clause would be subject to international adjudication, thus safeguarding the stability of agreements by precluding unilateral breaches.

(Mr. Osiecki, XXIIInd session, 977th meeting, para. 10)

Sierra Leone

The doctrine of rebus sic stantibus, and the concepts of jus cogens and pacta sunt servanda, which had been dealt with so clearly in the draft articles, were merely a few of the principles which, in his delegation's view, urgently required codification. The law of treaties must therefore be placed on the widest and most secure foundations as soon as possible.

(Mr. Cole, XXIIInd session, 982nd meeting, para. 24)

Sweden

See XXIIInd session, 980th meeting, para. 10, quoted supra under article 50.

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Part V, section 3, article 59Thailand

Although the principle rebus sic stantibus had been used in the past, it had operated mainly to the detriment of Asian and African nations. In several instances where an Asian nation had tried to invoke the doctrine of pacta sunt servanda against a Western Power which had agreed in an earlier treaty to a frontier line, the expansionist Power had been able to rely on an implied rebus sic stantibus clause in the treaty in alleging that, owing to a fundamental change of circumstances, the frontiers so fixed by treaty should be moved further into the territory of the Asian nation. Such cases belonged to the colonial past, however, and the big Powers now tended to favour a more restricted application of rebus sic stantibus, maintaining, contrary to their past habit, that there had been no clear precedent or judicial application of the doctrine of rebus sic stantibus which could give any meaningful effect to it. It was gratifying, in that respect, to see that the principle rebus sic stantibus was clearly stated in article 59, paragraph 1, and that paragraph 2 (a) had been appropriately added to that article for the protection of Asian and African countries. Paragraph 2 (b) might also be said to serve a similar purpose.

(Mr. Sucharitkul, XXIInd session, 976th meeting, para. 14)

Turkey

See XXIst session, 907th meeting, para. 16, quoted infra under article 62.

See XXIInd session, 980th meeting, para. 20, quoted supra under article 50.

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United Kingdom

See XXIst session, 908th meeting, para. 26, quoted supra under Comments and observations on the draft articles as a whole.

United Republic of Tanzania

...the Tanzanian delegation did not regard the provisions of the draft articles as perfect. It had reservations concerning some of the sub-paragraphs of article 59.

(Mr. Samata, XXIIInd session, 981st meeting, para. 15)

United States of America

On other points, such as the rebus sic stantibus clause the subject of article 59, the existence of a large body of legal commentary, did not in itself elucidate the numerous complex questions which were raised and for which no satisfactory answer had yet been provided.

(Mr. Kearney, XXIIInd session, 977th meeting, para. 21)

Article 59, which permits a State to withdraw from treaty obligations on the ground of a fundamental change of circumstances, is burdened with the same threat to the stability of treaty obligations. That the International Law Commission recognized this danger is apparent from the negative manner in which the article is expressed and the limitations upon its application contained in article 59. Thus paragraph 2 (a) of the article excludes boundary treaties from the operation of the rule, and the reason given in the commentary is... "because otherwise the rule, instead of becoming an instrument of peaceful change, might become a source of dangerous frictions". The implication of this statement is that it is only boundary treaties whose unilateral termination might become a source of

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Part V, section 3, article 59

dangerous friction. But there are a wide range of international settlements which are not boundary treaties - but whose unilateral denunciation would give rise to dangerous friction. Peace treaties without territorial clauses, cease-fire agreements, treaty provisions for passage through straits, are a few of the areas where there are obvious dangers inherent in the unilateral application of this provision.

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

The United States Government considers that when the dangers implicit in article 59 are weighed against the advantage of providing "a safety valve in the law of treaties", the balance is against the article as drafted. The claim of fundamental change in circumstances has been made too often on inadequate grounds and is too easily distorted for partisan advantage to anticipate that it will be raised but seldom and only as a last resort. Certainly if this theory is to be included in a convention on the law of treaties as a binding rule, and neither the need for nor the desirability of this course has been established, its scope and effect must be much more sharply delimited.

(Note verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, pp. 9-10)

Venezuela

The generally accepted principle of rebus sic stantibus had been definitely confirmed in article 59 of the draft but had been expressed in negative terms. In view of the importance of that principle, it would be better if article 59, paragraph 1, stated positively that the principle could be invoked in certain conditions, i.e., those given in sub-paragraphs 1 (a) and 1 (b). The negative expression should be retained only in paragraph 2.

(Mr. Molina, XXIst session, 914th meeting, para. 6)

Yugoslavia

...while agreeing with the underlying principle embodied in article 59, his Government had requested a more precise explanation of the expression "fundamental change of circumstances" and an indication of its relation to the principle pacta sunt servanda.

(Mr. Sahovic, XXIIInd session, 975th meeting, para. 19)

The rebus sic stantibus clause is of special importance in the law of treaties provided that it is applied in accordance with the purposes and principles of the Charter of the United Nations and with the permanent interest of the international community in maintaining peace and peaceful co-operation. Consequently, it would be advisable to include in paragraph 1 [of article 59] a special condition to the effect that it must have become evident in the application of any particular treaty that the vital interests of one of the contracting parties are threatened.

In any case, it is essential to keep the idea - which should be expressed in the text of the convention - that a fundamental change of circumstances cannot be considered ipso facto a change in the contractual relationship.

In accordance with the fundamental principle pacta sunt servanda and the principle that the durability of international treaties is an essential condition for the maintenance of harmonious international relations, the rebus sic stantibus clause, accompanied by more clearly defined conditions for its application, particularly if the idea of a "fundamental change of circumstances" is made clearer, can offer definite advantages as an element in the law of treaties, because the world community of today is not immune to the effects of the rapid development of science and technology and real and radical changes in social and historical conditions.

The danger of a subjective interpretation and arbitrary application of this principle can, under certain conditions, be kept to a minimum if the international treaty is effectively inapplicable because of a fundamental change of circumstances and of the damage done to the vital interests of one of the contracting parties.

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Part V, section 3, articles 59 and 60

It is therefore important to define in more detail the extent of the fundamental change of circumstances. On a preliminary basis, however, one can raise the question of whether the rebus sic stantibus clause should or should not be included as a general rule in the convention on the law of treaties.

In point of fact, the existence of outmoded international treaties cannot contribute to the maintenance or development of friendly relations between the contracting parties. On the other hand, the exceptional application of the rebus sic stantibus clause can help to a great extent under certain conditions to avoid unilateral, arbitrary, unlawful and unpeaceful measures.

Finally, it would also be desirable to indicate the application of this article in relation to draft article 41, when the separability of treaty provisions is at issue, i.e., when only certain provisions of a treaty are fundamentally modified by a change of circumstances.

(Letter of 28 June 1967 from the Chief Legal Adviser of the Ministry of Foreign Affairs (A/6827, pp. 31-32))

ARTICLE 60

Severance of diplomatic relationsMEMBER STATESCyprus

See XXIst session, 910th meeting, para. 43, quoted supra under article 1.

See XXIIInd session, 980th meeting, para. 53, quoted supra under article 1.

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Ghana

See XXIst session, 905th meeting, para. 11, quoted supra under article 1.

Liberia

His delegation... felt that the effect of the outbreak of hostilities on treaties, State responsibility, the succession of States, and participation in multilateral treaties should have been adequately provided for in the draft articles. Although those issues were politically explosive, they would have to be regulated sooner or later.

(Mr. Brewer, XXIst session, 912th meeting, para. 3)

Philippines

See XXIIInd session, 981st meeting, para. 19, quoted infra under article 69.

Sierra Leone

See XXIst session, 911th meeting, para. 46, quoted supra under article 1.

United Arab Republic

See XXIst session, 911th meeting, para. 22, quoted infra under article 69.

United Republic of Tanzania

See XXIst session, 912th meeting, para. 45, quoted supra under article 1.

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Venezuela

In his opinion, the Commission had acted wisely in excluding from the scope of the draft articles the topics mentioned in paragraphs 28-34 of its report (see A/6309). Nevertheless, the specific question of the validity of a treaty in the case of the outbreak of hostilities between two or more parties to it called for special attention. For example, the so-called peace and friendship treaties, for which there were sound precedents in Latin America, contained saving clauses relating to the outbreak of hostilities that were aimed generally at ensuring the observance of the obligations contracted through those instruments. That was a question of particular importance in contemporary international law, and the Commission ought to begin a study of it without further delay.

(Mr. Molina, XXIst session, 914th meeting, para. 1)

ARTICLE 61

Emergence of a new peremptory norm of general international law

MEMBER STATES

Australia

See XXIst session, 912th meeting, paras. 21-24, quoted supra under article 50.

Austria

See XXIst session, 911th meeting, paras. 6-14, quoted supra under article 50.

Bolivia

...he... agreed with article 61, concerning the emergence and validity of a new ius cogens, and with the provisions of article 62 concerning the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty.

(Mr. Morales Aguilar, XXIInd session, 980th meeting, para. 30)

Canada

See XXIIInd session, 976th meeting, para. 3, quoted infra under article 62.
See also ibid., para. 4, quoted under articles 50 and 62.

Ceylon

See XXIst session, 908th meeting, para. 7, quoted supra under article 50.

See XXIIInd session, 969th meeting, para. 11, quoted supra under article 50.

China

See XXIIInd session, 976th meeting, para. 33, quoted supra under article 50.

Part V, section 3, article 61

Cuba

His delegation considered that the extension of the modern principle prohibiting the threat or use of force to treaties which, although concluded before the establishment of that principle, had not ceased to have consequences at the time of its establishment, did not involve or imply retroactive application, particularly in view of the fact that the prohibition of the threat or use of force was a rule of jus cogens whose emergence, according to article 61, deprived any existing treaty which was in conflict with it of validity. Despite the many difficulties involved in identifying rules of jus cogens, no one denied that the clauses of the Charter prohibiting the use of force were in themselves a clear example of a rule of international law having the character of jus cogens. The wording of article 61 was clear and forceful; in his delegation's opinion, however, the article should contain an express statement that any treaties which had been concluded or were to be concluded and which were in conflict with the principles of the Charter should become void and should terminate. His delegation endorsed the Commission's statement, in its commentary (1) on article 50, that the view that there was no rule of international law from which States could not at their own free will contract out had become increasingly difficult to sustain.

(Mr. Alvarez Tabio, XXIIInd session, 974th meeting, para. 21)

Cyprus

See XXIst session, 910th meeting, para. 48, quoted supra under article 50.

Article 61 was simply a logical corollary of article 50.

(Mr. Jacovides, XXIIInd session, 980th meeting, para. 69)

See also ibid., paras. 59, 60, 62-66, quoted supra under article 50.

Denmark

See document A/6827, quoted supra under Comments and observations on the draft articles as a whole.

Ecuador

See XXIIInd session, 981st meeting, para. 32, quoted supra under article 50.

Finland

Article 61... embodied a new principle which had not been tested by customary international law and which might therefore lead to unwanted consequences.
(Mr. Broms, XXIIInd session, 980th meeting, para. 48)

See document A/6827, quoted supra under Comments and observations on the draft articles as a whole.

France

See XXIIInd session, 969th meeting, paras. 4-5, quoted supra under article 50.

Hungary

...articles 61 (Emergence of a new peremptory norm of general international law) and 67 (Consequences of the nullity or termination of a treaty conflicting with a peremptory norm of general international law) required special attention.
(Mr. Prandler, XXIIInd session, 978th meeting, para. 6)

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Part V, section 3, article 61

Iraq

See XXIst session, 913th meeting, para. 7, quoted supra under article 50.

Japan

See document A/6827 and Corr.1, quoted infra under article 62.

Libya

See XXIIInd session, 980th meeting, para. 22, quoted supra under Comments and observations on the draft articles as a whole.

Netherlands

See XXIIInd session, 977th meeting, para. 5, quoted supra under part V.

Nigeria

See XXIIInd session, 978th meeting, para. 11, quoted supra under Comments and observations on the draft articles as a whole.

Pakistan

See XXIIInd session, 980th meeting, para. 39, quoted supra under article 50.

Philippines

See XXIst session, 913th meeting, para. 23, quoted supra under article 50.

Poland

See XXIIInd session, 977th meeting, para. 9, quoted supra under article 50.

See also ibid., para. 10, quoted supra under article 49.

Thailand

See XXIIInd session, 976th meeting, para. 15, quoted supra under article 50.

Turkey

See XXIIInd session, 980th meeting, paras. 18-20, quoted supra under article 50.

Union of Soviet Socialist Republics

See XXIst session, 910th meeting, paras. 21-25, quoted supra under article 50.

United Arab Republic

See XXIIInd session, 980th meeting, para. 44, quoted supra under article 50.

Part V, section 3, article 61 and
section 4

United States of America

See XXIIInd session, 977th meeting, para. 21, quoted supra under article 50.

See document A/6827/Add.2, quoted supra under article 50.

Yugoslavia

See XXIIInd session, 975th meeting, para. 18, quoted supra under part V,
section 2.

SECTION 4 - PROCEDURE

MEMBER STATES

Czechoslovakia

His delegation feared that the general formulation of the rules of procedure to be followed in cases of invalidity ab initio, termination, withdrawal from or suspension of a treaty could give rise to some misunderstanding. The procedure laid down in article 62 would surely not apply to all cases of termination of or withdrawal from a treaty governed by the convention (for instance, under article 51). Article 62 could not be fully applied in case of the invalidity of a treaty under article 50. The proposed procedure placed the party invoking grounds for annulment at a disadvantage and favoured the party responsible for the existence of such grounds. Czechoslovakia therefore proposed that articles 62-64 should be deleted and that separate rules of procedure should be drafted for each case stated in article 62, ensuring that they related directly to the pertinent article. On that basis, the possibility of a general section on procedure might be reconsidered.

(Mr. Smejkal, XXIIInd session, 976th meeting, para. 27)

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It appears that considerable misunderstanding might arise from the general formulation of individual rules of the procedure to be followed in cases of invalidity of the treaty from the very beginning, termination of its validity, withdrawal from or suspension of the operation of a treaty.

The procedure stated in article 62 undoubtedly does not relate to all cases of termination of and withdrawal from a treaty governed by this convention (see, for instance, article 51). This article cannot be fully applied, for instance, in the case of invalidity of a treaty under article 50 either.

The suggested procedure puts the party invoking some of the reasons leading to the cessation of validity of a treaty at disadvantage and is advantageous for the party which brought about the ground for the cessation of validity of a treaty.

Apart from that the provision of article 62, paragraph 5, practically cancels the preceding provision of the same article. In view of that it would be useful to delete the whole section 4 (articles 62, 63 and 64), to formulate the procedure rules individually for each case stated in article 62 and to put them always in direct relationship with the respective article.

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 14))

Netherlands

Throughout the law of treaties were to be found rules that, although indispensable from a technical point of view, were of very unequal importance. They included technical rules, such as articles 62 and 63 on the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty, and the last five articles regarding depositaries, notifications, corrections and registration.

(Mr. Tammes, XXIst session, 903rd meeting, para. 12)

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Part II, section 4 and article 62Nicaragua

... [His delegation]... approved the procedure laid down for invalidating a treaty....

(Mr. Montenegro Medrano, XXIInd session, 978th meeting, para. 10)

Nigeria

See XXIInd session, 978th meeting, para. 12, quoted supra under Comments and observations on the draft articles as a whole; see also ibid., para. 14, quoted supra under article 50.

ARTICLE 62

Procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty

MEMBER STATES

Australia

The question whether any particular rule of international law possessed the juridical status of jus cogens was plainly one which could appropriately be decided by a judicial body. In view of the present division of international opinion, however, the Commission had rejected as impracticable any solution by way of compulsory judicial settlement, although it had proposed a practical solution in draft article 62. His Government intended to study closely the recommendations made by the Commission in that regard.

(Sir Kenneth Bailey, XXIst session, 912th meeting, para. 25)

...the Australian delegation believed that, as the establishment of a treaty régime was the result of mutual consent, the parties should be protected against unilateral arbitrariness in the termination of the treaty. The International Law Commission had been aware of that problem, for it had sought to reduce as far as possible the element of arbitrariness in that area of treaty law. Article 62 provided a number of procedural safeguards designed to protect the parties to a treaty from unilateral action of that kind. Those safeguards, however, were inadequate, for they merely provided that, in case of dispute, reference should be made to Article 33 of the Charter of the United Nations. That Article required the parties to any dispute to seek a solution by peaceful means of their own choice. Since negotiation was one of those means, a party which refused to adopt any other means of settlement would not be failing to comply with article 62. But if the party making the notification provided for in that article adopted an uncompromising attitude, negotiation would place the other party entirely at its mercy. Provision should therefore be made for an arbitration procedure enabling disputes to be settled objectively and in complete independence.

(Sir Kenneth Bailey, XXIIInd session, 981st meeting, para. 12)

Belgium

The Commission... had sought to indicate some procedures for the settlement of the disputes which might arise as to whether a given rule was a peremptory norm of international law. However, the solutions it had proposed amounted essentially to recommending resort to political procedures, which experience had already shown to have a relative value. It was not surprising that the representative of Nigeria had wished to have the conference draw up stricter and more precise procedures, but there was no indication that such a solution might be found soon.

(Mr. Schuurmans, XXIIInd session, 982nd meeting, para. 7)

Bolivia

See XXIInd session, 980th meeting, para. 30, quoted supra under article 61.

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Part V, section 4, article 62

Bulgaria

The procedure provided in article 62 was another way of protecting the stability of treaties and preventing the misuse of the doctrine of rebus sic stantibus.

(Mr. Yankov, XXIIInd session, 979th meeting, para. 6)

See also ibid., para. 3, quoted supra under article 1.

See document A/6827/Add.1, quoted supra under article 2.

Byelorussian Soviet Socialist Republic

See document A/6827/Add.1, quoted supra under Comments and observations on the draft articles as a whole.

Canada

One of the tasks of the conference would be to discover a satisfactory method of applying the principles of international law enunciated in the draft articles to the everyday treaty activities of States. Some of the articles, such as those dealing with peremptory norms of international law and those dealing with the effect of changing circumstances, would possibly call for highly subjective judgements in their application and might give rise to misunderstandings and disputes. It was essential that the convention should contain a provision for effective means of settling such disputes.

... The conference must also consider carefully the relationship between article 62 and a number of other articles and sub-articles, including articles 10 (2) (a), 11 (1) (b), 12 (b), 24, 25, 27 (4), 33 (1) and (2), 39 (1), 53 (1), 56 (1) (a), 56 (2) and 61, all of which required that a fact or facts

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should be "established" before the provision in question took effect. Indeed, article 39 extended that requirement to all the articles in part V of the draft. The concept of establishing a fact or facts, as contemplated by the articles in question, required further definition. It should be specified whether it meant nothing more than the assertion of a given fact by only one party to the treaty or whether it implied some form of objective determination of the fact to be established and, in the latter case, whether the provision of the article concerned would not take effect until the fact in question had been thus determined.

... With respect to the relationship between the provisions of article 62 (3) of the draft, and Article 33 of the United Nations Charter, which itself applied only to disputes likely to endanger international peace and security, it should be made unmistakably clear that article 62 (3) referred to the means indicated in Article 33 of the Charter and that it was not the intention to limit the application of that paragraph to disputes likely to endanger international peace and security. (Mr. Gotlieb, XXIIInd session, 976th meeting, paras. 3, 4 and 6)

Ceylon

...his delegation had no doubt that the Commission had been concerned about such difficulties of interpretation, as could be seen from draft article 62, and it understood the reasons - set forth in paragraph (3) of the commentary to article 62 - why the Commission was reluctant to subject the application of the articles to the compulsory jurisdiction of the International Court of Justice. But article 62, which merely cited the means indicated in Article 33 of the Charter of the United Nations, did not solve the problem. His delegation would be willing to examine the possibility of submitting disputes to the Court, even though the Commission had not considered that approach realistic in the present state of international practice. While, as pointed out in the commentary, it was true that the Vienna Conventions did not provide for recourse to that procedure, there were several recent conventions, notably the International Convention on the Elimination of All Forms of Racial Discrimination, which did subject disputes arising under them to the compulsory jurisdiction of the Court. If agreement could not be reached on such a procedure, perhaps an optional protocol containing similar provisions could be considered.

(Mr. Pinto, XXIIInd session, 969th meeting, para. 12)

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Part V, section 4, article 62China

See XXIIInd session, 976th meeting, para. 31, quoted supra under part V.

See XXIIInd session, 976th meeting, para. 33, quoted supra under article 50.

Cyprus

With regard to article 62, his delegation considered that the methods for resolving disputes should be flexible and that the remedy in each case should be chosen by the parties with reference to the particular circumstances. The Commission had taken the right approach in paragraph 3, which referred to Article 33 of the United Nations Charter; any more specific stipulation might prove unrealistic. (Mr. Jacovides, XXIIInd session, 980th meeting, para. 70)

Czechoslovakia

See XXIIInd session, 976th meeting, para. 27, quoted supra under part V, section 4.

See document A/6827, quoted supra under part V, section 4.

Dahomey

The Commission should, without delay, suggest some juridical means of terminating unjust treaties, the application of which, had been extended to, or even imposed on, former colonies that were currently sovereign States.

(Mr. Adjibade, XXIst session, 912th meeting, para. 10)

Denmark

See document A/6827, quoted supra under article 59.

Finland

In his Government's comments on the final draft articles [see below] attention had been drawn to the fact that, while article 58 stipulated when a contracting party might invoke the impossibility of implementing a treaty and article 59 when a party might invoke a change of circumstances, neither article made any provision for the case in which another party had a different opinion of the question, nor did the draft articles contain any general provision on the settlement of disputes regarding interpretation. According to article 62 (3), however, solutions to those disputes should be sought through the means indicated in Article 33 of the Charter of the United Nations.

His Government considered that the draft articles should include more precise provisions on the settlement of disputes regarding the interpretation of treaties. If it proved impossible to incorporate such provisions in the text, consideration should be given to the preparation of an additional protocol. Otherwise, the interpretation of treaties in the future might easily lead to growing uncertainty as to the validity of existing treaty commitments in the light of the provisions now included in part V of the articles. His Government, for its part, would not object to articles providing that disputes regarding the interpretation of treaties should be dealt with either by means of judicial or arbitral procedures or, in suitable cases, by means of some reliable form of fact-finding. The omission from the draft articles of any such provision had been due to lack of unanimity within the Commission with regard to the provisions needed to settle the issue.

(Mr. Broms, XXIInd session, 980th meeting, paras. 49-50)

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Part V, section 4, article 62

Article 58 stipulates when a contracting party may invoke the impossibility of implementing a treaty and article 59 when a party may invoke a change of circumstances. The above-mentioned articles do not make any provision for the case that another party has a different opinion of the question. Nor does the treaty contain any general provision on the settlement of disagreements regarding the interpretation. If no provision is made in this regard, all the different possibilities to solve disputes provided for in the general international law and, above all, in the United Nations Charter will come into question. A provision, dealing with the order in which different settlement measures should be adopted, might be appropriate. The reason for the omission of provisions concerning settlement measures in the text of the treaty may, however, be the fact that some States, as is well known, do not approve of compulsory settlement of disputes, for instance through arbitration or judicial procedure. In order that as many States as possible may adopt the substantial provisions of the treaty, a separate optional protocol concerning the settlement of disputes could be drafted. This was done for instance in connexion with the Geneva Conventions on the Law of the Sea, 1958, and with the two Vienna Conventions on Diplomatic and Consular Relations, 1961 and 1963, respectively. Apparently the best solution would be, in this case, to adopt the same procedure.

(Note verbale of 11 July 1967 from the Permanent Representative to the United Nations (A/6827, pp. 18-19))

France

In the circumstances, it was to be feared that the abstract formulas of the International Law Commission's text covered misunderstandings which were the more serious as the draft articles offered no method of overcoming them. The Commission had been aware of the need to introduce safeguards, but article 62, where the Commission indicated the procedure to be followed by a party to an international agreement which claimed that the agreement was invalid under the convention on the law of treaties, did nothing to remove the difficulty. The criteria which under part V of the draft articles should govern a judgement as to the possible invalidity

of an international agreement were subjective and their corresponding principles were left unformulated. It might therefore have been expected that the task of identifying those criteria or of formulating those principles would be assigned by the draft articles to an international authority, acting in accordance with a fixed and mandatory procedure. However, on those two points, article 62 did not go beyond a reference to "the means indicated in Article 33 of the Charter of the United Nations". Since the procedures mentioned by that Article made the solution of a dispute a matter of the goodwill of the parties concerned, the question arose whether the treaty would remain in force or its nullity ensue if those procedures should fail. The reply given by the draft articles to so basic a question was ambiguous to say the least, since on the one hand they stipulated that a treaty conflicting with them "is void" and on the other hand there was really no procedure in article 62 which would make it possible to determine the existence of the claimed invalidity. Owing to the differences which had arisen within the International Law Commission, it had not been able either to define in precise and detailed terms the criteria for the invalidity of treaties and the principles of jus cogens to which they must conform, or otherwise to provide for a compulsory procedure that would require States to address themselves to a body responsible for adjudicating the matter; in short, it had recourse to a system which, it was to be feared, might even add to the shakiness of all existing treaty law to the extent that it might encourage any State to invoke the invalidity of any international treaty at any time, without at the same time providing how that State would deal with the inevitable challenge which its initiative would evoke from the other parties to the treaty. It was the view of the French delegation that rather than introduce uncertain innovations, it would be better to rely on the customary process of developing the law of treaties, which had not outlived its usefulness by any means.

(Mr. de Bresson, XXIIInd session, 969th meeting, para. 6)

India

It would also be useful to have suggestions on how the procedure laid down in article 62 could be improved, so as to prevent States from using the convention to evade treaty obligations which they had freely undertaken.

(Mr. Rao, XXIIInd session, 979th meeting, para. 14)

Israel

A great deal of the discussion on article 62 had related to the merits of tying that article in with some system for the compulsory settlement of disputes. In that connexion, his delegation considered that the Commission had probably been right in not going beyond Article 33 of the United Nations Charter in its codification of the law of treaties, and in leaving the question of Article 33 to other bodies, notably the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. However, there was a second aspect of article 62 which seemed to his delegation to be of greater long-term significance. In paragraph (2) of its commentary on the article, the Commission drew attention to the necessity of achieving a perfectly fair balance between what it called the objecting State and the claimant State - terms which might not be quite appropriate to describe the relationship between the two States concerned, but which he would use as a matter of convenience. Nevertheless, the question arose whether, when article 62 was read closely and in direct connexion with the various substantive articles dealing with the invalidity and the termination of treaties, that balance was always fairly maintained. His delegation doubted whether that was so. In some cases, it seemed that the so-called claimant State might actually be placed at a very unfair disadvantage. Article 62, and probably the substantive articles also, needed to be very closely re-examined from that point of view.

(Mr. Rosenne, XXIIInd session, 974th meeting, para. 15)

Japan

His delegation believed that further efforts should be made to designate or establish a body invested with the standing competence to settle such disputes as were not solved within the regional framework provided for in article 62, i.e. through diplomatic negotiations or by some other peaceful means. What made that procedure indispensable was the fact that the successful application of many of the provisions in the draft articles depended upon an objective interpretation of certain

concepts. ... In its comment on the draft articles [see below] the Japanese Government had indicated many articles that required an objective interpretation, and it had suggested that the establishment of an interpretative body might be based on Article 29 of the Statute of the International Court of Justice.

(Mr. Togo, XXIInd session, 981st meeting, para. 37)

Not a few provisions of the draft articles contain, as is admitted by the commentary by the International Law Commission, certain concepts which may cause disputes in their application. (For example, "the object and purpose of the treaty" in articles 16, 17, 27, 37, 55 and 57, "a peremptory norm of general international law" in articles 50 and 61 and "an essential basis" and "radically to transform" in article 59.)

It is desirable, therefore, to designate or establish a body (taking advantage of article 29 of the Statute of the International Court of Justice, to cite an example) which is invested with standing competence to pass objective and purely legal judgements upon such disputes when they have not been solved through diplomatic negotiations or some other peaceful means. Article 62, paragraph 3, seems to be insufficient to secure such legal judgements.

(Note verbale of 19 July 1967, from the Permanent Representative to the United Nations (A/6827 and Corr.1, p. 20))

Libya

...the rules of procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty had been amply and clearly laid down in article 62, which would undoubtedly help in minimizing the danger of disputes between States parties to a treaty.

(Mr. El Saadek, XXIInd session, 980th meeting, para. 24)

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Part V, section 4, article 62

Netherlands

See XXIst session, 903rd meeting, para. 12, quoted supra under part V, section 4.

His delegation fully agreed with the Commission that the law of treaties should be given a hard objective core as a brake on arbitrary conduct. In municipal law, the principle of good faith was a well-defined concept, indicating clearly the rules of conduct to be followed by the contracting parties. However, what made it possible for the principle of good faith, in municipal law, to play its preponderant part in the law of contracts was the fact there was an independent and objective authority which interpreted the law; moreover, many concepts which in themselves were not clear, such as error or fraud, could only gain significance as regulative factors if the ultimate decision on their meaning was in the hands of an impartial and independent authority.

His delegation therefore regretted the inadequacy of article 62; some notions which at the moment seemed unclear and ambiguous and consequently raised doubts as to the desirability of their being codified became fully acceptable as soon as it was clear that the interpretation of them would not be left to the parties concerned but would be entrusted to an independent organ of the community of States. Article 62, by simply referring to Article 33 of the United Nations Charter, did not provide any guarantee that the applicability of the provisions on the nullity, termination and suspension of treaties would not be decided upon unilaterally by a contracting party. A decision to provide independent adjudication would in no way encroach upon the principle of sovereignty; that principle would merely be brought under the rule of law, which was the necessary presupposition for the exercise of sovereignty. In that connexion, he referred to paragraph 5 of the consensus text on the principle concerning the peaceful settlement of disputes agreed upon by the 1966 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States and to the statement made by the Chairman of the Drafting Committee. The United Kingdom suggestion correctly combined those

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statements as follows: recourse to, or acceptance of, a settlement procedure freely agreed to by the parties with respect to existing or future disputes should not be regarded as incompatible with sovereign equality.

(Mr. Kooijmans, XXIIInd session, 977th meeting, paras. 3-4)

See also ibid., para. 5, quoted supra under part V.

Nigeria

Fears had been expressed that article 59 dealing with the theory of rebus sic stantibus might in practice be used as a weapon to attack the integrity of treaties, because of the subjective element and the possibility of unilateral action lurking in that doctrine. Since that article appeared in part V, section 3, dealing with the termination and suspension of the operation of treaties, thought should be given to the possibility of working out, under article 62, procedural guarantees for the application of article 59.

(Mr. Ogundere, XXIIInd session, 978th meeting, para. 13)

Pakistan

The necessity of establishing a world order on a legal basis was not a new concept; but a way must be found to translate into action the principles of the law of treaties formulated by the International Law Commission. Those principles, moreover, should be so framed as to avoid any conflict. The settlement of conflicts should be based on reciprocity, i.e., on compliance, to the extent that others conformed, or were expected to conform, with the basic legal norms. A useful legal system must contain ready answers to any complicated matters in dispute or simple rules for obtaining such answers. But without a spirit of compromise, conflicts between States could not be settled by any fixed rule.

(Mr. Huda, XXIst session, 911th meeting, para. 19)

Part V, section 4, article 62

He would like... to stress the importance of objective interpretation in respect of all the draft articles and the necessity for compulsory adjudication of disputes arising out of their application. The provisions of article 62 (3), which obliged parties in dispute to seek a solution through the means indicated in Article 33 of the United Nations Charter, appeared insufficient.

(Mr. Sobhan, XXIIInd session, 980th meeting, para. 38)

Peru

There was... the case of treaties that provided for and aimed at the settlement of conflicts; and, more particularly, there was the case where an act of violence associated with a conflict was not clearly unilateral, and it was necessary to determine which party was responsible. When the Inter-American Treaty of Reciprocal Assistance was being drafted, the United States had proposed a text whereby that determination would have taken the form of a sort of judgement. Peru, Venezuela, Argentina and Brazil had then proposed an amendment whereby the Contracting Parties, meeting in consultation, would call upon the contending States to suspend hostilities and restore matters to the status quo ante bellum. Rejection of the pacifying action would be considered in determining which party was the aggressor. That amendment had been incorporated in article 7 of the Inter-American Treaty of Reciprocal Assistance and was just as valid and relevant today as it had been then.

(Mr. Belaunde, XXIst session, 907th meeting, para. 30)

Poland

The rules concerning invalidity of treaties (part V, section 2) should be respected, but if there was any conflict between an international agreement and those rules a settlement should not, in principle, depend on the State alleging the invalidity of the agreement but on the agencies and arrangements referred to in Article 33 of the United Nations Charter. That was a very important factor in

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the objectivity of international law. In the view of his delegation, article 62 of the draft articles on the law of treaties simply assimilated disputes arising in the field involved to those referred to in Article 33 of the Charter, and there would be no justification for applying to them any procedure other than that specified in that Charter provision. In any event, the Commission had been correct in not asserting that recourse must be had to the compulsory jurisdiction of the International Court of Justice, which, apart from anything else, would have complicated the problem, since many States did not accept compulsory jurisdiction. (Mr. Osiecki, XXIIInd session, 977th meeting, para. 11)

Romania

The procedure laid down in article 62 was in accord with the general principle of the pacific settlement of international disputes, which, as formulated by the 1966 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States in its report, endorsed the free choice of means and respect for State sovereignty and equality.

(Mr. Secarin, XXIIInd session, 976th meeting, para. 43)

Sweden

See XXIIInd session, 980th meeting, para. 15, quoted supra under article 50.

Turkey

His delegation noted that new conceptions, such as were to be found in the more developed systems of municipal law, had been introduced into the draft; that was a desirable step, and his delegation welcomed it. However, to ensure the continuity and stability of a given juridical order without preventing its possible development no new element should be introduced unless it was accompanied by its

Part V, section 4, article 62

counterpart. In that connexion, he referred to articles 50 and 59, which dealt respectively with treaties conflicting with a peremptory norm of general international law and treaties in respect of which there occurred a fundamental change of circumstances. In both cases, the draft provided, in article 62, paragraph 3, that if objection was raised, the parties should seek a solution through the means indicated in Article 33 of the Charter, but it did not impose any compulsory judicial procedure. The result was an obvious lack of balance, and his delegation found it difficult to accept the solution which the Commission had adopted in the matter.

(Mr. Bilge, XXIst session, 907th meeting, para. 16)

See XXIIInd session, 980th meeting, paras. 19-20, quoted supra under article 50.

Union of Soviet Socialist Republics

See XXIIInd session, 971st meeting, para. 7, quoted supra under Comments and observations on the draft articles as a whole.

Attention should also be given to draft article 62, which establishes specific guarantees against the arbitrary termination of international treaties.

(Note verbale of 21 July 1967 from the Permanent Mission to the United Nations (A/6827, p. 25))

United Arab Republic

See XXIst session, 911th meeting, para. 25, quoted supra under Comments and observations on the draft articles as a whole.

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United Kingdom

...as to the question of the means by which the convention would be interpreted - unilateral interpretation or objective and independent means of interpretation - while his delegation did not say that the only possible solution was that matters of interpretation should be adjudicated on a compulsory basis, in the last resort, by the International Court of Justice, it considered that the success of the conference would be jeopardized if some means of objective and independent interpretation was not laid down in the convention.

(Mr. Darwin, XXIIInd session, 967th meeting, para. 5)

United States of America

...the main weakness of the draft... was that it pointed to a good many ways of beginning arguments over the validity of a treaty without indicating any sure methods of settling such arguments. Article 62 did not provide any real safeguard against the possibility of abuse, it merely referred to Article 33 of the Charter, under which the parties must settle their disputes by peaceful means. A party not entitled to terminate a treaty could nevertheless do so, and Article 33 of the Charter did not provide any secure methods of protecting the other party against such an illegal action. The procedural safeguards laid down in article 62 did not provide any real protection, and a convention on the law of treaties would have to provide for recourse to some mandatory means for the impartial settlement of disputes. Article 62 should enable the parties to select the method of settlement most likely to resolve the questions at issue, but it must do so in such a way that a party to a dispute should not be able to refuse settlement of the dispute and, at the same time, be left free to take unilateral action with respect to the treaty.

(Mr. Kearney, XXIIInd session, 977th meeting, para. 22)

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Part V, section 4, article 62

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

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

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

(Note verbale of 2 October 1967 from the Permanent Representative to the United Nations (A/6827/Add.2, pp. 10-12))

Uruguay

As to the procedure to be followed under article 62 of the draft articles in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty, Uruguay, true to the principle of mandatory legal settlement, hoped that a formula would be found at the 1968 conference on the law of treaties which would stipulate compulsory recourse to the International Court of Justice, as the only guarantee of the proper application of the law of treaties.

(Mr. Ciasullo, XXIIInd session, 971st meeting, para. 4)

ARTICLE 63

Instruments for declaring invalid, terminating, withdrawing from
or suspending the operation of a treaty

MEMBER STATES

Czechoslovakia

See XXIIInd session, 976th meeting, para. 27, quoted supra under part V, section 4.

Part V, section 4, articles 63 and 64

See document A/6827, quoted supra under part V, section 4.

Netherlands

See XXIst session, 903rd meeting, para. 12, quoted supra under part V, section 4.

ARTICLE 64

Revocation of notifications and instruments provided for
in articles 62 and 63

MEMBER STATES

Czechoslovakia

See XXIIInd session, 976th meeting, para. 27, quoted supra under part V, section 4.

See document A/6827, quoted supra under part V, section 4.

SECTION 5 - CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION
OF THE OPERATION OF A TREATY

ARTICLE 65

Consequences of the invalidity of a treaty

MEMBER STATES

Japan

Since articles 46 and 47 should be deleted, there is no necessity for referring to them in... paragraph 3 of article 65. "46, 47", should, therefore, be deleted in that paragraph.

(Note verbale of 19 July 1967 from the Permanent Representative to the United Nations (A/6827 and Corr.1, p. 22))

Netherlands

See XXIIInd session, 977th meeting, para. 5, quoted supra under part V.

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Part V, section 5, articles 66
and 67

ARTICLE 66

Consequences of the termination of a treaty

MEMBER STATES

Czechoslovakia

It is desirable to apply the provision contained in ... article [66] also to those cases where the treaty enters into force provisionally under article 22 and that provisional validity expires without the treaty having entered into force definitively under article 21.

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 14))

ARTICLE 67

Consequences of the nullity or termination of a treaty conflicting
with a peremptory norm of general international law

MEMBER STATES

Australia

See XXIst session, 912th meeting, paras. 21-24, quoted supra under article 50.

Austria

See XXIst session, 911th meeting, paras. 6-14, quoted supra under article 50.

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Hungary

See XXIIInd session, 978th meeting, para. 6, quoted supra under article 61.

Netherlands

See XXIIInd session, 977th meeting, para. 5, quoted supra under part V.

Philippines

See XXIst session, 913th meeting, para. 23, quoted supra under article 50.

Union of Soviet Socialist Republics

See XXIst session, 910th meeting, para. 18, quoted supra under Comments and observations on the draft articles as a whole.

ARTICLE 68

Consequences of the suspension of the operation of a treaty

(No comments relating specifically to this article.)

Part VI, article 69

PART VI - MISCELLANEOUS PROVISIONS

ARTICLE 69

Cases of State succession and State responsibility

MEMBER STATES

Australia

The International Law Commission had had to tackle some extremely complex problems, and it was understandable that it should have decided not to deal with certain aspects of treaty law, for the study of which, as noted in its report, it had made special arrangements.

(Sir Kenneth Bailey, XXIIInd session, 981st meeting, para. 10)

Bolivia

His country shared the concern expressed in the Commission by the representatives of newly independent countries with regard to article 69, and hoped that some way could be found to allay their misgivings. It was encouraging to note in that connexion that in paragraph 3 of its commentary on that article the Commission had stated that the reservation regarding cases of a succession of States was formulated in entirely general terms and should not appear to prejudice any of the questions of principle that might arise.

(Mr. Terceros Banzer, XXIst session, 909th meeting, para. 30)

Bulgaria

Together with other delegations, particularly those from Africa, he also regretted that the Commission had not found it possible to elaborate appropriate

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provisions concerning the succession of States in respect of treaties and to provide more explicit legal means for the termination of unequal treaties left over from the era of colonial domination.

(Mr. Yankov, XXIst session, 910th meeting, para. 8)

Cameroon

His delegation regretted... that the draft was incomplete and, in particular, that it contained no provisions on State succession, a question of the greatest concern to the new nations. It must not be forgotten, however, that the draft before the Committee was merely intended to serve as a basis for a convention on the law of treaties.

(Mr. Engo, XXIst session, 908th meeting, para. 19)

Canada

See XXIIInd session, 976th meeting, para. 6, quoted supra under article 5.

Congo (Democratic Republic of)

...he expressed regret that the Commission had not seen fit to include in its draft articles two topics which his delegation considered of particular importance: the question of the succession of States and Governments and that of the international responsibility of a State with respect to a failure to perform a treaty obligation. He also regretted the absence of any provision concerning the sanctions to be applied in the case of the non-performance of treaty obligations concluded on the basis of the future law of treaties.

(Mr. Mutuale, XXIst session, 909th meeting, para. 39)

Cyprus

See XXIst session, 910th meeting, para. 43, quoted supra under article 1.

Dahomey

His delegation... regretted the omission of any provision relating to the succession of States and Governments and the responsibility of States with regard to the non-fulfilment of treaty obligations. It was to be hoped that the Commission would consider both subjects at its next session, particularly the former, which was of special interest to his country.

(Mr. Adjibade, XXIst session, 912th meeting, para. 10)

Ghana

His delegation... was particularly disturbed by the absence of any provisions on the succession of States and Governments, as were doubtless also the delegations of all other newly independent countries, which were presumed to have accepted obligations under treaties concluded on their behalf by the former metropolitan Powers, often against the interests of those countries.

(Mr. Van Lare, XXIst session, 905th meeting, para. 11)

India

See XXIIInd session, 979th meeting, para. 10, quoted supra under article 1.

Iran

...the omission from the draft articles of provisions relating to the succession of States and State responsibility with respect to failure to perform

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a treaty obligation was regrettable, for those two questions were closely bound up with the general concept of contractual obligations between States. His delegation was glad that at least they were included in the proposed provisional agenda for the next session of the International Law Commission.

(Mr. Fartash, XXIst session, 913th meeting, para. 25)

Jamaica

His delegation hoped that the International Law Commission would soon find it possible to include in its agenda the topics to which his Government had drawn its attention, namely, State succession and the status of individuals in the law of treaties.

(Mr. Rowe, XXIst session, 905th meeting, para. 15)

Kuwait

See XXIst session, 911th meeting, para. 39, quoted supra under article 1.

Liberia

See XXIst session, 912th meeting, para. 3, quoted supra under article 60.

Nigeria

His delegation was disappointed to find in the draft articles no provisions concerning the succession of States and Governments in respect of treaties. It appreciated the reasons for the decision to postpone consideration of that subject, but it hoped that the Commission would give the matter due attention at its next session.

(Mr. Ogundere, XXIst session, 904th meeting, para. 12)

Part VI, article 69

Pakistan

The problems posed by the emergence of new nations, their needs and their development had to be taken into account, as several delegations, including that of Nigeria, had emphasized in requesting, inter alia, that the draft articles should be completed by provisions concerning the succession of States.

(Mr. Huda, XXIst session, 911th meeting, para. 16)

Philippines

The Commission had been wise not to include in the draft articles provisions concerning State responsibility and State succession in respect of treaties, the consequences of aggression so far as concerned the treaties of an aggressor State, the most-favoured-nation clause and the effect on treaties of the outbreak of hostilities.

Mr. Espejo, XXIIInd session, 981st meeting, para. 19)

Romania

See XXIIInd session, 976th meeting, para. 39, quoted supra under article 1.

Sierra Leone

See XXIst session, 911th meeting, para. 46, quoted supra under article 1.

Sudan

Mr. Abdulla observed that under the rules of international law prevailing before the United Nations era the consent of dependent countries, which were to become new States in the future, could not be accepted. Those countries had found

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themselves committed to treaties and conventions concluded without regard to their will or interests. His delegation believed that the draft articles or additional articles should provide means of wiping out all vestiges of the treaties imposed upon the new States before independence and should create safeguards to prevent their recurrence. Otherwise a country whose economy had been crippled by the former dominating Power might continue to be bound by such treaties, to the detriment of its interests and development. The problem of State succession was thus of crucial importance, as was made clear by the report before the Committee. His delegation hoped that a statement on the subject would be added to the draft articles, in keeping with the request of several delegations, including those of Cameroon, Ghana and Nigeria, so as to protect the rights of the currently dependent peoples.

(Mr. Abdulla, XXIst session, 913th meeting, para. 30)

Sweden

He wished [to comment] on two matters that were not covered by the draft articles. The first was succession in respect of treaties; it was gratifying to note that the International Law Commission had embarked on a study of the topic, as its conclusions would form an important complement to the draft convention on the law of treaties....

(Mr. Blix, XXIInd session, 980th meeting, para. 8)

Tunisia

[His delegation] would have preferred to have the draft include provisions on State succession and on the most-favoured-nation clause, the latter of which was of great importance in relations between States and helped to eliminate many instances of discrimination.

(Mr. Ben Aissa, XXIst session, 913th meeting, para. 39)

Part VI, article 69

As for the general economy of the draft, his delegation would have liked the text to include some provisions concerning the most-favoured-nation clause - which now played a very important role in relations between States and helped to eliminate many types of discrimination - the succession of States in respect of treaties, and the international responsibility of a State with respect to a failure to perform a treaty obligation.

(Mr. Gastli, XXIIInd session, 981st meeting, para. 2)

Turkey

Certain questions relating to both the succession of States and the international responsibility of States had also been excluded. Aware, in particular, of the imperative needs of the younger States, his delegation hoped that those questions would be settled as soon as possible.

(Mr. Bilge, XXIst session, 907th meeting, para. 17)

Uganda

See XXIst session, 910th meeting, para. 2, quoted supra under article 32.

Union of Soviet Socialist Republics

See XXIst session, 910th meeting, para. 18, quoted supra under Comments and observations on the draft articles as a whole.

His delegation supported the representatives of the African and Asian countries in their view that when the convention on the law of treaties was drafted the topic of State succession should be given serious consideration and that legal rules should be drawn up to protect the interests of the developing countries.

(Mr. Khlestov, XXIst session, 910th meeting, para. 31)

United Arab Republic

His delegation understood the considerations which had led the Commission to decide against the inclusion in its draft articles of provisions that would have required an exhaustive study of questions, such as those of the responsibility of States, State succession or the effects of hostilities. He hoped, nevertheless, as several delegations had already urged, among them those of Ghana and Nigeria, that the Commission would examine the rules governing State succession without delay.

(Mr. El-Erian, XXIst session, 911th meeting, para. 22)

United Republic of Tanzania

See XXIst session, 912th meeting, para. 45, quoted supra under article 1.

Yugoslavia

As to State succession and State responsibility, it was... regrettable that more specific solutions had not been proposed, and it was to be hoped that the omissions could be remedied.

(Mr. Sahovic, XXIst session, 907th meeting, para. 23)

Zambia

His delegation... considered that the Commission should have included in its draft articles concerning the succession of States and Governments. Since the Commission had promised to take up the subject later, his delegation could only hope that when that time came careful consideration would be given to the topic. His Government would give the greatest possible encouragement and support to the Commission's work.

(Mr. Chipampata, XXIst session, 912th meeting, para. 17)

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Part VI, article 70

ARTICLE 70

Case of an aggressor State

MEMBER STATES

Byelorussian Soviet Socialist Republic

The Byelorussian SSR... considered article 70 of the draft articles, concerning aggressor States, to be a positive contribution to the development of international law.

(Mr. Stankevich, XXIst session, 908th meeting, para. 17)

See document A/6827/Add.1 quoted supra under Comments and observations on the draft articles as a whole.

Hungary

His delegation attached great importance to article 70 which laid down the principle of the responsibility of the aggressor State and which had a special echo in the present international situation.

(Mr. Prandler, XXIIInd session, 978th meeting, para. 7)

Libya

His delegation especially welcomed the provisions of article 70 concerning an aggressor State.

(Mr. El Sadek, XXIIInd session, 980th meeting, para. 25)

Netherlands

See XXIst session, 903rd meeting, para. 16, quoted supra under article 26.

Philippines

See XXIIInd session, 981st meeting, para. 19, quoted supra under article 69.

Ukrainian Soviet Socialist Republic

Further clarification [with respect to article 49] was provided by article 70, which stated that the provisions of the draft articles were without prejudice to any obligation in relation to a treaty which might arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression.

(Mr. Yakimenko, XXIst session, 905th meeting, para. 4)

Union of Soviet Socialist Republics

International law established some exceptions to the rule that consent was required for a State to be bound by a treaty; one such exception concerned treaties imposing obligations on an aggressor State guilty of the initiation and conduct of aggressive war. In that connexion, draft article 70 was particularly important. An example was the Potsdam Agreements, in which the signatories undertook to establish the measures necessary to assure that Germany would never again threaten its neighbours or the peace of the world, and which at the same time imposed corresponding obligations on Germany itself.

(Mr. Khlestov, XXIst session, 910th meeting, para. 27)

See also ibid. para. 18, quoted supra under Comments and observations on the draft articles as a whole.

Part VI, article 70

See XXIIInd session, 971st meeting, para. 7, quoted supra under Comments and observations on the draft articles as a whole.

Draft article 70, which confirms the principle of responsibility under international law in respect of aggression, is also of great importance.

(Note verbale of 21 July 1967 from the Permanent Mission to the United Nations (A/6827, p. 25))

PART VII - DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

MEMBER STATES

France

See XXIIInd session, 969th meeting, para. 2, quoted supra under Comments and observations on the draft articles as a whole.

Netherlands

See XXIst session, 903rd meeting, para. 12, quoted supra under part V, section 4.

SPECIALIZED AGENCIES

Food and Agriculture Organization of the United Nations

The exercise of the depositary functions of FAO is governed by article XIV-7 of the Constitution, rule XXI-3 of the General Rules of the Organization, and paragraph 17 of the Principles and Procedures governing Conventions and Agreements. To the extent that these provisions cover the same ground as... articles [71 to 75] on the law of treaties, they are in harmony with those articles. (Letter of 7 July 1967 from the Legal Counsel of the Food and Agriculture Organization of the United Nations (A/6827/Add.1, p. 26))

Part VII and article 71

International Telecommunication Union

It is the custom in the case of ITU conferences held outside Switzerland for the texts of the convention or agreement to be deposited with the host Government. In the case of conferences held in Switzerland, however, the texts are deposited with the ITU Secretary-General. In most cases, it is provided that ratifications, accessions, notifications, etc. shall be communicated to the ITU Secretary-General, either direct or by the diplomatic channel through the intermediary of the Government of the country of the seat of the Union. The Secretary-General is charged with the duty of informing the Members. In the few cases where communications are to be made to the depositary Government it is provided that that Government shall inform all parties and the ITU Secretary-General.

It has not been the custom formally to register each ITU treaty with the Secretariat of the United Nations after it has been agreed. Mention of them is made, however, in the answers to a questionnaire for the United Nations Juridical Yearbook received every year from the United Nations Secretariat.

The ITU treaties are published in accordance with ITU rules.

(Letter of 24 July 1967 from the Secretary-General ad interim of the International Telecommunication Union (A/6827/Add.1, p. 41))

ARTICLE 71

Depositaries of treaties

MEMBER STATES

Hungary

With regard to article 71 concerning the depositaries of treaties, it was glad to support the amendment proposed by the International Atomic Energy Agency [see below] which took into account the recent practice of having several depositaries.

(Mr. Prandler, XXIIInd session, 978th meeting, para. 7)

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Israel

See XXIInd session, 974th meeting, para. 13, quoted supra under article 2.

SECRETARY-GENERAL OF THE UNITED NATIONS

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

(A/6827/Add.1, p. 17)

INTERNATIONAL ATOMIC ENERGY AGENCY

Some recent treaties such as the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water, and the Treaty on Outer Space provide for several depositaries instead of the traditional one depositary. If it would seem desirable to take account of this novel practice in international law, article 71 "Depositaries and treaties" could read as follows:

1. The depositary or depositaries of a treaty, which may be one or several States or an international organization, shall be designated by the negotiating States in the treaty or in some other manner.
2. Unchanged.

(Letter of 26 June 1967 from the Director of the Legal Division of the International Atomic Energy Agency (A/6827/Add.1, p. 44))

Part VII, article 72

ARTICLE 72

Functions of depositaries

MEMBER STATES

Czechoslovakia

The term "State entitled to become party to the treaty" does not include the States that have already become parties to the treaty. It would be useful, therefore, to use a more accurate terminology in that respect.

The provision contained in paragraph 1 (d) of article 72 would enable a depositary to express judgement even upon questions the consideration of which belongs exclusively to States that are parties to the treaty. It is recommended that the provision be formulated in a way making it clear that the depositary's function consists merely in informing the respective States of facts stated in the said article without advising them of its own position in respect of the merits of those facts.

The meaning of the term "States in question" is not quite clear either; it was used in paragraph 1 (d) and the doubt concerns particularly the question of whether it includes the same group of States as those under letters (b), (e) and (f).

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 14))

SECRETARY-GENERAL OF THE UNITED NATIONS

See document A/6827/Add.1, quoted supra under articles 15 and 71.

SPECIALIZED AGENCIES

Food and Agriculture Organization of the United Nations

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

(Letter of 7 July 1967 from the Legal Counsel of the Food and Agriculture Organization of the United Nations (A/6827/Add.1, p. 26))

ARTICLE 73

Notifications and communications

(No comments relating specifically to this article.)

ARTICLE 74

Correction of errors in texts or in certified copies of treaties

MEMBER STATES

Czechoslovakia

The provision contained in paragraph 2 (c) of article 74 does not solve the complete procedure in case the depositary was advised of the objections against the suggested correction. It is proposed that the possibility be considered to

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Part VII, articles 74 and 75

amend the provision in respect of the procedure to be followed after the depositary transmits the objections to States that are parties to the treaty.

(Note verbale of 15 August 1967 from the Chargé d'Affaires ad interim to the United Nations (A/6827, p. 15))

SECRETARY-GENERAL OF THE UNITED NATIONS

In connexion with paragraph 2 (a) of article 74, it may be pointed out that the practice of the Secretary-General is to notify all States entitled to become parties (including, of course, the contracting States as well) of a proposal to correct an error, rather than simply "the contracting States". It is noted that this practice is not excluded by the present wording.

(A/6827/Add.1, p. 18)

ARTICLE 75

Registration and publication of treaties

MEMBER STATES

Byelorussian Soviet Socialist Republic

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

(Note verbale of 29 August 1967 from the Permanent Mission to the United Nations (A/6827/Add.1, p. 8))

China

While article 75 indicated that the registration of treaties was mandatory, there was no provision for the enforcement of that rule. In view of the popular feeling against secret diplomacy, from which his country had suffered considerably during the past 100 years, his Government felt strongly that some remedy similar to that contained in Article 102, paragraph 2, of the United Nations Charter should be incorporated in article 75.

(Mr. Chen, XXIInd session, 976th meeting, para. 35)

Venezuela

With respect to article 75 on the registration and publication of treaties, he criticized the Spanish version of the initial words in that article which read: "Los tratados celebrados por las partes en los presentes artículos"; those words seemed to give the impression that treaties were being entered into in the draft articles themselves.

(Mr. Molina, XXIst session, 914th meeting, para. 8)

SPECIALIZED AGENCIES

Food and Agriculture Organization of the United Nations

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

(Letter of 7 July 1967 from the Legal Counsel of the Food and Agriculture Organization of the United Nations (A/6827/Add.1, p. 26))

See also document A/6827/Add.1, quoted supra under part VII.