MONGOLIA

35. 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. That was a matter of particular concern to Mongolia, for the 1921 Agreement on the Establishment of Friendly Relations between Mongolia and Soviet Russia, the forty-fifth anniversary of which would be soon celebrated and under which the U.S.S.R. had renounced the privileges that Czarist Russia had acquired over Mongolia by force, had been the first treaty between a great and a small Power in which the rights of the parties and their mutual independence had been respected, thus opening a new era in inter-State relations. [74]

SIERRA LEONE

45. Articles 45-49 stated that fraud, error, corruption or coercion vitiated 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. [75]

UNITED ARAB REPUBLIC

27. 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.

74. 911th meeting, paragraph 35, A/C. 6/SR.911, p. 62
75. 911th meeting, paragraph 45, A/C. 6/SR.911, pp. 61-62.

The same remark applied, incidentally, to the retroactivity of the provisions of article 50 (*jus cogens*).[76]

II. WRITTEN COMMENTS OF GOVERNMENTS 1967

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 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. [77]

III. COMMENTS IN THE SIXTH COMMITTEE 1967

IRAQ

There was a basic misunderstanding over the I.L.C.'s approach to the question of rules forming part of *jus cogens*, The I.L.C. had been asked to prepare a draft 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*, 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 I.L.C. had drawn the inevitable conclusions from the existence of such peremptory rules, and had given an affirmative answer to the question whether there were rules of international law from which States could not

76. 911th meeting, paragraph 27, A/C.6/SR 911, pp. 60-61.
77. A/6827/Add. 1 of 27th September, 1967.

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 in the rule prohibiting slavery and that outlawing the use of force. The I.L.C. 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 a theoretical point of general international law and had no place on the law of treaties. [78]

CEYLON

Some of the draft articles dealt with very complex questions and, as drafted, would leave too much uncertainty to gain general acceptance. With regard to article 50, the international community was insufficiently developed for the concept of peremptory norms 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 would be determined whether a peremptory norm existed. In any event, ascertainment, for the purpose of draft article 61, of the establishment of such a norm was never likely to be a single matter. [79]

Article 55

OBSERVATIONS IN THE SIXTH COMMITTEE

GHANA

13. Article 55 was a bold but perhaps dangerous step

78. A/C. 6/SR 697, 16th October, 1967, pp. 5-6.
79. A/C. 6/SR 969, 17th October, 1969, p. 6.

on the part of the Commission, as it did not seem possible to rely on the practice of States on that matter. [80]

Article 57

I. OBSERVATIONS IN THE SIXTH COMMITTEE 1966

PAKISTAN See Article 23 above.

II. COMMENTS IN THE SIXTH COMMITTEE 1967

CEYLON

Some of the draft articles dealt with very complex questions and, as drafted would leave too much uncertainty to gain general acceptance. In connexion with article 57, it would often be difficult to determine whether the breach of treaty was "material" or not. [81]

Article 58

OBSERVATIONS IN THE SIXTH COMMITTEE

PAKISTAN See Article 23 above.

Article 59

I. OBSERVATIONS IN THE SIXTH COMMITTEE

JAPAN See Article 45 above.

PAKISTAN See Article 23 above.

TURKEY

16. It 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

80. 905th meeting, 1966, paragraph 13, A/C.6/SR.805 p. 24.
81. A/C.6/SR. 969, 17th October, 1967, p. 6.

and it 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 counterpart. In that connexion they referred to articles 50 and 59. 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 Turkey found it difficult to accept the solution which the Commission had adopted in the matter. [82]

CEYLON

Some of the draft articles dealt with very complex questions and, as drafted, would leave too much uncertainty to gain general acceptance. The idea of a "fundamental change of circumstances" referred to in article 59 was bound to present difficulties of interpretation. [83]

II. WRITTEN COMMENTS OF GOVERNMENTS 1967

AFGHANISTAN

The Government of Afghanistan supports the formulation of this article, with the understanding that in conformity with *rebus sic stantibus*, any treaty may become inapplicable through a fundamental change of circumstances. 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. [84]

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82. 907th Meeting, 1966, paragraph 16, A/C.6/SR.907, p. 33.

83. A/C.6/SR.969, 17th October, 1967, p. 6.

84. A/6827/Add. 1 of 27th September, 1967, p. 4.

Article 61

OBSERVATIONS IN THE SIXTH COMMITTEE

CEYLON : See General above.

IRAQ : See Article 50 above.

PHILIPPINES : See Article 50 above.

Article 62

I. OBSERVATIONS IN THE SIXTH COMMITTEE

JAPAN : See Article 45 above.

TURKEY : See Article 59 above.

UNITED ARAB REPUBLIC : See Article 26 above.

CEYLON

It had no doubt that the Commission had been concerned about 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 draft article 62, which merely cited the means indicated in Article 33 of the Charter of the United Nations, did not solve the problem. Ceylon would be willing to examine the possibility of submitting disputes to the Court, even if that was not realistic in the present state of international practice. While, as pointed out in the commentary, it was true that the Vienna Convention 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. [85]

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85. A/C.6/SR.969, 17th October 1967, p. 7.

II. WRITTEN COMMENTS OF GOVERNMENTS, 1967

JAPAN

Not a few provisions of the draft articles contain, as is admitted in 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 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. [86]

Article 65

WRITTEN COMMENTS OF GOVERNMENTS, 1967

JAPAN

Since articles 46 and 47 should be deleted, there is no necessity for referring to them, in this paragraph. "46, 47" should, therefore, be deleted. [87]

Article 67

OBSERVATIONS IN THE SIXTH COMMITTEE

PHILIPPINES : See Article 50 above.

86. A/6827 of 31st August 1967, p. 20 read with A/6827/Corr. 1, of 6th October 1967.

87. A/6827 of 31st August 1967, p. 22.

Article 69

OBSERVATIONS IN THE SIXTH COMMITTEE

AFGHANISTAN

9. It hoped that at its next session the I. L. C. would give priority to the question of the succession of States and Governments which was very important to all States, particularly the newly independent ones. [88]

ALGERIA

They hoped that the question of State Succession would be included in the agenda for the next session. [89]

CAMEROON : See General above.
CONGO : See General above.
DAHOMEY : See General above.
IRAN : See General above.
IRAQ : See General above.

KENYA

It hoped that the Commission could examine without delay the question of the succession of States and Governments which was of particular importance to Kenya and to all other States that had recently achieved independence. [90]

KUWAIT : See General above.
LIBERIA : See General above.
MALI : See General above.
NIGERIA : See General above.
PAKISTAN : See General above.
SIERRA LEONE : See General above

88. 917th Meeting, 1966, paragraph 9, A/C.6/SR.917, p. 98.
89. 908th Meeting, 1966, paragraph 35, A/C.6/SR.908, p. 42.
90. 913th Meeting, 1966, paragraph 33, A/C.6/SR. 913, p. 77.

SUDAN

30. 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 themselves committed to treaties and conventions concluded without regard to their will or interests. They 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 (See A/6309) before the Committee. They hoped that a statement of the subject would be added to the draft articles in keeping with the request of several delegations so as to protect the rights of the currently dependent peoples. [91]

TUNISIA : See General above.

TURKEY : See General above.

UGANDA : See General above.

UNITED ARAB REPUBLIC : See General above.

UNITED REPUBLIC OF TANZANIA : See General above.

ZAMBIA : See General above.

Article 70

OBSERVATIONS IN THE SIXTH COMMITTEE

JAPAN : See Article 45 above.

91. 913th Meeting, 1966, paragraph 31, A/C.6/SR.913, p. 77.

(IV) DISCUSSIONS AT THE EIGHTH SESSION OF THE COMMITTEE HELD IN BANGKOK ON THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON THE LAW OF TREATIES

The President of the International Law Commission (H. E. Dr. M. K. Yasseen) :

Mr. President,

First of all, I should like to thank you and the other members of the Asian-African Legal Consultative Committee, both on behalf of the International Law Commission and on my own behalf, for the warm welcome I have received. I take it as a tribute to the importance which is attached, both by your Committee and by the International Law Commission, to the regular contacts which have been established between the two bodies.

These contacts and the co-operation which they aim to develop can do much towards promoting the codification and progressive development of International Law, which is the purpose of the International Law Commission, and they also serve the interests of the Governments participating in the Asian-African Legal Consultative Committee. One of the three functions of the Committee, as stated in article 3 of its Statutes, is to study the items on the agenda of the International Law Commission and to take appropriate steps to communicate its views to the Commission. To this provision the Committee at its Fifth Meeting at Rangoon in 1962 added the responsibility of examining the reports of the Commission and of making recommendations concerning them to the Governments of the participating countries. The work of codification

and progressive development in the framework of the United Nations must take full account of the interests and positions of States in all parts of the world, including those of the States in Asia and Africa, which constitute more than half of the membership of the United Nations. The study of the Commission's drafts by this Committee will promote wider knowledge and understanding of them, and will enable Governments of Asia and Africa to take their positions in the light of that knowledge and understanding. The Committee, which is composed of experts in international law, can thus assist Governments in order to enable them to point out any gaps which may exist in the Commission's drafts, and also any portions of them which may be inconsistent with the interests and positions of those Governments.

The role of the Asian-African Legal Consultative Committee in this regard takes on added importance in view of the results of the eighteenth session of the International Law Commission, which took place in Geneva from 4 May to 19 July 1966. At that session the Commission finally adopted a set of seventy-five draft articles on the Law of Treaties, and will submit them to the United Nations General Assembly at its next session. The Law of Treaties is a topic on which the Commission has been working since its first session in 1949, and to which it has devoted about twice as many meetings as to any other topic. The Law of Treaties is not only the most difficult topic which the Commission has ever dealt with, but also the most important, in view of the increasing tendency for more areas of international relations to be governed by treaty law rather than by customary law.

Furthermore, the Commission has unanimously recommended that the General Assembly should convoke an international conference of plenipotentiaries to study the Commission's draft articles on the Law of Treaties and to conclude a convention on the subject. The Commission has

explained in its reports the reasons that led it to recommend the conclusion of a convention rather than the drawing up of an expository code. These reasons were as follows :

> "First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the Law of Treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the Law of Treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the Law of Treaties may be placed upon the widest and most secure foundations."

The effort to codify and progressively develop the Law of Treaties presents an important challenge and opportunity to Governments, particularly to those of newly independent States which are numerous in Asia and Africa and which can thereby participate in the clarification and partial reshaping of a major branch of international law. If this effort succeeds, international treaty law will be placed upon a new and firmer footing. On the other hand, should it fail, not only will States be left subject to an ancient and obscure customary law which many of them had no part in creating, but also the whole effort at codification and progressive development of international law, with all its opportunities for adapting the law to the needs of the modern world, will have suffered a severe reverse.

I wish, therefore, to make an appeal to the Asian-African Legal Consultative Committee to carry out as soon as possible

a thorough study of the Commission's draft articles on the Law of Treaties with the aim of giving the Governments the benefit of its views, and thereby assisting them to formulate their positions in the General Assembly and in any conference which it may decide to convoke. By doing so the Committee will be rendering an important service to its participating Governments, to the cause of the codification and progressive development of international law, and to the International Law Commission.

CEYLON

In regard to the Law of Treaties, we would first of all like to refer to a matter on which the Commission has not yet taken a final decision, namely, the question of *participation in a general multilateral treaty* and the question of opening a treaty to the participation of additional States.

According to traditional rules of international law, States which have not participated in the negotiating of a general multilateral treaty can only become parties to the treaty by acceding to it under the provisions of the treaty itself. Unless all the negotiating States consent, new States cannot become parties to the treaty. In the draft Articles proposed by the Commission (Articles 8 and 9 of the draft of its Special Repporteur, Sir Humphrey Waldock) it is suggested as a general rule that there is a right of accession to general multilateral treaties *unless* "otherwise provided by the terms of the treaty itself or by the established rules of an international organization". We think that this measure of progressive development is to be welcomed and that the newly independent States will endorse the view that general multilateral treaties should be open to participation on as wide a basis as possible. Likewise we favour the view reflected in Article 9 that a multilateral treaty should be open to States "other than those to which it was originally open". Article 9, paragraph 1, provides for them to be open to additional States either by

a two-thirds majority of the States which drew up the treaty or by the decision of the competent organ of an international organisation.

Another question which has been controversial and on which the views of the Committee were invited by the distinguished representative of the Commission at the last session at Baghdad was the the question of *reservations* to treaties. The draft Articles of the Commission (Articles 18 to 22) certainly do recognise the paramountcy of consent by providing that the formulation of reservations is still dependent on the degree of freedom granted by the very terms of the treaty as determined by the negotiating States. But in another respect the draft Articles do represent a departure from the *traditional view* which was that in the absence of express provision permitting reservations in a multilateral treaty, a State making reservations can be regarded as a party *only* if no objection was made by the other contracting States. The present draft Articles enable a State making a reservation to be a party to the Convention despite objections made, subject to the qualification that the convention is deemed not to be in force between the reserving State and the objecting State. There is a definite advantage in this system insofar as it facilitates maximum participation in a multilateral Convention while at the same time safeguarding the sovereign rights of other States who do not wish to be bound by such reservations. On the other hand, it has been pointed out that if this provision leads to a multiplicity of reservations being made, it may be a very difficult matter at any given time to ascertain from the time of the Convention and the diverse reservations what precisely thereto have been agreed upon. Nevertheless we favour the more liberal position taken by the Commission in this matter.

In conclusion, we welcome the decision of the Intertional Law Commission to propose for the conclusion of a multilateral Convention on the Law of Treaties in preference

to an expositary code for the reason that it would enable the entire International Community to participate in the development of the Law of Treaties.

GHANA

Mr. President, one cannot help but congratulate the International Law Commission on its work on the Law of Treaties. Hitherto, the principles governing treaty making were not properly defined. Hitherto, Big Powers had actually used their power to achieve what in the legal parlance would be regarded as no more than an unequal treaty. Why did we have unequal treaties, Mr. President? The only explanation is that, one was at a point of advantage and another at a point of disadvantage. Now, if you were to have clear cut principles governing the subject of treaties, I think, the gap between the developed and developing countries, as far as the law is concerned, would be closed and disappear completely. It is in the light of this that we feel strongly that though some time has been taken by the International Law Commission in achieving this purpose, yet, we cannot strictly say that the time has been wasted, because it is better to spend some time to achieve a concrete object than to rush through it and get nowhere. Mr. President, I need not elaborate on the importance of this subject. All I can say is that, let us give encouragement to the International Law Commission through our representatives in the United Nations because if the principles drawn up by the Commission are actually put before the United Nations and for political reasons, though not legal reasons, they are thrown over-board, it would really be a setback to the development of international law which we all yearn for. We all desire that at least there should be some sort of crystallization and certainty in the principles of international law. My delegation would like to thank Dr. Yasseen for giving us an insight into the work done by the International Law Commission on the Law of Treaties and request our Governments to give serious consideration to the adoption of the prospective convention when the time comes. Thank you.

INDIA

Mr. President, we deeply appreciate the lucid statement made by the Chairman of the International Law Commission. We realize that in achieving what they have done in the matter of compiling articles relating to the very important branch of international law, the Law of Treaties, the Commission has after a long series of labours undoubtedly reached an important landmark. We have had not the opportunity to seeing these articles yet and studying them, and it is necessary that before we offer any observations, we should have a good acquaintance with them.

I therefore suggest that this subject should be looked into by our Secretary, and the articles should be examined particularly from the point of view of Asian and African States so that our Governments may have the benefit of this Committee's views on the articles. It is a matter of satisfaction that the International Law Commission has taken the view that this is a matter more fit for a convention rather than codification. As I have said already, we welcome the success of the labours of the International Law Commission in this field, and we await the study which our Secretary will undoubtedly make of these articles. Thank you.

IRAQ

The International Law Commission has achieved so many things with satisfaction, and we thank the Commission for these achievements because it was necessary to have these achievements for the benefit of the United Nations and for its States Members. As Dr. Yasseen pointed out, we should study the Law of Treaties, and study carefully and give our opinion to our Governments. I think, it is a good idea to have this subject on the agenda of our Committee, to study it carefully,

because we need to give our opinion and the opinion of the Committee to our Governments. In general, we have no objection on the draft Articles on the Law of Treaties, but it is necessary for our Governments as Asian and African countries to have one opinion on these questions. Concerning the law of multilateral treaties, our opinion in this matter has been concluded a long time ago. They should be revised in accordance with the developments which have taken place in the field of International Law and in other technical fields, and they should be open for accession for all the States without distinction. I mean these should be universal, to be participated or acceded to by all the States, not only the Member States of the United Nations, but all the States of the world. Thank you.

JAPAN

Mr. President, I would like at first to thank the President of the International Law Commission, Dr. Yasseen, for his clear statement and a brief summary he made on the Law of Treaties. I am quite in agreement with him that the Law of Treaties forms a very important part of International Law. Now that the Commission has completed the drafting of 75 Articles on this subject, we must in the name of the Committee pay our tribute to the International Law Commission for the laborious work undertaken by it extending over a very long space of time. I have not had the pleasure to have the final text of these Articles in hand, therefore I could not make up my mind on the merit of these Articles. But now that the task of drafting by the International Law Commission has been completed, it is now up to our Governments to study these articles and define their position *vis-a-vis* these articles for the coming diplomatic conference. The task of the International Law Commission is of the nature of progressive development and codification of international law. We know that the draft prepared by the Commission contains many propositions of the nature of

progressive development of international law which, in my personal view, require careful study on the part of the Governments which would be bound in case these draft articles be formulated in the form of a universal convention. The Governments will be bound legally in their conduct in the future. Therefore, these aspects of progressive development of international law naturally require careful and serious consideration on the side of Governments. But we honestly hope that the coming diplomatic conference will succeed in drawing up a universal convention on the Law of Treaties because it is absolutely necessary to stabilize Treaty Order in a society of nations of today. And to my mind, I think the basic foundation of so-called Treaty Order among nations is based on the principles of free consent or free wills and good faith. Thank you.

PAKISTAN

Mr. President; all of us feel obliged to Dr. Yasseen, the Distinguished Chairman of the International Law Commission, for his very kind gesture in asking us to assist our respective Governments to take effective steps for the study of this important branch of international law. The effort to codify and develop the Law of treaties is undoubtedly an important challenge and an opportunity to the newly independent States in Asia and Africa. Since these States are in a majority in the United Nations, all of us fully realize that this Committee should make persistent efforts in the re-shaping of this important branch of international law. We consider in these circumstances that we should take up a study of the Commission's Draft article by article and convey to our Governments our considered views so as to enable them to formulate their position in the General Assembly or any of the conferences that may be convened for this purpose. I don't think that at this stage it is appropriate to express any opinion on the draft articles. Thank you, Sir.

THAILAND

Mr. President, the Delegation of Thailand has listened with great interest to the statement made by the learned and respected Chairman of the International Law Commission. The Delegation of Thailand would like to associate itself with other Delegations in expressing its gratitude for the work done by the International Law Commission. My Delegation would like also to express our appreciation for the report prepared by Dr. Hassan Zakaria, who attended the seventeenth session of the International Law Commission in Geneva in the capacity of an observer on behalf of our Committee. My Delegation also takes note with great satisfaction of the attitude of the International Law Commission towards our Committee. It is our belief that closer association and cooperation between the two legal bodies would contribute and facilitate the progressive development of international law as well as its codification. The presence amongst us at this session of Dr. Yasseen, the Chairman of the International Law Commission, is a matter of great honour for us and in particular for the Delegation of Thailand. My Delegation is also happy to learn that the International Law Commission has given due attention to the activities of our Committee. With regard to the subjects discussed by the International Law Commission at its seventeenth and eighteenth Sessions, my Delegation fully appreciates its deliberations which should be considered as a contribution to the promotion of progressive development of international law. The works accomplished by the International Law Commission are of high academic value, and prove once again that the Commission has continued its object progressively. My Delegation would not for the time being give detailed comments on the subjects discussed by the Commission but we reserve our right to deal with those subjects in the near future when the Committee comes to consider all those subjects in detail.

(V) PRELIMINARY REPORT SUBMITTED BY THE COMMITTEE'S SPECIAL RAPPORTEUR, DR. SOMPONG SUCHARITKUL (THAILAND)

The present report is submitted at the request of the Asian-African Legal Consultative Committee made at its last session in Bangkok, 1966. The commentator in this case has not yet had the benefit of any preliminary views of Governments which are represented on the Committee as envisaged in the original request. However, since the coming session is approaching and there is not much time left for renewed consultations before the next session, which according to latest information will now be held in New Delhi in the second half of December 1970, accordingly, the present rapporteur has no alternative but to collect and assess whatever information he can gather and try to present some pertinent observations which might be of relevant use to the deliberation of the subject at New Delhi.

In view of the fundamental importance of the Law of Treaties to Asian and African countries, which constitutes the most significant part of international law governing the relations among States, its codification and progressive development should be a matter of primary concern to all Asian and African nations. It is of vital importance that Asia and Africa should present a more coherent attitude than hitherto experienced. The voice of Asia and Africa would only be heard and heeded if their concerted views are formulated and expressed in a consistent manner with the same sense of mission and direction. Without solidarity or similarity of approach, their uncoordinated voices will be drowned despite the existence of their common interest in this matter.

The Draft Articles form part of an item which is currently receiving attention in the Sixth Committee of the General Assembly. The General Debate on the subject has been rather revealing. The larger Powers are reluctant to agree to any progress which has already been achieved in the development of the law. The poorer and weaker nations, on the other hand, are not always spontaneous in exercising their discretion. Consequently, considerable manoeuvring has been going on in order to produce results which are not as favourable to the vital interests of the Asian and African nations as could otherwise be achieved.

In international law, the generic term "treaties" includes not only the "*treaites-contrats*" or the contractual international agreements which create binding obligations between the contracting parties, but essentially also the "*treaites-lois*" or the law-making treaties which provide an inexhaustible material source of international law. As such, the law of treaties has a crucial bearing, in its practical application, on the realities of international life as well as the daily intercourse between nations.

In municipal law terminology, the law of treaties may be compared with the domestic law of contract, constitutional law and also the process and the science of legislation. In terms of jurisprudence, the law of treaties which forms part of the main body of international law necessarily affects the vital interests of nations in more than one respect. By way of analogy, the law of treaties has a much wider scope than any single branch of national law. In the light of its paramount importance, a useful approach to be adopted for its study and examination must be characterised by utmost care and cautious consideration. The Draft Articles therefore deserve our closest attention.

While the Draft Articles will receive much fuller discussions in far greater details at the International Conference

of Plenipotentiaries on the Law of Treaties to be convened at Vienna in the Spring of 1968 pursuant to General Assembly Resolution 2166 (XXI), the Asian-African Legal Consultative Committee might appropriately take occasion to sound out the views of participating governments. For this purpose, the present rapporteur has prepared certain preliminary observations of a general nature which apart from coinciding with the position taken by the Government he represents is also designed to help facilitate the final conclusion of a general convention on the law of treaties.

A special tribute should be paid to the International Law Commission and its successive Special Rapporteurs on the Law of Treaties for the valuable work they have accomplished. The work was started by the late Professor J.L. Brierly, continued by the late Sir Hersch Lauterpacht and Sir Gerald G. Fitzmaurice, and finally completed by the latest Special Rapporteur, Sir Humphrey Waldock. It has thus taken four generations of the British Member of the International Law Commission to finalize the Draft Articles we now have before us. The General Assembly, in particular the Sixth Committee, has taken a keen interest in the subject ever since its First Session. Observations have been made by various delegations in the Sixth Committee and written comments of Governments submitted and circulated, as the result of which the International Law Commission and its Special Rapporteurs on the topic have been able to complete their preparation of the Draft Articles which correspond more and more to the current needs of a modern international society under the rule of law. The gradual improvements discernible from each draft reflect the spirit and direction in which the law of treaties has continued progressively to develop in favour of the increasing sovereign equality of States. This development is slowly but steadily gaining wider acceptance in the general practice of States, notwithstanding occasional expressions of opposition from certain quarters whose diminishing interests in world affairs are

necessarily affected by the continuous progress of the contemporary law of treaties. It is understandable, however, that as the development of international law progresses in favour of greater equality and therefore better protections for the interests of smaller and weaker nations, it cannot help provoking an outburst of dissatisfactions or disappointments on the part of certain traditionalists within the larger and stronger Powers. But it should be emphasized that in the longer run this progressive trend is equally beneficial to the larger and stronger Powers. For peace and order cannot be maintained by sheer physical force alone but to be durable it must of necessity be placed on the solid basis of equity and equality. In the ultimate analysis, the law can retain its binding force only so long as it remains just, both in substance as well as in the eyes of all concerned. It is in the interest of peaceful relations and harmonious cooperation among nations that an appeal should be made to those who still persist in opposing the progress of the law to step aside so as to allow its progressive development to take its natural course unhindered by external pressures from the larger and stronger Powers. After having inflicted so much hardship and unfairness upon others, it is now their duty not to obstruct or to stand in the way of progress. It is not too late for any one to make positive and constructive contribution to the advancement of the law in support of the weaker and poorer countries.

In the main, the Draft Articles appear to be reasonably satisfactory and should be generally acceptable to Asian and African countries, especially from the point of view that the draft seems to afford far greater safeguards against unreasonable demands on the part of big Powers to the detriment of the weaker and poorer nations than the big Powers are prepared to accept. Indeed, after two decades of careful examination, through discussions in which Asian and African nations were able to take part, and continuing drafting improvements, we have come very close to meeting the minimum

requirements which from the Asian African standpoint may be considered necessary for the protection of the interests of smaller and weaker nations in the process of their national development. It is the prevailing belief of developing countries that greater safeguards in the law of treaties for the protection of the vital interests of smaller and weaker nations would be welcome because they would serve to enhance the stability of international society generally as well as promoting the social and economic stability of developing nations in particular. For these reasons, the Asian and African countries have agreed to use the Draft Articles as the basic working document which seems to provide a convenient point of departure for our discussion with the view to the adoption of a general convention on the law on the subject.

Without attempting an exhaustive commentary of the draft on an article-by-article basis, it might be convenient to adopt a systematic analytical treatment of the subject by tackling first and foremost the crux of the matter.

To a classical international lawyer no other norm can be more fundamental or fascinating than "*pacta sunt servanda*". It is not only the foundation of the law of treaties itself, but according to Professor Kelsen is the very essence of the law of nations. The Special Rapporteur has succeeded in bringing down to earth this almost celestial creature. Article 23 of the draft requires performance of a treaty in good faith only while the treaty itself remains in force and is binding upon the parties. This is indeed a modest and sober statement of the rule "*pacta sunt servanda*", which often in the past has been credited with a quaint notion of sacrosanctity akin to a "*deus ex machina*", upon the very mention of which a big Power could demand endless and limitless concessions from a poor defenceless nation. Surely neither absolute power nor any degree of sanctimony, or their combination, can convert an otherwise useful general rule of international law into a

machinery by which to perpetuate alien domination, or human enslavement or any regime of colonialism however benevolent. A question might be seriously asked whether any State can in good conscience be heard or allowed to insist upon the performance of a treaty which is unjust, or which subjects men to alien domination or imposes on a nation a status of subservience to another. Such treaties which defy the dictates of humanity have been appropriately referred to as "unequal treaties".

It has been argued by some traditionalists that such "unequal treaties" should be preserved for the sake of stability, and that a less stable system of treaty system would be more dangerous to smaller and weaker nations. The Asian and African nations will find no advantage from the stability of control and domination by external influence and pressure as the result of "unequal treaties". But the position of the protagonists of "unequal treaties" can also be understood, since invariably such treaties were unequal to their advantage and detrimental to the interests of Asian-African nations. When they talk about the stability of the treaty system, they have in mind the stability of their income and profits. Some of them even have the courage as almost shamelessly to propose that stability or the preservation of unequal treaties is good for the weaker and poorer nations, and that it is designed for their protection. The point is that if the weaker and poorer nations do not realize where their vital interests lie and should they allow themselves to swallow this line of patronizing argument, a confusion might easily be created among us. We should therefore guard against such paternalistic attitude of the big Powers.

An argument has sometimes been advanced in support of the absolute concept of "*pacta sunt servanda*" which according to some classicists admits of little or no qualification, subject only to one possible exception that in the circumstances above

described, should the colonial power utter the magic words "*pacta sunt servanda*", the newly emerged country could reply with parallel confidence "*rebus sic stantibus*", and that should be the end of the matter. But the facts of international life cannot be stated in such simple and absolute terms.

Admittedly, "*clausula rebus sic stantibus*" has been resorted to with some measure of success and without requiring any international sanction or judicial endorsement. It should be observed, however, that so far this doctrine has been operative only in one direction, i.e., to the detriment of Asian and African nations. In several instances in which an Asian nation 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 could invariably and successfully rely on the implied "*clausula rebus sic stantibus*" in the treaty alleging that owing to a fundamental change of circumstances the frontier so fixed according to treaty should be moved further inside the territory of the Asian nation. There was no known precedent for the operation of earlier of the above doctrines any other way. Each one has operated solely against the weak and poor for the benefit of the rich and strong.

But events have since taken a different turn, and things have really changed fundamentally. The chance of a big power invoking "*clausula rebus sic stantibus*" against an Asian or African State claiming the application of "*pacta sunt servanda*" has become more remote, with the result that there has been a sudden change of heart on the part of the big powers. The reversal of the trend is so striking that it has now become fashionable for the big powers unconsciously or perhaps self-consciously to argue for a more restricted application of "*rebus sic stantibus*", maintaining, contrary to their past habit, that there has been no clear precedent or judicial application of the doctrine of "*rebus sic stantibus*" so as to give