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33rd meeting of the Committee of the Whole

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disclose the deeper intention of the parties in any precise manner. Recourse should then be had to all the means of interpretation listed in the Commission's draft articles 27 and 28. No hierarchy should be established as between those means. The preparatory work and the circumstances in which a treaty had been concluded should not be regarded as subsidiary means of interpretation. The Italian delegation was therefore in favour of combining articles 27 and 28 in a single article. It would support the amendments to article 28, if that article was not combined with article 27.

The meeting rose at 12.55 p.m.

THIRTY-THIRD MEETING

Monday, 22 April 1968, at 3.20 p.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Article 27 (General rule of interpretation) and

Article 28 (Supplementary means of interpretation) *(continued)*

1. THE CHAIRMAN invited the Committee to continue its consideration of articles 27 and 28 of the International Law Commission's draft. [1]

2. Mr. SINCLAIR (United Kingdom) said he wished to analyse some of the arguments advanced by the United States representative during the Committee's 31st meeting [2] when introducing his delegation's amendment (A/CONF.39/C.1/L.156) to articles 27 and 28. A particular reason for subjecting those articles to careful examination was that the statements made in the debate would constitute part of the preparatory work of the forthcoming convention on the law of treaties.

3. The most important issue raised in connexion with the subject of treaty interpretation was that of the primary aim of treaty interpretation. It was often asserted that it was to ascertain the common intention of the parties, independently of the text. That view had been subjected to fierce criticism in the debate on treaty interpretation in the Institute of International Law in the early 1950s and had ultimately been decisively rejected by the Institute. Parts of the United States representative's statement had seemed to be directed towards reviving the doctrine thus rejected.

4. The United Kingdom delegation did not consider that there was any undue rigidity in ascribing paramount importance to the principle of textuality in treaty interpretation. As had already been pointed out by the representative of Uruguay, the dangers of the alternative doctrine had been persuasively presented by Sir Eric Beckett at the Institute of International Law when he had stated that there was a complete unreality in the references to the supposed intention of the legislature in the interpretation of the statute when in fact it was almost certain that the point which had arisen was one which the legislature had never thought of at all; that was even more so in the case of the interpretation of treaties. As a matter of experience it often occurred that the difference between the parties to the treaties arose out of something which the parties had never thought of when the treaty was concluded and that, therefore, they had had absolutely no common intention with regard to it. In other cases the parties might all along have had divergent intentions with regard to the actual question which was in dispute; each party had deliberately refrained from raising the matter, possibly hoping that that point would not arise in practice, or possibly expecting that if it did, the text which was agreed would produce the result which it desired. [3]

5. The United Kingdom delegation upheld the view expressed in the resolution adopted on the subject by the Institute of International Law in 1956, according to which, when agreement had been reached between the parties on the text of the treaty, the natural and ordinary meaning of the terms of the treaty should be taken as the basis for interpretation; the terms of the provisions of the treaty should be interpreted in the context as a whole, in good faith, and in the light of the principles of international law. [4]

6. As the International Law Commission stated in paragraph (11) of its commentary to the articles, the starting point of interpretation was the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. Moreover, in the case of many important multilateral conventions, some of the parties might have joined by subsequent accession, particularly in the case of new States which had not been in a position to participate in preparing the original instruments. It was hardly possible to interpret the rights and obligations of those acceding States in the light of the supposed common intention of the original drafters; it was wiser and more equitable to assume that the text represented the common intentions of the original authors and that the primary goal of interpretation was to elucidate the meaning of that text in the light of certain defined and relevant factors.

7. With regard to the criticisms levelled against the phrase " ordinary meaning ", the words obviously could not be viewed in isolation; it was inconceivable that the International Law Commission had intended that interpreters of treaties should arbitrarily select dictionary meanings when construing treaty texts. Paragraph 1 of article 27 referred to the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, and paragraph (12) of the commentary clearly indicated the sense in which the term " ordinary meaning " was used. The Commission presumably also had in mind the need to differentiate between the ordinary meaning of a treaty provision and any special meaning which might be established in accordance with paragraph 4 of the article. In any case, the concept

[1] For a list of the amendments submitted to articles 27 and 28, see 31st meeting, footnote 9.

[2] Paras. 38-50.

[3] See *Annuaire de l'Institut de droit international*, vol. 43 (1950), tome I, p. 438.

[4] *Op. cit.*, vol. 46, (1956), p. 349.

of " ordinary meaning " seemed to have afforded no undue disquiet to international or national judges, a point which the Polish representative had illustrated with reference to decisions of the International Court of Justice and the Permanent Court of International Justice. Even in the United States, the Supreme Court had, as recently as 1963, considered an issue relating to the interpretation of the 1945 Income Tax Convention between the United States and the United Kingdom in the case of *Maximov* v. *United States*. In giving judgement, the then Justice Goldberg had stated that the plain language of the convention did not afford any support to the petitioner's argument, and that there was no indication that application of the words of the treaty according to their obvious meaning effected a result inconsistent with the intent or expectations of its signatories. [5]

8. Part of the purpose of the United States amendment seemed to be to place preparatory work on a parity with other means of interpretation, and the United States representative had argued that article 28 imposed on the use of preparatory work restrictions which were inconsistent with established practice. The United Kingdom delegation considered that recourse to the preparatory work of a treaty as a guide to interpretation should always be undertaken with caution. In the first place, preparatory work was almost invariably confusing, unequal and partial: confusing because it commonly consisted of the summary records of statements made during the process of negotiation, and early statements on the positions of delegations might express the intention of the delegation at that stage, but bear no relation to the ultimate text of the treaty; unequal, because not all delegations spoke on any particular issue; and partial because it excluded the informal meetings between heads of delegations at which final compromises were reached and which were often the most significant feature of any negotiation. If preparatory work were to be placed on equal footing with the text of the treaty itself, there would be no end to debate at international conferences.

9. The International Law Commission had established a delicate balance in the value to be attached to preparatory work. Interpreters of treaties usually had recourse to that work to see what guidance it could afford, but the Conference was seeking not to describe the process of interpretation, but to distil the common rules which resulted from the process. In making that vital distinction, the Commission had undoubtedly not sought to deny the usefulness of preparatory work as a guide, but had simply wished to recognize that the evidentiary value of preparatory work was less than that of the text of the treaty itself.

10. Finally, if greater significance were attributed to preparatory work than in the Commission's text of article 28, a greater degree of risk would be created for new States wishing to accede to treaties in the drafting of which they had taken no part. The text of the treaty was what those new States had before them when deciding whether or not to accede; if more weight were attached to preparatory work in the rules of treaty interpretation, new States would be obliged to undertake a thorough analysis of the preparatory work before acceding to treaties, and even a thorough analysis was likely to give them limited enlightenment on the intentions of the parties. The United Kingdom delegation, therefore, could not support the United States proposal because, although the new text placed primary emphasis on the text of the treaty, it gave equal weight to a series of factors of greater or lesser significance in treaty interpretation and was likely to open the door to a never-ending stream of inquiry for would-be interpreters, and to encourage unnecessary disputes. The Commission's text corresponded much more precisely to the rules accepted and applied by international tribunals and in State practice. In principle his delegation would have no overriding objection to an amalgamation of the two articles, provided the proper balance between the general rule and the supplementary means of interpretation was preserved.

11. For similar reasons, his delegation could not support the amendment by the Republic of Viet-Nam (A/CONF. 39/C.1/L.199) or the Philippine amendment (A/CONF.39/C.1/L.174) because the context of a treaty covered more than the text, preamble and annexes. The amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.214) would have to be considered carefully in relation to article 26. The United Kingdom delegation agreed with the comments of the Tanzanian representative in connexion with his delegation's amendment (A/CONF.39/C.1/L.215), on the value to be attributed to preparatory work, but thought it might be unwise to remove the qualifications in article 28 entirely. The remaining amendments would no doubt be referred to the Drafting Committee.

12. Mr. ZEMANEK (Austria) said the debate had shown that there were two distinct approaches to the problem of treaty interpretation. According to one, the will of the parties was exhaustively expressed by the text of a treaty and could therefore be ascertained exclusively from it, and according to the other, the text of a treaty was only one element in ascertaining the intention of the parties. Those two approaches could not be reconciled at the theoretical level, but in any case such reconciliation was not the task of the Conference: its aim should be to adopt a workable rule of positive law commanding the widest possible support. Neither the International Law Commission nor a majority of delegations to the Conference could purport to teach governments to alter their traditional positions. The Committee should therefore adopt a flexible text which, while it might not completely satisfy the advocates of either theory, would be at least acceptable to both. In the contrary event, if a substantial minority opposed the text finally adopted, reservations might be expected to the provisions, or at worst, the Conference would end by having no clause on interpretation at all.

13. The Austrian delegation believed that the necessary flexibility might be achieved by enhancing the role of preparatory work. Preparatory work was the key to the problem, for a number of reasons. In the Committee's own work, for example, no fewer than nine articles provisionally approved by the Committee contained such phrases as " it appears from the circumstances..." or " a different intention is otherwise established...". In paragraph (3) of its commentary to article 10, the International Law Commission, referring to paragraph 1(*b*) of that article, stated that " in this case it is simply a question of demonstrating the intention from the evidence "; such demonstration seemed to be impossible

[5] *United States Reports*, vol. 373, pp. 52 and 54.

without recourse to the preparatory work of the treaty.

14. The problem also arose in paragraph 4 of article 27, which provided that a special meaning should be given to a term if it was established that the parties so intended. With the exception of the cases where, according to the commentary, the technical or special use of a term appeared from the context, the intention of the parties could only be ascertained by recourse to the preparatory work; and yet, according to the Commission's wording of article 28, the preparatory work would not be considered in such a case, because it met none of the requirements stipulated in the article. First, the search was evidently not intended to confirm the meaning resulting from the application of article 27, because the intention of the parties to use the term in its technical sense might not be apparent before the preparatory work was examined. Secondly, the interpretation according to article 27 would neither leave the meaning ambiguous or obscure nor lead to a result which was manifestly absurd or unreasonable. On the other hand, if the ordinary meaning of the term, instead of its technical meaning, were used for interpretation, the results might not correspond to the true intention of the parties.

15. The Austrian delegation considered that such eventualities should be avoided, either by amending the Commission's text along the lines set out in the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.199), which took preparatory work into account together with the context, or by formulating article 28 more flexibly, as proposed in the Tanzanian amendment (A/CONF.39/C.1/L.215).

16. Mr. NYAMDO (Mongolia) said that, in considering articles 27 and 28, the Committee must first decide whether each State should interpret treaties according to its own lights, or whether it should decide on a firm general rule on treaty interpretation. The Mongolian delegation was in favour of the latter solution. The International Law Commission had prepared a sound and well-balanced text of a uniform general rule based on the text of the treaty, as against extrinsic proof of intention as the fundamental means of interpretation.

17. In his delegation's opinion, any diminution of the importance of the text as a basis for interpretation would tend to undermine the stability of treaty relations. The meaning of a treaty must not be the meaning ascribed to it by just one of the parties; interpretation must be based on the intention common to all the parties as expressed in the text of the treaty itself. Accordingly, his delegation did not believe that the United States amendment (A/CONF.39/C.1/L.156) improved the Commission's text in structure or in substance. On the other hand, the amendment by the Ukrainian SSR (A/CONF.39/C.1/L.201) deserved careful attention, as did the Romanian drafting amendment (A/CONF.39/C.1/L.203.). Those and some of the other drafting amendments could be referred to the Drafting Committee.

18. Mr. EEK (Sweden) said that, in view of the wide variety of opinions expressed on treaty interpretation in legal literature and of the fact that no uniform State practice had yet developed in the matter, an authoritative formulation of rules on treaty interpretation had become vital in order to safeguard stability in treaty relations. Codification would obviously not have sufficed, and the International Law Commission had recognized that fact in choosing the method of formulating rules leading to a higher degree of certainty. The Swedish delegation fully endorsed that approach, which involved the progressive development of a part of the law of treaties which was as yet obscure.

19. The Commission had had to make a second choice between the textual approach, which it had ultimately adopted, and the subjective approach whereby the ordinary meaning to be given to the terms of a treaty could be set aside if it was clearly established that there was a conflict between the terms and the proven common intentions of the contracting parties. A number of representatives had referred to the shortcomings of the latter approach. Whereas the textual approach did not entail the same dangers, it had the drawback, or hardship, that it required representatives of States drafting the text of a treaty to consider all the implications of a subsequent textual approach to interpretation in the event of dispute; it called for energetic efforts to achieve the utmost clarity and completeness in formulating the text of a treaty. But that hard work seemed to be a reasonable price to pay for achieving the maximum certainty and a solid foundation for the expectations of each party with respect to the conduct of the others in the future and to the outcome of litigation in the event of a dispute.

20. The Swedish delegation considered that the Commission's texts of articles 27 and 28 should not lightly be set aside. Although article 27 favoured the textual approach while also giving considerable weight to the object and purpose of the treaty, article 28 gave wider scope than the opponents of the draft were prepared to admit for the use of all supplementary means of interpretation, including preparatory work. The Swedish delegation saw considerable danger in such proposals as that of the United States, and would be unable to support them.

21. Mr. RUDA (Argentina) said that the question which arose in connexion with Part III of the draft convention was whether it was desirable to include rules on treaty interpretation. There were many indications that the International Law Commission had been right to try to establish such rules, despite the divergent practice in the matter. First, there was a considerable volume of case-law on treaty interpretation, particularly in the International Court of Justice, which had come to some clear and decisive conclusions. Secondly, the existence of a general rule in the convention would have the effect of reaffirming the principle *pacta sunt servanda*, which was the fundamental basis of the law of treaties. Thirdly, in the absence of standards on interpretation, States could choose their own particular means of interpretation in order to evade their obligations in the performance of a treaty. The existence of Part III of the convention would help to stabilize treaty relations, as the members of the Committee seemed to realize, for no one had suggested the deletion of articles 27 and 28.

22. On those general assumptions, the second problem that arose was that of the basic criterion of treaty interpretation. In paragraph (2) of the commentary, the Commission listed three possible approaches, which might be described as the textual, subjective and functional approaches. The Argentine delegation was in favour of the textual approach, based on the thesis that the starting point of interpretation was the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions

of the parties. That view was based not only on the Commission's deliberations, or even on logic, but on the support it found in a large body of doctrine and in decisions of the International Court of Justice. Thus, at the Granada session of the Institute of International Law in 1956, that method of interpretation had been adopted by 35 votes to none, with 6 abstentions. The trend of contemporary doctrine, according to which the text should be the point of departure, was also supported by decisions of the International Court of Justice: in its Advisory Opinion of May 1948 on Conditions of Admission of a State to Membership in the United Nations,[6] the Court had stated that it regarded the text as sufficiently clear, and consequently did not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there was no occasion to resort to preparatory work if the text of a convention was sufficiently clear in itself. The Court had repeated that opinion in the *Ambatielos* case [7] in 1952.

23. The International Law Commission had followed that doctrine in drafting paragraph 1 of article 27, which comprised the principles of interpretation in good faith, in accordance with the ordinary meaning of the terms of the treaty; it made it clear that the intention of the parties should be embodied in the terms of the treaty, and should be interpreted not *in abstracto*, but in the context, with due consideration for the object and purpose of the treaty. In view of the variety of possible circumstances, the Commission had not adopted a rigid approach; the provisions of article 27 constituted a single rule, as was indicated by the title of the article, and although the paragraphs were placed in logical sequence, they did not indicate any hierarchy, as was clear from the introductory sentences to paragraphs 2 and 3. Paragraph 2 listed the intrinsic means of interpretation, and paragraph 3 the extrinsic means, but there was no question of any adverse reflection on the use of the latter. Furthermore, sub-paragraph 3(*b*) related to subsequent practice, qualified by the phrase " which establishes the understanding of the parties regarding its interpretation "; it was important that the practice should be established, and should not be just any action arbitrarily taken by the parties. Accordingly, his delegation considered that the Commission's text of article 27 solved some difficult legal problems and was flexible enough to become a most useful instrument of treaty interpretation.

24. The Argentine delegation was in favour of separating the general rule of interpretation and the supplementary means of interpretation, since to place preparatory work and analysis of the circumstances of the conclusion of a treaty on a higher level would destroy the very basis of the draft, which was the presumption that the text of the treaty was the authentic expression of the intentions of the parties. Recourse to means of interpretation not listed in article 27 should be permitted only in the case mentioned in article 28, particularly where preparatory work was concerned.

25. The value of preparatory work was undeniable, and it should play its proper part among the supplementary means of interpretation, but in view of the difficulties of ascertaining intentions before a treaty had been signed, preparatory work should be used with great caution, as Sir Eric Beckett had pointed out in the Institute of International Law: if recourse to preparatory work in interpretation were made too easy, States might invoke preparatory work to prove their arguments in support of any thesis. That applied *a fortiori* to the circumstances surrounding the conclusion of a treaty. In view of all those considerations, the Argentine delegation supported the Commission's text, and could not vote for the United States amendment (A/CONF.39/C.1/L.156), which would certainly not make for certainty and clarity in the complex process of treaty interpretation.

26. Mr. RUEGGER (Switzerland) said that generally speaking he was in favour of the International Law Commission's text, but had doubts as to whether the distinction it had drawn between a general rule and supplementary means of interpretation was justified. Although the text itself was, of course, of prime importance, it would not always be easy for an arbitrator or judge to establish from the text alone the common intention of the parties, a difficulty to which Judge Huber had drawn attention. Moreover, the constitutional bodies which had to establish that intention would also have to examine the text.

27. He had some sympathy for the United States amendment (A/CONF.39/C.1/L.156), which would make for flexibility, and was in favour of any proposal that did not seek to establish a hierarchy in the methods of interpretation. Articles 27 and 28 should contain an enumeration of means of interpretation but not an exhaustive one.

28. The fact should also be borne in mind that articles 27 and 28, if adopted, would have some effect on the application of Article 38 of the Statute of the International Court of Justice which had functioned well and had allowed the necessary margin of flexibility.

29. Mr. MWENDWA (Kenya) said that the International Law Commission had been right in giving pride of place to the textual approach, since it would lead to certainty in treaty relations. The difficulty of establishing the intention of parties was due to the fact that it would require extensive recourse to preparatory work, whereas the records of negotiations leading up to the conclusion of a treaty were often incomplete or inconclusive and some decisions were arrived at informally without being recorded in writing at all. Unless clear rules were laid down in articles 27 and 28, the principle of *pacta sunt servanda* would be jeopardized. The Commission's draft satisfactorily covered both major treaties and most international agreements within the definition established in the draft convention.

30. The words " any agreement relating to the treaty which was made between all the parties " in paragraph 2(*a*) and the words " any instrument " in paragraph 2(*b*) suggested that only written documents drawn up in connexion with the treaty should be taken into account for purposes of interpretation.

31. The United States amendment was not acceptable because it opened the way for the party with the greatest powers of persuasion to impose its interpretation on the other parties. The Pakistan amendment (A/CONF.39/C.1/L.182) was unnecessary. The amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.199) was not acceptable because it rejected the priorities established

[6] *I.C.J. Reports 1948*, p. 63.

[7] *I.C.J. Reports 1952*, p. 28.

by the Commission. The Romanian amendment (A/CONF.39/C.1/L.203) would lead to difficulties in determining what was relevant. The Greek amendment (A/CONF.39/C.1/L.213) was unnecessary and the Spanish amendment (A./CONF.39/C.1/L.216) would make the process of interpretation altogether too subjective. The amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.214) was not necessary. He did not agree with the proposal to merge articles 27 and 28 into one article.

32. The Commission's draft had rightly laid great emphasis on good faith, the absence of which had contributed to the absurd decision in the *South-West Africa* case.

33. Mr. BRODERICK (Liberia) said that, although views differed on the rules of interpretation, certain general principles, without being dogmatic, were recognized by jurists and courts on both the internal and the international planes. They served as guidelines in ascertaining the meaning of expressions used in a treaty, but only where a general principle was appropriate in a particular case could it be applied. The first thing to be established was the will of the parties, assuming that the treaty had been entered into in good faith, and the text was the most authentic expression of that intention and should be given priority. Only when the text failed to indicate the intention should resort be had to extrinsic matters.

34. In principle, his delegation endorsed the texts submitted by the International Law Commission. If the two articles were combined, that would not materially affect their substance.

35. Mr. OGUNDERE (Nigeria) said that the interpretation of a treaty involved a logical process that had to be taken step by step, with good faith as the starting point, as the Commission had wisely emphasized at the beginning of article 27. There were no generally accepted rules of interpretation in international law and articles 27 and 28 represented an effort to lay down certain rules which, if accepted, would simplify the work of interpretation by judicial and arbitral tribunals. The Commission had adopted a cautious approach to the use of preparatory work and had achieved a careful balance between the common law and continental systems. It did not exclude preparatory work and placed the correct emphasis on the text of the preparatory work as a supplementary means of ascertaining the intention of the parties in the two exceptional circumstances specified in article 28.

36. The Commission had been right to emphasize in paragraph (8) of its commentary that " the process of interpretation is a unity " founded on the primacy of intrinsic over extrinsic evidence. The former was the text of the treaty and related agreements or instruments wherein the parties, after the negotiations, gave expression to their intentions. Preparatory work was extrinsic evidence and only a supplementary source of interpretation.

37. Thus his delegation approved in principle the provisions of articles 27 and 28, subject to any drafting changes, and preferred having two separate articles. It was opposed to the amendments by the United States and by the Republic of Viet-Nam. The others, which were of a drafting character, could be referred to the Drafting Committee.

38. Mr. SUAREZ (Mexico) said that interpretation of the text of a law was often an extremely difficult task, so much so that the most learned judges of the highest municipal and international courts often failed to agree on the interpretation to be given to a text and were obliged to take decisions by a majority vote. Interpretation was inevitably subject to the human factor, and differences in the interpretation of the same text were bound to lead to disputes, many of them in good faith, and to majority decisions which could only detract from the prestige of the judiciary.

39. Faced with that difficult problem, the International Law Commission had wisely drafted provisions which concurred with the views expressed in the best legal writings and in the bulk of court decisions. It had opted for the rule that the will of the parties as declared in the text represented their authentic intention, and had thereby rejected the doctrine which would allow the interpreter to resort to any available means in a search for the actual intentions of the parties. It had abided by the old maxim of Roman law: *uti lingua nuncupassit, ita jus est*. It was only in those cases where the expression in the text of the intention of the parties was ambiguous or obscure, or where the reading of that text led to absurd or unreasonable results, that it was permissible to resort to supplementary means of interpretation of which the preparatory work and the circumstances of the conclusion of the treaty were two. Although article 28 did not say so explicitly, it was to be understood that in that case the interpreter could also make use of the rules of logic and dialectics, legal maxims and all his legal, historical and sociological knowledge.

40. Since his delegation regarded the subsidiary character of the supplementary means set forth in article 28 as a key element in the system of articles 27 and 28, it could not support the United States amendment (A/CONF.39/C.1/L.156). It would serve no useful purpose merely to enumerate, without indicating any priority, a series of means of interpretation which was necessarily incomplete, and from which the interpreter could choose whichever he preferred. Rather than adopt such a system, it would be better to delete the articles altogether, and leave interpretation completely free.

41. The provisions of paragraph 3(*b*) of article 27, on the reference for purposes of interpretation to subsequent practice in the application of the treaty were closely connected with those of article 38, on modification of treaties by subsequent practice. The Committee had before it two proposals, by Finland (A/CONF.39/C.1/L. 143) and the Republic of Viet-Nam (A/CONF.39/C.1/L.220), to delete article 38. If those proposals were rejected, article 27 would not require any amendment. If, however, article 38 were deleted, paragraph 3(*a*) of article 27 should be amended so as to state that any subsequent practice by the parties in the application of the treaty could be taken into account for purposes of interpretation only if that practice did not openly conflict with the text of the treaty. Unless that final proviso were introduced, it would be possible to modify the treaty by the devious route of interpretation. He accordingly suggested that paragraph 3(*a*) of article 28 be reserved until the results of the discussion on article 38 were known.

42. The Mexican delegation supported the International Law Commission's text of articles 27 and 28.

43. Mr. ALVAREZ TABIO (Cuba) said he supported the Commission's text, which was well-balanced and based on the proposition that the text of the treaty was the authentic expression of the will of the parties and that the first thing to be done in interpreting it was to establish the literal meaning of the terms in the light of the general context of the treaty. The Commission suggested that the universally accepted means of interpretation should be applied in a flexible manner taking into account the circumstances of each case. The process of interpretation was a single one and the elements of a treaty had to be regarded as inseparable.

44. Article 28 rightly dealt separately with supplementary means of interpretation, which could only be resorted to if the text was not clear. He was opposed to combining the two articles in one.

45. The United States amendment (A/CONF.39/C.1/L.156) was unacceptable because it did not admit the primacy of the text and gave preparatory work equal importance with the text.

46. Mr. TÖTTERMAN (Finland) said that his delegation considered that it was in the interests both of individual States and of the international community as a whole to achieve a maximum measure of certainty in the interpretation of treaties, and it was therefore desirable to include rules on the subject in the draft convention. The weight to be given to the text, to the intention of the parties as distinct from the text, and to the object and purpose of the treaty could give rise to divergent views. The International Law Commission had succeeded in striking a balance, relying on the jurisprudence of international tribunals and taking account of the need for stability in treaty relations. Its texts reinforced the rule *pacta sunt servanda*, and would provide a valuable instrument for the interpretation and application of treaties and for their drafting.

47. The fear expressed in the discussion that the Commission's articles paid insufficient regard to the intention of the parties by establishing a distinction between general and supplementary means of interpretation and reducing the importance of preparatory work was excessive. The draft articles were based on the idea that the establishment of the common intention of the parties was the point of departure for interpretation, and it was reasonable to assume that the draftsmen of a treaty would have exercised care in giving written expression to the intention of the parties.

48. He could not support amendments which failed to maintain the distinction between general and supplementary means of interpretation and which wished to merge articles 27 and 28. He opposed the amendment of the United Republic of Tanzania (A/CONF.39/C.1/L.215), because it gave too much importance to preparatory work.

49. The Pakistan amendment (A/CONF.39/C.1/L.182) introduced a new element which might be too far-reaching in its consequences. The Australian amendment (A/CONF.39/C.1/L.210) to delete the word " subsequent " in paragraph 3(*a*) of article 27 would obscure the necessary connexion between that sub-paragraph and paragraph 2(*a*), and so would not be conducive to clarity. The insertion of the word " common " in paragraph 3(*b*) might be useful.

50. The Greek amendment (A/CONF.39/C.1/L.213) departed from current practice and opinion and his delegation could not support it. The remaining amendments were of a drafting character.

51. Mr. MIRAS (Turkey) said that the Commission's articles contained progressive rules. The Commission had not sought to deal with all hypotheses in the controversial problem of interpretation and had confined itself to formulating certain fundamental principles which might be regarded as rules of international law. In its comments on what had previously been articles 69, 70 and 71, his Government had expressed approval of the Commission's text. [8]

52. The rules of interpretation must be based on the principle of good faith. The text of the treaty had to be regarded as the final expression of the intention of the parties, the text being read in the ordinary meaning of words. If the text of the treaty was ambiguous or obscure, then resort must be had to the preparatory work.

53. Mr. MYSLIL (Czechoslovakia) said that, in the draft adopted by the International Law Commission in 1964, [9] the provision now appearing in paragraph 3(*c*) had formed part of the basic rule expressed in paragraph 1 of the article. In the opinion of his delegation, that important provision belonged in the basic rule and its transfer to paragraph 3 had not been convincingly justified. The application of the rules of international law in the process of interpretation should not be made dependent on the will of the parties. It must be assumed that the parties could not have intended to violate such fundamental rules of international law as the sovereignty of States. He would therefore urge that the provision in paragraph 3(*c*) be transferred back to paragraph 1.

54. With regard to the same provisions, the question had arisen whether the " relevant rules " of international law were those in force at the time of the conclusion of the treaty or those in force at the time of its application. He submitted that it was in the interests of the international community to take into account the rules of international law in force at the time of application of the treaty. Principles and institutions of law underwent changes in the course of time; for example, the rules relating to neutrality. It would be undesirable to apply rules existing in the seventeenth and eighteenth centuries or rules which had become obsolete since war had been outlawed after the Pact of Paris of 1928. A static interpretation of the law could lead to a misinterpretation. The International Law Commission was to be congratulated on the manner in which it had dealt with a problem that was difficult both in theory and in practice.

55. That being the position taken by his delegation, he could support the amendments by Pakistan (A/CONF.39/C.1/L.182), the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.201), Romania (A/CONF.39/C.1/L.203), Australia (A/CONF.39/C.1/L.210) and Greece (A/CONF.39/C1./L.213), which were largely of a drafting character, but not any of the other amendments.

56. Mr. CRUCHO DE ALMEIDA (Portugal) said that in its Advisory Opinion on the interpretation of the Convention of 1919 concerning employment of women during the night, the Permanent Court of International

[8] *Yearbook of the International Law Commission, 1966*, vol. II, p. 342.

[9] *Yearbook of the International Law Commission, 1964*, vol. II, p. 199.

Justice had found that the preparatory work confirmed the conclusion reached on a study of the text of the Convention. [10] In that particular instance, the judges had been fortunate because the two elements of interpretation had yielded the same results. There had been other decisions in international case law when the natural meaning of the text had coincided with the historical meaning. But a rule could not be based on coincidences, and that was precisely the case with article 28. What would happen if, though the text of a treaty was apparently clear, in seeking confirmation in the preparatory work and other surrounding circumstances a divergent meaning came to light? It was impossible to be sure in advance that those circumstances would confirm the textual meaning of the treaty. If the emphasis were placed on good faith, it would appear that in such a case those circumstances should be taken into consideration, although they did not lead to the confirmation of the meaning resulting from the application of article 27. But that would destroy the hierarchy established between articles 27 and 28.

57. There were two further points he wished to make. First, the " ordinary meaning " doctrine with its emphasis on the clarity of the text led to the unpleasant but inevitable conclusion that one of the parties to a dispute over the interpretation of a text must be acting in bad faith. The truth was certainly different: many pronouncements by international tribunals affirming the clarity of the texts under interpretation were nothing but an artificial way of reassuring the parties to the dispute about the reasonableness of the interpretations adopted by those tribunals. Secondly, it had been said that when there was no agreement between the parties except on the words of a text, only the textual approach to interpretation could be helpful. Even in those cases interpretation did not consist of a search for a hypothetical " ordinary meaning ". It had to be recognized that in those circumstances interpretation would necessarily be an activity of a discretionary and creative nature. He would therefore support the United States amendment (A/CONF.39/C.1/L.156) because it was flexible and he would also support others in the same sense, such as the amendment by the Republic of Viet-Nam (A/CONF.39/C.1/L.199).

58. Mr. BADEN-SEMPER (Trinidad and Tobago) said he supported the remarks by the Austrian representative; the Drafting Committee should make a careful examination of articles 27 and 28 in the light of all the amendments proposed and of the discussion, and endeavour to produce a text which would command a broader measure of acceptance. The differences between delegations were not as wide as appeared at first sight. His delegation was in favour of combining the two articles; the Drafting Committee should bear in mind that the concept of ordinary meaning would essentially be a fiction unless that ordinary meaning could be gleaned from the circumstances surrounding the conclusion of the treaty.

59. Investigation of the circumstances surrounding the conclusion of a treaty should be undertaken in order to determine not the subjective intention of the parties but rather the objective intention expressed by them in the text of the treaty.

60. Lastly, he could not support the United States amendment to insert in paragraph 3(*b*) the word " common " before the word " understanding " (A/CONF.39/C.1/L.156). The introduction of that qualification would inject into the provisions of paragraph 3(*b*) a rigidity which was inconsistent with the other provisions of the articles.

61. Mr. RAZAFINDRALAMBO (Madagascar) said that the dispute between those who upheld the primacy of the text and those who advocated the need to search for the intention of the parties was essentially a doctrinal dispute. The question should be viewed from the practical point of view and, in practice, the United States amendment (A/CONF.39/C.1/L.156) involved grave dangers, bearing in mind the Committee of the Whole's decision to delete sub-paragraph (*a*) of article 15. [11] The effect of that decision was that the principle of good faith would not be made applicable at the stage of the negotiation of a treaty. If the United States amendment to articles 27 and 28 were adopted, a State could then, at the time of the negotiation of a treaty, purposely lay great stress on a position which was manifestly unacceptable to the other party; at the time of the application of the treaty, it would be open to that party to invoke its initial position as part of the preparatory work and thus, under cover of interpretation, frustrate the application of a clear and unambiguous text.

62. It was essential to guard against that danger, since a State would not be required, now that article 15(*a*) had been deleted, to refrain during the negotiations from " acts tending to frustrate the object and purpose of the proposed treaty. " It was for those reasons that his delegation opposed all attempts to place on an equal footing with the text of the treaty other means of interpreting the intention of the parties, which were of a purely unilateral or subjective character.

63. His delegation would vote in favour of the International Law Commission's draft, which made a distinction between the general rule of interpretation in article 27 and the provision for recourse to supplementary means of interpretation in article 28. His delegation would oppose all amendments which were not of a purely drafting character.

64. Mr. PINTO (Ceylon) said that he would reply to the question put by the Spanish representative at the previous meeting, whether the term " instrument " in the amendment by Ceylon (A/CONF.39/C.1/L.212) was intended to cover decisions and other acts of the organization relevant to the treaty adopted within the organization. His delegation did not wish its present statement to prejudge the question whether, and if so to what extent and in what circumstances, the decisions and other acts of the organization might become relevant to the interpretation of the treaty adopted within it under another provision of the draft articles, or under some other rule of international law. That being said, he wished to state that his delegation's amendment was designed to cover only a limited special class of instrument adopted by the competent organ of an organization in connexion with a particular treaty, and intended by the organization to be of significance for the interpre-

[10] *P.C.I.J.* (1932), Series A/B, No. 50, pp. 378-380.

[11] See 20th meeting, para. 47.

tation of the treaty. The explanatory memoranda or reports adopted by the Executive Directors of the International Bank for Reconstruction and Development and circulated to member States together with certain treaties adopted within the Bank when opening them for signature and ratification, constituted examples of such instruments.

65. The CHAIRMAN invited the Expert Consultant to answer the various points raised during the discussion.

66. Sir Humphrey WALDOCK (Expert Consultant) said that he wished to dispel any impression that the International Law Commission had approached the problem of interpretation from the point of view of settling a doctrinal controversy. The Commission had of course taken into account the various theories in the matter but the rules which it had framed had been conceived as reflecting what happened in State practice; at the same time, the Commission had striven to give legal character as rules to some of the practice.

67. For example, with regard to the use made in practice of preparatory work for purposes of interpretation, the differences of opinion were not very wide. The Commission had fully appreciated the importance and the value of preparatory work and had fully realized that habitual recourse was had to such preparatory work whenever a party had some difficulty. From his experience as a practitioner of international law, he could say that preparatory work played little part so long as there was no problem, but when difficulties arose—and they did so for more than one reason—recourse was had to preparatory work. Sometimes difficulty arose because the text was ambiguous; it was also common, however, for one of the parties to find that the text had proved awkward in application because it had led to results not at first contemplated. Recourse was then had to preparatory work to try and find arguments for some other meaning for the text of the treaty.

68. In the circumstances, if the door were opened too widely to the use of preparatory work, very real dangers would arise for the integrity of the meaning of the treaty. The Commission had therefore considered that those elements of interpretation which had an authentic and binding character in themselves must be set apart in article 27; some distinction must be drawn between them and the other elements, although there had been no intention to discard recourse to preparatory work.

69. It was important to bear in mind that, under article 28, such supplementary means as preparatory work could be used " in order to confirm the meaning resulting from the application of article 27 ", apart from serving to determine that meaning in the cases envisaged in subparagraphs (*a*) and (*b*) of article 28. The International Law Commission had given careful consideration to the term " confirm "; the use of the term " verify " had also been suggested, a use which would have gone near to bringing preparatory work into the first processes of interpretation, but the Commission had ultimately settled for " confirm ". There had certainly been no intention of discouraging automatic recourse to preparatory work for the general understanding of a treaty.

70. With regard to the expression " ordinary meaning ", nothing could have been further from the Commission's intention than to suggest that words had a " dictionary " or intrinsic meaning in themselves. The provisions of article 27, paragraph 1, clearly indicated that a treaty must be interpreted " in good faith " in accordance with the ordinary meaning of the words " in their context ". The Commission had been very insistent that the ordinary meaning of terms emerged in the context in which they were used, in the context of the treaty as a whole, and in the light of the object and purpose of the treaty. So much so that, quite late in the Commission's deliberations, it had even been suggested that paragraph 4 of article 27 could safely be omitted. It was said with some justice during those discussions that the so-called " special " meaning would be the natural meaning in the particular context.

71. He could not agree with the Austrian representative's remark that in such cases the special meaning could only be arrived at by reference to the preparatory work. That type of case was comparatively rare; but those which had occurred did not support the Austrian representative's view. For example, in the *Legal Status of Eastern Greenland* case, [12] the Permanent Court of International Justice had considered whether the word " Greenland ", used in certain treaties between the parties to the case, meant the whole island, or had been used in the special meaning of Eastern Greenland; that question had been discussed in the Court by reference to the context and not to the preparatory work. The fact that the Commission had considered doing away with paragraph 4 of article 27 clearly illustrated its wish to associate in the strongest possible way the " ordinary meaning " with the context; the Commission had, moreover, stated in paragraph 3 an expanded concept of " context " to cover the relevant elements of authentic interpretation.

72. With regard to the question of hierarchy, he must emphasize that the arrangement of the elements set forth in article 27 was not intended to establish any order of priority among them; the Commission had simply adopted what seemed a logical arrangement. Unfortunately, in such cases it was almost impossible to prevent interpretations from being placed upon the arrangement chosen, as was amply demonstrated by the controversy over the order in which the sources of international law were set forth in Article 38(1) of the Statute of the International Court of Justice. As far as article 27 was concerned, the intention had been to place on the same footing all the elements of interpretation therein mentioned.

73. As to the distinction between articles 27 and 28, there had been a difference in treatment by the Commission because the two sets of elements were founded on slightly different legal bases.

74. On the question of the temporal element, he said that there were immense difficulties in any treatment of the subject with respect to interpretation. The Commission, after struggling with those difficulties, had abandoned the attempt to cover the point in the draft, realizing that it would have involved entering into the whole relationship between treaty law and customary law.

75. The CHAIRMAN said he would invite the Committee to vote first on the amendments to both articles 27 and 28.

[12] *P.C.I.J.* (1933), Series A/B, No. 53, p. 49.

The United States amendment to articles 27 and 28 (A/CONF.39/C.1/L.156) was rejected by 66 votes to 8, with 10 abstentions.

The amendment by the Republic of Viet-Nam to articles 27 and 28 (A/CONF.39/C.1/L.199) was rejected by 70 votes to 3, with 9 abstentions.

76. Mr. BADEN-SEMPER (Trinidad and Tobago) asked whether the rejection of those amendments would preclude the Drafting Committee from using any of the ideas which they contained.

77. The CHAIRMAN said that, since the two amendments had been rejected, no part of them would be referred to the Drafting Committee.

78. He invited the Committee to vote on the amendment by Ceylon to article 27.

The amendment by Ceylon (A/CONF.39/C.1/L.212) was rejected by 29 votes to 9, with 49 abstentions.

79. The CHAIRMAN said that the amendments to article 27 by the Philippines (A/CONF.39/C.1/L.174), Pakistan (A/CONF.39/C.1/L.182), the Ukrainian Soviet Socialist Republic (A/CONF.39/C.1/L.201), Romania (A/CONF.39/C.1/L.203), Australia (A/CONF.39/C.1/L.210), Greece (A/CONF.39/C.1/L.213), the Federal Republic of Germany (A/CONF.39/C.1/L.214) and Spain (A/CONF.39/C.1/L.216) would be referred to the Drafting Committee.

80. Mr. KHLESTOV (Union of Soviet Socialist Republics) said that the amendment by the Federal Republic of Germany (A/CONF.39/C.1/L.214) involved a point of substance and it should be put to the vote.

81. The CHAIRMAN said that the representative of the Federal Republic of Germany clearly stated that his amendment was one of drafting and had asked that it should not be put to the vote. Where a quasi-substantive amendment was not insisted upon by its sponsor, the implication was that it was withdrawn and that the fate of the amendment in the Drafting Committee was immaterial to the sponsor.

82. He invited the Committee to vote on the Tanzanian amendment to article 28.

The amendment by the United Republic of Tanzania (A/CONF.39/C.1/L.215) was rejected by 54 votes to 8, with 25 abstentions.

83. The CHAIRMAN said that the Spanish amendment to article 28 (A/CONF.39/C.1/L.217) would be referred to the Drafting Committee.

84. If there were no objections, he would take it that the Committee accepted articles 27 and 28, which could be referred to the Drafting Committee with the drafting amendments already mentioned.

It was so agreed. [13]

The meeting rose at 5.55 p. m.

[13] For resumption of the discussion on articles 27 and 28, see 74th meeting.

THIRTY-FOURTH MEETING

Tuesday, 23 April 1968, at 10.55 a.m.

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December 1966 *(continued)*

Texts proposed by the Drafting Committee

1. The CHAIRMAN invited the Chairman of the Drafting Committee to make a statement on article 8 and to introduce the text of articles 6 and 7 adopted by that Committee.

Article 8 (Adoption of the text)

2. Mr. YASSEEN, Chairman of the Drafting Committee, explained that in the absence of specific instructions from the Committee of the Whole, the Drafting Committee had been unable to prepare a text for article 8.[1]

Article 6 (Full powers to represent the State in the conclusion of treaties) [2]

3. Mr. YASSEEN, Chairman of the Drafting Committee, said that the text for article 6 adopted by the Drafting Committee read as follows:

"*Article 6*

" 1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

"(*a*) he produces appropriate full powers; or

"(*b*) it appears from the practice of the States concerned or from other circumstances that their intention was to dispense with full powers.

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

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

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

"(*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of the adoption of the text of a treaty in that conference, organization or organ."

4. The words " Except as provided in paragraph 2 ", at the beginning of paragraph 1, had been deleted as not being absolutely necessary. In the opening sentence the affirmative form had been substituted for the negative, in order to make the text more flexible.

5. In accordance with the amendment submitted by the United States (A/CONF.39/C.1/L.90), the Drafting Com-

[1] At the 80th meeting, further consideration of article 8 was deferred until the second session of the Conference. See also 15th meeting, footnote 4.

[2] For earlier discussion of article 6, see 13th meeting.