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Summary record of the 720th meeting

Topic:
Other topics

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720th MEETING

Thursday, 11 July 1963, at 3.30 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Draft report of the Commission on the work of its fifteenth session (A/CN.4/L.102 and Addenda)¹

Chapter II: Law of treaties (continued)

1. The CHAIRMAN invited the Commission to consider the commentaries on articles 13, 15, 16, 18 and 19 (A/CN.4/L.102/Add.4).

Commentary on article 13 (37 in final report)

Paragraph 1

2. Mr. TUNKIN proposed that the opening words of paragraph 1 "Opinion has been divided" should be replaced by the words "The opinions of writers have been divided", in order to avoid giving the impression that it was opinion in the Commission itself which had been divided.

3. Secondly, he proposed that, in the third sentence, the words "the international legal order" should be replaced by the words "international law" and that the words "no international public order" should be deleted.

4. Thirdly, he proposed the deletion of the fourth sentence, with its reference to the "law of the Charter concerning the use of force" and to the controversial concept of "international criminal law"; that amendment would entail the deletion of the opening words of the last sentence: "This being so".

5. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Tunkin's first two proposals. He could not support the proposal to delete the fourth sentence, however. The original article 13 (A/CN.4/156) had contained a number of examples and they had only been dropped from the text on the understanding that they would be included in the commentary.

6. Mr. TUNKIN said that the point could be covered by redrafting the sentence to refer to the prohibition of the use of force by general international law.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that while he accepted the deletion of the reference to international criminal law, he thought that it would be going too far to delete all reference to the law of the Charter. The concept of *jus cogens* was not yet accepted everywhere and it was appropriate for the Commission to state the basis on which it had accepted that concept. It was necessary to refer to the law of the Charter in connexion with the prohibition of the use of force, because it was the focal point of the matter. He

therefore suggested that the fourth sentence should be redrafted to read:

"The law of the Charter concerning the use of force really presupposes the existence of rules of international law having the character of *jus cogens*".

8. Mr. ROSENNE said he could accept that wording if it was amended to refer to "the prohibition of the use of force", rather than "the use of force".

9. Mr. CADIEUX said that he, for one, believed that an international public order existed.

10. Sir Humphrey WALDOCK, Special Rapporteur, said that he too believed in the existence of an international public order. He had been rather surprised, however, to hear Mr. Tunkin propose the deletion of the reference to the "international legal order".

11. Mr. TUNKIN said that he would not press for the deletion of that expression, but he thought it advisable not to include references to the controversial concept of an "international public order".

12. The CHAIRMAN, speaking as a member of the Commission, proposed that, in the last sentence, the words "merely bilateral or regional" should be deleted. The inclusion of those words might suggest that States could derogate from *jus cogens* rules by means of treaties that were neither bilateral nor regional.

13. Mr. ROSENNE objected that, if the words in question were deleted, the sentence would suggest that it was not possible for a new rule of *jus cogens* on the same matter to be created by a subsequent general multilateral treaty.

14. The CHAIRMAN replied that the sentence referred to the competence to derogate. The fact that no derogation was possible did not prevent the modification of a rule of *jus cogens* by a subsequent general multilateral treaty.

15. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the concluding words should be replaced by the words "any merely contractual arrangements".

16. Mr. TUNKIN said that that wording would raise the controversial issue of the distinction between "*traités-contrats*" and "*traités-lois*".

17. Mr. ROSENNE suggested that the last sentence should be amended to read:

"The Commission concluded that in codifying the law of treaties it must take the position that today there are certain rules and principles from which States are not competent to derogate".

18. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to make the following changes in paragraph 1 of the commentary: First, to amend the first sentence as proposed by Mr. Tunkin's; second, to delete from the third sentence the words "no international public order" as proposed by Mr. Tunkin; third, to amend the fourth sentence as suggested by the Special Rapporteur.

¹ For final Report see *Official Records of the General Assembly*, eighteenth session, Supplement No. 9.

teur, with the modification proposed by Mr. Rosenne; fourth, to amend the last sentence as proposed by Mr. Rosenne.

It was so agreed.

Paragraph 3

19. Mr. CASTRÉN proposed that the third sentence should be deleted. It was not altogether correct to say that the emergence of *jus cogens* rules was comparatively recent. The principle of the freedom of the seas was over a hundred years old.

20. Mr. GROS objected that the deletion of that sentence would give the impression that there had always been, in international law, rules having the character of *jus cogens*.

21. Mr. de LUNA supported Mr. Gros.

22. Sir Humphrey WALDOCK, Special Rapporteur, said that the difficulty might be met by replacing the opening words "The emergence of rules" by "The recognition of rules".

23. Mr. AGO proposed that the first sentence should be deleted, since it referred to internal systems of law, and the situation in international law was radically different.

24. Mr. TUNKIN suggested that the first two sentences should be deleted. They might give the impression that the Commission had done nothing towards formulating rules in the matter; in fact, it had drafted a number of articles which prescribed the nullity of treaties which violated *jus cogens*.

25. Mr. AGO was not in favour of referring to "recognition"; the question was whether a peremptory rule existed, not whether it was recognized.

26. The CHAIRMAN said that, if there were no objection he would consider that the Commission agreed to delete the first two sentences of paragraph 3, and leave the third sentence as it stood.

It was so agreed.

27. Mr. TUNKIN suggested that the concluding words of paragraph 3, "matters which really belong to other branches of international law" should be amended to read "matters which are outside the scope of the present articles".

It was so agreed.

The commentary on article 13 was adopted, as amended.

Commentary on article 15 (38 in final report)

28. Mr. YASSEEN referring to the last sentence of paragraph 3, said that it was not quite correct to say that sub-paragraph (c) had been included in paragraph 1 of article 15 because "a clause providing for a terminating 'event' is not always expressed in the form of a condition, but rather as the temporal limit of the treaty". In fact, the question of the temporal limit of the treaty was covered by sub-paragraph (a) of para-

graph 1 and that of a resolutive condition by sub-paragraph (b). The purpose of sub-paragraph (c) was apparently to cover cases that involved neither a resolutive condition nor a temporal limit.

29. The CHAIRMAN said that the difficulty could be overcome by deleting the words "but rather as the temporal limit of the treaty".

30. Sir Humphrey WALDOCK, Special Rapporteur, said that there would have been no difficulty if the three sub-paragraphs of paragraph 1 had been combined in a single provision reading:

"on such date or event, or on the expiry of such period as may be fixed in the treaty..."

However, the Drafting Committee had considered it appropriate to keep the three cases separate. The case covered in sub-paragraph (c) could be described as a form of term; an event was one of the ways of expressing a term.

31. Mr. AGO proposed that the last sentence of paragraph 3 of the commentary should be amended to read:

"As, however, a clause providing for a terminating event is not always expressed in the form of a term or of a condition, it was thought preferable to include sub-paragraph (c) so as to ensure that no case could be said not to have been covered."

The proposal was adopted.

The commentary on article 15 was adopted as amended.

Commentary on article 16 (39 in final report)

32. Mr. CASTRÉN drew attention to the opening words of paragraph 4: "Some members of the Commission considered...". As he recalled it, only Mr. Briggs had expressed the view referred to.

33. Mr. BRIGGS said that his position was not in fact fully stated by the sentence in question. His view was that, in the absence of any treaty provision or of an agreement between the parties, the right of unilateral denunciation or withdrawal was excluded.

34. Sir Humphrey WALDOCK, Special Rapporteur, said he did not think Mr. Briggs was alone in holding that view.

35. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to amend the first sentence of paragraph 4 by adding a reference to the absence of any agreement between the parties.

It was so agreed.

The commentary on article 16 was adopted as amended, with various drafting changes.

Commentary on article 18 (40 in final report)

36. Mr. ROSENNE said that the first sentence of the commentary was at variance with the text of article 18. The article provided that a treaty could be

terminated at any time by agreement of all the parties, whereas the first sentence of the commentary stated that the termination of a treaty by subsequent agreement was "necessarily a process which involves the conclusion of a new treaty in some form or another". As he understood it, the text of article 18 covered the possibility of tacit agreement to terminate the treaty.

37. Mr. TUNKIN agreed with Mr. Rosenne that the first sentence of the commentary should be brought into line with the text of the article.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that according to one school of thought an agreement terminating a prior treaty had to be in the form of a treaty of equal weight to the treaty which was to be terminated. That view was not confined to jurists from the United States of America.

39. Mr. BRIGGS thought it would be sufficient to retain the last two sentences of paragraph 1.

40. The CHAIRMAN, speaking as a member of the Commission, said that the view in question was maintained by distinguished jurists outside the United States, particularly Basdevant, the author of the doctrine of "*l'acte contraire*".

41. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that he had prefaced the reference to jurists from the United States (in the fourth sentence) with the words "for example".

42. Mr. ROSENNE favoured retaining the passage, but proposed that, in the fourth sentence, the concluding words "treaty law" should be replaced by "international law".

43. Mr. AGO proposed the deletion of the word "subsequent" in the first sentence.

44. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to amend the first two sentences so as to bring them into line with the text of article 18 itself and to make the changes suggested by Mr. Rosenne and Mr. Ago.

It was so agreed.

The commentary on article 18 was adopted as amended, with various drafting changes.

Commentary on article 19 (41 in final report)

The commentary on article 19 was adopted with various drafting changes.

Chapter III: Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (A/CN.4/L.102/Add.5)

45. The CHAIRMAN invited the Commission to consider Chapter III of the draft report, which was based on document A/CN.4/162, revised by the Special Rapporteur in the light of the discussion at the 712th and 713th meetings.

Paragraphs 1 to 32 were adopted with various drafting changes.

46. The CHAIRMAN announced that, in deference to the request of a number of members who wished to study the conclusions in paragraph 33, consideration of that paragraph would be deferred until the next meeting.

47. Mr. TUNKIN said that chapter III only set out the conclusions reached; it did not give an account of the discussion that had taken place in the Commission. He suggested that it should be explained that the views expressed by the members of the Commission were to be found in the summary records of the 712th and 713th meetings.

48. Mr. CADIEUX proposed that a reference to those meetings be given in a footnote to paragraph 33.

It was so agreed.

Chapter IV: Progress of work on other questions under study by the Commission

Paragraph 16 (66 in final report)

49. The CHAIRMAN invited the Commission to consider paragraph 16 of chapter IV of the draft report (A/CN.4/L.102/Add.7), prepared by the Secretariat in pursuance of the decision taken at its previous meeting (para. 5).

50. Mr. CASTRÉN proposed the insertion of a reference to the working paper in the scope and order of future work on relations between States and inter-governmental organizations (A/CN.4/L.103) submitted by the Special Rapporteur on that topic.

The proposal was adopted.

Paragraph 16 of chapter IV of the draft report was adopted as amended.

Chapter II: Law of treaties (resumed)

Section B: Draft articles on the Law of Treaties

Part II: Invalidity and Termination of Treaties²

51. The CHAIRMAN drew attention to the fact that the draft articles in Part II had been renumbered to follow consecutively from those in Part I.³ He also pointed out that the Commission had agreed at the 714th meeting (paras. 55-56) to amend the opening words of article 25 (since renumbered 51) to read "A party alleging the nullity of a treaty. . .". He now saw that the Drafting Committee had reverted to the word "invoking".

52. Mr. BARTOŠ, Chairman of the Drafting Committee, said that the Drafting Committee had considered the word "invoking" more correct than "alleging".

53. The CHAIRMAN said that it was open to the Commission to amend the text on the recommendation of the Drafting Committee, but to do so would involve

² See final Report, pp. 3 ff.

³ See *Official Records* of the General Assembly, seventeenth session, Supplement No. 9, pp. 4 ff.

a reversal of the previous decision and would require a vote.

54. Mr. TUNKIN, speaking as a member of the Drafting Committee, explained that the term "invoke" had been used in other articles and the Drafting Committee had therefore considered it appropriate to use it in article 51.

55. The CHAIRMAN, speaking as a member of the Commission, said that the term "invoke" had not been consistently used in all the articles referring to the nullity of treaties. The Commission had deliberately avoided its use in article 35 (personal coercion of representatives of States), article 36 (coercion of a State) and article 37 (treaties conflicting with a peremptory norm of general international law). If, therefore, the term "invoke" was used in article 51, it might be erroneously inferred that the provisions of that article did not apply to the cases covered by articles 35, 36 and 37. He did not insist that the term "alleging" should be retained, but if it were replaced by "invoking", the passage should be amended to read: "A party invoking the nullity of a treaty under any of the provisions of the articles of section II. . .".

56. Mr. BARTOŠ pointed out that, in the cases covered by articles 35, 36 and 37, the treaty was void *ipso jure*, without any action on the part of the injured party. Hence it was not correct to speak of the nullity being "invoked".

57. Mr. de LUNA said that, in systems of internal law, one of the differences between an instrument that was void and one that was merely voidable was that, in the case of the void instrument, the court could declare its nullity without any application by the injured party. In international law, since there was no court competent to declare a treaty void *ex officio*, that difference did not exist; whether a treaty was void or voidable, the nullity would always have to be invoked.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that the point which had been raised was one of substance. The discussion had shown him that the word "alleging" should have been retained.

59. Mr. TSURUOKA said there appeared to be no doubt that the provisions of article 51, paragraph 1, applied to the cases covered by articles 35, 36 and 37.

60. The CHAIRMAN said that, if there were no further comments, he would assume that the Commission did not intend to reverse its decision that the opening words of article 51 should read: "A party alleging the nullity of a treaty. . .".

It was so agreed.

Section I: General provision

ARTICLE 30 (FORMERLY ARTICLE 2): PRESUMPTION AS TO THE VALIDITY, CONTINUANCE IN FORCE AND OPERATION OF A TREATY

Article 30 was adopted.

Section II: Invalidity of treaties

ARTICLE 31 (FORMERLY ARTICLE 5): PROVISIONS OF INTERNAL LAW REGARDING COMPETENCE TO ENTER INTO TREATIES

Article 31 was adopted with various corrections.

ARTICLE 32 (FORMERLY ARTICLE 6):
LACK OF AUTHORITY TO BIND THE STATE

Article 32 was adopted without discussion.

ARTICLE 33 (FORMERLY ARTICLE 7): FRAUD

Article 33 was adopted without discussion.

ARTICLE 34 (BASED ON FORMER ARTICLES 8, 9
AND 10): ERROR

61. Mr. ROSENNE proposed that the concluding words of paragraph 3: "these clauses alone" should be amended to read "those clauses alone".

Article 34 was adopted with that amendment.

ARTICLE 35 (FORMERLY ARTICLE 11):
PERSONAL COERCION OF REPRESENTATIVES OF STATES

62. Mr. CASTRÉN recalled that the Commission had decided at the previous meeting (para. 54) to replace the word "invoke" in paragraph 2 by the word "treat".

63. Mr. AGO said he saw no reason for dropping the term "invoke", which was used elsewhere in the draft articles. It brought out the fact that the provisions of article 51 (formerly article 25) applied to the case covered by article 35.

64. The CHAIRMAN, speaking as a member of the Commission, pointed out that the word "invoke" was not used in paragraph 1.

The Commission decided to retain the word "invoke" in article 35, paragraph 2.

Article 35 was adopted.

ARTICLE 36 (FORMERLY ARTICLE 12): COERCION
OF A STATE BY THE THREAT OR USE OF FORCE

Article 36 was adopted without discussion.

ARTICLE 37 (FORMERLY ARTICLE 13): TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW (*jus cogens*)

Article 37 was adopted without discussion.

Section III: Termination of treaties

ARTICLE 38 (FORMERLY ARTICLE 15): TERMINATION OF TREATIES THROUGH THE OPERATION OF THEIR PROVISIONS

Article 38 was adopted without discussion.

ARTICLE 39 (BASED ON FORMER ARTICLES 16 AND 17):
TREATIES CONTAINING NO PROVISIONS REGARDING THEIR
TERMINATION

Article 39 was adopted without discussion.

ARTICLE 40 (FORMERLY ARTICLE 18): TERMINATION OR
SUSPENSION OF THE OPERATION OF TREATIES BY AGREEMENT

Article 40 was adopted without discussion.

ARTICLE 41 (FORMERLY ARTICLE 19): TERMINATION
IMPLIED FROM ENTERING INTO A SUBSEQUENT TREATY

Article 41 was adopted without discussion.

ARTICLE 42 (FORMERLY ARTICLE 20): TERMINATION OR
SUSPENSION OF THE OPERATION OF A TREATY AS A CONSEQUENCE
OF ITS BREACH

65. In reply to a question by Mr. BRIGGS, the CHAIRMAN said that the comma after the words "terminating the treaty" in paragraph 1 should be deleted. The words "in whole or in part" applied to both suspension and termination.

Article 42 was adopted with that amendment.

ARTICLE 43 (FORMERLY ARTICLE 21 bis): SUPERVENING
IMPOSSIBILITY OF PERFORMANCE

Article 43 was adopted without discussion.

ARTICLE 44 (FORMERLY ARTICLE 22): FUNDAMENTAL
CHANGE OF CIRCUMSTANCES

Article 44 was adopted without discussion.

ARTICLE 45 (FORMERLY ARTICLE 22 bis): EMERGENCE
OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW

Article 45 was adopted without discussion.

*Section IV: Particular rules relating to the application
of sections II and III*

ARTICLE 46 (FORMERLY ARTICLE 26): SEPARABILITY OF
TREATY PROVISIONS FOR THE PURPOSES OF THE OPERATION
OF THE PRESENT ARTICLES

Article 46 was adopted without discussion.

ARTICLE 47 (FORMERLY ARTICLE 4): LOSS OF A RIGHT
TO INVOKE THE NULLITY OF A TREATY OR A GROUND FOR
TERMINATING OR WITHDRAWING FROM A TREATY

66. Mr. CASTRÉN said that in the opening paragraph and in sub-paragraph (b), the reference to articles 33-35 was incorrect; it should read articles 32-35.

67. Mr. AGO proposed that the word "invoke" should be replaced, in the title and in the opening sentence of the text, by the word "allege".

68. Mr. CADIEUX said that, in French at least, it would sound strange to refer to the loss of a right to "allege" the nullity of a treaty.

Article 47 was adopted with the amendments proposed by Mr. Castrén and Mr. Ago.

ARTICLE 48 (FORMERLY ARTICLE 2 bis): TREATIES WHICH
ARE CONSTITUENT INSTRUMENTS OF INTERNATIONAL ORGANIZATIONS
OR WHICH HAVE BEEN DRAWN UP WITHIN
INTERNATIONAL ORGANIZATIONS

Article 48 was adopted without discussion.

Section V: Procedure

ARTICLE 49 (FORMERLY ARTICLE 23): AUTHORITY TO
DENOUNCE, TERMINATE OR WITHDRAW FROM A TREATY
OR SUSPEND ITS OPERATION

Article 49 was adopted without discussion.

ARTICLE 50 (FORMERLY ARTICLE 24): PROCEDURE UNDER
A RIGHT PROVIDED FOR IN THE TREATY

Article 50 was adopted without discussion.

ARTICLE 51 (FORMERLY ARTICLE 25): PROCEDURE IN
OTHER CASES

Article 51 was adopted without discussion.

Section VI: Legal consequences of the nullity, termination or suspension of the operation of a treaty

ARTICLE 52 (FORMERLY ARTICLE 27): LEGAL CONSEQUENCES
OF THE NULLITY OF A TREATY

69. Mr. ROSENNE suggested that, in paragraph 1 (a), the words "shall not affect as such" should be amended to read "shall not as such affect".

Article 52 was adopted with that amendment.

ARTICLE 53 (FORMERLY ARTICLE 28): LEGAL CONSEQUENCES
OF THE TERMINATION OF A TREATY

70. Mr. ROSENNE observed that the words "as such" did not appear in paragraph 1 (b) of article 53, as they did in paragraph 1 (a) of article 52.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that while those words were appropriate in the case of nullity of a treaty (article 52) it should be remembered that in the case of termination (article 53) the treaty had been absolutely valid before it was terminated.

Article 53 was adopted.

ARTICLE 54 (FORMERLY ARTICLE 29): LEGAL CONSEQUENCES OF THE SUSPENSION OF THE OPERATION OF A TREATY

Article 54 was adopted without discussion.

Part II of the draft articles as a whole, as amended, were adopted unanimously.

72. Mr. BARTOŠ explained that although he had voted in favour of the draft articles as a whole, he maintained his reservations regarding certain specific paragraphs, which were recorded in the summary records. On the whole, he thought the draft articles adopted by the Commission were suitable for submission to governments.

73. Mr. YASSEEN said his position was similar to that of Mr. Bartoš.

74. Mr. AGO moved a vote of thanks to the Special Rapporteur on the law of treaties.

The motion was carried by acclamation.

75. Sir Humphrey WALDOCK, Special Rapporteur, thanked all the members, and in particular the members of the Drafting Committee, for their contributions to improving the draft articles.

The meeting rose at 5.30 p.m.

721st MEETING

Friday, 12 July 1963, at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Draft report of the Commission on the work of its fifteenth session (A/CN.4/L.102 and Addenda)¹

Chapter II: Law of Treaties (continued)

1. The CHAIRMAN invited the Commission to consider the commentaries on articles 20-24 (A/CN.4/102/Add.8).

Commentary on article 20 (42 in final report)

Paragraph 1

2. Mr. TUNKIN proposed the deletion of the second sentence which read "Nor could the rule well be otherwise, since good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect". In the past, a number of rules had been in existence against which good sense and equity might have rebelled. That change would also require the deletion of the word "Moreover" at the beginning of the next sentence.

3. He suggested that, in general, when commenting on a general rule of law it would be more appropriate first

to refer to State practice in the matter and then to the views of writers.

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the second sentence reflected a view of Judge Anzilotti, which certain members had endorsed, but he had no objection to its deletion.

Paragraph 4

5. Mr. ROSENNE proposed that the word "assume" should be substituted for the words "lay down" in the last sentence, which seemed to imply that a precedent might have binding force.

It was so agreed.

Paragraph 5

6. Mr. TUNKIN proposed the deletion of the first two sentences of paragraph 5, which did not entirely correspond to the sense of article 20, and in which the emphasis was not right.

7. Mr. BRIGGS favoured the retention of those two sentences; he considered that the generalization that a breach, or a mere unilateral allegation of a breach, did not *ipso facto* bring the treaty down was correct.

8. Sir Humphrey WALDOCK, Special Rapporteur, believed that the two sentences reflected the Commission's decision.

It was agreed to substitute the words "ipso facto" for the words "as such" and the word "not" for the word "never" in the first sentence of paragraph 5.

Paragraph 6

9. Mr. ROSENNE proposed that in order to bring the fourth sentence into line with the final text of the article, which permitted partial termination in the case of a material breach, the words "of the whole treaty or, if it does not wish to take so drastic a step" should be deleted and replaced by the word "or".

10. He also thought it inappropriate to refer to compensation in the last sentence of the paragraph, since all questions of responsibility had been reserved.

11. Sir Humphrey WALDOCK, Special Rapporteur, accepted Mr. Rosenne's first amendment and said that he would revise the last sentence so as to make it more general. It might, for example, end with some such wording as "the injured party's right to invoke the law of State responsibility".

The commentary on article 20 was adopted as amended, subject to further drafting changes.

Commentary on article 21 (43 in final report)

The commentary on article 21 was adopted without discussion.

Commentary on article 22 (44 in final report)

Paragraph 5

12. Mr. BARTOŠ said he thought that the Egyptian case had been interpreted as based not on the *rebus*

¹ For final Report see *Official Records* of the General Assembly, eighteenth session, Supplement No. 9.