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Summary record of the 769th meeting

Topic:
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funeral was a ceremonial occasion ; but the conveyance of congratulations on an occasions such as the inauguration of a new head of State was not.

Article 9 was adopted by 12 votes to none, with 1 abstention.

ARTICLE 10 (Commencement of the function of a special mission)

144. Mr. BRIGGS, Chairman of the Drafting Committee, said the Committee proposed the following text for article 10 :

"The function of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving State. The commencement of its function shall not depend upon official presentation by the regular diplomatic mission or upon the submission of letters of credence or full powers."

145. Mr. YASSEEN considered that there was no need to qualify the word "presentation" by the word "official".

146. Mr. de LUNA hoped that the term would be kept, since presentation had a very specific meaning in protocol.

147. Mr. TSURUOKA proposed that the second sentence be placed in the commentary rather than in the body of the article.

148. He also suggested that the commentary should explain what was meant by "appropriate organs".

149. Mr. YASSEEN thought that that suggestion concerned substance, especially in view of the phrase "submission of letters of credence or full powers".

150. Mr. BARTOŠ, Special Rapporteur, agreed that a matter of substance was involved. In practice, presentation was often deliberately delayed.

151. The CHAIRMAN suggested that the sentence should read : "...shall not depend upon official presentation of the special mission by the regular diplomatic mission".

152. Mr. TSURUOKA said his principal concern was that the article should not give the impression that the mere fact of forming part of a special mission could empower a person to commit a State.

153. Mr. BARTOŠ, Special Rapporteur, said that the text reflected existing practice.

154. The CHAIRMAN said that it was clear that the text in no way exempted a State from the duty to submit letters of credence and full powers ; but, in his opinion, it would be enough to explain that in the commentary.

Article 10 was adopted unanimously.

The meeting rose at 1.10 p.m.

769th MEETING

Friday, 17 July 1964, at 3.40 p.m.

Chairman : Mr. Roberto AGO

Special Missions

(continued)

[Item 4 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 11 (End of the function of a special mission)

1. The CHAIRMAN drew attention to the following text proposed by the Drafting Committee for article 11 :

"The function of a special mission shall come to an end, *inter alia* :

"(a) upon the expiry of the duration of the special mission ;

"(b) upon the completion of the task of the special mission ;

"(c) upon notification of the recall of the special mission by the sending State ;

"(d) upon notification by the receiving State that it considers the mission terminated."

2. He suggested that the word "functions" in the plural should be used instead of "function", a change which would necessitate a consequential change in article 10.

It was so agreed.

Article 11, as amended and subject to drafting changes, was adopted unanimously.

Law of Treaties

(resumed from the 767th meeting)

[Item 3 of the agenda]

ARTICLE 70 (General rule) [concerning the interpretation of treaties],

ARTICLE 71 (Cases where the meaning of a provision is in doubt),

ARTICLE 72 (Terms having a special meaning) and

ARTICLE 69 A (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law)

3. Sir Humphrey WALDOCK, Special Rapporteur, said that he had redrafted articles 70, 71, 72 and 69 A¹ to read :

" Article 70

" General rule

" 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each provision —

" (a) in the context of the treaty and in the light of its objects and purposes ;

and

" (b) in the light of the rules of international law [in force at the time of its conclusion].

" 2. The context of the treaty, for the purposes of its interpretation, shall be understood as comprising in addition to the treaty, including its preamble :

" (a) any instrument annexed or related to the treaty and drawn up in connexion with its conclusion ;

" (b) any agreement between the parties regarding the interpretation of the treaty.

" 3. Any subsequent practice in the application of the treaty which establishes the common understanding of all the parties regarding its interpretation shall also be taken into account as if it formed part of the context of the treaty.

" Article 71

" Cases where the meaning of a provision is in doubt

" If the interpretation of a provision in accordance with article 70 — (a) leaves the meaning ambiguous or obscure ; or (b) leads to a result which is manifestly absurd or unreasonable in the light of the objects and purposes of the treaty, recourse may be had to further means of interpretation, including the preparatory work of the treaty, the circumstances of its conclusion and any relevant indications in the practice of individual parties.

" Article 72

" Terms having a special meaning

" Notwithstanding anything contained in article 70, a meaning other than its ordinary meaning may be given to a term if it is established conclusively that the parties intended the term to have that special meaning.

" Article 69 A

" Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law

" The operation of a treaty may also be modified —

" (a) by a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible ;

" (b) by a subsequent practice of the parties in the application of the treaty establishing their tacit agreement to an alteration or extension of its provisions ; or

" (c) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties."

4. He explained that the new form of article 70 had been suggested by the Chairman and several other members of the Commission. In redrafting the rule, he had tried to assign a slightly less important place than in his earlier draft (A/CN.4/167/Add.3) to subsequent concordant practice. Logically, there was some difficulty about including a reference to subsequent practice in article 70. The fundamental rule, it would be generally agreed, was that a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to each provision. If subsequent practice coincided with the ordinary meaning, it was of interest only in showing that the ordinary meaning had been correctly interpreted. Subsequent practice was of special value when doubts arose, for in that case it might indicate the correct interpretation. He had hesitated to put subsequent practice, as a means of interpretation, on the same level as instruments or agreements. In order to be able to mention subsequent practice in article 70 at all, he had used the formula, familiar in English law, that it should be taken into account "as if it formed part of the context of the treaty". A majority of the Commission appeared to desire that context and subsequent practice should be treated in article 70 after a brief definition of the general rule. The Commission should now decide on the exact contents of paragraph 2 and on how to deal with subsequent practice when it was concordant.

5. Article 71 related to the main cases in which doubt arose as to the meaning of a provision. The "relevant indications in the practice of individual parties" were on a different level from concordant practice. A State might by its practice acknowledge a certain interpretation of its obligations. For example, in the case of the *South West Africa mandate*,² the mandatory Power had acknowledged its obligations and subsequently tried to evade them, so that a form of estoppel had arisen.

6. The Commission would also have to decide whether to retain article 72, dealing with terms having special meanings. In the *Eastern Greenland case*,³ for instance, the meaning of the word "Greenland" had been disputed, and the Permanent Court of International Justice had decided that evidence of the special meaning to be attached to a term was admissible but that the burden of proof was upon the party desiring to establish that special meaning. He personally thought that where a special meaning could be established by special evidence, it was very probable that that meaning would appear in the context of the treaty. In most cases in which a special meaning of a term had been pleaded, the tribunals appeared to have rejected the special meaning. Since, however, there was a great deal of jurisprudence behind the provision and since it might be of some importance in determining on whom fell the burden of proof, he had included it.

7. In article 69 A, he had tried to deal with the impact on a treaty of a subsequent treaty, subsequent practice

² *I.C.J. Reports*, 1962.

³ *Legal Status of Eastern Greenland, P.C.I.J.* (1933), Series A/B, No. 53.

¹ Article 69A replaces former article 73 in the Special Rapporteur's original draft (A/CN.4/167/Add.3).

and customary law. Article 69 A should be included in section II (Modification of treaties) of part III of the Commission's draft on the law of treaties.

ARTICLE 70

8. Mr. TUNKIN thought that in article 70, paragraph 1 (b), the words "in force at the time of its conclusion" should be omitted. It was also too much to suggest that a treaty should be interpreted "in the light of the rules of international law", since not all rules, but only the basic principles of international law which had a bearing on the treaty were applicable in its interpretation. With regard to paragraph 2 (a), he agreed on the relevance of any instrument annexed to the treaty, but would like the Special Rapporteur to explain what he meant by a related instrument. A party to a treaty might draw up a document in connexion with the conclusion of the treaty. Surely, if such a document was purely unilateral it should not be taken into account in the interpretation of the treaty. In paragraph 3, he would hesitate to consider subsequent practice "as if it formed part of the context of the treaty" and would prefer those words to be omitted. Besides, the word "any" before "subsequent practice" was too sweeping.

9. The CHAIRMAN, speaking as a member of the Commission, suggested that sub-paragraph 1 (a) and (b) of article 70 should be redrafted to read "(a) in the context of the treaty and taking into account its objects and purposes; and (b) in the light of the general principles of international law". The expression "rules of international law" was unsuitable, because the treaty itself created rules of international law, and international law was, in fact, largely treaty law.

10. Sir Humphrey WALDOCK, Special Rapporteur, agreed that international law consisted to a large extent of treaty law. It was precisely for that reason that he preferred not to speak of general rules or general principles. A treaty among Latin American States, for example, would have, as a definite context, the rules of international law applicable to those States and would be interpreted in the context of those rules. If the draft stated that the interpretation of such a treaty should be based exclusively on the general rules or principles of international law, it might be understood to mean that that specific context could not be taken into account.

11. Mr. YASSEEN thought that the expression "rules of international law in force at the time of its conclusion" should be retained because more than general principles were involved; the definition of a term employed in a treaty might well depend on the meaning attached to that term in the context of a previous treaty, and the parties concluding the new treaty might find it unnecessary to define the term afresh precisely because its meaning was clear from the earlier treaty. In the *North Atlantic Coast Fisheries* case,⁴ it

had, in fact, been decided that the term "bay" had to be interpreted in the light of earlier international law and could not be interpreted in the light of whatever new ideas were reflected in later conventional rules and custom.

12. The CHAIRMAN, speaking as a member of the Commission, said that he had serious doubts on paragraph 1 (b), since a treaty might establish rules derogating entirely from previous rules.

13. Mr. de LUNA said that a treaty was concluded not in a vacuum, but in the framework of an existing international legal order. He could not accept the arguments in favour of including the word "general" before the word "rules" in paragraph 1 (b). In some cases, regional law, as established by regional treaties, applied to a certain area, and the inclusion of the adjective "general" before the word "rules" would fail to make allowance for that fact.

14. With regard to sub-paragraph 2 (a), he said he could appreciate Mr. Tunkin's objection to the words "[instrument] related to [the treaty]"; but if those words were omitted only the words "any instrument annexed to the treaty" would remain, and that phrase would hardly suffice in the definition of the "context" of a treaty. Cases had occurred where the main obligation arising out of an agreement had been included, not in the treaty itself or in instruments annexed to the treaty, but simply in notes exchanged at the time of the conclusion of the treaty, a procedure adopted for the purpose of evading parliamentary control. Clearly, in such cases, the obligations in question were set forth in instruments which were not annexed but merely related to the treaty.

15. With regard to paragraph 3, he adhered to the view that subsequent practice was more essential to interpretation than *travaux préparatoires*, but would not object to the deletion of the words "as if it formed part of the context of the treaty", if a majority of the Commission desired to omit those words. As to paragraph 2 (b), an element of doubt persisted. If any agreement between the parties regarding the interpretation of the treaty was considered part of the context, a tacit agreement between them would also be so considered.

16. Mr. ROSENNE shared the doubts as to the need for paragraph 1 (b). In article 1 (a) of the Commission's draft on the law of treaties⁵ the term "international agreement" was defined as an agreement "governed by international law". That definition applied to the whole of international law which might be applicable at any given moment, and article 70, paragraph 1 (b), therefore seemed redundant. There was an element of redundancy also in article 70, paragraph 2, since article 1 (a) defined a treaty as "any international agreement in written form, whether embodied in a single instrument or in two or more related instruments". Nor could he see any reason for referring, in article 70,

⁴ *Reports of International Arbitral Awards*, Vol. XI (United Nations publication, Sales No. 61.V.4).

⁵ *Yearbook of the International Law Commission*, 1962, Vol. II, p. 161.

paragraph 2 (a), to instruments annexed to the treaty since such instruments formed part of the treaty. In article 70, paragraph 3, he favoured the deletion of the words "as if it formed part of the context of the treaty" and the addition of paragraph 3 as a sub-paragraph to paragraph 2.

17. The CHAIRMAN, speaking as a member of the Commission, suggested that the definition of the "context of the treaty" in article 70, paragraph 2, should end with the words "or related to the treaty". A third paragraph should then indicate that subsequent practice should be taken into account together with the context but subsequent practice should not be described as forming part of the context.

18. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that interpretative agreements were sometimes concluded before the treaty itself; he had intended paragraph 2 (b) to cover such agreements concluded both before and after the treaty.

19. The CHAIRMAN said that an interpretative agreement concluded, perhaps, ten years after a treaty, could not be regarded as part of the context.

20. Sir Humphrey WALDOCK, Special Rapporteur, agreed, but thought that some reference to interpretative agreements was desirable.

21. Mr. BRIGGS thought that if the words "in force at the time of its conclusion" in article 70, paragraph 1 (b) were omitted, the reference to the rules of international law would be out of place in the article, which was merely intended to give guidance on interpretation. He considered that the whole of the sub-paragraph should be retained, for it indicated the relevance of usage prevailing at the time of the conclusion of the treaty. As to paragraph 2 (a), he agreed that the Special Rapporteur should define the meaning of the expression "related to the treaty and drawn up in connexion with its conclusion".

22. Mr. RUDA urged the retention of the words "or related to" in paragraph 2 (a). As an illustration, he mentioned the Inter-American Treaty of Reciprocal Assistance of Rio de Janeiro, 1947,⁶ and the Bogota Charter of the Organization of America States, 1948. Such terms as "legitimate self-defence" and "collective security", wherever used in those inter-American instruments, should be construed in the sense given to them in the United Nations Charter.

23. Sir Humphrey WALDOCK, Special Rapporteur, explaining his reference to instruments "related to" the treaty, said that when a treaty was concluded, certain documents were frequently drawn up which, for the purposes of interpretation, were regarded as part of the treaty. It would be unwise to rely entirely on the definition of the term "agreement" in article 1, as Mr. Rosenne had suggested. Not only ratifications accompanied by reservations, but other instruments such as declarations of policy might affect the inter-

pretation of a treaty. He had also thought it necessary to indicate by the words "drawn up..." that such instruments had to be in writing. The Commission had used similar language before when dealing with reservations.

24. Mr. TUNKIN said that it was virtually meaningless to speak of the rules of international law in paragraph 1 (b), because the need to take the relevant rules into account was self-evident and because the treaty itself constituted a rule of international law. There would be more point in referring to "other rules" of international law, but that, too, would not be entirely satisfactory. With regard to the words "in force at the time of its conclusion", there would be general agreement that the interpretation of a treaty should be guided not only by the intentions of the parties at the time of its conclusion, but by subsequent practice accepted by the parties as signifying a certain interpretation. He added that the rules in force at the time of the conclusion of a treaty were often superseded by a subsequent development of the rules.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that it might be that Mr. Tunkin's concept of interpretation differed slightly from his. The purpose of article 70 was surely to establish the meaning of the treaty at the time of its conclusion, for which purpose it was necessary to take into account the rules in force at that time, which formed part of the context. He had hesitated to include paragraph 3, concerning interpretation in the light of subsequent practice, in an article concerned with the interpretation of a treaty in the light of its context at the time of conclusion. In his view, interpretation based on subsequent practice or on the subsequent development of international law was different from the other kind of interpretation. Admittedly, subsequent development might have an impact on a treaty, and in article 69A he had endeavoured to deal with the influence of later events on the interpretation of a treaty. It was often difficult to know where interpretation ended and where modification began. For instance, in using the expression "territorial waters" in a treaty, the parties might originally have intended to refer to territorial waters as understood at the time — say, the sea area within the three-mile limit. If subsequently the expression "territorial waters" came to mean a broader belt of sea, then the scope of the treaty changed and its provisions would have to be re-interpreted. In most cases, however, where a new rule relating to the subject matter emerged, it probably tended to modify earlier treaties.

26. He would hesitate to agree to the deletion of the words "in force at the time of its conclusion" in paragraph 1 (b); on the other hand, he would be prepared for the purpose of arriving at a compromise to accept the words "the general rules of international law".

27. The CHAIRMAN, speaking as a member of the Commission, said that he increasingly inclined to the view that paragraph 1 (b) should be omitted. A bare reference to the general principles of international law would hardly suffice. The meaning of a term used in a treaty might not be determined by reference to general

⁶ *United Nations Treaty Series*, Vol. 21.

principles : it might have been defined in a special rule. Furthermore, reference was very frequently made in treaties to concepts of internal law, or to technical ideas, which were apt to evolve in the course of time. It would therefore be confusing, and indeed dangerous, to provide that, in each case, it was necessary to interpret a treaty in the light of the rules in force at the time of its conclusion.

28. Mr. YASSEEN said that he was unable to agree with the Chairman. The purpose of interpretation was to ascertain the meaning and scope of a rule of law. Where that rule was the expression of an act of will, as it was in a treaty, interpretation necessarily had to be based on the intention of the parties. In concluding the treaty, the parties had had in mind a certain situation in fact and in law and it was important to make that clear. He did not, however, dispute the effect of subsequent development ; treaties evolved with time as a result of changes in the legal order.

29. Mr. TABIBI said that he accepted article 70, paragraph 1, which contained all the basic elements for the purpose of the interpretation of a treaty — the context and the objects and purposes of the treaty. The words “in the light of the rules of international law” should be retained because, although the parties might create special rules, such rules would come within the meaning of “context” as defined and would in any case be in accord with the intentions of the parties.

30. Mr. AMADO said that he could not accept the words “in the light of the rules of international law” ; it was surely inconceivable that the parties could have concluded a treaty not governed by those rules.

31. Mr. de LUNA said that he was in favour of the text of paragraph 1 (b) as it stood, including the words in brackets. There was no harm in stating a fact, even if it was obvious.

32. Mr. VERDROSS said that, if that was the majority view, he would have no objection to the deletion of article 70, paragraph 1 (b), since its contents were obvious ; but if it was retained, the reference should be to “the general rules of international law”, for a treaty itself contained rules of international law. Moreover, that phrase had been used by the Permanent Court of International Justice and in certain arbitral awards. The Institute of International Law had used the formula “in the light of international law”, and Judge Huber had used a similar phrase.⁷

33. The CHAIRMAN, speaking as a member of the Commission, said that the words used in the resolution of the Institute of International Law (cited in paragraph (11) of the commentary in document A/CN.4/167/Add.3) did not mean very much.

34. Mr. AMADO said that interpretation should be left to the good sense of future judges. The Commission could not include in its rules a reference to every judicial decision.

35. A reference had been made to the use of the expression “territorial waters” in a treaty, which might be affected by a new rule of international law. Surely however, a treaty could not be drafted by reference to what the law was going to be in future ; it obviously had to be based on existing international law.

36. His impression was that the reference in the opening words of paragraph 1 (b) to the rules of international law had been made mainly in order to justify the inclusion of the passage “in force at the time of its conclusion”.

37. Mr. TUNKIN said that he still maintained that there must be a reference in some form to international law. Perhaps it might be possible to use the formulation of the Institute of International Law.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the Institute’s formula was a weak one, on the point under discussion. Simply to adopt it would be tantamount to an admission by the Commission that it could not form an opinion on that point.

39. It was true that a treaty might create rules, but that difficulty was avoided by adding the words “in force at the time of its conclusion”. There was always a certain presumption, in the interpretation of a treaty, that a State had intended to abide by the rules of international law.

40. Mr. BRIGGS said that, as he understood it, the object of interpretation was to establish what a treaty meant, not to say whether or not it was in accordance with international law. If there was to be no reference to the possibility of interpretation in accordance with contemporary usage at the time of the conclusion of the treaty, he would prefer paragraph 1 (b) to be omitted altogether.

41. Mr. AMADO said that anyone interpreting a treaty in good faith could hardly help assuming that it had been drafted in the light of the rules of international law.

42. He suggested that in the French text of paragraph 1 the expression *qui doit être donné* should be replaced by the words *à attribuer*.

It was so agreed.

43. The CHAIRMAN said that in view of the difference of opinion the decision on paragraph 1 would be postponed until the next meeting.

44. Mr. TABIBI noted that annexes to the treaty were relegated to paragraph 2 (a), whereas the preamble was referred to in the opening passage of the paragraph. But in many cases an annex was as important as the treaty itself : for instance, a map might constitute an annex and the treaty would be meaningless without it. He therefore suggested that the concluding words of the opening paragraph should read : “including its preamble and annexes” ; the words “annexed or” in paragraph 2 (a) would then be deleted.

It was so agreed.

⁷ In the *Island of Palmas* arbitration, *Reports of International Arbitral Awards*, Vol. II.

45. Mr. ROSENNE thought that it would be better to say "shall comprise" in the opening passage rather than "shall be understood as comprising".

46. Sir Humphrey WALDOCK, Special Rapporteur, accepted that suggestion.

47. The CHAIRMAN said that, as Mr. Tunkin had pointed out earlier, the word "instrument" in paragraph 2 (a) was unsatisfactory in that it excluded declarations. It would be better to say "any agreement".

48. Sir Humphrey WALDOCK, Special Rapporteur, said that the question would then arise whether an instrument of ratification could be regarded as included in the word "agreement". Such instruments were not exchanged in the case of a general multilateral treaty.

49. Mr. YASSEEN said that in his view instruments of ratification should accordingly not be taken into account for the purpose of interpretation, for ratification was a unilateral expression of will after the adoption of the text.

50. Mr. BARTOŠ said that it was often possible for the parties to make reservations at the time of ratification and it was impossible to keep the text of those reservations separate. If a reservation had been accepted, or had been submitted within the agreed time limit and no party had protested against it, it was legally part of the instrument.

51. The CHAIRMAN suggested that the difficulty could be surmounted if paragraph 2 contained the words "any agreement or instrument related to the treaty". Such an expression would cover verbal agreements and instruments of ratification containing reservations.

It was so agreed.

52. Mr. ROSENNE pointed out that a situation might arise where, for instance, there might be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side. A purely unilateral interpretative statement of that kind made in connexion with the conclusion of a treaty could not bind the parties. It was true that in Part I of its draft the Commission had carefully distinguished between the international and domestic aspects of treaty-making, but he thought it advisable to draw attention to the existence of that danger.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the two phrases "related to" and "drawn up in connexion with its conclusion" had been used in order to indicate that the instrument had to be germane to the actual conclusion of the treaty.

54. Mr. ROSENNE suggested that a looser formula such as "accepted by" (rather than "drawn up" by) the parties, might be used in order to avoid a reference that might include purely unilateral action; the passage would then read "any agreement or instrument related to the treaty and accepted by the parties in connexion with its conclusion".

55. In the light of a suggestion by the Chairman, Sir Humphrey WALDOCK, Special Rapporteur, suggested the following wording for paragraph 3 of article 70:

"There shall also be taken into account, together with the context

"(a) any agreement between the parties regarding the interpretation of the treaty;

"(b) any subsequent practice in the application of the treaty which clearly establishes the understanding of all the parties regarding its interpretation."

That revision of paragraph 3 was adopted.

ARTICLE 71

56. Mr. YASSEEN, referring to the redraft of article 71, said that the clearness or ambiguity of a provision was a relative matter; sometimes one had to refer the preparatory work or look at the circumstances surrounding the conclusion of the treaty in order to determine whether the text was really clear and whether the seeming clarity was not simply a deceptive appearance. He could not accept an article which would impose a chronological order and which would permit reference to preparatory work only after it had been decided that the text was not clear, that decision itself being often influenced by the consultation of the same sources.

57. Sir Humphrey WALDOCK, Special Rapporteur, noted that it was sometimes impossible to understand clearly even the objects and purpose of the treaty without such reference.

58. The CHAIRMAN, speaking as a member of the Commission, thought that the second part of article 71 should come first, so that the text would provide that recourse could be had to further means of interpretation, including those serving to confirm the interpretation resulting from the context or to establish it, in cases where the interpretation according to article 70 would lead to an obscure meaning.

59. Mr. BRIGGS said that as article 71 dealt with cases in which the meaning of a provision was ambiguous or in doubt, a second paragraph could be added to the effect that the same method could be used to confirm a meaning established by a textual approach.

60. Sir Humphrey WALDOCK, Special Rapporteur, preferred the Chairman's suggestion as being closer to his original version.

61. Mr. BARTOŠ said that if an interpretation was to be objective — as he thought it should be — all the circumstances and the preparatory work had to be taken into account to permit, firstly, verification then confirmation, and, thirdly, to provide a way out of an impasse. The redraft of article 71 seemed to be concerned solely with the first aspect. As Mr. Yasseen had pointed out, it was not easy to determine what was clear and what was not.

62. Mr. de LUNA supported the Chairman's suggestion.

63. Mr. RUDA said that he opposed the Chairman's suggestion for reasons which he had stated earlier. If the general rule of article 70 was applied and a clear conclusion was reached there was no need for confirmation. The need for recourse to other methods arose only if the matter was unclear.

64. Mr. ROSENNE believed that it would be going too far to undertake to say both when recourse could be had to preparatory work and other further means of interpretation and for what purpose. He preferred to deal with the "when" aspect, as there was a large element of fiction in the confirmation doctrine as advanced by many international tribunals.

65. Sir Humphrey WALDOCK, Special Rapporteur, recalled the instructions he had been given to strike out (a), (b) and (c) of his original draft article 71, paragraph 2 (A/CN.4/167/Add.3) and that some members, including Mr. Ruda, would have preferred that confirmation should not be mentioned. In his view it was unrealistic to imagine that the preparatory work was not really consulted by States, organizations and tribunals whenever they saw fit, before or at any stage of the proceedings, even though they might afterwards pretend that they had not given it much attention. He thought it would probably suffice to state the basic rule firmly in article 70. From another point of view, the reference to confirmation and, *a fortiori*, verification tended to undermine the text of a treaty in the sense that there was an express authorization to interpret it in the light of something else; nevertheless that was what happened in practice.

66. Mr. YASSEEN believed that a text could not be deemed clear until its entire dossier had been studied. There also remained the problem of what should be done if reference to the preparatory work showed that such an interpretation was not clear.

67. Sir Humphrey WALDOCK, Special Rapporteur, agreed that the same obscurity might well be found in the preparatory work. In that case the only possibility was to use any other indications available, and it was then that the objectives and purposes of the treaty assumed a particular importance. Nevertheless, some difficulties of interpretation were inescapable.

68. Mr. TUNKIN believed it might be wiser to avoid excessive detail and not to indicate the purposes for which the preparatory work should be used. It would be sufficient to state that it could be consulted for the purpose of interpretation.

69. The CHAIRMAN suggested that in that case it would be possible to say, simply "In the interpretation of a provision, recourse may be had also to other means...".

70. Mr. de LUNA said he preferred the present wording.

71. Sir Humphrey WALDOCK, Special Rapporteur, agreed with Mr. de Luna. To adopt the suggested change would be to return to the language of the resolution of the Institute of International Law. Throughout, the Commission had shown a strong predilection

for textual interpretation, in the interests of stability and certainty of treaty relations. All were agreed that the text was not everything and that the preparatory work had its place, but to reduce the passage to "Recourse may be had to other means" would solve nothing and weaken the text.

72. Mr. TUNKIN considered that the last phrase in article 71 "and any relevant indications in the practice of individual parties", should be deleted. While the practice of individual parties might be taken into consideration in some instances, such practice should not be placed on the same level as preparatory work.

73. For example, where one of the parties consistently violated the provisions of a treaty and the other, possibly owing to weakness, hesitated to protest, surely such a constant practice of one of the parties should not be taken into account.

74. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the concept needed to be preserved because there were certain cases where indications of the practices of a number of States could be very important, especially in the case of multilateral treaties.

75. Mr. BARTOŠ favoured the retention of the phrase but agreed with Mr. Tunkin that only common practice should be taken into account.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the practice of individual parties might be mentioned in the commentary as one of the other forms of evidence, without its being given special importance.

77. The CHAIRMAN suggested that article 71 should be revised along the following lines: "Recourse may be had to further means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to verify or confirm the meaning resulting from the application of article 70, or to determine the meaning of the interpretation... and purposes of the treaty".

It was so agreed.

ARTICLE 72

78. Mr. BRIGGS referring to article 72, considered it desirable to retain the article for the reasons he had expressed earlier.

79. Mr. BARTOŠ also favoured retention of article 72, since it was not uncommon for parties to accept new meanings and to invent new terms.

80. Mr. LACHS agreed that article 72 should be retained, but wondered if the cross-reference should be to the first part of article 70 or to the entire article.

81. The CHAIRMAN, speaking as a member of the Commission suggested that the words "paragraph 1 of" should be added before the words "article 70".

It was so agreed.

It was agreed that articles 70, 71 and 72 should be revised in the light of the discussion.

The meeting rose at 6.5 p.m.