

Document:-  
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**Summary record of the 845th meeting**

Topic:  
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session, but it would never have been held if the United Nations Office had not taken the initiative.

11. The CHAIRMAN called for nominations for the office of First Vice-Chairman.

12. Mr. JIMÉNEZ de ARÉCHAGA proposed Mr. Briggs.

13. Mr. AGO seconded the proposal.

14. Mr. BARTOŠ, Mr. TUNKIN, Mr. VERDROSS, Mr. AMADO, Mr. de LUNA and Mr. TSURUOKA supported the proposal.

*Mr. Briggs was unanimously elected First Vice-Chairman.*

15. Mr. BRIGGS thanked the Commission for his election.

16. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

17. Mr. RUDA proposed Mr. Lachs.

18. Mr. REUTER seconded the proposal.

19. Mr. VERDROSS, Mr. BARTOŠ and Mr. AMADO supported the proposal.

*Mr. Lachs was unanimously elected Second Vice-Chairman.*

20. Mr. LACHS thanked the Commission for his election.

21. The CHAIRMAN called for nominations for the office of Rapporteur.

22. Mr. EL-ERIAN proposed Mr. de Luna.

23. Mr. AGO seconded the proposal.

24. Mr. ROSENNE, Mr. TUNKIN, Mr. RUDA, Mr. VERDROSS, Mr. AMADO, Mr. BARTOŠ, Sir Humphrey WALDOCK, Mr. REUTER, Mr. TSURUOKA and Mr. PAREDES supported the proposal.

*Mr. de Luna was unanimously elected Rapporteur.*

25. Mr. de LUNA thanked the Commission for his election.

### Adoption of the Agenda

26. The CHAIRMAN suggested that the provisional agenda (A/CN.4/185) be adopted without discussion of the order in which the items would be taken up; it had already been decided at the previous session to start with the law of treaties.

*It was so agreed.*

### Organization of Work

27. Sir Humphrey WALDOCK, Special Rapporteur, said that as the Commission had not been able to complete its work on Part II of the draft articles on the law of treaties at the second part of its seventeenth session, he presumed that it would wish to start work on that item of the agenda by considering article 51, on which he had commented in his fifth report (A/CN.4/183/Add.4). That article laid down the proce-

cedure for dealing with disputes arising from the invocation by one party of nullity as a ground for terminating a treaty. The Commission could then take articles 52, 53, and 54, dealing with the legal consequences of nullity, termination and suspension, which were discussed in his sixth report (A/CN.4/186), containing his observations and proposals in the light of the comments by governments. After that it could consider the articles in Part III.

28. The CHAIRMAN suggested that the Commission proceed with the articles on the law of treaties in that order.

*It was so agreed.*

29. Mr. WATTLES, Deputy Secretary to the Commission, said that the administration of the United Nations Office at Geneva had asked the Commission to hold its meetings on 5 and 10 May in the afternoon, because on those dates the interpreters would be required in the mornings for meetings of the Eighteen-Nation Committee on Disarmament.

30. Mr. AMADO asked whether other United Nations bodies had ever been asked to change their usual working hours in that way.

31. Mr. WATTLES, Deputy Secretary to the Commission, said there had been occasions when other bodies had been asked to change the times of meetings at the Palais des Nations, where the staff was not as numerous as at Headquarters.

The meeting rose at 4.45 p.m.

### 845th MEETING

*Thursday, 5 May 1966, at 3 p.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Present:* Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock.

### Special Missions

[Item 2 of the agenda]

1. The CHAIRMAN announced that a letter had been received from Mr. Elias informing the Commission that he had been appointed a Professor and Dean of the Faculty of Law of Lagos University, and that to his great regret he would be unable to attend the Commission's meetings until later in the session.

2. He invited Mr. Bartoš, the Special Rapporteur on special missions, to make a statement on the position with regard to that topic.

3. Mr. BARTOŠ, Special Rapporteur, said he had been slightly delayed in the preparation of his report

on special missions because he was anxious to take into account some comments by governments which he should be receiving shortly. He would, however, see that the report was distributed in good time during the session.

### Law of Treaties

(A/CN.4/183/Add.4, A/CN.4/186 and Addenda;  
A/CN.4/L.107 and L.115)

[Item 1 of the agenda]

#### ARTICLE 51 (Procedure in other cases) [62]

[62]

##### *Article 51*

##### *Procedure in other cases*

1. A party alleging the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty, shall be bound to notify the other party or parties of its claim. The notification must:

(a) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(b) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Subject to article 47, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.

4. The CHAIRMAN invited the Commission to consider article 51, for paragraph 5 of which the Special Rapporteur, in his observations (A/CN.4/183/Add.4), had proposed a rewording which read:

“5. Subject to article 47, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty”.

5. Sir Humphrey WALDOCK, Special Rapporteur, said that article 51 was the last article in section V of Part II. It dealt, with respect to cases other than those in which action was taken under a right provided for in the treaty itself, with the procedure governing disputes arising from an allegation of a ground for nullity, withdrawal, termination or suspension of a treaty.

6. The question had been discussed at length in 1963 and the Commission had arrived at a text in five paragraphs (then article 25) which represented the maximum common ground that could be found.<sup>1</sup> The comments by governments on that text, which were analysed in his fifth report (A/CN.4/183/Add.4), reflected the differences of opinion in the international community on the question of independent adjudication, which had already become manifest in discussion in the Commission. Nine governments had called for a strengthening of the provisions of article 51, while seven had expressed approval of the text as it stood. A large number of governments had made no comment, thereby presumably indicating that they did not take exception to article 51 as adopted by the Commission.

7. Although he personally was in favour of as large a measure of independent adjudication as States could be persuaded to accept, it was his feeling that it would be preferable not to disturb the compromise reached in the 1963 text.

8. With regard to the specific proposals made by certain governments, he had not incorporated the suggestion put forward by the Government of Luxembourg, despite its superficial attraction, because it would almost certainly lead to great difficulties. The proposals made by the Governments of Finland and Italy represented a return to the formula which he himself had proposed in his second report as article 25.<sup>2</sup> The Commission had discussed that proposal, but had rejected it in favour of the present text of article 51. In the light of that decision, he did not feel that, as Special Rapporteur, he should reintroduce his original proposal.

9. He now proposed, however, a minor amendment to the wording of paragraph 5, designed to take into account a comment by the Swedish Government to the effect that the 1963 text of that paragraph could be interpreted as meaning that the party invoking the nullity or grounds for termination could at once act as though the treaty were invalid or terminated. His rewording ruled out that interpretation.

10. Mr. BRIGGS said that the Special Rapporteur's proposed new paragraph 5 was an improvement on the former text; it made the provision much clearer.

11. With regard to article 51 as a whole, he noted an important observation by the Special Rapporteur in his report, which read: “Governments in their comments appear to be unanimous in approving the general object of the present article, namely, the surrounding of the various rights to invoke grounds of invalidity or termination with specific procedural safeguards against arbitrary recourse to these grounds for the purpose simply of getting rid of inconvenient treaty obligations”. In order to ascertain whether article 51 as proposed achieved that object, it was necessary to examine the substantive articles on invalidity and termination that created the need for the provisions of article 51.

<sup>1</sup> *Yearbook of the International Law Commission, 1963*, vol. I, pp. 278 et seq. and p. 318.

<sup>2</sup> *Op. cit.*, vol. II, pp. 86-87.

12. In that connexion, he drew attention to Mr. Ruda's remarks at the previous session during the discussion on article 44, on fundamental change of circumstances, when he had said: "With regard to the question of the safeguards for the application of the rule, he noted that the idea of a higher jurisdiction appeared to overhang the entire draft. Article 31, for example, contained the words 'unless the violation of its internal law was manifest', while article 43, paragraph 2, in the Special Rapporteur's redraft, opened with the words 'If it is clear'. Those were patently subjective notions on which a ruling could only be given by a third party, not by the parties themselves. Again, the idea of a higher jurisdiction was inherent in article 44, where it spoke of a change that transformed in an essential respect the character of obligations".<sup>3</sup> The question that arose there was who was to decide when a violation of internal law was "manifest", or when the character of obligations was transformed in "an essential respect".

13. Similarly, in article 33, on fraud, the question arose who was to establish whether a fraud had been committed. In article 34 the same problem arose with regard to error, and in article 35 with regard to coercion of a representative of the State. No doubt most members of the Commission would agree that a ruling on those questions could only be made by an impartial third party, but that was nowhere stated in the draft articles.

14. A striking example was furnished by article 36 as adopted at the previous session (A/CN.4/L.115). How would it be decided whether the words "threat or use of force in violation of the principles of the Charter of the United Nations" referred only to the principles set forth in Article 2 of the Charter, or even only to those in paragraph 4 of Article 2, or, whether they referred more generally to the many other principles included in the Charter? Even if the reference were to be limited to the principles set forth in Article 2(4) of the Charter, the question would still arise whether the term "threat or use of force" included measures of economic pressure or not.

15. It was important to bear in mind, moreover, that unlike articles 33 and 34, article 36 made no provision for invoking invalidity but merely proclaimed that: "A treaty is void if its conclusion has been procured by the threat or use of force...". Would the mere allegation that there had been such a threat or use of force be sufficient to release a State from its obligations under a treaty?

16. An equally grave problem arose in connexion with article 37 (treaties conflicting with a peremptory norm of general international law (*jus cogens*)), because no procedure was laid down for establishing what constituted a rule of *jus cogens*. The absence of such a procedure affected the application of the provisions of article 45 (Establishment of a new peremptory norm of general international law).

17. For those reasons, greater weight should be given to the proposals for additional safeguards put forward by the Governments of Finland and Luxembourg,

to the concern expressed by the Swedish Government and to the proposal by the Government of Turkey that provision should be made for adjudication by the International Court of Justice. The Government of the United Kingdom had also pointed out that paragraphs 3 and 4 of article 51 did not provide sufficient safeguards, and that view was shared by the United States Government, which had also suggested compulsory jurisdiction. The Italian Government had pointed out that the reference to Article 33 of the Charter of the United Nations was not sufficient protection. Some of those States might not accept the Commission's draft on the law of treaties if article 51 remained in its present weak and unsatisfactory form.

18. He also felt strongly that a State which was unwilling to submit to impartial adjudication its allegation that a treaty was void or terminated, should not be allowed to release itself from its obligations under the treaty.

19. The least that the Commission could do was to revert to the proposal put forward in 1963 by the Special Rapporteur in his second report as article 25, paragraph 4, which read:

"If, however, objection has been raised by any party, the claimant party shall not be free to carry out the action specified in the notice referred to in paragraph 1, but must first:

(a) seek to arrive at an agreement with the other party or parties by negotiation;

(b) failing any such agreement, offer to refer the dispute to inquiry, mediation, conciliation, arbitration or judicial settlement by an impartial tribunal, organ or authority agreed upon by the States concerned".<sup>4</sup>

20. He would urge the Commission to adopt that formula, which did not amount to compulsory jurisdiction, but represented the minimal procedural requirement or rather a condition that could be laid down to qualify the substantive rights set forth in the various articles which expressed grounds of invalidity or termination.

21. He was not making any specific proposal at that stage, but would submit a text if his general approach met with support.

22. Mr. REUTER said he thought that article 51 raised, first of all, a question of principle. In theory, he shared the opinion just expressed by Mr. Briggs, for every jurist must prefer a solution providing the safeguard of a legal procedure. But in practice, the question whether such a procedure should be established or not was a political question to be decided by governments. Some governments might be reluctant to approve the text proposed by the Commission because of the absence of any provision for compulsory jurisdiction; because of that omission, some might also be tempted to regard the Commission's draft as a sort of guide or model and prefer not to conclude a convention on the subject. Nevertheless, he agreed with the Special Rapporteur that a further debate on that point would serve no useful purpose.

<sup>3</sup> Yearbook of the International Law Commission, 1966, vol. I, part I, 834th meeting, para. 9.

<sup>4</sup> Yearbook of the International Law Commission, 1963, vol. II, p. 87.

23. The drafting of the article should be sufficiently flexible to cover either the omission or the inclusion of a compulsory jurisdiction clause. He accepted the amendment proposed by the Special Rapporteur, but had three comments to make on the drafting.

24. First, article 51 still contained traces of preference for a procedure in which the final decision in the event of a dispute would be taken by a third party. For example, the word "*demande*" in the French text was too strong if the dispute was not to be settled by an independent authority; the word "*prétention*" would be more suitable.

25. Secondly, it was doubtful whether it was right to give the State which made the notification the right to specify the period within which it must receive the reply. By the position it took, that State was disturbing the established order and was thus putting itself in the position of plaintiff at the outset, so that if it fixed the time limit for the reply itself, its action would appear unfriendly in diplomacy: it would be in the nature of an ultimatum. It was the State from which a reply was awaited that should be the judge of the period within which that reply should be made, and the Commission could not do better than specify that the period must be "reasonable". If the Commission supported his view, the drafting of the article could be simplified by deleting paragraph 1 (b) and substituting the words "within a reasonable period" for the words "before the expiry of the period" in paragraph 2.

26. Thirdly, article 51 should be co-ordinated with article 42. For neither in the form adopted in 1963<sup>5</sup> nor as amended in January 1966 (A/CN.4/L.115) did article 42 deal with the particular case in which a State suspended the application of a provision of a treaty, but not of the whole treaty, because the other party was not applying that provision. By virtue of the principle of reciprocity and of the principle *inadimplenti non est adimplendum*, in that limited case the partial suspension of the treaty should be permitted without an obligation to notify. It might not be necessary to change the text of the articles to cover that situation, but if the Commission agreed that the derogation he had mentioned was acceptable, he thought it should at least make that clear in the commentary.

27. Mr. TUNKIN said that in 1963, article 51 had given rise to prolonged discussion both in the Commission and in the Drafting Committee; the text then arrived at with so much difficulty represented a compromise and the Commission should abide by it.<sup>6</sup>

28. With regard to the comments by governments, it would not be accurate to describe the position merely by reference to the views of the sixteen governments which had commented on article 51. To say that nine governments favoured some form of independent adjudication while seven supported article 51 as it stood would not reflect the true position. Experience showed that governments which had no objection to a particular article usually did not comment on it; a government very rarely submitted comments on an article it supported. It could therefore safely be assumed that most,

if not all, of the very large number of governments which had not commented were in fact in favour of article 51 as the Commission had adopted it in 1963.

29. In those circumstances, he urged that the Commission should adhere to the 1963 text, subject to drafting changes. In particular, he supported the Special Rapporteur's proposed redraft of paragraph 5.

30. He saw no need to reopen the discussion on the question of compulsory jurisdiction, which had been discussed at length several times by the Commission, most recently at the previous session. If the discussion on that point were reopened, there was every likelihood that members would merely repeat the same views as they had expressed in the past. In previous discussions on the subject, it had been emphasized that the question of compulsory jurisdiction and arbitration was a general problem which arose in connexion with every rule of international law. There was as yet no higher authority than States themselves to decide whether a rule of international law had been violated. If the Commission took the view that it should not accept a particular rule of international law because there was no authority to decide when it had been violated, that would mean giving up any attempt to codify and develop international law.

31. In conclusion, he reminded the Commission of the history of one of the articles on diplomatic relations, which had been adopted as a compromise after a difficult discussion. At the 1961 Vienna Conference, an attempt had been made to alter the text of that article and the delegations of the United Kingdom and the USSR had appealed to the Conference not to upset the delicate balance achieved by the compromise text. The Conference had finally accepted the original text as drafted by the Commission.

32. Mr. CASTRÉN said that the Commission had had a long discussion on the highly important article 51 in 1963 before deciding on the present text, which was in the nature of a compromise. Most of the amendments proposed by governments were designed to strengthen the safeguards against abuses which might result from the application of the rules of the draft permitting the termination of a treaty.

33. The Special Rapporteur had not been able to accept even the mildest of the proposals, such as those submitted by Finland and Italy; and the reasons he had given for his attitude—in particular, that the present text represented common ground beyond which it would be unwise to go—were quite understandable. The diplomatic conference convened to discuss the Commission's draft could, of course, reconsider the problem; and another possibility would be to annex to the convention an optional protocol providing more effective ways of settling procedural questions between States which were prepared to accept an arrangement of that kind.

34. He could also accept the reasons why the Special Rapporteur had rejected the proposal to set a time-limit in paragraph 1 (b) for the other party's reply in cases of special urgency.

35. On the other hand, he thought that the Swedish Government's comments on paragraph 5 were quite

<sup>5</sup> *Ibid.* p. 204.

<sup>6</sup> *Ibid.* p. 214.

justified, as that paragraph could be interpreted as allowing a State, on discovering an error or fundamental change of circumstances, immediately to cease to perform the treaty, and to invoke those grounds only if and when another party made a demand for the performance of the treaty or lodged a complaint alleging a violation. Neither article 51 as a whole nor paragraph (7) of the commentary could dispel the Swedish Government's fears. The new wording of paragraph 5 suggested by the Special Rapporteur was hardly likely to discourage the interpretation to which he had referred. It was difficult to deny that a State which had ceased unilaterally to perform a treaty without complying with the procedure laid down in article 51, paragraphs 1 to 3, had acted in a reprehensible manner and might thereby have impaired the rights of other parties. Hence it should not be allowed to evade its responsibilities merely by making a notification at some later date. He therefore proposed that paragraph 5 should be deleted, or, if that solution seemed too radical, that the question should be dealt with in the commentary.

36. Mr. VERDROSS said he supported Mr. Tunkin's proposal that the text adopted in 1963 be retained. Personally, he was inclined to share the views of Mr. Briggs; but, as a member of the Commission, he thought that it ought not, on the second reading of the draft, to reopen discussion on a compromise text which had been adopted after long debates, unless there were serious grounds which might induce the majority of the members to change their views. If the Commission were to engage in a fresh discussion of article 51 at the present stage, it would probably end by reaching the same conclusions as it had in 1963. It would therefore save time by adopting the Special Rapporteur's proposal.

37. Mr. AGO said that he had been convinced by the arguments put forward by Mr. Briggs in his plea for the development of the international law of procedure and the establishment of compulsory jurisdiction for the settlement of disputes relating to the application of rules of law. On the other hand, as he had already had occasion to point out, care should be taken not to confuse questions of substance and questions of procedure.

38. If international law were compared with private law—a perfectly valid comparison, since error, fraud and coercion were also grounds for alleging the invalidity or nullity of acts in private law—it would be found that it was not the existing rules which showed what authority was responsible for settling possible disputes relating to their application. The procedure for settling such disputes was laid down in a separate code relating solely to procedure. In international law, too, there were rules of substance and rules of procedure. The latter were certainly far from satisfactory, but they did exist; and any effort to combine the two kinds of rule might lead to dangerous confusion. The Commission tended too often, perhaps, to think that it was breaking new ground: in fact, some of the rules incorporated in the draft were as old as the law of treaties itself, and no one had ever contested them on the ground that there was no established means of settling disputes relating to their application. Moreover, even when the Commission affirmed the existence of mandatory rules or *jus cogens*, it was only defining a principle which

already existed and had already been recognized by the conscience of States. Thus rules of substance did not lose any of their validity merely because there were no corresponding rules of procedure, even though the development of substantive international law was bound to demonstrate more clearly the need for parallel development of the international law of procedure. Hence, it was not only for practical reasons that he was in favour of retaining the text adopted in 1963, but also for reasons of principle, since the draft under consideration stated rules of substance, and was not the place for settling questions of procedure. It was to be hoped that the Commission would one day draft rules of procedure, not only on the particular point under discussion, but for the settlement of all international legal disputes.

39. Perhaps the use of the word "Procedure" as the title of Part II, section V, of the draft had led to some confusion. What the Commission was trying to do in that section was not really to establish a procedure, but to place certain limits on the conduct of States in order to prevent abuses. The title should therefore be amended to make it more accurate.

40. At first sight, he was inclined to favour the amendment proposed by the Special Rapporteur; he would like time to reflect on the proposals put forward by Mr. Castrén and Mr. Reuter, which might be considered by the Drafting Committee.

41. Mr. AMADO said he had not expected a discussion on article 51, which, in the words of the Special Rapporteur (A/CN.4/183/Add.4) "represented the highest measure of common ground that could be found in the Commission at the fifteenth session" on procedural safeguards. He recalled the disagreement he had had with Sir Gerald Fitzmaurice over the expression "reasonable period", the use of which seemed to him inconceivable in a legal text. Many members of the Commission, however, had expressed themselves in favour of that strange expression, which seemed, in their opinion, to meet a real need.

42. A conflict might arise between those who were considering law as it *might* be and those who were concerned with law as it *could* be. The Commission's task was to reduce law as it *could* be to formulas acceptable to States, which were motivated by perfectly logical reasons. It was true that the idea of States submitting to compulsory jurisdiction was an ideal to which many aspired, but if States themselves were unable to reach agreement on the matter, there was nothing to be done except dream of the day when compulsory jurisdiction would be accepted; but that day was still a long way off.

43. As he had expected quite a simple exchange of views, he had been surprised by the vigorous attack launched by Mr. Briggs. In support of his thesis, Mr. Briggs had used arguments that were justified on scientific and practical grounds. Some of those seeds would perhaps germinate, but not for some time. While Mr. Reuter's observations provided food for thought, he (Mr. Amado) took a position similar to that of Mr. Tunkin and Mr. Verdross, and applauded Mr. Ago's criticism of procedure.

44. Mr. de LUNA said he agreed that the Commission should abide by the 1963 compromise; it was not possible to embody in the draft articles a greater measure of institutionalization than was warranted by the present stage of international solidarity. For that reason, although he sympathized with the ideas behind Mr. Briggs's proposal, he could not support it. He recalled the failure of the draft on arbitral procedure adopted by the Commission under the generous inspiration of Mr. Scelle; because it had tried to anticipate the international law of the future and to replace diplomatic arbitration by compulsory arbitration, it had proved unwelcome to States.

45. The wording adopted by the Commission in 1963 for article 51 had clearly met with the approval of the majority of States; it could be safely assumed that those States which had not commented on that important article had no objection.

46. All international disputes were both legal and political. There was no conflict that was not amenable to settlement in accordance with rules of law. At the same time, any dispute could be charged with political implications, even one relating to a purely technical matter. It was for the State concerned to decide whether any particular dispute had political implications and whether it was or was not prepared to submit it to judicial settlement or arbitration.

47. He supported the rewording proposed by the Special Rapporteur and hoped that at some future time the Commission would be able to go further in the direction proposed by Mr. Briggs.

48. The CHAIRMAN, speaking as a member of the Commission, said he wished to state his view on the attitude the Commission should adopt with regard to the draft article. From the procedural point of view, there was no reason to reopen the debate: in 1963 the Commission had adopted a solution which, though not ideal, nevertheless represented a balanced compromise in the present state of international law and a formula which could be accepted as a general rule. He did not think the Commission could modify that solution, which was the only one that would be acceptable to States as a general rule in a convention on the law of treaties.

49. As to the principle, he endorsed the comments of Mr. Tunkin and Mr. Ago. Two such different problems as the question of substance and the question of procedure or institutions should not be linked together. The international community was still primitive compared with a national community, and the international order was not as developed as a national order. It would therefore be dangerous to make the development of international law and its codification conditional on the acceptance of compulsory jurisdiction. Such a step would impede the movement towards codification and, indirectly, the extension of compulsory jurisdiction. For one of the reasons why States distrusted compulsory jurisdiction was that they were not certain what law was applicable. Codification was one means of giving international law certainty and precision, and the movement towards codification would thus facilitate the early acceptance of compulsory jurisdiction.

50. It would therefore be advisable to retain the text adopted in 1963, subject to drafting changes.

51. Mr. EL-ERIAN said that every member of the Commission had stated his views on article 51 in detail at the fifteenth session and the text finally formulated after arduous work in the Drafting Committee represented what the Special Rapporteur had described as the highest measure of common ground. The object of the article was to provide procedural safeguards against the arbitrary invoking of certain grounds in order to secure the nullity of a treaty. The Commission could not go any further or attempt to solve the problem of independent adjudication and compulsory jurisdiction. No consensus of opinion on those two difficult issues had been reached in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, and the experience of the diplomatic conferences on the law of the sea and on diplomatic and consular relations had shown that it was not practicable at the present juncture to insert compulsory jurisdiction clauses as *clauses de style* in general multilateral law-making treaties. He had, of course, been very interested by Mr. Briggs's comments and looked forward to the day when the structure of international institutions would be completed and authoritative interpretation and enforcement of international law would become possible.

52. With regard to the argument developed by Mr. Briggs, he asked whether it would be right to impose on the party invoking the nullity of a treaty on the ground that it had been procured by fraud, that it violated a peremptory norm, whether old or new, or that a fundamental change of circumstances had taken place, the obligation to continue to apply the treaty until its claim had been found valid by an independent third party decision.

53. He agreed with the Special Rapporteur's conclusion on the Swedish Government's comment and could accept the proposed change in paragraph 5, if that would meet the Swedish Government's point.

54. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission and the Drafting Committee ought to examine article 51 very carefully, since it was a key provision to which States obviously attached importance, and not simply retain the text adopted at the fifteenth session merely because it was a compromise. The result of their scrutiny might be that the 1963 text would have to be retained, subject to drafting changes, but the very fact that discussion of article 51 had been postponed during the second part of the seventeenth session<sup>7</sup> implied that the Commission had intended to consider all its implications at the present session.

55. At the risk of repeating what he had said about article 51 in the past, he felt bound to emphasize that it gave a substantial measure of protection against unilateral action and arbitrary assertions by a State wishing to release itself from treaty obligations. The provisions of paragraphs 2 and 3 did not exonerate a party from its general obligations under the treaty or allow it to act as judge in its own case. Only when no

<sup>7</sup> *Yearbook of the International Law Commission, 1966*, vol. I, part I, 842nd meeting, para. 107.

objections had been lodged against a claim or when the period for the reply had expired could the claimant act unilaterally. The difference between the provisions of paragraph 2 and those of paragraph 3 clearly showed that unilateral action was excluded. If an objection were made against a claim or the facts on which it was based were challenged, a dispute would arise. It could be argued that that did not go very far, but in his opinion the recognition of the existence of a dispute in such circumstances represented progress that was not without significance, because one way in which powerful States had sought to suppress the claims of weaker ones had been to deny the existence of a dispute altogether and thereby deprive the latter of any recourse to a means of settlement.

56. Like the Special Rapporteur and Mr. Briggs, he had always thought that the application of article 51 should be subject to a third party decision and compulsory jurisdiction by the International Court of Justice, and he held to that view; the argument that substance must be kept separate from procedure could be pushed too far and some safeguards were necessary. That view had not received the support of the majority in the Commission, however, and States were evidently opposed to a rigid requirement concerning judicial determination. Therefore, because of practical considerations he would support the compromise reached in 1963, whereby the parties would seek a solution of any dispute through the means indicated in Article 33 of the Charter.

57. A new factor in favour of keeping the compromise text reached in 1963 was the resolution on the peaceful settlement of disputes recently adopted by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States,<sup>8</sup> the terms of which were not far removed from certain provisions in the Commission's draft. The proposal by the representatives of Dahomey, Italy, Japan, Madagascar and the Netherlands in that Committee to include a provision requiring legal disputes to be referred to the International Court of Justice had not obtained a consensus, although it was rather more timid than Article 36(3) of the Charter itself.

58. At the present stage of development, it seemed that the Commission had been right in its conclusion that a proposal to go beyond the obligations laid down in the Charter would have little chance of success. It should be recalled, however, that under Article 36(3) one of the obligations of the Charter was that legal disputes should as a general rule be referred to the International Court, and most of the disputes that could arise in the cases covered by article 51 would be of a legal nature.

59. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that there was a clear consensus of opinion in the Commission that the compromise reached in 1963 should be retained, but that the text of paragraph 2 should be reviewed to see what drafting improvements were possible. The Drafting Committee should certainly consider Mr. Reuter's

criticism of the word "*demande*" ("claim") and of the time-limit specified in paragraph 1 (b).

60. Personally, he would like to reflect further on Mr. Reuter's proposal to cover the case of one party suspending the operation of part of a treaty because of the failure of another party to apply that part.

61. He himself had always been in favour of a provision that went as far as possible towards requiring disputes to be submitted to independent adjudication, but the attitude of governments and the present state of international relations seemed to indicate that the article approved in 1963 went as far as it would be wise to go.

62. The inter-relationship between substance and procedure had caused him some anxiety when trying to draft the article, as would be seen from his observations on the proposal by the Government of Luxembourg, which was quite unacceptable because its effect would be to divide States into different categories under the régime of a treaty intended to codify general rules of international law.

63. Another delicate problem raised by article 51 was that if, as had been argued, it was procedural in character, it ought to be transferred to the end of the draft as a general "disputes" article and might then suffer excision at the diplomatic conference. If the article was to survive at all, the Commission would be unwise to press for independent adjudication, and in its present place article 51 should certainly provide a safeguard against abuse in respect of a particular series of provisions in the draft. Therefore, albeit reluctantly, he had come round to the view that caution was essential and that, generally speaking, the article should be handled in the way decided upon at the fifteenth session.

64. The article could now be referred to the Drafting Committee for consideration in the light of the discussion.

65. The CHAIRMAN suggested that article 51 be referred to the Drafting Committee, together with the various suggestions for its modification.

*It was so agreed.*<sup>9</sup>

ARTICLE 52 (Legal consequences of the nullity of a treaty) [65]

[65]

#### *Article 52*

##### *Legal consequences of the nullity of a treaty*

1. (a) The nullity of a treaty shall not as such affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked.

(b) The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed.

2. If the nullity results from fraud or coercion imputable to one party, that party may not invoke the provisions of paragraph 1 above.

3. The same principles shall apply with regard to the legal consequences of the nullity of a State's consent to a multilateral treaty.

<sup>8</sup> A/AC.125/6.

<sup>9</sup> For resumption of discussion, see 864th meeting, paras. 1-50.



66. The CHAIRMAN invited the Commission to consider article 52, for which the Special Rapporteur, in his sixth report (A/CN.4/186), had proposed a new text reading:

“Legal consequences of the invalidity of a treaty”

“1. (a) The invalidity of a treaty shall not by itself affect the legality of acts performed in good faith by a party in reliance on the void instrument before the invalidity of the instrument was invoked.

(b) However, a party to the void instrument may require any other party to establish as far as possible the position that would have existed between them if the acts had not been performed.

“2. A party may not invoke the provisions of paragraph 1 if the invalidity results

(a) under articles 33, 35 or 36 from fraud or coercion imputable to that party;

(b) under article 37 from the conflict of the treaty with a peremptory norm of general international law;

(c) under article 45 from the emergence of a new peremptory norm of general international law in which case article 53 applies.

“3. The same principles apply with regard to the legal consequences of the invalidity of an individual State's consent to be bound by a multilateral treaty.”

67. Sir Humphrey WALDOCK, Special Rapporteur, said that the first part of his sixth report dealt with articles 52, 53 and 54, which were concerned with the legal consequences of invalidity, termination and suspension of the operation of a treaty. In his introduction he had put forward some points that might be left to the Drafting Committee, as well as a proposal concerning the title of section VI. In the interests of consistency with the language of earlier articles, it was desirable to substitute the word “invalidity” for “nullity” in the title; so far as the English language was concerned, the meaning was the same.

68. The main difficulty in article 52, as the Government of Israel had pointed out, was that it dealt both with invalidity *ab initio* and with invalidity resulting from the subsequent emergence of a rule of *jus cogens*; that had led to some clumsiness in drafting which he had tried to eliminate in the new wording.

69. In response to the desire of the Government of Israel that the exceptions—when the benefits of the general provisions in paragraph 1 could not be invoked—should be stated more explicitly, he had referred to the relevant articles by number in the new paragraph 2.

70. He had also completed that paragraph by the addition of the new sub-paragraph (c). At the fifteenth session the Commission had decided that it was unnecessary to make an express reference to the fact that the provisions of paragraph 1 could not be invoked if the invalidity resulted from the emergence of a new peremptory norm, because that was self-evident.

71. Mr. TUNKIN pointed out that, in the new text of paragraph 1, the Special Rapporteur had still used the words “was invoked”, although presumably the paragraph was intended to cover invalidity in general, including invalidity by reason of a treaty being void

*ab initio*. He wondered whether that supposition was correct.

72. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin's supposition was correct. If a treaty conflicted with a rule of *jus cogens* at the time of its conclusion it was void *ab initio* and had never had any proper legal existence, provided there was no dispute as to whether the rule in question was in fact one of *jus cogens*. He agreed that the words “was invoked” were not appropriate to cover that case.

73. Mr. REUTER said he had not taken part in the drafting of article 52 in 1963, and he congratulated the Commission and the Special Rapporteur on their efforts to draw up a text on what was certainly a very difficult subject. He thought, however, that delegates to an international conference might perhaps have some difficulty in understanding the exact meaning of article 52.

74. One of the difficulties related to the substance of the article, which, among other things, touched on the problem of the inter-temporal law, which was dealt with in greater detail in articles 53 and 56.

75. Another difficulty arose from the fact that the Special Rapporteur had had the expression “nullity *ab initio*” in mind, but had wished to avoid using it, which had led to some ambiguity on several points. In the first place, he did not think that the word “*légitime*” in the French text was the right term. If he understood paragraph 1 correctly, the Commission had merely wished to say that acts performed in good faith could not give rise to international responsibility; it had not intended to take a position on the question of the inter-temporal law. Paragraph 1 (a) did not mean that the acts in question were upheld, as paragraph 1 (b) stated the contrary. It was important to be quite clear on that point. He could think of only one word in French which would convey that it was solely the problem of responsibility that was at issue: the word “*licite*”. For where responsibility was concerned, it was generally recognized that an act which gave rise to responsibility was “*illicite*”. Thus the situation was one in which an act, although lawful—paragraph 1 (a)—and giving rise to no responsibility, might become void—paragraph 1 (b). However, the text provided, not that the act “must” become void, but that it “might”. It thus offered the two parties the possibility of agreeing not to insist on that consequence.

76. With regard to the drafting of paragraph 2, although it was understandable, on reflection, that the guilty party could not invoke the provisions of paragraph 1 (a), it was rather less clear why it could not invoke the provisions of paragraph 1 (b).

77. With regard to paragraph 2 (c), he could agree to the case of the new rule of *jus cogens* being included in the interests of simplification. But the present wording implied that if a new norm emerged, the party concerned could no longer invoke paragraph 1 (a), and that was going too far. If a new norm emerged, acts performed in accordance with the earlier norm were lawful; whether they became void was another question, which could not be decided in an absolute sense.

78. With regard to article 45, it might be desirable to combine article 52, paragraph 2 (c), with the relevant paragraph of article 53 and make them into a separate provision. He did not wish to reopen the discussion on article 45, which had already been adopted, but he would raise that point when the Commission took up article 53.

79. Mr. CASTRÉN observed that the Special Rapporteur's new text did not differ greatly from the text adopted by the Commission in 1963;<sup>10</sup> the changes made to the earlier text were only drafting amendments. He approved the replacement of the expression "the nullity of a treaty" by "the invalidity of a treaty". The addition of two new sub-paragraphs in paragraph 2, and the inclusion in paragraph 2 (a) of a specific reference to articles 33, 35 and 36 were also improvements.

80. He noted that the Special Rapporteur, in his observations, had dealt almost exclusively with the comments of the Government of Israel and had left aside those of other governments, such as El Salvador, Sweden and the United Kingdom. The latter two Governments had pointed out that the article dealt with problems of great complexity and that the operation of some of its provisions might be difficult in practice, which appeared to be the case.

81. The relationship between paragraphs 1 (a) and 1 (b) should be studied more thoroughly and more clearly defined, as there seemed to be a contradiction between them. In any case, paragraph 1 (b), particularly in the very weak terms in which it was now couched in the French text, had no practical value as a legal rule. Was it necessary to specify, in a legal document, that one party to a treaty "*peut demander*" (may request) the others to establish as far as possible the position that had existed earlier without referring to the obligation, in certain conditions, to comply with such a request? Requests were always permissible. In that respect, the 1963 French text was slightly more satisfactory since, instead of saying "*une partie peut demander*", it provided that the parties might be "*tenués*" (required) to establish the previous position.

82. He therefore proposed that paragraph 1 (b) be amended to read: "However, at the request of a party to the void instrument, any other party shall be required to establish, provided it can be done without causing undue difficulty for these parties, the position that would have existed between them if the acts had not been performed".

83. Sir Humphrey WALDOCK, Special Rapporteur, said it was not correct to say that he had omitted to take account of the comments of the Governments of El Salvador and the United Kingdom. In fact they had prompted him to change the wording of paragraph 1 (b).

84. Mr. BARTOŠ asked whether the reference to "undue difficulty" in Mr. Castrén's proposal should be taken to mean that if a party was grossly guilty it would be placed in a very favourable position because the harm caused by its guilty action would place it in danger of "undue difficulty", whereas the position of the party which had acted in good faith would be

very unfavourable if it was to lose the right to compensation.

85. Mr. BRIGGS said that, in principle, paragraphs 1 and 2 of the new text were acceptable, subject to some drafting changes. The word "void" in paragraph 1 (a) was unnecessary and should be dropped. Perhaps the meaning would be clear if the words "in relation to another State party" were inserted after the words "the legality of acts" in the same paragraph.

86. It would be well to make clear that the acts referred to in paragraph 1 (a) were acts in international law, otherwise they might be understood to include acts in municipal law.

87. Mr. AMADO said that the Drafting Committee should carefully examine the expression "*caractère légitime*", used in the French text to render the English word "legality"; he had serious doubts about it.

88. Sir Humphrey WALDOCK, Special Rapporteur, said that article 52, like articles 53 and 54, was much more intricate than appeared at first sight and would probably require further discussion at the next meeting.

#### *Appointment of a drafting committee*

89. The CHAIRMAN said it had been agreed by the officers of the Commission that a drafting committee of eleven should be appointed.

90. Mr. BRIGGS, First Vice-Chairman, said it was proposed that the Drafting Committee should consist of the two Vice-Chairmen, the General Rapporteur, the Special Rapporteur and the following members of the Commission: Mr. Ago, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Reuter, Mr. Rosenne and Mr. Tunkin.

*It was so agreed.*

The meeting rose at 5.55 p.m.

### 846th MEETING

*Friday, 6 May 1966, at 10 a.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Present:* Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

### Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

*(continued)*

[Item 1 of the agenda]

ARTICLE 52 (Legal consequences of the nullity of a treaty) *(continued)*<sup>1</sup>

<sup>10</sup> Yearbook of the International Law Commission, 1963, vol. II, p. 216.

<sup>1</sup> See 845th meeting, preceding para. 66.