

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1962

*Volume I*

*Summary records  
of the fourteenth session*

*24 April—29 June 1962*

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UNITED NATIONS





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UNITED NATIONS  
New York, 1964



### INTRODUCTORY NOTE

The summary records which follow were originally distributed in mimeographed form as documents A/CN.4/SR.628 to A/CN.4/SR.672. They incorporate the corrections to the provisional summary records requested by members of the Commission, together with such drafting and editorial changes as were considered necessary.

United Nations documents are indicated by symbols composed of capital letters combined with figures.

The documents relating to the work of the fourteenth session of the Commission are printed in volume II of this *Yearbook*.

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## MEMBERS OF THE COMMISSION

The Commission consists of the following members :

Mr. Roberto AGO	Italy	Mr. Obed PESSOU	Dahomey
Mr. Gilberto AMADO	Brazil	Mr. Shabtai ROSENNE	Israel
Mr. Milan BARTOS	Yugoslavia	Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Herbert W. BRIGGS	United States of America	Mr. Senjin TSURUOKA	Japan
Mr. Marcel CADIEUX	Canada	Mr. Grigory TUNKIN	Union of Soviet Socialist Republics
Mr. Erik CASTRÉN	Finland	Mr. Alfred VERDROSS	Austria
Mr. Abdullah EL-ERIAN	United Arab Republic	Sir Humphrey WALDOCK	United Kingdom
Mr. Taslim ELIAS	Nigeria	Mr. Mustafa Kamil YASSEEN	Iraq
Mr. André GROS	France	All the members, with the exception of Mr. Victor Kanga, attended the session of the Commission.	
Mr. Eduardo JIMÉNEZ de ARÉCHAGA	Uruguay		
Mr. Victor KANGA	Cameroon	<p style="text-align: center;"><b>Officers</b></p> <p>The Commission elected the following officers :</p> <p><i>Chairman</i> : Mr. Radhabinod Pal</p> <p><i>First Vice-Chairman</i> : Mr. André Gros</p> <p><i>Second Vice-Chairman</i> : Mr. Gilberto Amado</p> <p><i>Rapporteur</i> : Mr. Manfred Lachs</p>	
Mr. Manfred LACHS	Poland		
Mr. Liu CHIEH	China		
Mr. Antonio de LUNA GARCÍA	Spain		
Mr. Luis PADILLA NERVO	Mexico		
Mr. Radhabinod PAL	India		
Mr. Angel PAREDES	Ecuador		

## AGENDA

The agenda adopted by the Commission for its fourteenth session consisted of the following items :

1. Law of treaties
2. Future work in the field of codification and progressive development of international law (General Assembly resolution 1686 (XVI))
3. Question of special missions (General Assembly resolution 1687 (XVI))
4. Co-operation with other bodies
5. Date and place of the fifteenth session
6. Other business

In the course of the session, the Commission held forty-five meetings. It considered all the items on its agenda except item 3 (Question of special missions).

At its twelfth session, in 1960, the Commission had, in pursuance of General Assembly resolution 1453 (XIV) of 7 December 1959, requested the Secretariat<sup>1</sup> to undertake a study of the juridical regime of historic waters and to extend the scope of the preliminary study outlined in paragraph 8 of the memorandum on historic bays, prepared by the Secretariat in connexion with the first United Nations Conference on the Law of the Sea.<sup>2</sup> This study (A/CN.4/143) was submitted to the present session, but as the question was not on the agenda, it was not considered by the Commission.

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<sup>1</sup> *Yearbook of the International Law Commission, 1960*, vol. II (United Nations publication, Sales No. : 60.V.1), p. 180.

<sup>2</sup> United Nations Conference on the Law of the Sea, *Official Records*, vol. I (United Nations publication, Sales No. : 58.V.4, vol. I), document A/CONF.13/1.

## LIST OF DOCUMENTS PERTAINING TO THE FOURTEENTH SESSION OF THE COMMISSION

<i>Document No.</i>	<i>Title</i>	<i>Observations and references</i>
A/925	Report of the International Law Commission covering the work of its first session	<i>Official Records of the General Assembly, Fourth Session, Supplement No. 10</i> ; also published in <i>Yearbook of the International Law Commission, 1949</i>
A/1858	Report of the International Law Commission covering the work of its third session	<i>Ibid.</i> , Sixth Session, Supplement No. 9; also published in <i>Yearbook of the International Law Commission, 1951</i> , vol. II
A/3859	Report of the International Law Commission covering the work of its tenth session	<i>Ibid.</i> , Thirteenth Session, Supplement No. 9; also published in <i>Yearbook of the International Law Commission, 1958</i> , vol. II
A/4169	Report of the International Law Commission covering the work of its eleventh session	<i>Ibid.</i> , Fourteenth Session, Supplement No. 9; also published in <i>Yearbook of the International Law Commission, 1959</i> , vol. II
A/4425	Report of the International Law Commission covering the work of its twelfth session	<i>Ibid.</i> , Fifteenth Session, Supplement No. 9; also published in <i>Yearbook of the International Law Commission, 1960</i> , vol. II
A/4843	Report of the International Law Commission covering the work of its thirteenth session	<i>Ibid.</i> , Sixteenth Session, Supplement No. 9; also published in <i>Yearbook of the International Law Commission, 1961</i> , vol. II
A/5209	Report of the International Law Commission covering the work of its fourteenth session	<i>Ibid.</i> , Seventeenth Session, Supplement No. 9; also published in <i>Yearbook of the International Law Commission, 1962</i> , vol. II
A/CONF.13/L.52	Convention on the Territorial Sea and the Contiguous Zone	See <i>United Nations Conference on the Law of the Sea, Official Records</i> , vol. II: Plenary Meetings, Annexes
A/CONF.13/L.53	Convention on the High Seas	<i>Ibid.</i>
A/CONF.13/L.54	Convention on Fishing and Conservation of the Living Resources of the High Seas	<i>Ibid.</i>
A/CONF.13/L.55	Convention on the Continental Shelf	<i>Ibid.</i>
A/CONF.20/12	Vienna Convention on Diplomatic Relations: Optional Protocol concerning the Compulsory Settlement of Disputes	See <i>United Nations Conference on Diplomatic Intercourse and Immunities, Official Records</i> , vol. II
A/CONF.20/13 (and Corr.1)	Vienna Convention on Diplomatic Relations	<i>Ibid.</i>
A/CN.4/1/Rev.1	Survey of international law in relation to the work of codification of the International Law Commission: Memorandum submitted by the Secretary-General	United Nations publication, Sales No.: 48.V.1 (1)
A/CN.4/19	Law of treaties: replies from governments to questionnaires of the International Law Commission	See <i>Yearbook of the International Law Commission, 1950</i> , vol. II
A/CN.4/23	Law of treaties: report by J. L. Brierly, Special Rapporteur	<i>Ibid.</i>

<i>Document No.</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/43	Law of treaties : second report by J. L. Brierly, Special Rapporteur	<i>Ibid.</i> , 1951, vol. II
A/CN.4/54	Law of treaties : third report by J. L. Brierly, Special Rapporteur	<i>Ibid.</i> , 1952, vol. II
A/CN.4/63	Law of treaties : report by H. Lauterpacht, Special Rapporteur	<i>Ibid.</i> , 1953, vol. II
A/CN.4/87 (and Corr.1)	Law of treaties : second report by H. Lauterpacht, Special Rapporteur	<i>Ibid.</i> , 1954, vol. II
A/CN.4/96	State responsibility : International responsibility : report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1956, vol. II
A/CN.4/101	Law of treaties : report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Ibid.</i>
A/CN.4/107	Law of treaties : second report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Ibid.</i> , 1957, vol. II
A/CN.5/115 (and Corr.1)	Law of treaties : third report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Ibid.</i> , 1958, vol. II
A/CN.4/120	Law of treaties : fourth report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Ibid.</i> , 1959, vol. II
A/CN.4/124	Report by Dr. Yuen-li Liang, Secretary of the Commission, on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists	<i>Ibid.</i> , 1960, vol. II
A/CN.4/130	Law of treaties : fifth report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Ibid.</i>
A/CN.4/142	Provisional agenda	Adopted without change. See page 1
A/CN.4/144 (and Add.1)	Law of treaties : first report by Sir Humphrey Waldock, Special Rapporteur	See <i>Yearbook of the International Law Commission</i> , 1962, vol. II
A/CN.4/145	Future work in the field of the codification and progressive development of international law : working paper prepared by the Secretariat	<i>Ibid.</i>
A/CN.4/146	Report by Mr. Radhabinod Pal, Observer for the International Law Commission, on the fifth session of the Asian-African Legal Consultative Committee (Rangoon, January 1962)	<i>Ibid.</i>
A/CN.4/147	Resolution 1687 (XVI) of the General Assembly concerning the question of special missions : working document prepared by the Secretariat	<i>Ibid.</i>
A/CN.4/L.9	Reservations to multilateral conventions : memorandum submitted by Mr. Gilberto Amado	See <i>Yearbook of the International Law Commission</i> , 1951, vol. II
A/CN.4/L.28	Law of treaties : text of articles tentatively adopted by the Commission at its third session	<i>Ibid.</i>
A/CN.4/L.76	Planning of future work of the Commission : comments and proposals submitted by Mr. J. Zourek	<i>Ibid.</i> , 1958, vol. II
A/CN.4/L.101 (and Add.1, Add.2, Add.3, Add.4 and Corr.2, Add.5)	Draft report of the International Law Commission covering the work of its fourteenth session	Mimeographed
A/AC.97/5/Rev.2	I. The status of permanent sovereignty over natural wealth and resources : study by the Secretariat ; and	United Nations publication, Sales No. : 62.V.6
E/3511- A/AC.97/13	II. Report of the Commission on Permanent Sovereignty over Natural Resources	
E/CONF.24/23	United Nations Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956 : Final Act and Supplementary Convention	United Nations publication Sales No. : 57.XIV.2
ST/LEG/3/Rev.1	Status of multilateral conventions in respect of which the Secretary-General acts as depositary	United Nations publication Sales No. : 59.V.6
ST/LEG/7	Summary of the practice of the Secretary-General as depositary of multilateral agreements	Mimeographed



**INTERNATIONAL LAW COMMISSION**  
**SUMMARY RECORDS OF THE FOURTEENTH SESSION**

*Held at Geneva, from 24 April to 29 June 1962*

**628th MEETING**

*Tuesday, 24 April, 1962, at 3 p.m.*

*Chairman : Mr. Grigory I. TUNKIN*

*Later : Mr. Radhabinod PAL*

**Opening of the session**

1. The CHAIRMAN declared the fourteenth session of the International Law Commission open.

2. After congratulating old members on their re-election and new ones on their election, he said that the increase in the Commission's membership to twenty-five reflected, though as yet not adequately, the great changes taking place in the world. One of the features of the age in which they were living had been the emergence and consolidation of the new socialist system which was playing a decisive role in international affairs; another was the dissolution of the colonial system from whose ruins new states were arising. As a result of those changes, international law was undergoing a radical transformation. Previously nations under a colonial regime and others nominally independent had been debarred from taking part in the formulation of its principles and rules, and had been subject to an international law which stronger powers had used to impose their will on the weaker. That was no longer true; international law was now becoming more nearly universal, a process that would continue as the last vestiges of colonialism disappeared in the not too distant future.

3. The nature of international law was also changing. It had become a weapon in the struggle for peace and furnished the fundamental legal concepts on which the principle of peaceful co-existence was based and which must be upheld if mankind was not to be plunged into catastrophe. The persistence of international tension and the continuance of the cold war impeded a solution of such major problems as the representation of China in the United Nations, the conclusion of a peace treaty with Germany and agreement on disarmament. The progressive development and codification of international law and the observance of its rules were indispensable for the preservation of peace, the most burning issue facing the international community.

4. The Commission had a number of solid achievements to its credit. It had provided the basis for the conventions concluded at the Geneva Conference on the Law of the Sea in 1958 and for the Convention on Diplomatic Relations concluded at Vienna in 1961. It had also prepared the draft for the diplomatic conference on consular relations which it was proposed to hold in 1963, while a number of other useful tasks had been accomplished. It must, however, take to heart the criticisms

levelled against it at the sixteenth session of the General Assembly, of which the main one was that it had not always paid enough attention to the most urgent problems of the time. He hoped that, as in the past, a spirit of co-operation would prevail and that the Commission would be successful in carrying out the General Assembly's recommendations in resolution 1686 (XVI) and in preparing drafts that would prove generally acceptable.

**Election of officers**

5. The CHAIRMAN called for nominations for the office of Chairman.

6. Mr. TABIBI proposed Mr. Pal, who had proved an excellent Chairman in 1958.

*Mr. Pal was elected Chairman by acclamation and took the Chair.*

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

8. Mr. BRIGGS proposed Mr. Gros.

*Mr. Gros was elected First Vice-Chairman by acclamation.*

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

10. Mr. TSURUOKA proposed Mr. Amado.

*Mr. Amado was elected Second Vice-Chairman by acclamation.*

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

12. Sir Humphrey WALDOCK proposed Mr. Lachs.

*Mr. Lachs was elected Rapporteur by acclamation.*

**Adoption of the agenda (A/CN.4/142)**

13. The CHAIRMAN invited comments on the provisional agenda (A/CN.4/142).

14. Mr. LIANG, Secretary to the Commission, on behalf of the Acting Secretary-General, extended a cordial welcome to the members of the Commission. With its extended membership the Commission now represented the main forms of civilization and the principal legal systems of the world and would be in a better position to carry out its task of progressive development of international law and its codification.

15. It had unfortunately not yet been possible to reproduce and distribute Sir Humphrey Waldock's report on the Law of Treaties, owing to delay in receiving the report and to difficulties at the resumed session of the General Assembly in New York. The Commission might therefore find it advisable to take up first item 2 of its

provisional agenda (Future work in the field of codification and progressive development of international law), on which the Secretariat had produced a working paper (A/CN.4/145). As the General Assembly had devoted a good deal of time to the question, which was of great importance, there would be some advantage in devoting the first two weeks of the session to it, and the discussion would make a substantial contribution to the Commission's report to the Assembly.

16. Sir Humphrey WALDOCK explained that he had not been able to start work on his report as soon as he had anticipated, as he had been unable to obtain release from his duties as President of the European Commission on Human Rights. The report was fairly long, but he thought that its length would eventually save the Commission's time since he had tried to make a synthesis of the very considerable discussion which had already taken place in the Commission.

17. Mr. ROSENNE asked whether the other two questions on which the General Assembly had laid special emphasis, in sub-paragraph 3 (a) of resolution 1686 (XVI)—namely, state responsibility and the succession of states and governments—would be discussed under item 2 or under item 6 (Other business). If they were discussed under item 2, two weeks would hardly be sufficient.

18. Mr. LIANG, Secretary to the Commission, said that he had not meant to imply that item 2 would require only two weeks. If the discussion had not been concluded by the beginning of May, the Commission might then follow its usual practice and take up its main item, reverting to the subject of its earlier discussion later. His interpretation of General Assembly resolution 1686 (XVI) was that the Commission was asked to give priority to the topic of the succession of states and governments and during the present session to discuss it only in so far as it pertained to its programme of work; the Commission was not asked to devote a great deal of time to the merits of the question. As to state responsibility, the Commission would consider how to plan its future work on the question. Of course the Commission might, if it so wished, devote some time to a general survey of both questions.

19. The CHAIRMAN proposed that the Commission should discuss item 2 of the agenda for two weeks, then take up the law of treaties, reverting to item 2, if it so wished, at a later stage.

*It was so agreed.*

*The provisional agenda (A/CN.4/142) was adopted.*

The meeting rose at 3.55 p.m.

## 629th MEETING

*Wednesday, 25 April 1962, at 10 a.m.*

*Chairman: Mr. Radhabinod PAL*

### **Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145)**

1. The CHAIRMAN invited the Commission to consider item 2 of its agenda, on which the Secretariat had prepared a working paper (A/CN.4/145).

2. It was stated in paragraph 7 of that paper that sub-paragraph 3 (a) of General Assembly resolution 1686 (XVI) required no comment. He read that observation as meaning that the recommendation amounted to a direction, first, that so far as the law of treaties was concerned, the Commission's prearranged work should continue; secondly, that so far as the topic of state responsibility was concerned, the Commission should continue to work on it and should take the necessary steps to continue the work, maintaining its place in the priority list; and thirdly, that so far as the topic of succession of states and governments was concerned, the Commission should take up its study and include it in the priority list in preference to other topics. In his view, the Commission would have to appoint special rapporteurs for those two topics.

3. With regard to sub-paragraph 3 (b) of the resolution, he observed that the Commission was thereby called upon, first, to prepare a new list of topics for the codification and progressive development of international law with a view to bringing the international community under the rule of law; secondly, to plan its method of work for the future; and thirdly, to report its conclusions on those matters to the General Assembly at its seventeenth session.

4. Mr. TUNKIN said that, as he understood it, operative paragraph 3 of resolution 1686 (XVI) reflected the Sixth Committee's intention that the Commission should reconsider its whole programme of work, taking into consideration the discussions in the Sixth Committee and the new circumstances of international life. The Commission could hardly approach any of the subjects, even those mentioned in sub-paragraph 3 (a) of the resolution, from a purely technical point of view. It should therefore not limit its discussion at that stage to any specific topic, but enter into a general discussion; that discussion could lead to specific proposals on the three topics mentioned in sub-paragraph 3 (a).

5. The Commission should also consider the importance of new methods of work, a topic which had been the subject of much discussion both in the Commission itself and in the Sixth Committee and which was still alive.

6. For those reasons, he suggested that the Commission should begin by discussing paragraph 3 of the resolution as a whole, without endeavouring to single out the topics mentioned in sub-paragraph (a). At a later stage the Commission would of course take a separate decision on each topic.

7. Mr. VERDROSS said he agreed with Mr. Tunkin on the need for a general discussion, bearing in mind particularly the new composition of the Commission.

8. He also concurred with the view expressed by the Chairman that, if the Commission retained on its agenda the topic of state responsibility, a special rapporteur should be appointed for that topic. The former rapporteur for the topic had submitted reports which dealt not only with the principles of international law governing state responsibility, but also with the application of those principles to the status of aliens. As he had already pointed out at the previous session,<sup>1</sup> a draft on the subject of the general principles of state responsibility could be completed within a reasonable time, but it was extremely doubtful whether an acceptable draft could be similarly produced in regard to the status of aliens. He therefore repeated the proposal he had then made that the two subjects should be divided, and that the new special rapporteur, if appointed, should be entrusted only with the study of the topic of the general principles of state responsibility.

9. He noted that his further proposal to include the topic of the succession of states and governments had been accepted by the General Assembly. To deal usefully with that topic, however, the Commission needed much more material on the practice of new states. Much research was still required on the subject, and if the topic were retained, the Secretariat should be asked to prepare the necessary material.

10. Mr. AMADO, speaking as one of the members of the Committee of Seventeen which had drawn up the Statute of the International Law Commission and as the Commission's member of longest standing, wished to emphasize the impressive work already performed by the Commission. More than half the topics mentioned in the 1949 secretariat "Survey of International Law in relation to the work of Codification of the International Law Commission"<sup>2</sup> had been disposed of, including the whole of the Law of the Sea. In addition, the Commission had formulated a draft on the continental shelf and had dealt with a number of subjects referred to it by the General Assembly. As a result, there only remained six topics outstanding out of those on the 1949 list. In the case of some of those topics, such as "Recognition of states and governments", state practice was still obscure: other topics were not of great practical importance to the community of states.

11. Notwithstanding some impatience shown in the Sixth Committee's discussions, the Commission should take a calm view. It was called upon to deal first with the law of treaties, a topic which all its members were anxious to see completed. After that, the choice of topics would depend on whether those proposed were ripe for codification. The decision on that point rested with states: it was for them to decide in the light of the conflicting interests in the international community and of the need to find means of coexistence. Speaking for his country in the Sixth Committee, he had made it clear

that Brazil understood that term to mean first and foremost the coexistence of the rich and the poor. Viewed in that light, coexistence could be nothing other than peaceful in order to ensure the unhindered international circulation of economic wealth.

12. He emphasized the need for the Commission to work within the limits of its terms of reference as a body of experts entrusted with a task of elucidating the existing rules of international law, those which were alive in the international community, and to formulate those rules in a manner likely to prove acceptable to governments.

13. He agreed as to the need for a general discussion and if from that discussion there emerged agreement on the need to give priority to at least one topic, the time given to it would have been well employed.

14. Mr. PAREDES said the remarkable work accomplished by the International Law Commission would be a source of encouragement for its future work.

15. Although, in article 15 of the Commission's statute, progressive development was mentioned before the codification of international law, the Commission had in fact concentrated on codification. Personally, he felt that mere codification, the scientific reformulation of existing rules in a particular branch of the law, was not sufficient, and that the Commission should enter into a more thorough consideration of the new factors which had recently transformed the character of the rights and duties of states.

16. It seemed to him, from the wording of its statute, that no commission enjoyed greater authority or scope in the search for peace and understanding between peoples, the supreme aim of the United Nations, than the International Law Commission. But it must improve on the past by recognizing and illuminating the new spirit which now informed relations between states. Otherwise it would be betraying the confidence reposed in it. One of the new factors to which he had referred was the tendency for the former principle of unrestricted sovereignty of states to be superseded by that of the interdependence of states. Another was the acknowledgment that the great powers were no longer the unquestioned masters and that the smaller states were entitled to make their views felt. Yet another was the increasing realization that states owed each other mutual assistance and co-operation, particularly in the economic field. A great human aspiration for centuries, the Society of Nations, had now become a reality; states were regarded no longer as completely separate and distinct entities which entertained relations with one another only for selfish ends, but as co-operating closely for the common purpose and the maximum joint benefit. In the light of those considerations, it was essential to review the principles of international law and bring them into line with the new trends that had become manifest and with the future aspirations of humanity. Any codification which did not take that need into account would be premature or ineffective.

17. He agreed with Mr. Tunkin on the need for the Commission to undertake a more thorough study of the problem of its methods of work, to which he would add a study of the aims pursued.

<sup>1</sup> *Yearbook of the International Law Commission, 1961, Vol. I* (United Nations publication, Sales No.: 61.V.1, Vol. I), p. 206, para. 44.

<sup>2</sup> United Nations publication, Sales No.: 48.V.1 (I).

18. Mr. ROSENNE said he broadly shared Mr. Tunkin's understanding of General Assembly resolution 1686 (XVI): the Commission should consider the whole of its future programme of work. The fact that, in sub-paragraph 3 (a), a number of topics had been singled out for special mention did not mean that no comment was necessary on those topics.

19. The impressive character of the Commission's past record should be regarded, particularly in view of the Commission's new membership, as a challenge rather than simply as a source of satisfaction. At a time when the Commission consisted of only fifteen members, it had accomplished the tremendous task of the codification of the Law of the Sea. With its membership increased to twenty-one, it had codified the rules governing diplomatic and consular intercourse and immunities. With its present membership of twenty-five, it must endeavour at least to equal that impressive record.

20. He fully concurred with the view so often expressed that, in the task of codification, all undue haste should be avoided. That need should be borne in mind, not only in connexion with the Commission's substantive work, but also in connexion with the study of the programme of work which the Commission would have to undertake in pursuance of paragraph 3 of General Assembly resolution 1686 (XVI). The programme of work drawn up in 1949 had stood the test of time remarkably well. The Commission should endeavour to emulate that example and draw up a constructive and comprehensive programme. In doing so, it should bear in mind that the programme thus drawn up might well take a considerable time to complete. It was significant that the General Assembly had stressed on two occasions the need for a new programme of codification. The debate which led to resolution 1505 (XV) had been of a more or less spontaneous character. At the following session of the General Assembly, a deliberate decision had been adopted on the basis of more preparatory work and had taken the form of paragraph 3 of resolution 1686 (XVI).

21. Following that General Assembly decision, the Commission was faced with two questions: first, whether enough material was available to serve as a basis for the study entrusted to the Commission by the General Assembly, and secondly, how much time would be needed for that study. With regard to the first question, he felt that the 1949 Survey and the working paper recently prepared by the Secretariat (A/CN.4/145) contained enough material for at least a preliminary consideration; the discussion in the Commission would show if any further material was needed. On the second question, he had an open mind. In the discussions in the Sixth Committee, a number of representatives had in fact mentioned that the International Law Commission's final report (called for in sub-paragraph 3 (b) of resolution 1686 (XVI)) need not be prepared for the General Assembly's seventeenth session in 1962. If, therefore, the Commission considered that more time was necessary, it was not precluded from making arrangements for submitting its final report at a later date, provided it submitted an interim report the present year.

22. There could be no doubt that the law of treaties would constitute the main topic of discussion at the present session and for the next few years. However, the fact that the chief topic of discussion was known, even where that topic was a vast one, did not preclude the Commission from initiating work on other topics now. Indeed, if the International Law Commission had not maintained the topic of the Law of Treaties on its agenda while it disposed of other subjects, it would have been faced at the present session with considerable difficulty in finding a subject to which it could devote the major part of its time.

23. The Commission must keep in mind two criteria for the selection of topics. The first was technical feasibility: the possibility of undertaking the codification and progressive development of a subject from the point of view of the material available. Mr. Amado had rightly pointed out that much research was needed on state practice on the subjects of the succession of states and of governments. The second criterion was the political feasibility. That question was not, of course, for the Commission to decide: it was the special function of the Sixth Committee of the General Assembly. That fact bore out the need for a reciprocal exchange of views between the Sixth Committee and the International Law Commission, a factor which was particularly important in drawing up the Commission's future programme of work.

24. The CHAIRMAN pointed out that, by the terms of sub-paragraph 3 (b) of resolution 1686 (XVI), the Commission was recommended "to report to the Assembly at its seventeenth session on the conclusions it has reached" regarding its future programme of work.

25. Mr. ELIAS said that most of the newly independent countries in Africa attached great importance to the question of succession of states. At each of the three conferences held at Lagos, Nigeria, within the past twelve months, several delegations of African countries had taken the opportunity to consider the problems arising from the fact that the metropolitan countries on which they had formerly been dependent had signed treaties and agreements affecting them many years before independence. For example, Nigeria, which had attained independence on 1 October 1960, had taken over 334 such agreements from the United Kingdom. The United Kingdom Government had already sent to Nigeria copies of 269 of them. They fell into several categories. Some were bilateral, between the United Kingdom and another sovereign state, some multilateral, between the United Kingdom and several states, but most were agreements signed by the United Kingdom as a member of an international organization. Some dealt with matters that concerned the United Kingdom alone; some concerned the United Kingdom and a number of Commonwealth countries. The majority affected Nigeria as well as the United Kingdom.

26. One example of the difficulties caused by that situation was provided by the Nigerian decision to break off diplomatic relations with France over the question of nuclear tests in the Sahara. When the Netherlands Embassy had taken over the representation of French

interests, the French Government, through the Netherlands Embassy, had drawn attention to a treaty signed in 1923—a year before the first elected members had participated in the Government of Nigeria—giving France the right to land at airports and to dock at harbours virtually in perpetuity, and had claimed that Nigeria had assumed all the rights and obligations arising out of the 1923 treaty. Happily, diplomatic relations had subsequently been resumed between Nigeria and France and the matter was therefore in abeyance. The question was to what extent a newly independent state should be expected to fulfil all the requirements of such treaties, especially when it had not been a party to them and when the effects were limited to the country concerned. At the time of granting independence, the metropolitan countries had ensured by means of an exchange of letters that treaties and agreements should be kept alive. Unfortunately, most of the negotiators of the formerly dependent countries had been too eager for the attainment of independence to go into the details of such treaties, but as soon as the law officers of the newly independent country had had time to examine them, they had realized what difficulties were likely to ensue.

27. The question therefore arose whether the customary law governing succession of states was broad enough to cover such cases. The secretariat of the Conference of African and Malagasy Heads of State at Lagos had had to contend with that difficulty when drafting the Charter which had emerged from the Conference. He therefore endorsed the suggestion made at the previous meeting by Mr. Rosenne that the Commission should give priority to the topic of succession of States.

28. Mr. CASTRÉN said that, when the Sixth Committee had discussed the Commission's programme of work at the fifteenth and sixteenth sessions of the General Assembly, several delegations had suggested that the Commission should be allowed considerable latitude in deciding the order of work, and several governments had expressed the same view in their observations. The final decision would, of course, rest with the General Assembly, since it was a political rather than a legal question. In the ninth paragraph of the preamble to General Assembly resolution 1505 (XV), the Assembly had said that the Commission's programme of work should be reconsidered in the light of recent developments in international law and with due regard to the need for promoting friendly relations and co-operation among states. That formulation was extremely broad and would cover both codification and the progressive development of international law.

29. The Commission's task was not merely to codify international law but to ensure its progressive development. The exact distinction was difficult to draw at any given moment. The Commission should be prudent, since if it proposed unduly advanced rules of law, the governments would not accept them. It was not precluded from studying topics on which opinions were known to differ, but such topics were not worth studying unless they were important and unless there was some chance of success. The Commission might also study certain topics not of general, but of regional, concern provided they

were sufficiently important. It should, however, avoid topics in which the political content was very strong.

30. The Commission should continue its original programme, especially the two topics on which it had already begun work—namely, the law of treaties and state responsibility. Those would provide ample work, although if some subject of particular importance arose, it might be given priority.

31. With regard to form, conventions were generally preferable to codes. The Conventions on the Law of the Sea and on Diplomatic Relations showed that the Commission was competent to undertake that kind of work, and indeed its preliminary work had saved the diplomatic conferences a great deal of time.

32. The Commission should avoid studying any topic which fell within the purview of some other international organization or any topic which was too broad and ill-defined. Its programme should therefore not be drawn up on too long a term or too rigid a basis since the situation might change suddenly and other topics require a higher priority. It could include topics already referred to the Commission, such as the juridical regime of historic waters, including historic bays, and the relations between states and international organizations. For state responsibility it should elect a new special rapporteur and decide whether or not it would be appropriate, for the time being, to deal with the treatment of aliens in that framework. The recognition of states and governments, succession of states and governments, jurisdictional immunities of states and their property, jurisdiction with regard to crimes committed outside national territory and the right of asylum were all important topics and might be given some measure of priority. The governments had proposed about thirty new topics, some of which were extremely interesting, but the time was not yet ripe to undertake them.

33. Some guidance on the organization of the Commission's work had been provided by the Commission's own discussions, by the Sixth Committee of the General Assembly and by the observations of governments. The situation had changed considerably with the recent increase in membership. Admittedly the increase was of positive advantage in that it provided the Commission with new talent, but it also raised new problems. If the Commission always sat in plenary meeting, the debates might become too cumbersome. Perhaps therefore a new system might be adopted and the Commission might divide into two sub-commissions for the first reading of any convention it might prepare. In addition, a small committee might be asked to help the special rapporteur in the interval between sessions and two special rapporteurs might be appointed for very complex subjects, such as state responsibility. The Commission should also be careful to give special rapporteurs as precise instructions as possible. The Commission could, of course, expect from the United Nations Secretariat the same effective help as it had received in the past, but a secretariat of its own might give better results. Outside help might be requested on a larger scale than hitherto. The suggestion that sessions should be extended or that two sessions should be held each year raised difficulties, as members

had their own occupations to attend to. To hold two meetings a day would be impracticable, since there would be too little time to prepare for them. If, however, some of the preparatory work were done by two sub-commissions, both might sit on the same day and members who so wished might attend both of them.

34. Mr. GROS said that he had come to appreciate the difference in atmosphere between the Commission and the committee of the General Assembly. The Commission was a real club, in which ideas that differed from one's own were received with indulgence. The intellectual atmosphere was therefore favourable to the establishment of well-thought-out legal texts, which could later be translated into agreements between states. The Commission should never lose sight of the fact that its task was to prepare texts acceptable to states in the prevailing circumstances. That was why its work at previous sessions had been so successful. Whatever the difficulties encountered, the Commission had been able to prepare draft conventions, thanks to the exchange of experience among members, several of whom had given very helpful explanations of actual practice in their own countries. It was in that spirit that it should approach the question of its programme of work for the next five years.

35. Five years was either a great deal of time or very little time; it really meant five sessions. The Commission should see what it could do in addition to dealing with the law of treaties. If in five years it could also complete the question of state responsibility, it would have achieved a great deal. If states could be brought to agree on the way in which they concluded, applied, and terminated treaties, one of the most solid pillars of international law would have been built. The study of state responsibility would be a second main pillar. It was therefore to be hoped that a report could be produced on state responsibility. The codification of that topic was undoubtedly difficult, as had already emerged from the reports submitted to the Commission. Mr. Tunkin had suggested that new methods should be adopted. He (Mr. Gros) was not sure that it would be wise to decide forthwith to entrust the work to one or perhaps several special rapporteurs. Each member should first state his own approach to the study of the topic. The Commission would have to see whether the topic could be broken down into chapters, and whether certain of those chapters could or must be dealt with first. He himself had an open mind on the subject, but a method of study must be devised which would enable work on the topic of international responsibility to be started at the present session.

36. He agreed with Mr. Elias and Mr. Rosenne that the Commission must undertake the topic of succession of states as it had been instructed to do so by the General Assembly in resolution 1686 (XVI). It would perhaps, however, be preferable to confine the topic to succession of states only, since succession of governments was not of immediate interest.

37. There was no need to be afraid of innovation in international law. He himself was doubtless regarded as a traditionalist, but must point out that for many years past, jurists from capitalist and socialist countries had been accustomed to discussing legal problems together

and had managed to reach agreement. The matter had been extremely well put by Mr. Verdross when, speaking at Salzburg in September 1961 as President of the Institute of International Law, he had said: "Our science is perfectly capable of solving the new problems if it takes account of the guiding ideas of international law. For these ideas are in principle also recognized by the new states of Africa and Asia. If the present development of the international community is studied closely, it will be realized that the states represented at the Bandung Conference in 1955 did not in any way proclaim new legal principles, but ideas which are the very foundations of international law, such as the principle of the equality of states, of non-intervention in domestic affairs, of territorial sovereignty, of the peaceful solution of all international disputes and of respect for human rights." That statement reflected the unanimous opinion of jurists in all parts of the world. There was therefore no difficulty for jurists of all schools in interpreting international law according to the new ideas.

38. With regard to the succession of states, the question had not, to his knowledge, given rise to any special difficulties recently, but he would be glad to supply the Commission with information on the way in which negotiations on the subject had been carried on with the former French territories, now independent.

39. To sum up: he noted that it was generally agreed that the Commission should take first the law of treaties; it should now agree on how to tackle state responsibility. He supported the suggestion for taking up the topic of succession of states immediately.

40. Mr. TABIBI said that resolutions 1505 (XV) and 1686 (XVI) had been the outcome of the general feeling in the Sixth Committee that a fresh impetus should be given to the Commission's work. The importance of the role of the Sixth Committee itself, which depended upon the Commission for material for its discussions, should not be underestimated.

41. Views differed in the General Assembly as to the topics to be discussed by the Commission. Some delegations believed it should devote itself mainly to codification, whereas others, including his own, believed that the Commission should not shirk complex subjects of special relevance to the present time, even though they might possess political overtones, because it was the only body in the United Nations which was composed of independent members chosen in their personal capacity, capable of representing the conscience of the world, and thus specially fitted to formulate principles of international law that would further the cause of international co-operation. Many delegations were of the opinion, for example, that the Commission should codify the rules of peaceful co-existence.

42. The Commission's task was not only to work on the three topics listed in sub-paragraph 3 (a) of resolution 1686 (XVI), but also to survey the whole of international law with a view to selecting further topics for consideration in the light of the important changes which had taken place in recent years, owing to the disappearance of colonialism and the rise of new states, all of which were now able to take part in the process of

developing international law. The basic material for such a survey was already available in the form of observations by governments, the records of the discussions at the fifteenth and sixteenth sessions of the General Assembly, and the Secretariat's working paper (A/CN.4/145). The Commission should give special attention to those elements of international law which would serve directly to strengthen peace. It must convey its views on its future programme of work to the seventeenth session of the General Assembly.

43. With regard to methods of work, as a government representative in the Sixth Committee he had favoured the idea of holding two meetings a day, but now as a member of the Commission he wished to gain some experience of its working before expressing an opinion. There was certainly great merit in the suggestion, already discussed in the General Assembly, that two special rapporteurs be appointed for each topic, the second being as it were an associate who would be able to take over the work of the principal rapporteur if for one reason or another he could not continue. Another suggestion would be to amend the Commission's statute so as to provide that a special rapporteur not re-elected to membership could complete his work.

44. He recognized the force of the argument against extending the length of the Commission's sessions, because members could not stay away longer from their regular duties, but thought it was timely to consider the possibility of extending the term of membership from five to seven years so as to ensure that work on hand could be finished without a breach of continuity. Such a change might in the long run prove less costly to the United Nations.

45. Mr. de LUNA said he agreed with Mr. Gros regarding the three topics mentioned in sub-paragraph 3 (a) of resolution 1686 (XVI).

46. Any further topics for codification or progressive development must pass a threefold test: first, whether, in the view of governments, they were of special urgency; secondly, whether they lent themselves to a draft international instrument which stood a reasonable chance of acceptance, and thirdly, whether the necessary material was available to enable the Commission to do useful work. By applying such criteria the Commission should be in a position to elaborate its future programme of work and if it were guided by a sense of realism, should be successful in framing legal rules for the maintenance of world peace.

47. With regard to methods of work, careful thought should be given to the possibility, where the nature of the subject was suitable, of conducting the first reading at least, in committee rather than in plenary meeting.

48. The CHAIRMAN said that the consensus of opinion was clearly in favour of dealing with the topic of the law of treaties first. As regards the other two topics mentioned in sub-paragraph 3 (a) of resolution 1686 (XVI), the observation in paragraph 7 of the Secretariat's working paper (A/CN.4/145), as it was worded, was equivocal; he, on the other hand, expressed his views on the resolution in unequivocal terms. It,

however, appeared to him that the Commission would still wish to discuss the order of priority of the topics it wished to take up, including those two.

49. With regard to methods of work, he pointed out that the Commission had not found it feasible in the past, when its membership had been smaller, to adopt any of the methods now suggested. That would be seen by reference to the 1958 *Yearbook*, Vol. II,<sup>3</sup> pages 74 to 76, which contained similar proposals made by Dr. Zourek, and Vol. I,<sup>4</sup> pages 174 to 180, where the matter was thoroughly discussed. The occasion for the discussion was the debates on the working methods of the Commission in the Sixth Committee of the General Assembly at its eleventh and twelfth sessions. Moreover, although no formal decision in that respect was then taken by the Commission, the matter was given a place in its report to the General Assembly, as would be seen from the 1958 *Yearbook*, Vol. II,<sup>3</sup> page 108, paragraphs 62 to 67.

50. With regard to the possibility of extending the term of office of members, he pointed out that the process of preparing a draft, obtaining the observations of governments, which took at least two years, and reconsidering the draft in the light of those observations was a lengthy one, and he himself had already suggested that, if the Commission was to discharge its important functions properly, it ought to be a permanent body or at least possess the same degree of continuity as the International Court of Justice.

51. On the question of choice of topics for codification and progressive development, he drew attention to the 1949 *Yearbook*<sup>5</sup> where, at pages 33 and 34, Mr. Amado and Mr. Scelle suggested some weighty criteria for selection. Fields of tension, fields of potential anarchy of forces and interests demanded immediate attention in that respect for the establishment of some tolerable harmony.

52. Mr. LIANG, Secretary to the Commission, explained that the reference in paragraph 7 of the Secretariat's working paper (A/CN.4/145) to the fact that sub-paragraph 3 (a) of resolution 1686 (XIV) required no comment, should be construed in the sense that the recommendation did not fall within the purview of the examination of the future programme of work. The subjects of the law of treaties and of state responsibility had been under discussion by the Commission over a number of years and remained on the Commission's agenda. The topic of succession of states and governments was one that came within the terms of article 18 of the statute. Moreover, under sub-paragraph 3 (b) of the same resolution, the Commission might wish to report to the General Assembly at its seventeenth session about the way in which it intended to deal with a number of other topics it had been requested to study, including special missions, relations between states and

<sup>3</sup> *Yearbook of the International Law Commission, 1958*, Vol. II (United Nations publication, Sales No. 58.V.1, Vol. II).

<sup>4</sup> *Yearbook of the International Law Commission, 1958*, Vol. I (United Nations publication, Sales No. 58.V.1, Vol. I).

<sup>5</sup> *Yearbook of the International Law Commission, 1949* (United Nations publication, Sales No. 57.V.1).



intergovernmental organizations, the right of asylum, and the juridical régime of historic waters including historic bays, as indicated in the note appended to the provisional agenda (A/CN.4/142).

53. Mr. ROSENNE said he agreed that the Commission must submit a report on its future programme of work at the seventeenth session, but the terms of sub-paragraph 3 (b) did not seem to oblige it to complete its consideration of that programme at the present session. He would not, however, press the point if the members of the Commission thought otherwise.

The meeting rose at 1 p.m.

### 630th MEETING

Thursday, 26 April 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

#### **Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)**

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.

2. Mr. LACHS said that he had followed the Commission's work closely from the outset and had taken part in discussions on its progress at twelve sessions of the General Assembly. On more than one occasion, he had been among those who had expressed grave concern at the declining role of international law of which there had been evidence in recent years; the Commission could do much to arrest and reverse that process. Codification was slow and laborious, but the Commission's achievements in that field, compared with earlier official and private efforts, were impressive. It should, however, guard against both excessive adherence to principles that belonged to the past and over-hasty anticipation of future developments.

3. The interesting range of topics referred to the Commission by the General Assembly would call for different methods of approach, and it might prove impossible to deal adequately with some of them. The Commission, in fulfilling its tasks, should take due account of the great changes taking place in the world and keep in touch with the new international relationships that were being formed. Among the topics mentioned in sub-paragraph 3 (a) of General Assembly resolution 1686 (XVI), the only one on which work was well under way was the law of treaties, and despite the wording of the sub-paragraph it was clear that state responsibility did not fall within the same category. In the case of the latter, the Commission should not only consider the appointment of a new special rapporteur or rapporteurs, but also decide how the topic was to be treated. A preliminary

debate concerning the procedure to be followed in regard to the topic of succession of states and governments would also be necessary.

4. Finally, pursuant to sub-paragraph 3 (b) of the same resolution, the Commission would have to give thought to the selection of topics referred to it by the General Assembly and the order in which this should be dealt with.

5. Mr. BRIGGS said he agreed that first priority should be given to a statement of the existing law of treaties and its codification, which should be of the greatest value to states. On a conservative estimate that work was likely to take up most of the Commission's time for the next four or five years, so that the question of the priority to be accorded to other topics was, from the practical point of view, somewhat academic, though it would be of advantage at least to make a start on a few other subjects.

6. Certainly, the trend of opinion in the Sixth Committee of the General Assembly at its sixteenth session had been that the Commission should consider appointing special rapporteurs for the topics of state responsibility, succession of states and special missions. Rather fewer speakers in the Committee had thought that the Commission should deal with the topics of right of asylum, the juridical régime of historic waters and the relations between states and international organizations. He could not judge whether that attitude was due to their being less interested in the topics or to the realization of the limitations of time.

7. If the Commission were to appoint special rapporteurs only for the additional topics, other than the law of treaties, which the General Assembly had asked it to study, there next arose the question whether enough material existed to make codification possible. He noted from paragraph 176 of the Secretariat's working paper (A/CN.4/145) that volumes 10 and 11 in the United Nations *Legislative Series* were devoted to the legal status, privileges and immunities of international organizations, and from paragraph 12 (c) that a secretariat study of the juridical régime of historic waters was to be circulated at the present session; but no such material was readily available on the important topic of succession of states, and a special rapporteur might not be willing to undertake research on it until material had been collected and classified.

8. Furthermore, the succession of states and of governments were in reality two separate topics with some analogies and some important differences, both in theory and in practice. Even if state succession were considered alone, the Commission would have to decide whether state succession in relation to treaties, public property, public rights, tort liability, public debts, concessions, contracts, pensions, private rights and the survival or otherwise of the old law should all be treated under the topic. It was conceivable — though he expressed no final opinion on the subject — that it might be preferable to deal with the relation of state succession to treaties in the draft of the law of treaties as part of the topic of the effect of certain political changes on the termination or survival of treaties.



9. In the matter of state responsibility, no problem of material arose, since there were many judicial decisions by international tribunals in existence. Of 54 states endorsing at the sixteenth session of the General Assembly the codification of the law of state responsibility, 13 had advocated what they termed a "broader approach" to the topic; but the United Kingdom representative had warned that any attempt to give the topic a political content should be firmly resisted. He (Mr. Briggs) was strongly of the opinion that some of the questions mentioned during the discussions in the Sixth Committee had a remote or no connexion with what international lawyers and judges dealt with as the law of state responsibility.

10. It was a complete misnomer to call the law of state responsibility which dealt with the treatment of aliens a colonial or imperialist law. International law in that field was and always had been the law governing relations between independent states—a law which had been applied in thousands of cases by international judicial tribunals constituted by the states in dispute—and almost always including judges of their own nationality. One case in which the two states in dispute dispensed with judges of their own nationality was the case of the British Claims in the Spanish Zone of Morocco<sup>1</sup> where Judge Max Huber had clearly indicated the basic problem in relation to responsibility under international law for the protection of aliens, when he said:

"It is admitted that all law has the object of assuring the coexistence of interests worthy of legal protection. That is undoubtedly also true of international law. The conflicting interests in relation to the problem of indemnification of aliens are, on the one hand, the interest of the state in the exercise of its authority in its own territory without interference or control by any foreign state, and, on the other hand, the interest of the state in seeing the rights of its nationals in a foreign country respected and effectively protected."

Whiteman's "Damages in International Law" provided an examination of over 30,000 international law claims in that field in which the cases were decided judicially rather than by force or intervention. Even if, however, the Commission should decide to treat the topic of state responsibility *latro sensu*, it would be advisable to deal with a specific aspect of the topic in the first place, and for that purpose no better subject could be selected than the international responsibility of a state for the just and humane treatment of aliens. He certainly thought that the Commission should appoint a special rapporteur to study that subject. In view of the Commission's heavy programme, it should perhaps defer for the time being the appointment of special rapporteurs on other subjects.

11. Sir Humphrey WALDOCK explained that the first report which he had prepared as special rapporteur on the law of treaties (A/CN.4/144) covered the conclusion, entry into force and registration of treaties. His intention was to put forward two further groups of articles on substantive and temporal validity, dealt with in

Sir Gerald Fitzmaurice's second and third reports (A/CN.4/107 and 115) and on the effects as between the parties and on third states, dealt with in Sir Gerald's fourth and fifth reports (A/CN.4/120 and 130). He hoped to finish that task in two years, but of course, as the work proceeded, additional matters might emerge for consideration.

12. Mention had been made at the previous meeting of certain points at which the subjects of state responsibility and that of succession of states and governments touched upon that of the law of treaties. The fact that Sir Gerald Fitzmaurice had alluded only briefly to the question of state succession in his fifth report might perhaps lead to the conclusion that state succession could be dealt with separately. Sir Gerald had merely made brief mention of state succession in two articles and seemed to have assumed that there was a general principle of state succession. He himself, perhaps, approached the matter from a somewhat different standpoint from Sir Gerald. It seemed to him doubtful how far a general doctrine of state succession could be said to exist. There were a number of disparate topics with regard to which a problem analogous to that of succession arose; but that the solution of those problems was based on a coherent doctrine of state succession was not at all certain. Such was, indeed, the conclusion of O'Connell in his recent study.<sup>2</sup> There was, in fact, quite a lot of material, apart from the recent practice to which reference had been made. As to succession in the matter of treaties, most of the modern practice in regard to British territories was available; and there was, for example, an instructive account of the Irish Republic's attitude towards British extradition treaties in a recent volume of the *British Yearbook*.<sup>3</sup> He himself thought that succession in regard to treaties was primarily a matter of examining how the political changes had affected the personalities of the contracting states. Perhaps even more important than the practice as between the parent state and the new state was the attitude of third states towards succession to treaties, concerning which less information was available. From one point of view the problem formed part of the law of treaties and it had, in fact, been dealt with by Lord McNair in his *Law of Treaties* in connexion with the effect of territorial changes and the doctrine of *rebus sic stantibus*.

13. The points at which the doctrine of state responsibility touched the law of treaties had been mentioned by Sir Gerald Fitzmaurice in his fourth report in connexion with the articles relating to the consequences of the breach of a treaty. Some delimitation of the subjects as between the special rapporteurs would be necessary.

14. The subject of state responsibility was of immense scope but there were a number of general principles, for example, those concerning the principles of tortious responsibility, due diligence, the treatment of aliens, local remedies, nationality of claims, respect for territo-

<sup>2</sup> D. P. O'Connell, *The Law of State Succession*, 1956.

<sup>3</sup> Paul O'Higgins, "Irish Extradition Law and Practice", *British Yearbook of International Law*, Vol. XXXIV, 1958, p. 274.

<sup>1</sup> *Reports of International Arbitral Awards*, Vol. II, p. 640 (United Nations publication, Sales No.: 49.V.1).

rial sovereignty and others. He had not himself a fixed mind about the order in which the various principles could best be studied, but while he agreed with Mr. Briggs that the treatment of aliens remained a very real problem in the world of today, affecting every independent state, he was doubtful whether priority should be given to that aspect of state responsibility.

15. In addition, it might be useful to initiate work on one or two more restricted topics. He looked forward with interest to the Secretariat's paper on the juridical regime of historic waters, which might give some idea of what could be done in that direction.

16. Regarding the Commission's method of work, although he had originally been attracted by the idea of dividing the Commission into two committees, after attending one session he had decided that such a procedure would impair the value of the Commission's work. Working in plenary meeting it was able to do much towards reconciling differences of opinion due to misconceptions, and the fruits of its discussions gained a notable measure of support and acceptance for the very reason that its conclusions were representative of opinion all over the world. Division into two groups would have the result either that that advantage would be lost or that the same discussions would have to be renewed in plenary. A further practical difficulty was that, once the drafting committee had started work, it would probably be impossible to hold two meetings concurrently.

17. Mr. PESSOU said that some of the difficulties mentioned by Mr. Elias at the previous meeting<sup>4</sup> had been common to all African states on the acquisition of independence, but widely different ways had been used to overcome them. The thirteen governments of the African and Malagasy Union (UAM) had concluded a number of agreements with France, other states and international organizations. Mr. Gros, who had spoken of the relations between those governments and France, was certainly aware that there had been no dispute between them.

18. It was a clear rule of international law that treaties were binding on the parties only, and some which had not been concluded on equal terms had to be regarded as void when circumstances changed, a development on which Mr. Tunkin had thrown light in his statements to the Sixth Committee. For instance, the international regime for the Congo and Niger rivers set up by the Treaty of Berlin of 1885 and confirmed by the Convention of St. Germain-en-Laye of 1919 should be considered as having lapsed, since it was no longer consonant with actual conditions.

19. Members of the UAM had concluded both collectively and individually a number of economic, financial and cultural agreements with France and with each other. They had also entered into or renewed a series of trade agreements with a number of countries, some of which had been originally concluded before independence. In some cases the compatibility of new treaty relations with

earlier bilateral or multilateral treaties would arise—a question discussed by the Chiefs of State of the UAM at their recent meeting at Bangui.

20. He earnestly hoped that the law of the succession of states and of governments would be codified, since it was a matter of direct importance for the political development of African states.

21. Mr. YASSEEN said the world had changed and very substantial adjustments to many of the rules of international law were now required. One of the most important contemporary facts was the wholesale accession of peoples to independence. Since the Commission's list of topics had been established in 1949, the membership of the United Nations had doubled and the day was not far distant when all peoples would accede to independence.

22. If the world community was to continue to be governed by the rule of law, it was essential that new states should freely accept the rules of international law and should do so wholeheartedly and not just formally. Such acceptance was the surest means of making international law effective.

23. Unfortunately many of the new states had had unhappy experiences of international law. That very real fact had had grave repercussions on the international order, for it had led in some instances to a questioning of the rules of international law in general. While he did not wish to dwell on that extremist tendency, which though perhaps understandable, was not justifiable, he felt it was necessary to understand the crisis of international law so as to confine its effects within reasonable bounds.

24. A notable effort in that direction had been made by Mr. Verdross as President of the Institute of International Law, in his opening address at the Salzburg session of the Institute in September 1961. Mr. Verdross had then said that the new states did not appear to question the validity of the whole of international law, but only certain safeguards affecting the status of aliens; at the same time, Mr. Verdross had expressed his belief that the new states would be prepared to afford protection to the capital of aliens admitted to the territory after the liberation and at the request of the new states. By "liberation" was presumably meant genuine independence and not an apparent independence which only constituted a cloak for colonialism. The valuable thought put forward by Mr. Verdross underlined the need to revise many sections of international law, in particular the rules governing the conclusion of international conventions and their termination, the status of aliens, and the rules governing international concessions and diplomatic protection of such concessions.

25. With regard to sub-paragraph 3(a) of General Assembly resolution 1686 (XVI), he had no comment to offer on the topic of the law of treaties, which it was agreed should be the main subject for the Commission at its current session.

26. So far as state responsibility was concerned, he noted that the special rapporteur had concentrated on only one of the many practical applications of the general

<sup>4</sup> 629th meeting, paras. 25 and 26.

rules of state responsibility—namely, the treatment of aliens. Notwithstanding the importance of that particular aspect of the question, that approach was unfortunate. The Commission should work towards the formulation of rules enunciating the general principles which governed the responsibility of the state in all forms of international activity. Once the Commission had reached agreement on those general principles, it could usefully consider how they would operate in practice, for which purpose it might appoint several special rapporteurs, each to be concerned with a particular field of international activity.

27. It was hardly necessary to stress the importance of the topic of the succession of states and of governments. Mr. Elias and Mr. Pessou had clearly shown the great practical importance of that topic to the newly independent states. There was a genuine and urgent need to formulate rules, as complete and precise as possible, on that topic for the benefit of the many newly independent states.

28. Mr. LIANG, Secretary to the Commission, said that several references had been made to the assistance which the Secretariat might be able to give to the Commission in its future work and he wished to take that opportunity to make some comments on that point. He had been very much impressed by the remarks of the General Rapporteur. Along the same lines, he wished to make the point that General Assembly resolution 1686 (XVI), and more particularly sub-paragraph 3 (b), demonstrated the Assembly's special interest in reviewing the programme of work of the International Law Commission. That special interest had not been apparent before resolution 1505 (XV) of 12 December 1960.

29. Since its inception in 1949, the Commission had included in all its annual reports a section on the planning of its future work and on its methods of work. However, that customary consideration of the Commission's tasks for the immediate future, and of the manner in which it proposed to carry them out, would not suffice for the purposes of sub-paragraph 3 (b). By that sub-paragraph, the General Assembly asked the Commission to consider its long-term programme of work; the Commission was invited to select for codification a number of topics in the same manner as it had done at its first session in 1949, as explained in paragraph 9 of the secretariat working paper (A/CN.4/145).

30. The Commission should give an account of its discussions in support of its conclusions on the selection of topics. He therefore strongly recommended to the General Rapporteur that in the report on the present session a separate section should set out those discussions and conclusions. That section would follow the lines of chapter II of the Commission's report covering the work of its first session.<sup>5</sup> It was only by thus giving a list of topics for its long-range work that the Commission could adequately respond to the active interest demonstrated by the General Assembly in the work of the Commission through its resolutions 1505 (XV) and 1686 (XVI).

31. The drawing up of such a list of topics was, of course, a separate matter from the consideration of the Commission's programme for the immediate future in response to sub-paragraph 3 (a) of resolution 1686 (XVI). In that connexion, he could not agree with the suggestion that the specific reference to certain items in that sub-paragraph meant that the General Assembly attached less importance to subjects which it had already referred to the Commission. Such topics as historic waters, special missions and the relations between states and international organizations did not need to be specifically mentioned in the sub-paragraph in question, for they had been referred to the Commission by the earlier resolutions referred to in the secretariat working paper (A/CN.4/145, paras. 12 and 13).

32. With reference to the topic of the law of treaties, he said that the English text of the Special Rapporteur's report would be circulated within a few days; the translations into other languages would follow.

33. With regard to the topic of state responsibility, he shared the view of the General Rapporteur that the topic could not be placed on the same level as the law of treaties. The Commission had never engaged in a sustained discussion on the general principles governing state responsibility. There had been no real discussion of the extensive reports submitted by the Special Rapporteur on state responsibility; there had only been some casual comments on those reports. The Commission was now called upon to turn over a new leaf so far as that topic was concerned and would do well to consider the general approach to be adopted as well as the actual scope of the subject of state responsibility.

34. There had been some discussion as to whether the Commission should appoint one or more special rapporteurs on the subject of state responsibility. It seemed somewhat premature to consider the appointment of more than one. There was an interpenetration between the subject of state responsibility and practically all parts of international law, the law of treaties and the succession of states, for instance. In the past, a large part of the discussion on state responsibility had concerned the treatment of aliens; that had been the case, for example, at the Codification Conference of 1930 at The Hague. The newer tendency seemed to be in favour of undertaking a synthesis of the general principles governing the subject of state responsibility. In the circumstances, it did not appear advisable to appoint a second special rapporteur on the subject of the treatment of aliens until the Commission had clarified its views on the general principles governing state responsibility, for those principles would of necessity affect the rules relating to the treatment of aliens.

35. With regard to the topic of the succession of states and governments, he agreed with Sir Humphrey Waldock that its confines were not too clearly demarcated: that subject, too, was interrelated with other subjects of international law.

36. At that stage, however, he wished to dwell on what the Secretariat could do to place at the disposal of the future special rapporteur and of the Commission itself

<sup>5</sup> *Yearbook of the International Law Commission, 1949* (United Nations publication, Sales No. : 57.V.1), p. 279.

the facts in its possession which could be of assistance in the study of the topic of the succession of states and governments. In the first place, the Secretariat had considerable experience in questions of the succession of states and governments relating to the membership of international organizations. In the second place, the Secretariat could furnish all facts and information in connexion with the succession to treaty obligations in regard to conventions of which the United Nations was the depositary.

37. Turning to a wider field of research, he considered that practical steps could be taken to deal with the more difficult question of investigating state practice in the matter of the succession of states. The Commission had in the past adopted the system of addressing to governments a general request for information regarding the relevant treaties. The response to that type of question had not been altogether satisfactory. Governments had displayed no alacrity to supply the information requested. He therefore suggested that the Commission should adopt a system which had been employed with success by League of Nations organs in the past: the Special Rapporteur, the Commission itself, or a special sub-committee, could with the assistance of the Secretariat prepare a detailed questionnaire to be addressed to governments. There was no doubt that it was easier for governments to reply to a questionnaire of that type.

38. While on the subject of the Commission's programme for the immediate future, he said that the Commission might find ways and means of dealing with the other tasks already assigned to it by the General Assembly. A secretariat document on the subject of historic waters was ready but its actual production had been delayed until early June in order that the report on the law of treaties should receive priority. In the case of both historic waters and special missions, he suggested that the Commission should deal with those topics directly instead of by appointing new special rapporteurs, a procedure which would delay the work by about two years.

39. The right of asylum and relations between states and intergovernmental international organizations, however, were such broad topics that the Commission would have to appoint a special rapporteur.

40. The Commission's methods of work was a question which might be dealt with later in the session, for practical reasons. The Secretariat would always be ready to adapt itself to any method of work decided upon by the Commission, but early notice was necessary of any change that might be proposed. If, for example, it were desired at forthcoming sessions to hold two meetings a day, or sub-committee meetings during the period when the Commission itself was not in session, a decision would have to be taken at the current session. The reason was that any such decision would involve additional expenditure and would therefore need to be submitted to the appropriate United Nations organs in good time.

41. Mr. CADIEUX said he agreed with the view put forward by Mr. Rosenne that the Commission might submit

to the General Assembly an interim report in response to sub-paragraph 3 (b) of resolution 1686 (XVI). In fact, by paragraph 4 of the same resolution, the General Assembly itself had decided to place on the provisional agenda for its seventeenth session the question entitled "Consideration of the principles of international law relating to friendly relations and co-operation amongst States in accordance with the Charter of the United Nations": in the course of the debate on that question, additional topics might be suggested as suitable for priority treatment and referred to the International Law Commission, as in the case of the topic of the succession of states. The list of topics to be established by the Commission for its future work could not therefore be definitive.

42. Personally, he had some doubts as to the advantages of drawing up a long rigid list of topics for codification. In the first place, the Commission would hardly find time in the next five years to deal with anything more than the law of treaties, the succession of states and state responsibility. In the second place, political considerations, which were paramount in the Sixth Committee of the General Assembly, could lead to the alteration of the list of topics. Nevertheless, the Commission could certainly begin to study some topics, even if it were unable to complete work on them before the expiry of the term of office of the present members; that was a practical argument in favour of drawing up a list of topics as suggested.

43. He shared the views of the Secretary to the Commission concerning the programme of work for the immediate future. The General Assembly had entrusted two distinct tasks to the Commission: first, the continuation of the work on the law of treaties and state responsibility; secondly, the preparation of a programme of work for the years to come, for which purpose the Commission was to give priority to the succession of states and governments.

44. With regard to state responsibility, the suggestion by Mr. Verdross for the division of the subject might offer a way out of some of the difficulties. Actually, however, the subject of state responsibility covered practically the whole field of international law and even if agreement were reached on the division of the subject, it might be difficult for the Commission to agree on the precise manner of effecting that division.

45. Accordingly, he suggested as a possibility that a rapporteur might be appointed to study the whole subject of state responsibility and to submit to the Commission, at the commencement of the next session, his proposals on such questions as whether certain aspects of state responsibility should receive priority and whether special rapporteurs should be appointed for them. A further question to be considered was whether certain sections of the topic of state responsibility should be dropped, in particular the treatment of aliens. He would not in principle be averse to the codification of the law concerning the treatment of aliens but would prefer to hear the opinion of the other members of the Commission before making up his mind as to the best course to follow in dealing with the subject as a whole.

46. Mr. BARTOŠ said that the first question to be settled was the Commission's approach to the establishment of its programme of work. General Assembly resolution 1686 (XVI) was binding on the Commission, as were all relevant General Assembly resolutions, but the Commission should also take into account the developments in international law which made topics ripe for codification. There were at least four strata of international law: classical international law before the foundation of the United Nations; the modifications and rules inherent in the United Nations Charter; the rules which had subsequently emerged and had been enshrined in the modern practice of states; and *lex ferenda*, or the progressive development of international law.

47. General Assembly resolution 1686 (XVI) was not very clearly phrased. He did not agree that sub-paragraph 3 (a) required no comment, as the Secretariat had stated (A/CN.4/145, para. 7). Even from a practical point of view the three topics mentioned in it—the law of treaties, state responsibility and succession of states and governments—could not be put on the same footing. The work on the codification of the law of treaties had already started and the Commission had given the Special Rapporteur implicit instructions. Parenthetically, he wished to say that he could not agree with Mr. Briggs' idea that the Commission should prepare a statement of the existing practice with regard to the law of treaties, since it had already decided that the Special Rapporteur should use the form of a draft convention.

48. The topic of state responsibility was an extremely broad one and of the utmost importance. No one, he believed, was opposed to its codification. What was involved, however, was not the continuation of the Commission's work; rather, the study of the whole topic would have to be started afresh. The reports of the previous Special Rapporteur, Mr. García Amador, had not been accepted even in principle and Mr. García Amador himself had stated that in the course of his research work he had completely changed his ideas on the subject. But Mr. García Amador was no longer a member of the Commission, which had never had a chance to see any document in which he explained how his ideas had changed. He agreed with Mr. Lachs and other members that the topic should be delimited, and especially with Mr. Verdross, who had urged that the title of the topic itself should be defined.

49. The topic of succession of states and governments fell into the mixed category, partly so-called classical law, partly United Nations Charter law, partly law developed in practice after the establishment of the United Nations—in particular as regards the creation of new states—and partly *lex ferenda*, seeing that some of the old rules no longer met present day requirements, and a number of states had urged the Commission to give the topic priority because of its practical importance. The Commission might in due course consider whether the succession of states and governments formed a single subject or two subjects.

50. As he had said, the three topics were not really on the same footing, although all three had been placed together in an effort to achieve a definite and practical

solution for difficulties which had arisen in the international community. Sub-paragraph 3 (a) of resolution 1686 (XVI) called for that comment, at least.

51. The question of what other topics should appear on the Commission's work programme remained to be settled. The topics might be divided into four groups: first, the six topics of the 1949 work programme which had not yet been studied (A/CN.4/145, para. 10, footnote 5); second, the topics which the General Assembly had referred to the Commission under special resolutions (*ibid.*, para. 12); third, topics suggested by governments (*ibid.*, parts I and II); and fourth, topics which the Commission itself might suggest on its own initiative under article 18 of its statute.

52. The Commission should not, of course, be over-ambitious, but it should keep two or three subsidiary items on its agenda at the same time as the major items. Experience at the eleventh session had shown the wisdom of that course, since at that session work on the major item had been interrupted by the enforced absence of the Special Rapporteur, who had been called to perform important duties at The Hague, while the second item had been treated in some confusion and the third item had eluded the Commission's grasp almost entirely. It would be desirable, therefore, for the Commission to have several reports before it so that it could work continuously during its sessions. The major item required several years not only of the Commission's work, but of preparation, but there might be other topics which would need less preparation; a fair balance should be struck, in keeping with the Commission's needs and abilities. He did not mean to imply that the Secretariat would have to do the preparatory work on all items at the same time, but it should prepare them in due course. The Commission should work continuously and bequeath a heritage to the future membership of the Commission, instead of thinking in terms of merely five years.

53. He had noted not only in the Sixth Committee of the General Assembly, but also at other assemblies of jurists outside the United Nations, a current of opinion that the Commission should do more work on the codification of international law than it had done. The Commission had achieved great things, notably the draft on the law of the sea, but it could not evade such expressions of public opinion. He would therefore formally propose that the Commission should examine the four groups of topics he had mentioned, although naturally they could not all receive priority.

54. In particular, work on the topic of special missions should be pressed on because it was being anxiously awaited. Diplomatic and consular relations had already been codified; that work needed to be supplemented by the completion of a draft on special missions.

55. The Commission should take into account practical matters which were intimately bound up with topics to which the General Assembly itself had given priority, such as the independence and sovereignty of states. It should not consider technical questions only, but also political questions. It should not confine itself to studying existing rules. Even the Conventions on the Law of the Sea of 1958 contained many new rules, especially

the Conventions on Fishing and Conservation of the Living Resources of the High Seas and on the Continental Shelf. The Commission would be rendering a real service to the international community if it examined controversial questions and succeeded in removing the sources of discord among states.

56. To sum up, everyone agreed that work should be continued on the law of treaties; the Commission should then examine how and how far it would study the topic of state responsibility; it should then pass to the question of succession of states and governments and decide whether that involved one or two topics; and, lastly, it should consider what priority should be given to other topics.

57. Mr. TSURUOKA said that he had listened with great interest to the discussion because it had turned on fundamental questions of international law as well as on methods of work and had confirmed his ideas about the Commission's role. All speakers had explicitly or implicitly stated that the purpose of international law was to furnish the international community with a basis of security without which there would be chaos. They had been unanimously of the opinion that international law should develop in order to adapt itself to the modern conditions of international life, and all had expressed a belief in the efficacy and flexibility of international law. It had been generally agreed that the Commission, in codifying international law, was also engaged in its progressive development for the general interest, not for the benefit of one country or region. The Commission's future work should continue along those lines.

58. While the Commission should appreciate the difficulties of particular nations, it was not a negotiating body. Its task was to discover and codify the existing law, and when innovations were made to meet new and genuine needs, it should take into account the legitimate interests of states, interests which were often diametrically opposed, and find some means of harmonizing solutions so that they would be acceptable to at least a majority of nations. No difficulties were insurmountable, as Mr. Pessou had shown in his remarks concerning the succession of states.

59. The Commission would, however, be wasting its time if it tried to undertake unduly bold innovations, since, even if they seemed justifiable to certain states, they would meet with strong resistance from others and the text would remain a dead letter. Such considerations should guide the choice of future topics for study and the methods of work. The choice, however, had in fact already been made and was to be welcomed. The three topics chosen by the General Assembly were important and urgent, and their study would contribute to the cause of peace and to closer collaboration among nations. Some new topics might, however, be included in the future programme of work, as Mr. Bartos had suggested, notably some of the pending work such as that on the juridical regime of historic waters, including historic bays.

60. Interesting suggestions had been made with regard to methods of work. Some changes had, perhaps, become

necessary in consequence of the increased membership of the Commission, but caution should be exercised, for the traditional methods of work had yielded such good results. Above all, undue haste should be avoided; the Commission should aim at quality rather than quantity.

61. The CHAIRMAN again drew attention to previous discussions of the Commission's work programme and method of work, which were not, of course, binding on the Commission, but might provide some guidance. The subjects had been discussed at the eleventh and twelfth sessions of the General Assembly. On the basis of those discussions Mr. Zourek had made certain specific proposals to the Commission<sup>6</sup> which had been discussed at the Commission's 464th meeting,<sup>7</sup> but no final decision had been reached.<sup>8</sup> It had, however, been decided to include the matter in the report to the General Assembly and that had been done.<sup>9</sup>

62. To subdivide the Commission into two sub-committees would not be practicable, because the report of a sub-committee would inevitably have to be discussed again at length in the plenary meeting if it was to be accepted by that body as its report. That method had been given a trial in connexion with arbitral procedure at the ninth session,<sup>10</sup> but without success.

63. The choice of subjects had also been discussed at the second to seventh meetings of the first session and the Commission might wish to pay special attention to the criteria then suggested by Mr. Amado<sup>11</sup> and Mr. Scelle.<sup>12</sup> A provisional list of fourteen topics selected for criticism would be found in the 1949 *Yearbook*<sup>13</sup> and might offer some guidance.

64. There could be little doubt that the work on the law of treaties would keep the Commission fully occupied for the term of office of the present members. Sir Humphrey Waldock had prepared his first report and, if the Commission completed consideration of that report at the current session, it would be able to examine the governments' comments in the fourth year of its term and their comments on Sir Humphrey's second report in its fifth. On the assumption that the term of office was not extended, the Commission would therefore spend its whole term discussing the law of treaties without perhaps completing its work even on that subject.

65. The terms of sub-paragraph 3(b) of resolution 1686(XVI) demanded special attention. The Commission always included a section on its future work in its

<sup>6</sup> *Yearbook of the International Law Commission 1958*, Vol. II (United Nations publication, Sales No. 58.V.1, Vol. II), pp. 74-76.

<sup>7</sup> *idem.*, Vol. I, pp. 174-180.

<sup>8</sup> *ibid.*, p. 180, para. 55.

<sup>9</sup> *idem.*, Vol. II, p. 108, paras. 62-67.

<sup>10</sup> *Yearbook of the International Law Commission 1957*, Vol. I (United Nations publication, Sales No. 57.V.5, Vol. I), p. 104.

<sup>11</sup> *Yearbook of the International Law Commission 1949* (United Nations publication, Sales No. 57.V.1), 2nd meeting, paras. 27-36.

<sup>12</sup> *ibid.*, paras. 61-63.

<sup>13</sup> *ibid.*, p. 281.

annual reports. The resolution, however, called for something more than that sort of routine report. It appeared to him that the Assembly wished to obtain a clear idea of the scope of the work the Commission considered to have been entrusted to it for the purpose of codification or progressive development, keeping in view the object of bringing the international community under the rule of law, and regardless of whether the work had been or could be completed. Indeed the world community had been trying to do that ever since the end of the First World War, which marked the pioneering enterprise of substituting the human device of some sort of constitutional governance for the blind play of physical force in the conduct of international relations. The world had been driven to that serious task by the lash of fear as well as by the incitement of hope. That new and compelling task, if and when fulfilled, would represent the positive side of historical development, revealing the indeterminate possibilities of good in history.

66. As regards the subjects other than the law of treaties mentioned in sub-paragraph 3 (a) of resolution 1686 (XVI), immediate steps to study them would have to be taken.

The meeting rose at 1 p.m.

### 631st MEETING

Friday, 27 April 1962, at 10 a.m.

Chairman : Mr. Radhabinod PAL

#### **Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)**

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.

2. Mr. VERDROSS suggested that the Commission's method of work might be improved if it adopted a system similar to that used with some success by the Institute of International Law. In the intervals between sessions, preliminary work might be done not only by a special rapporteur, but also by a committee. The special rapporteur might prepare a first draft, and submit it to the committee and then, in the light of its comments, prepare a final draft for the plenary Commission. That would probably save considerable time. If the Commission decided to place the topics of state responsibility and succession of states and governments on the agenda of its fifteenth session, it should at the current session appoint the special rapporteurs and the committees he had suggested. At the current session the Commission should continue its usual practice ; it should certainly not divide into two sub-commissions, for that would merely mean that the same debate would take place twice, as had happened at the ninth session.

3. Mr. AGO said that the Commission had discussed the subjects before it at several previous sessions. Mr. Verdross's suggestion was, however, relatively new, and he would wholeheartedly support it, provided, of course, that the proposed committee met in the intervals between the plenary Commission's sessions. He was, however, strongly opposed to any idea of dividing the Commission into two sub-commissions. It had been argued that the Commission's membership had been increased and that consequently subdivision would be easier ; his answer to that argument was that, for the purposes of the increase in membership to be achieved, all members must participate in the debates. If the Commission were subdivided and if the work of a sub-commission were to be regarded as final, the whole spirit in which the Commission had been constituted would be violated. On the other hand, if the sub-commission's work was to be regarded as preparatory, the debate would merely be repeated in the plenary meetings. In the light of experience he would urge members who favoured subdivision not to press their proposal, since such a system had been found completely unworkable.

4. He had noted with great pleasure that the General Assembly seemed to have realized that the Commission's essential task was to codify a few very broad topics and not to disperse its efforts on lesser ones. That approach was particularly appropriate in view of the great increase in the membership of the international community, and of the problems of international law arising out of that increase.

5. The topic of the law of treaties would, of course, receive priority. If the Commission succeeded in completing a draft on that topic, it would have achieved a notable success. However, state responsibility, on which a great deal had been said at earlier sessions, was an equally important topic and equally urgently in need of codification. When the Commission had defined the subject, however, it had been led astray by historic considerations. While it was true that the theory of the responsibility of the state had evolved from a body of case-law mainly concerned with the status of aliens, nevertheless the confusion of two distinct questions which had characterized the earlier reports on the topic should be avoided.

6. The two distinct questions were, first, the international responsibility of the state in general, and, secondly, the state's treatment of aliens. The second was of considerable practical importance in modern times, when the ever-increasing development of international intercourse was reason for a greater interest in the definition of the rights and duties of the State with respect to the alien residing on its territory. But the treatment of aliens should not be dealt with merely from the point of view of possible breaches of rules of international law. It was necessary first to establish what were the basic rules and what were the obligations of states with regard to aliens. By contrast, the state's international responsibility as such arose in circumstances in which a subject of international law infringed a rule of international law — any rule whatever, and not just the rules concerning the treatment of aliens. That was the essential subject.



7. In the course of a study of international responsibility the Commission would have to establish what was meant by an unlawful act under international law—what German jurists called *Unrecht*; in what circumstances a breach of international law might be imputed to a state; cases where the unlawful act was committed by an individual; at what moment an act in breach of international law finally produced international responsibility after the rules relating to the exhaustion of local remedies had been complied with; the responsibility of a state for the unlawful act of another state, also known as indirect responsibility; the circumstances which exonerated the state from responsibility; and so on. There was then the question of the consequences of responsibility, such as reparation or satisfaction, or other. That question ought to be tackled without encroaching on the separate topic of the procedures for the enforcement of responsibility.

8. He suggested, therefore, that the Commission should consider the basic nature of state responsibility separately from any other argument or subject with which it might be historically connected. Other special rapporteurs would have to be appointed for those subjects. Obviously, the treatment of aliens and enforcement measures were separate questions, which would have to be treated by special rapporteurs other than the one who would deal with the theory and nature of state responsibility as such.

9. The succession of states and governments was a very important topic, especially at the moment. He entirely agreed that the Commission should consider it and should appoint a special rapporteur.

10. The Commission should guard against one obvious danger. Some members had expressed the hope that the term of office of members would be extended and the length of sessions prolonged. He would not go into the merits of those excellent suggestions, but would merely point out that it was obvious that the codification of such very broad subjects could not be completed in five years with annual sessions of ten weeks. The Commission should, therefore, think very carefully about its work programme, for it would be deceiving the General Assembly if it gave the impression that it really believed it would be able to do all the work mentioned in the programme in the next four years. It was for the Assembly to decide whether some subjects were so important that it would be justified in allowing the Commission more time to meet in order to give them proper consideration, but if the Assembly decided that a particular topic should be codified, it should realize all the consequences of its decision.

11. Mr. TUNKIN said that the current discussion was called for by sub-paragraph 3 (b) of General Assembly resolution 1686 (XVI). That resolution had itself given the starting point in the third paragraph of the preamble, where it was stated that the codification and progressive development of international law should make international law a more effective means of furthering the purposes and principles set out in Articles 1 and 2 of the Charter of the United Nations. In other words, the object of the codification and progressive development of international law was to contribute to the maintenance

of peace and peaceful co-existence. If the Commission proceeded on that premise, then clearly it should give priority to topics the study of which tended most to achieve that fundamental purpose.

12. The programme of work should describe the Commission's intentions and its approach. Priority should be given to the three topics mentioned in sub-paragraph 3 (a)—the law of treaties, state responsibility, and the succession of states and governments. The Chairman had rightly pointed out that the law of treaties was a vast subject and might take at least five years. That was true, but the programme should also include items that might require more than five years. Certainly if it included all the three topics mentioned in the resolution, the work would take much more than five years.

13. It might be advisable to appoint a working group to draw up the list of topics for the Commission. There should be little difficulty in that; the main question was that of priority. At the current session the Commission should take action on the three topics mentioned in the resolution. The session would be mainly devoted to the law of treaties; the Commission would be able to decide, when it had seen Sir Humphrey Waldock's report, whether to try to cover the whole subject at once or to deal with it in sections.

14. He agreed with those members who had suggested that the study of the topic of state responsibility would have to be begun virtually anew. As Mr. Ago had said, the two different subjects of state responsibility as such and the treatment of aliens should be treated separately. The most important question was how the Commission should proceed; and he agreed with Mr. Lachs on the method of approach and with Sir Humphrey Waldock on the problems to be taken up. He disagreed, however, with Mr. Briggs's evaluation of the nature of state responsibility in the old international law. In the past, international law had been tainted by colonialism. Whereas it was true that in a number of cases disputes concerning the responsibility of the state had been settled by peaceful means, in hundreds of other cases armed intervention had been resorted to allegedly for the purpose of protecting aliens. The Commission would have to take the topic of state responsibility as a whole and examine it in the light of recent developments in international life and international law. The aspects of state responsibility cited by Mr. Ago did exist, but those were traditional aspects. Should not the Commission go further and study the problems arising out of the new developments, taking into consideration especially the fact that there had appeared new fields of state responsibility such as responsibility for acts which endangered the peace or constituted a breach of the peace, and responsibility for acts impeding the struggle of colonial peoples for independence?

15. The Commission had in the past often made the mistake of failing to give a topic sufficient preliminary study. Diplomatic and consular relations had not needed a great deal of preparatory work; but state responsibility was a very complex topic and not nearly so well defined. Lack of preliminary study had led to the situation which



now obtained even after many years' work and the submission of several reports. A special committee might, therefore, be set up to make a preliminary survey of the topic. He was glad to see that Mr. Verdross took the same view. His own suggestion was, however, slightly different. The committee should be established at the current session and asked to submit a preliminary report on the approach to be adopted and the specific points to be considered by the Commission at its next session. It would be premature to appoint one or more special rapporteurs, since the committee would have to clarify the issue and its report would show whether a committee or one or more rapporteurs would eventually be more effective.

16. Mr. Elias and Mr. Pessou had rightly stressed the importance of the topic of succession of states and governments to newly independent states, but it was also important for international relations as a whole. He would, therefore, support Mr. Verdross's suggestion that the Secretariat should be asked to collect the relevant material. The questionnaire to governments suggested by the Secretary would also be useful. Nevertheless, by reason of the complexity of the subject, it would be advisable in that case, too, to appoint a committee. The Secretariat might in due course compile the material, but it would not be essential for deciding the method of approach to the topic. The committee could be relatively small and should be appointed at the current session.

17. He agreed with Mr. Bartoš and Sir Humphrey Waldock that, for practical reasons, the Commission should have some other, less important topics on its agenda, as the special rapporteur on the main subject might be absent. The topic of special missions would be very suitable, since the General Assembly was awaiting new proposals and the subject had been examined at the Vienna Conference in 1961 and had since been referred back to the Commission by General Assembly resolution 1687 (XVI). A special rapporteur should be appointed at the current session.

18. It was useful to review the Commission's methods of work from time to time, but he wholeheartedly agreed with the Chairman, Mr. Ago and Mr. Verdross that it would be inadvisable and harmful to divide the Commission into two sub-commissions; that would waste time and might impair the quality of the work.

19. Mr. LIU said that the Commission's immediate objective should be to complete its work on the law of treaties and, so far as possible, to explore the field of state responsibility, tasks which the Commission had set itself even before the Assembly had adopted resolution 1686 (XVI). The Secretariat had pointed out that the General Assembly had shown far greater interest than ever before in the Commission's programme of work; that was only natural in view of the great increase in the membership of the United Nations. Some of the newer member states might not be aware of the programme established in 1949; some might have new needs; but all considered that the rapid codification of international law was necessary. The Commission would, therefore, have to submit a new list of topics suitable for codification. That task had been made easier by the

working paper prepared by the Secretariat (A/CN.4/145). In particular, the relations between states and intergovernmental organizations, the juridical regime of historic waters including historic bays, and the right of asylum should be included in the list. The Commission should not at that stage discuss substance or spend too much time in deciding priorities, for any list would necessarily be subject to revision in the light of changing circumstances.

20. The Chairman had made some excellent suggestions with regard to the Commission's method of work. It might be advisable to appoint small groups for exploratory work, but the main work should be done in the Commission itself.

21. Mr. CASTRÉN said that the Commission was clearly agreed that it should concentrate in the main on the codification of the law of treaties. It would have to decide whether the rules to be formulated as a basis for international instruments should be embodied in one or in several draft conventions. Perhaps as the subject was so vast it might be preferable to draft several conventions, for then each would be limited in scope and would consequently stand a better chance of ratification.

22. There seemed to be general support for the view that the Commission should also undertake the study of the more complex topic of state responsibility. Clearly the Commission would have to decide how the topic should be dealt with. After considerable hesitation he had formed the opinion that the right way for the Commission was first to formulate the general principles. The subject of the status of aliens, which some members thought should be dealt with first, raised very special problems, and practice in that regard varied considerably. Perhaps it should be taken up later.

23. The subject of special missions, on which the Commission had already prepared a preliminary draft,<sup>1</sup> was more limited in scope, and a special rapporteur, if selected forthwith, might be able to submit a report before the end of the session, in which event the Commission would be able to decide how to proceed.

24. Similarly, special rapporteurs should be appointed to study the topics of relations between states and intergovernmental organizations, the right of asylum and the juridical regime of historic waters, for all three had been expressly referred to the Commission by the General Assembly.

25. Work on the topic of the succession of states should be undertaken as soon as possible, for otherwise it might lose some of its immediate interest. The material could be collected by the special rapporteur himself with the Secretariat's help. As the subject was a wide one, perhaps a start should be made with state succession in relation to the law of treaties, and its effect on patrimonial rights and public debts.

26. The Commission might also wish to include in its programme of work the recognition of states and govern-

<sup>1</sup> *Yearbook of the International Law Commission 1960*, Vol. II (United Nations publication, Sales No. : 60.V.1, Vol. II), p. 179.

ments and jurisdictional immunities of states. In addition, careful thought should be given to including the pacific settlement of disputes, non-intervention, the rules governing international rivers and the laws of war and neutrality. He was uncertain, however, what order of priorities should be established for those last subjects.

27. Mr. JIMÉNEZ de ARÉCHAGA agreed with Mr. Lachs that, before appointing a special rapporteur, or perhaps, as suggested by Mr. Tunkin, a committee, for the preparatory work on state responsibility, the Commission should first determine the scope of its study. He held the view that the Commission should not leave aside for the time being the problem of responsibility for injuries to aliens, which traditionally was held to belong to the general topic of state responsibility.

28. As the Commission had no material available for even a preliminary discussion on state succession, it should appoint a special rapporteur on the subject at once who would report to the next session; by then the Commission should be able to decide whether more than one special rapporteur or a special working group would be needed. An effective way of obtaining information would be to circulate a questionnaire to governments.

29. The Commission should also initiate work on some other topics, to be considered when it had the time. As it might take too long to review in plenary the subjects listed in the Secretariat's working paper, perhaps a small working group should be asked to select suitable topics.

30. Mr. ROSENNE, on the question of the Commission's method of work, said that at one time he had thought that there was considerable room for improvement and that by introducing a procedure along the lines of that employed by the Institute of International Law, the Commission might be able to produce a greater flow of material for consideration by governments and the Sixth Committee of the General Assembly. However, after studying the paper prepared by Mr. Žourek in 1958<sup>2</sup> and the discussion on it at the Commission's tenth session,<sup>3</sup> he had become convinced that the recommended procedure, which theoretically might be desirable, was in fact impracticable.

31. The Commission's general method of work as determined by the provisions of its statute and the procedure followed by the Commission itself, the General Assembly and the Sixth Committee and governments, was to deal with a subject in two distinct stages. The first stage consisted in the preparation of draft articles by a special rapporteur, which, after being considered in first reading by the Commission, were circulated to governments and included for information in the Commission's report to the General Assembly, whose Sixth Committee might or might not examine and comment on the draft at that stage. Two years were allowed, after the Commission's first reading of the draft articles, for the submission of observations by

governments in writing. Those written observations were quite a different matter from oral statements by government representatives in the Sixth Committee. Only after that process had been completed did the second and final stage of the Commission's work take place, namely, the second reading of the draft articles. The Commission as a whole thus retained full responsibility for each of the two principal stages, and he was convinced that no other method would enable the Commission to discharge its task adequately. Within that general framework of working methods, the Commission was free, by virtue of articles 16, 17 and 19 of its statute, to adopt special plans of work appropriate for individual topics, including where necessary the appointment of sub-committees, which should be properly representative of the Commission as a whole.

32. In considering some possible advantages in the method of work adopted by the Institute of International Law, it should be kept in mind that the Institute differed from the Commission in several ways. For instance, the Institute numbered over 100 members compared to the Commission's twenty-five. It was too early yet to judge whether the recent increase in the Commission's own membership called for fundamental changes in the established patterns for the Commission's work.

33. Mr. Tunkin's interesting suggestion that preparatory committees might be set up should certainly be considered. If he had understood it correctly, for the topics for which that procedure would be adopted, the general directives to a special rapporteur would be framed after discussion in plenary of an initial report drawn up by such a committee. In order to avoid delay, it would probably be desirable that the Commission itself should hold some preliminary discussion on a topic before establishing such a preparatory committee. A further gain in formulating the general directives to a special rapporteur in that manner was that it would reduce some of the difficulties which arose when a special rapporteur had to be replaced by another.

34. In order to avoid unnecessary work and confusion, the Commission would have to examine the way in which the topic of the law of treaties impinged upon those of state succession and state responsibility and demarcate where possible the boundaries between them so as to give the special rapporteurs clear guidance.

35. To comply with sub-paragraph 3(b) of General Assembly resolution 1686 (XVI), the Commission should briefly discuss in turn each of the subjects mentioned in the Secretariat's working paper. If that discussion took place in a working group, as suggested by Mr. Tunkin, there was a danger of the same arguments being repeated in plenary meeting when the working group's report came to be examined.

36. Mr. ELIAS said he favoured the suggestion that a small working group be appointed to draw up a list of topics for the future programme of work, for submission to the General Assembly at its seventeenth session.

37. However, as a matter of first priority, the Commission should take up, in the following order, the topics of the law of treaties, state responsibility, succession of

<sup>2</sup> *Yearbook of the International Law Commission 1958*, Vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 74.

<sup>3</sup> *Ibid.*, Vol. I, p. 174.

states and of governments, special missions, the juridical regime of historic waters, and the right of asylum or political refuge.

38. At least at the preliminary stage the succession of governments should be taken together with the succession of states, since, as international practice demonstrated, it was not always easy to separate the two and they were often linked with the whole problem of recognition, whether *de jure* or *de facto*.

39. The right of asylum or political refuge was a matter of considerable interest to African countries and perhaps also to Asian countries. For example, certain persons from South Africa were seeking asylum in West Africa and elsewhere, and a government in exile from Angola had recently arrived at Leopoldville.

40. With regard to the suggestion that committees should be appointed for some preparatory work before the selection of a special rapporteur, he said that such an innovation could hardly be approved without the authority of the General Assembly, because of possible budgetary implications. The Commission's statute provided only for the appointment of special rapporteurs.

41. Perhaps some effort should be made to co-ordinate the work on the topic of succession of states and governments with that of a committee of the International Law Association formed recently in the United Kingdom specifically to study that question, particularly in connexion with newly independent states.

42. Mr. BARTOS explained that his own suggestion did not conflict in any way with that made by Mr. Tunkin. Under his own suggestion, all the topics before the Commission would be taken into consideration and a list of priorities established. However, he had not excluded the possibility of that being done by a working party as a preliminary. Each working group would have to consider all aspects of the topic referred to it; when the working group reported to the Commission, the latter could amend, if necessary, the proposals submitted to it by the group.

43. The CHAIRMAN, summing up, said that the law of treaties was the only topic with which the Commission could deal at the current session. The Commission would do so on the basis of the Special Rapporteur's first report. For the next two years, the Commission would continue its consideration of the law of treaties on the basis of further reports by the Special Rapporteur on other aspects of that topic. As far as the law of treaties was concerned, it appeared to be generally agreed that the Commission's existing methods of work should not be altered.

44. It was also generally agreed that the topic of special missions was suitable for consideration at the next session, if the topic of the law of treaties should not absorb the whole of the Commission's time.

45. So far as the topic of state responsibility was concerned, there appeared to be general support for Mr. Tunkin's proposal that a special working group should be appointed to consider the scope of the topic and report to the Commission at its next session. That proposal had been supplemented by the suggestion, made

by the General Rapporteur and amplified by Mr. Jiménez de Aréchaga, that even before the special working group was set up, the Commission should hold a general discussion on the scope of the topic of state responsibility. His personal view was that such a discussion would involve duplication and would be somewhat *in vacuo*. All the members might not have studied the questions involved sufficiently to enable them to participate fruitfully in the discussion. The Commission would in any event be called upon to discuss the proposals of the special working group. He therefore suggested that Mr. Tunkin's proposal should be adopted and that the officers of the Commission should submit nominations for membership of the working group.

46. The position with regard to the topic of succession of states and of governments was similar. He suggested that the officers of the Commission should submit, in due course, nominations for membership of a special working group to consider the scope of the topic and report to the Commission at its next session.

47. Lastly, in regard to the preparation of a list of topics for the Commission's future programme of work, he suggested that a small committee should be appointed to prepare the list on the basis of the 1949 list and of the suggestions for additional topics. When the committee had prepared a list of topics, it would submit it to the plenary Commission, which would have ample opportunity to amend or supplement the list in question.

48. Mr. LIANG, Secretary to the Commission, said it was his understanding that the special committee to deal with the Commission's future programme would work during the current session. Provided that the committee was prepared to accept the limited language services customarily provided to the Commission's drafting committee, and that it met in the afternoon, when the Commission itself was not in session, the necessary material arrangements could be made.

49. The position with regard to the suggested working groups for the topics of state responsibility and succession of states was different. If special meetings of those groups, say in New York, were contemplated, the additional expenditure involved would have to be considered: travelling expenses and members' daily allowances would involve expenditure not covered by the United Nations budget for 1962. A possible alternative would be to adopt a procedure similar to that followed by the Institute of International Law: members of each group would carry out their work by correspondence and meet a few days before the opening of the 1963 session. Given some notice of a decision to that effect, the Secretariat could make arrangements to include the small additional expenditure involved in the proposals for the 1963 United Nations budget.

50. Having been associated with the Institute of International Law since 1950, he had seen that method work and thought that it might be emulated to some extent by the Commission, although he recognized that there were great differences between the Commission and the Institute. First, the Institute usually met for only about ten days every two years, whereas the Commission met

for ten weeks annually; secondly, the meetings of the Institute were largely devoted to the adoption of decisions after discussion and there was little opportunity for reconciling views in the manner customary in the Commission; thirdly, much of the Institute's work was done in the periods between the sessions, whereas the bulk of the Commission's work was done in the course of its sessions.

51. He assured the Commission that whatever decisions it reached on its methods of work, the Secretariat would lose no time in making all possible material arrangements.

52. Mr. AGO, referring to Mr. Tunkin's proposal, urged that the working group should report to the Commission during the current session so that a special rapporteur could be appointed. Experience had shown that it was necessary to give a special rapporteur ample time to prepare his reports for future sessions.

53. The proposal which had been made by Mr. Verdross was quite different. Whereas under Mr. Tunkin's proposal a working group was to be appointed immediately, and before the appointment of a rapporteur, to define the scope of the topic of state responsibility, under the proposal of Mr. Verdross a sub-committee would be set up to consider the Special Rapporteur's report before it was examined by the Commission itself. That proposal concerned a much later stage of the work on state responsibility, and there would be ample opportunity for the Commission to consider all its implications and to solve any material difficulties which might arise. The proposal of Mr. Tunkin, however, should be considered immediately.

54. He did not consider the method of work by correspondence, followed by the Commissions of the Institute of International Law as very satisfactory; it had been adopted largely for financial reasons.

55. Mr. TUNKIN said that a purely scientific body like the Institute of International Law was very different from the Commission, which was an official organ of the United Nations. The Commission had a much greater responsibility than the Institute; it was expected to prepare drafts acceptable to governments.

56. The suggestion for a working group to draw up a list of topics did not raise any major problems. Such a group could meet during the Commission's session for one week or two and submit to the Commission a list of topics. The appointment of such a group was not without precedent.

57. The appointment of a special working group to study the scope of the topic of state responsibility would represent an innovation in the Commission's methods of work. The working group in question would have a very complicated and very serious task: it would have to undertake the essential preliminary study of the whole topic, which had not as yet been attempted by the Commission. It was evident that the working group could not accomplish that task during the current session.

58. The position was very much the same in regard to the proposed working group on the topic of the succession of states.

59. With regard to the financial implications in the case of both working groups, it should not be too difficult to organize their work without involving the United Nations in any great additional expense. If the groups were appointed forthwith, their members would have two months in which to consult each other and organize their work; in the interval between the current and the next session, the members could keep in touch by correspondence; lastly, there should be no difficulty in arranging for meetings of the working groups a few days before the opening of the fifteenth session. In fact, the groups could meet early in the fifteenth session and submit their reports during the session.

60. He urged the Commission to approach those two important subjects with due deliberation; undue haste would prejudice the value of future work on those topics.

61. Mr. JIMÉNEZ de ARÉCHAGA urged the Commission to consider the suggestion made by the General Rapporteur that a general discussion on the topic of state responsibility should precede the setting up of the proposed special working group. Such a general discussion would give the working group the benefit of the knowledge of the views prevailing in the Commission on the scope of that topic; such a foreknowledge could not but assist the working group in its task of preparing suitable recommendations for submission to the Commission at the following session.

62. Mr. TABIBI said that, in considering its methods of work, the Commission should endeavour to reconcile two needs: first, the need to satisfy the General Assembly that the work of the Commission was proceeding with due speed; second, that of maintaining a high standard in the preparation of the drafts.

63. He shared the general view that the law of treaties did not require examination by a special working group and should be considered by the Commission on the basis of the reports to be submitted by the Special Rapporteur.

64. For the topics of state responsibility and succession of states, he agreed with the suggestion for the establishment of special working groups, after a thorough examination of those subjects by the Commission. It would be another week before the Commission could take up the topic of the law of treaties, so there was time for such a thorough examination which would assist the working groups when these were appointed.

65. He shared the view that the working group on state responsibility should submit its report at the present session, so that the Commission could appoint a special rapporteur before the end of the session.

66. Mr. BRIGGS pointed out that the formulation of a list of topics for codification had been important in 1949 because of the duty imposed upon the Commission by article 18 (1) of its statute to "survey the whole field of international law with a view to selecting topics for codification".

67. The position in 1962 was quite different. The Commission's programme contained no fewer than seven topics which it had been officially requested to study by

the General Assembly. It had therefore enough work for many years to come, and any addition to that list of seven topics would have only a nominal significance.

68. With regard to Mr. Tunkin's proposal that a special working group be appointed to study the problem of state responsibility, he had at first been somewhat concerned at the vagueness of the terms of reference of the proposed group. After hearing the explanations given by Mr. Tunkin, he had the impression that the group in question would be performing the duties normally performed by a special rapporteur. He was opposed to that view of its duties and considered that the working group should do no more than demarcate the various chapters of the topic. He also strongly supported Mr. Ago in urging that the group should report to the Commission before the end of the session.

69. Sir Humphrey WALDOCK said that much would depend on the size of the proposed working group. He thought that even a small group would have to have a rapporteur of its own.

70. The discussion in the Commission should preferably take place after the small working group had submitted its suggestions.

71. Mr. TUNKIN said he could not accept the suggestion, implicit in some of the remarks made during the discussion, that the early appointment of a special rapporteur would mean that the Commission's work would move ahead faster. In fact, a special rapporteur had been appointed for state responsibility, and had submitted several reports over a long period, and yet the difficulties inherent in that topic had not been removed. The necessary ingredient for speedy progress was good preliminary work.

72. There could be no doubt that the current session would be taken up with the law of treaties and that at the next session the Commission would not be able to deal with any other topics than the law of treaties and special missions. Clearly, therefore, the Commission would not take up the topic of state responsibility either at its current or at its next session. There was therefore ample time to undertake a satisfactory preliminary study of that topic which would prove of great value to the future work of the Commission.

The meeting rose at 1 p.m.

### 632nd MEETING

*Monday, 30 April 1962, at 3 p.m.*

*Chairman : Mr. Radhabinod PAL*

#### **Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)**

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.

2. Mr. GROS said that the special rapporteur for the topic of state responsibility should be appointed at the current session. The Commission should have no difficulty in selecting a special rapporteur from among its members, several of whom had written well-known works on the subject.

3. The early appointment of a special rapporteur should not prevent careful examination of Mr. Tunkin's proposal, which contained valuable ideas for the improvement of the methods of work of the Commission. For example, between sessions the special rapporteur might with advantage draw on the knowledge and experience of fellow members of the Commission; it would be remembered what a remarkable contribution Mr. Bartos had made to the study of consular law and how much assistance he had given to the special rapporteur and to the Commission in the consideration of that topic. Indeed, it might be profitable if those members who were particularly interested in the topic of state responsibility met at Geneva two or three days before the opening of the fifteenth session to discuss with the special rapporteur the results of his work.

4. On the other hand, he was not in favour of the idea that the topic should be referred to a drafting committee. A useful draft could only be prepared by a single rapporteur who would specialize in a difficult problem for a number of years. The appointment of a committee was a procedural device which could not solve difficulties of substance. The real cleavage of opinion in the Commission was over the place of the question of the treatment of aliens in the subject of state responsibility. For some members, it was the foundation of the law of state responsibility; for others, it was simply one of the many hypotheses in international law where a breach of international law gave rise to state responsibility.

5. While there was some truth in both contentions, what concerned him particularly in that cleavage of opinion was the fact that it had already been responsible for the failure of the 1930 Conference to codify state responsibility. That conference had failed, not because of any difference of opinion on the principles underlying state responsibility, but because of its inability to agree on the rules governing the status of aliens; and yet even today it was the violation of those rules which most frequently gave rise to state responsibility.

6. He fully understood the misgivings with which certain members contemplated a discussion based exclusively on the treatment of aliens. Yet, it was hardly possible to avoid that question altogether and discuss the machinery of responsibility in the abstract; if the Commission formulated a draft on state responsibility which was silent on the treatment of aliens and the consequences of breaches of the rules governing the treatment of aliens, the draft would be nothing but an empty shell.

7. There were two aspects of the topic of state responsibility. One was the determination of the circumstances which gave rise to the international responsibility of the state; the other was that of the machinery for making international claims. Although it was not impossible to study the second aspect before the first, it would be more

logical to commence with a study of those acts which gave rise to responsibility on an analogy with torts in municipal law. In most systems of municipal law, there were certain general principles governing tortious liability. For example, in French law there were the two basic principles, laid down in articles 1382 and 1384 of the Civil Code: first, that a person's act or omission which caused damage to another rendered the first person liable to make good the damage caused to the second; and second, that any activity which created a risk of damage to other persons rendered the person exercising that activity liable to make good any damage thereby caused to such persons. In connexion with state responsibility, the first question would be to ascertain whether any such general rules existed in international law, to examine the "causes" of that responsibility.

8. In considering the principles governing state responsibility, it was not possible to ignore the impressive body of case-law built up by international tribunals which had adjudicated cases concerning the treatment of aliens. The majority of cases which had given rise to state responsibility had not involved direct claims by one state against another, but had been cases in which a state had acted to defend the rights of its nationals, in other words had made a claim against another state to assert the rules of international law in relation to the nationals of the claimant state, thereby, in the words of the Permanent Court, invoking its "own right".

9. The question of the protection of nationals abroad had not lost any of its relevance. All states, whatever their political, social or economic systems, protected their nationals abroad. That had been expressly recognized by the Commission in its draft articles on Consular Relations where article 5 stated that consular functions consisted more especially of protecting in the receiving state the interests of the sending state and of its nationals.<sup>1</sup> There was not a single state which ignored the interests of its nationals merely because they had chosen to live or work abroad. An example was the case of a French firm which had entered into a contract to set up a cardboard factory in the Soviet Union. The contract contained an arbitration clause which provided for arbitration by the Stockholm Chamber of Commerce and that the arbitral tribunal should adjudicate on the basis not only of the clauses of the contract but also of the general rules of international law. Examples of that type, of which he could give many, showed that countries considered that certain rules of international law concerned the protection of the rights and interests of their nationals abroad, and that machinery existed for the enforcement of those rules.

10. Accordingly, although he agreed that the treatment of aliens obviously did not cover the whole subject of state responsibility, he considered that breaches of international law in connexion with the treatment of aliens provided the most abundant source of international claims in which state responsibility was invoked. And it was not a question that could be avoided, because state

responsibility only arose where an unlawful act which caused damage involved reparation, following the decision of an international body, in default of settlement by agreement.

11. He agreed with Mr. Tunkin on the desirability of giving directives to the special rapporteur; but in the space of the two months available, both the Commission officially, and its members informally, could make their views known to the special rapporteur, who would also be enlightened by the current debate.

12. Personally, he would advise the special rapporteur, first, to commence the study of the topic by an analysis of the sources of state responsibility and the role of that responsibility in contemporary international life, the determination of what constituted unlawful acts, the question of imputability, the concept of damages and that of reparation; secondly, to study the machinery and procedure for making the state effectively responsible: the mere recognition of certain acts as unlawful was of theoretical value, but unless a remedy were provided there was no law of state responsibility; thirdly, to bear in mind the international case-law on the treatment of aliens: in that respect, an analysis should be made of the cases relating to breaches connected with the treatment not only of privileged aliens—diplomats and consuls—but also of ordinary aliens; and fourthly, to follow the example set by Sir Humphrey Waldo in the case of the law of treaties, and submit for 1963 a preliminary report on state responsibility which would present the Commission with at least a general plan of work. A general discussion would be held in 1963, but that discussion, in order to be fruitful, should be conducted on the basis of a report by the special rapporteur. Unless such a report were available, a whole year might be wasted.

13. Mr. LACHS said he was pleased to note that his suggestion for a general discussion had been so well received. The discussion on procedure was of great value, in view of the serious issue facing the Commission, and would save time at a later stage when the Commission came to consider the substance of state responsibility.

14. The general discussion covered both substance and procedure. So far as substance was concerned, it appeared to be agreed that the topic of state responsibility should have priority and that work on the topic had to be started again from the beginning.

15. So far as procedure was concerned, there was a difference of opinion but it was not on a major issue. In fact the proposals of Mr. Tunkin and Mr. Ago were not irreconcilable and it was generally agreed that the future special rapporteur on state responsibility would derive much benefit from preparatory work by a special committee. The difference of opinion concerned timing; some members considered that the special rapporteur should be appointed forthwith, others that his appointment should be deferred. Article 19(1) of the Commission's Statute provided that "The Commission shall adopt a plan of work appropriate to each case". Every topic should accordingly be examined on its own merits in

<sup>1</sup> *Yearbook of the International Law Commission 1961*, Vol. II (Sales No.: 61.V.1, Vol. II), p. 95.

order to determine what plan of work was best suited to it.

16. State responsibility was a complex subject. In view of the failure of past attempts to codify the rules of international law governing the responsibility of the state, the Commission was called upon to perform pioneer work. Mature reflection was therefore necessary before a decision on procedure was taken.

17. The Commission's past experience of the topic of state responsibility had at least the negative value of showing how not to proceed. The Commission had been invited to study the topic by General Assembly resolution 799 (VIII) of 7 December 1953; in 1955, at its seventh session, it had appointed a special rapporteur; work had been started in 1955, but in 1962 it found itself in the position of having to begin all over again. The mistakes of the past, which had led to that waste of eight years, must not be repeated.

18. One mistake had been to leave the special rapporteur without any guidance from the Commission, with the consequence that the report submitted reflected only the special rapporteur's personal opinions. It was precisely in order to avoid that mistake that the suggestion had been made that a special committee of three or four members should be appointed to prepare a preliminary report for discussion by the Commission as a whole. In the light of that discussion, one or several rapporteurs would be appointed to study the subject in detail.

19. He did not share the misgivings expressed by Mr. Gros on the subject of the work of a committee. The committee would not be engaged in actual drafting; it would be for the special rapporteur to prepare a draft. The committee's function would be to define the approach to the topic of state responsibility; it would not merely draw up a table of contents but would make an analysis of what the subject included.

20. Nor did he share the fear that the failure of the 1930 Conference would be repeated. The 1930 Conference had failed to codify the law of the sea, but the International Law Commission had achieved a substantial measure of success in that same field.

21. As he saw it, it would be the task of the committee to lay down the philosophical approach to state responsibility in the light of modern international law. It would have to consider whether there existed a set of rules on liability which applied to all branches of international law, as was the case in most systems of municipal law, or whether the rules of state responsibility applied only to some branches of international law; at that stage he would content himself with saying that, in principle, he did not favour the invasion of international law by private law. It would also have to consider whether or not the reports on state responsibility should deal with the question of remedies, and whether both direct and indirect responsibility should be studied. Cases of direct responsibility were those in which the claimant state itself had suffered the damage. Cases of indirect responsibility were those in which the claimant state acted on behalf of its injured national.

22. A mere preliminary glance at the topic of state

responsibility thus showed what a vast subject it was and how many other branches of international law it penetrated. The Commission would have to consider how it was related to other topics on the Commission's programme of work. All those questions required time for reflection and he doubted whether, in view of the Commission's agenda, they could all be dealt with at the current session.

23. For those reasons, he suggested that the questions he had mentioned should be studied in the interval between the fourteenth and the fifteenth sessions. The time so spent would be time saved because, when the Commission came to consider the future special rapporteur's first report, it would be better prepared to undertake a fruitful discussion.

24. For the purpose of maintaining the continuity of the work, he suggested that the future special rapporteur should be one of the members of the committee. He would then benefit from the experience gained as a member of the committee and the results of his studies would be better than if he were to undertake the task single-handed.

25. He suggested, furthermore, that a similar method of work should be adopted in regard to the topic of succession of states and of governments.

26. The CHAIRMAN said that it was not due to any faulty procedure that the Commission had not achieved tangible results in the codification of the principles governing state responsibility; the reason was that pressure of other work had prevented the Commission from dealing with the reports prepared by the special rapporteur.

27. Improvements in the methods of work of the Commission would not prevent the recurrence of such a situation. If, as was unfortunately not impossible, the Commission did not find time in the next five years to deal with state responsibility, then — whatever procedure were adopted — the topic would have to be held over.

28. Mr. EL-ERIAN said that, although Mr. Gros and Mr. Lachs approached the subject of state responsibility from different angles, they both agreed on the importance of establishing a method of dealing with the topic. When, in 1953, the General Assembly had considered whether the topic of state responsibility should receive priority, difficulties had arisen about the delimitation of the topic, and when the Commission had appointed Mr. García Amador as special rapporteur and his valuable report had been discussed at the ninth session of the Commission (413th to 416th meetings) great attention had been given to the method of work and to the aspects to which priority was to be given. Mr. Padilla Nervo (413th meeting, paras. 55-59) and Mr. Pal (414th meeting, para. 8) had indicated, without minimizing the importance of the topic of the international responsibility incurred by the state by reason of injuries to aliens, that other aspects were of great importance. The Commission should therefore review the matter in the light of past experience and decide what use might be made of the reports already submitted to it and how far it should cover aspects other than the traditional aspect. There existed a great deal of



state practice and case law on the problems of state responsibility for damage to aliens, and the subjects was ripe for codification; but the other aspects also needed codification or progressive development. If the method were considered immediately, time and discussion would be saved later.

29. Mr. CADIEUX thought that it would be better to hold a general discussion immediately than to appoint a rapporteur or committee, as all would derive considerable advantage from having heard the discussion. He had thought originally that the suggestion for the appointment of a committee was interesting, but since then he had become doubtful about its merits. A large committee would be open to the same objections as those advanced against the subdivision of the Commission, while a small committee would involve a rather delicate debate on the number of members and on the membership. There was the further objection of principle that the Commission should not delegate its powers in such an important matter. It could, of course, do so merely for drafting purposes, or to cope with technical problems such as the state of the documentation regarding the topic of succession of states; but to delegate its authority in so complex a subject as state responsibility would violate the spirit in which the Commission worked, and would not necessarily save time unless the committee was able to report before the end of the current session. The Commission had been instructed to report on its programme of work, and most members would undoubtedly wish to express their opinion on any conclusions reached by a small committee.

30. The idea of a consultative committee to be appointed after the appointment of a special rapporteur was equally open to objection, because when the General Assembly had increased the membership of the Commission, it had undoubtedly intended that the special rapporteur's preliminary report should be discussed by the whole Commission. If there were several rapporteurs working between the sessions and the other members of the Commission had to be consulted by post, financial and administrative difficulties would arise and, in any case, the other members would probably not have time to give their full attention to the work. The general debate on the topics in the work programme should be held forthwith, though Mr. Verdross' suggestion might be given further consideration.

31. Mr. TABIBI said that the Commission appeared to have begun discussing the substance, no doubt because it was difficult to separate sub-paragraphs 3 (a) and 3 (b) of General Assembly resolution 1686 (XVI). The general discussion would be useful in the long run, as it would save time later and would also enable the General Assembly to remain abreast of the Commission's thinking.

32. The Commission had been told that, in the light of the experience of its older members, it would be unwise to press any suggestion for splitting the Commission into two sub-commissions, which might duplicate work instead of accelerating it. A good compromise might be that suggested by Mr. Verdross.

33. It might not be possible for financial considerations to accept the Chairman's suggestion that the General Assembly should be asked to place the Commission on a permanent basis; the idea might be kept in abeyance. Equally, for financial reasons and because members were otherwise occupied, it was not possible to extend the sessions. No objection, however, had been raised to the suggestion — which had no financial implications — that the Commission's term of office should be extended to seven years. That extension might enable the Commission at least to finish its work on the law of treaties and to establish a sound work programme. He would suggest that a separate chapter in the Commission's report to the General Assembly should cover those points fully, so that the Assembly might realize the difficulties facing the Commission and the complexity of its work.

34. All members agreed that the debate on the report on the law of treaties should start on 7 May. As Mr. Gros had rightly stated, if states could be brought to agree on the way in which they concluded and terminated treaties, one of the most solid pillars of international law would have been built. When it had the report before it, the Commission would be able to obtain a clearer idea whether to codify the law of treaties as a whole or to subdivide the very broad subject.

35. The topic of state responsibility covered the whole body of positive international law and was of the greatest importance in view of the many changes in the relations between states, the emergence of new states and the development of the principle of political and economic self-determination. It would be a very difficult task, as had been shown by the reports of the special rapporteur, by the United Nations Secretariat's revised study on the status of permanent sovereignty over natural wealth and resources (A/AC.97/5/Rev.1 and Add.1) and the report of the Commission on Permanent Sovereignty over Natural Resources (E/3511). He agreed with Mr. Lachs that it was important to settle the method and with Mr. Tunkin and Mr. Ago that the subject of the treatment of aliens should be separated from the general subject of state responsibility. The general principles of international law, and particularly their application for the preservation of world peace, should be codified; the Commission might afterwards embark on a special study of the rules relating to responsibility for injuries to aliens.

36. He was entirely in favour of giving priority to the codification of the rules on succession of states. That topic had been included in the list drawn up by the Commission at its first session.<sup>2</sup> It was related to many important questions, including the right of peoples and nations to economic and political self-determination, the sanctity of treaties and the problems of nationality, inheritance, debts, acquired rights and compensation. He agreed, however, with previous speakers that for the moment the Commission should confine itself to succession of states and leave succession of governments until later.

<sup>2</sup> *Yearbook of the International Law Commission 1949* (United Nations publication, Sales No.: 57.V.1), p. 281.



37. The Commission needed a great deal more material concerning the topic of succession of states. He had done some research into the subject himself, but had found only a few scattered articles and one interesting book, that by O'Connell.<sup>3</sup> According to Mervyn Jones, "State succession in general is a thorny subject, and one on which the literature of international law offers divided, and somewhat confusing, counsel.... The very phrase itself is apt to lead one astray. State succession may be used in two senses, (a) denoting succession in fact, and (b) denoting succession in law."<sup>4</sup> According to Oppenheim, "A succession of International Persons occurs when one or more International Persons takes the place of another International Person, in consequence of certain changes in the latter's condition."<sup>5</sup> That was a definition of what occurred in fact, but was not doctrine. He would therefore suggest that the Commission should hold a general discussion on the topic of succession of states before it appointed a special rapporteur or committee.

38. He supported the suggestion that a working group be established to select new topics for codification, in the light of the views expressed by governments and by the Sixth Committee of the General Assembly.

39. Mr. PAREDES said that the great problems of law were not only of interest to specialists, from the theoretical standpoint, but also of practical application in everyday life; that was why they should pay heed to the urgings of the Sixth Committee of the General Assembly to study the general problems of international law. All the members of the Commission were agreed that international law had changed and was changing in their own lives; but there were some who thought that its evolution merely reflected the natural course of events. In his opinion, in any evolutionary system there were a number of slow, gradual changes but also others which were sudden and violent, abrupt leaps forward. During their time, international law had undergone radical and unexpected changes through modifications to its very foundations. And that was what they had to clarify in accordance with article 18 of the Commission's statute.

40. With regard to the topics proposed for the Commission's present session, the law of treaties would necessarily have to be examined anew seeing that at least a third of the members of the Commission were meeting for the first time. And as regards its substance, if, as he earnestly hoped, it was their aim to try to ensure that treaties were complied with by the parties, then treaties would have to be surrounded by the greatest safeguards to ensure that they expressed exactly the free and spontaneous will of the peoples.

41. The problem of state responsibility seemed obviously to require urgent study and formulation and also to be

wider in scope than any other international problem. But he did not believe that it could be reduced to the protection of aliens against arbitrary acts of the local government which was less a matter of public international law than of private international law.

42. What appeared to him of capital and primary importance was to bring out the responsibility of international persons for acts causing damage to other international persons: for instance, poisoning of the atmosphere by atomic explosions. Not long ago he had read a telegraphic report that the Japanese Government intended to put in a claim for damages suffered by the Japanese people through atomic explosions. If one state caused damage to another state unjustly or without reason it should make reparation for such damage. International obligations did not derive merely from treaties but from the simple fact of the relations between states and of their position in the world, based on the principle of interdependence and solidarity. That was the first requisite for international peace and security.

43. He did not deny the immense importance of protection of the individual but that was another matter with separate rules of procedure, because there the claimant was the state as representative of its injured national, though the direct beneficiary of the claim was the individual. That matter should be studied separately by a sub-committee appointed for the purpose.

44. Mr. JIMÉNEZ de ARÉCHAGA said that members should take the opportunity of expressing their views on the scope of the topic of state responsibility at that point rather than await a report from the suggested working group or committee. Mr. Ago had argued for a restrictive approach to the topic. Undeniably, some of the subjects which were usually dealt with under the heading of state responsibility, such as the responsibility of states for injury to the person or property of aliens, including measures of expropriation and nationalization, would, from a scientific point of view, perhaps fall more appropriately under the heading of the treatment of aliens. But he would challenge the conclusion that for that scientific reason the Commission should jettison those questions and confine the study of state responsibility to other less controversial and more academic aspects, such as the general principles of state responsibility, whether it was an objective responsibility or based upon *culpa*. Should it do so, the Commission would be disappointing the hopes and expectations not only of the General Assembly but also of various United Nations organs and scientific bodies. The United Nations Commission on Permanent Sovereignty over Natural Resources had been studying the right of every nation to exploit its own natural resources. When it had come to the legal aspect involving the right of expropriation and nationalization and the obligations which might arise therefrom, it had decided to suspend the study, since the topic was being dealt with by the International Law Commission under the heading of state responsibility, and simply to urge that the Commission should proceed with that task as speedily as possible. Similarly, the Economic and Social Council was considering ways and means of promoting the inter-

<sup>3</sup> D. P. O'Connell, "The Law of State Succession", Cambridge University Press, 1956.

<sup>4</sup> J. Mervyn Jones, "State Succession in the Matter of Treaties", British Yearbook of International Law, Vol. XXIV, 1957, p. 360.

<sup>5</sup> *International Law*, eighth edition, 1955, Vol. I, p. 157.

national flow of capital for the economic development of under-developed countries. It had reached the vital question of the legal status of foreign capital under international law and was looking to the Commission for guidance. That attitude was shared by scientific and other organizations, including the Asian-African Legal Consultative Committee. It was generally assumed that the Commission intended to deal with expropriation and nationalization as part of the topic of state responsibility. It was the Commission itself which had given rise to that expectation.

45. The reports of the special rapporteur had touched on that part of the question. At its eleventh session in 1959 the Commission had heard representatives of the Harvard Law School and at its 512th meeting had briefly discussed the Harvard draft dealing with the responsibility of states for damage to the person and property of aliens, the very question which it had been suggested should not be discussed by the Commission. He did not agree in many ways with the legal approach and conclusions of the Harvard draft, but he certainly thought that the matter covered by it was perhaps the most practical and urgent part of the topic of state responsibility.

46. No reasons had been advanced to justify the breaking up of the question assigned to the Commission by the General Assembly. Scientific precision and classification were not in themselves reasons for upsetting the traditional and generally accepted conception of the topic of state responsibility. When the General Assembly had instructed the Commission to give priority to the topic of state responsibility, it had quite definitely intended that the aspects of expropriation and nationalization should be included in the study. Some might fear that, without a restrictive approach, the work would be endangered by lack of agreement on the more controversial aspects. That fear would be allayed by separate treatment of the various aspects in separate reports. Naturally, it would be easier to reach conclusions on the general principles governing state responsibility, but such conclusions would be academic rather than the practical guidance which the General Assembly, the Economic and Social Council and the governments themselves expected. On the other hand, if even limited results were obtained on the aspects to which he had referred, the Commission would have made a real contribution to the codification of important rules of international law.

47. Again, without a restrictive approach, some might fear that the aspects of state responsibility to which he had referred might be regarded as colonialism, the imperialistic protection by a state of its nationals and their property in the territory of another state, since the relevant rules of international law had originally been framed by the colonial powers in the nineteenth century without the participation of the newly independent states in the Americas, Asia and Africa. But precisely for that reason, those rules should be considered and eventually agreed and codified. The developing countries complained that they had not participated in the formulation

of those rules, but now that they had an opportunity to express their views, they were being asked to neglect that opportunity. An attempt should therefore be made to codify the rules, with the active participation of the enlarged membership of the Commission.

48. It was precisely because questions of responsibility for damage to aliens, especially that of the consequences of expropriation and nationalization, were so difficult that the Commission should consider them; otherwise it would be failing in its duty. The problems involved were no more intractable than those raised, for example, by disarmament. The argument that there were no international rules on the subject and that it was, therefore, not suitable for codification could not be sustained until the field had been thoroughly explored. Personally, he believed that such an effort would not be in vain. To prove his point he would have to comment briefly on some substantive aspects of the problem.

49. Although disputes arose over nationalization laws—some governments claiming adequate and prompt compensation while others denied that there was any obligation to indemnify—in fact states interested in re-establishing or maintaining trade and the flow of investment funds usually achieved a settlement in the end, as was apparent from the prevailing practice of “lump sum” agreements, which indicated that the classical conception of responsibility towards a foreign individual or company had given way to a concept of responsibility by one state towards another. The practice had become so widespread that it appeared in no fewer than 40 post-war bilateral agreements, including agreements between states which did not admit the private ownership of the means of production. Poland and Yugoslavia, for example, had entered into such agreements with Czechoslovakia.

50. The Commission might draw some interesting conclusions from that practice, as distinct from official pronouncements of foreign ministers. The fear of failure to find common ground on such matters might perhaps be due more to theoretical than to practical reasons, and to a mistaken insistence on seeking to base conclusions on the assumption that there was a rule of international law safeguarding respect for private property—a concept which was no longer recognized by all civilized states. At the Commission's twelfth session (568th meeting) Mr. Tunkin had rightly criticized the Harvard draft on state responsibility for ignoring the fact that there were two fundamentally different economic systems in the world.

51. The duty to compensate, as revealed by widespread treaty practice, might be based on the principle of unjust enrichment, which all legal systems recognized. That approach would have important repercussions on the scope and extent of the duty to compensate: the measure of the enrichment and, therefore, the amount of compensation would be more for newly established foreign investments than for those which had already amortized their capital and repatriated profits. The Commission might achieve practical results on such lines and he was convinced that it would be both premature and unsound

to circumscribe at that stage the scope of the study on state responsibility.

52. Mr. VERDROSS said he remained of the opinion that general principles concerning state responsibility could and should be formulated. His opinion found support in the rules laid down in the draft adopted by the Institute of International Law in 1927.<sup>6</sup> Admittedly the articles of that draft applied the rules of state responsibility to the treatment of aliens, but they also proclaimed general principles of state responsibility which were applicable to other matters of international law as well.

53. The topic of state succession was extremely vague and he doubted whether in fact any binding rules on the matter existed. No special rapporteur would be able to start work until the Secretariat had collected the requisite material, and that material should be assembled before the appointment was made.

54. He agreed that some minor topics of more restricted scope should be taken up, such as *ad hoc* diplomacy, but on that subject as well the Secretariat should assemble material. Personally he was not familiar with existing practice, but legal advisers in foreign ministries were doubtless better informed.

55. Sir Humphrey WALDOCK said there seemed to be general agreement that the next report on state responsibility should not attempt to cover the subject comprehensively but should be more in the nature of an exploratory paper exposing the issues to be studied by the Commission. In the process of discussing that paper the Commission would be able to delimit the scope of its ultimate study. The question to be settled therefore was how that paper could best be prepared. His own opinion was that, whether a working group was set up or not, a special rapporteur should be appointed, since only a rapporteur could carry out the extensive research. Certain elements, such as the treatment of aliens, might indeed be controversial, but they loomed large and could hardly be set aside. It was not possible to separate the subject of aliens from that of state responsibility in general, and some of the most pertinent illustrations could most easily be found in the law of the treatment of aliens, but he did not think that that particular aspect should receive priority at the moment. Such an exploratory paper, apart from setting out the main topics for discussion, should also indicate what material was available and what would be the consequences of adopting any particular method of approach.

56. He did not support the idea of a small working group, of perhaps two persons, for the process of consultation would considerably hamper the special rapporteur. If a working group had to be set up, he would prefer a large consultative body whose members could address memoranda to the special rapporteur for inclusion in his preparatory paper.

57. Though he shared Mr. Verdross's doubts as to whether there were any general principles of international law governing state succession, he was not so pessimistic as to think that some rules could not be deduced from practice. The subject had real topical relevance and should not be relegated to the background, since new states were anxious for guidance. From the point of view of the work on the law of treaties, with which it was intimately connected, it would also be most desirable to plan for a comprehensive draft on state succession based on the considerable volume of recent practice and other material of earlier date for consideration in two or three years' time. As was the Commission's usual procedure, a special rapporteur should be appointed for that topic.

58. Mr. BRIGGS said he agreed with Mr. Gros that at the conclusion of the general discussion on state responsibility a special rapporteur should be designated. He had come round to the view that the appointment of a working group would serve no useful purpose and would not save time. The functions some members wished to assign to such a group belonged to the Commission as a whole.

59. Though he had suggested earlier that the Commission should first study the question of the international responsibility of states for the just and humane treatment of aliens, he would have no objection to its discussing general principles, particularly those contained in article 1 of the draft of the Institute of International Law just mentioned by Mr. Verdross. What he would deplore was an abstract approach to the subject of state responsibility divorced from its roots in actual international life. In his view, what was meant by the responsibility of the state for the protection of aliens was not so much that the state had a positive duty of protection, as that it was responsible for making reparation for injuries caused to aliens in its territory by its acts or omissions in violation of international law.

60. Mr. de LUNA said that a debate *in vacuo*, not based on a document, was hardly profitable. Once it had concluded its general debate on state responsibility, state succession, and the future programme of work, the Commission should appoint special rapporteurs, as well as small working groups to prepare preliminary reports for submission at least three weeks before the end of the session. Those preliminary reports would serve to guide the special rapporteurs. Between sessions, the same method of consultation as that used by the Institute of International Law could be employed.

61. Mr. VERDROSS, referring to certain views as to the way in which the subject of state responsibility should be approached, said that the proposal to study first the general principles of state responsibility as such in no way excluded their later application to the specific subject of the treatment of aliens.

The meeting rose at 5.55 p.m.

<sup>6</sup> *Annuaire de l'Institut de Droit International*, Lausanne session, August-September 1927, Paris, Pedone, 1927. See also document A/CN.4/96, annex 8.

## 633rd MEETING

*Tuesday, 1 May 1962, at 10 a.m.*

*Chairman: Mr. Radhabinod PAL*

**Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)**

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.

2. Mr. AMADO said that he was greatly concerned about the difficulties which would face the special rapporteur who had to deal with the topic of state responsibility. It was most important that the Commission should give precise instructions to its special rapporteurs, for otherwise they might, through excessive zeal, write reports which tried to cover too much ground. The main function of the Commission was to restate customary rules of law in a form suitable for international instruments and acceptable to the majority of states. Even that relatively modest task was not free from controversy, as had been seen when the Commission had prepared its draft on the continental shelf and its draft on consular intercourse and immunities, which had contained some innovations. Any realistic codification was bound to contain an element of progressive development: to attempt to fix immutable rules of international law was to deny the realities of international life.

3. The Commission could not hope to reduce to a series of rules the enormous body of doctrine and practice which existed in the matter of state responsibility. The law had changed greatly since the days of the Drago doctrine and the Calvo clause. Whereas, for example, the second Hague Peace Conference, in 1907, had adopted a convention admitting by implication that in certain circumstances recourse to armed force for the recovery of contract debts was permitted, the Seventh International Conference of American States, in 1933, had proclaimed as part of international law the principle of non-intervention in the affairs of other states. Not only had the law evolved, but also some of the firmly established principles were difficult to codify. For example, it was universally recognized that the duty to make reparation was one of the consequences of a wrong committed by a state. Yet, the Codification Conference of The Hague, in 1930, had been unable to codify the principle. Again, the imputability of wrong to the state was a controversial question, some authors thinking that unlawful intent was necessary, and others that it was not indispensable. The formulation of rules concerning the nationality of the claim and the exhaustion of local remedies would pose no less thorny problems.

4. Besides, the Commission would have to consider to what extent the law governing state responsibility had been affected by the Charter of the United Nations, with its recognition of the sovereign equality of states and its provisions concerning the pacific settlement of disputes.

5. Similarly, in the case of the topic of state succession, precise instructions would have to be given to the special rapporteur, if one were appointed. Indeed, he was by no means convinced that the topic was ripe for codification. Nevertheless, although customary rules of international law did not exist on the subject, certain rules could be deduced from treaties; for example, a successor state undoubtedly inherited certain obligations, such as those connected with river systems, and financial obligations.

6. He hoped the Commission would reach unanimous agreement on the method to be followed in dealing with state responsibility and, in particular, would delimit the scope of the study so that the special rapporteur did not introduce material not strictly relevant to his task.

7. Mr. AGO said that the exchange of views during what was virtually a general discussion on state responsibility and state succession would have cleared the ground and might save considerable discussion later. It was reassuring to note that there was no real major disagreement concerning the content of future reports on state responsibility; both Mr. Gros and Mr. Amado had mentioned some of the essential points that would have to be covered.

8. To his mind, the first general report on state responsibility should define the nature of that responsibility and the meaning of "unlawful act" in international law. It should answer, among others, the questions: When could a breach of an international obligation be said to have occurred? Was it imputable to a subject of international law? Could there be responsibility without fault? It should also investigate the different kinds of unlawful acts, whether of commission or omission and whether complex or simple; all those questions had already formed the subject of international arbitrations. Among the other points to be covered in the report were: circumstances exonerating from responsibility, such as consent of the injured party, legitimate measures of sanction, "légitime défense"; state of necessity; the scope and measure of reparation; the admissibility of repressive sanctions for certain kinds of unlawful acts; the rule concerning the exhaustion of local remedies, and so on.

9. To allay the concern expressed by Mr. Briggs and Mr. Gros at his suggested approach to the subject of the treatment of aliens, he said he agreed that the vast case-law in that field should not be overlooked. One of the reasons for that abundance of material was that breaches of the rules concerning the treatment of aliens did not affect the prestige of states to the same extent as other breaches and were therefore more readily submitted to arbitration. Although responsibility for breaches of the rules concerning the treatment of aliens was probably not the most important part of the topic of state responsibility, he agreed that the case-law built up by arbitral tribunals in the matter of responsibility for damage to aliens could be a valuable source of rules and principles concerning the responsibility of the state in general. At the same time, the material already mentioned should be utilized for an even more direct purpose, namely, the determination of the substantive rules concerning the duties and obligations of states as to the treatment of aliens.

10. In view, however, of the relatively short time at the Commission's disposal during its five-year term, it should perhaps first discuss the general principles of state responsibility and then take up other topics, such as measures for the enforcement of responsibility, and the treatment of aliens.

11. As regards the very important problem of state succession, a great deal of preparatory work was required. Ample material illustrating the practice existed; for instance, material connected with the unification of Italy and of Germany, and with the independence of Latin-American states, but it had to be collected and classified. Perhaps the Secretariat might recruit additional staff for the purpose. In any event the topic should not be postponed, since it would be extremely helpful to a number of states if the Commission could frame general rules based on the lessons of both practice and treaties.

12. So far as the method of work was concerned, special rapporteurs should be appointed who would each be responsible for his own topic; possibly they should be assisted by a committee, which should not be too small. The rapporteurs and the committee could consult each other by mail or even meet between the Commission's sessions.

13. Mr. TUNKIN said that the discussion, and particularly the arguments put forward against his proposal that small committees be appointed to consider the scope of the topics of state responsibility and succession of states, had convinced him of the correctness of that proposal.

14. The main argument against his proposal had been that the outline of the two topics was already sufficiently clear. As far as state responsibility was concerned, the discussion had clearly demonstrated that its outline was far from clear. In particular, several members had spoken of international responsibility exclusively in its traditional sense, as expounded, for example, by Anzilotti.<sup>1</sup>

15. Perhaps it would be more correct to say that most speakers had discussed state responsibility in the context of the old conception of international law. The Commission, however, was expected to consider all the aspects of the topic in the light of new developments in international life, and as yet little or no reference had been made to those developments.

16. Since the end of the First World War, new fields of international responsibility had been opened up. For example, state responsibility arose as a result of a war of aggression, an instance of state responsibility not covered by the rules current before the First World War. Yet it was undeniable that modern international law considered aggressive war as a very important case of state responsibility.

17. He could not agree with Mr. Ago's suggestion that the study of state responsibility should be limited to general problems. General problems were undoubtedly of interest, but the Commission should go much further. The main interest of the topic of state responsibility,

both from the point of view of codification and from the point of view of progressive development, was the application of the general rules to those breaches of international law which vitally affected the maintenance of peace. That responsibility could not be reduced to general principles, but on the other hand, it had its bearing on the formulation of general principles of state responsibility.

18. So far as the topic of succession of states was concerned, he agreed with Mr. Verdross that it raised serious problems. He therefore supported Mr. Verdross's proposal that the Secretariat should be asked to collect the necessary material. However, he would go further and press his own proposal that a small committee be appointed to undertake a preliminary study of the topic; the very complexity of the subject rendered such a preliminary study essential.

19. He confessed that he failed to understand some of the arguments which had been put forward against setting up two small committees. It had, for example, been suggested by Mr. Briggs that it would mean substituting a small group for the Commission itself. But there was no such intention; the small group would work when the Commission was not in session and would report back to the Commission itself.

20. Mr. Gros had suggested that, even if a committee were set up, the actual work would always be done by a single person. But already in at least one case the Commission had designated two rapporteurs for the same topic: at its first session it had appointed Mr. Alfaro and Mr. Sandstrom to study the question of international criminal jurisdiction.<sup>2</sup>

21. Reference had been made to possible technical difficulties. Those difficulties were certainly not insuperable. The Secretariat had indicated that it would be possible to arrange committee meetings for the exchange of views during the current session. Committee members could continue their study in the interval between the sessions, and it would be comparatively easy to arrange for the committees to meet immediately before the next session. In any event, there would be no problem at all in arranging such a meeting in the course of that session.

22. The suggestion had been made that the committees should report to the Commission during the current session. That suggestion was impracticable; the Commission would be fully occupied with the discussion of Sir Humphrey Waldock's first report on the law of treaties.

23. The appointment of the proposed two small committees would have the great advantage of filling a gap in the procedure of the Commission. In the past, the Commission had refrained from giving specific instructions to special rapporteurs. One interesting and notable departure from that tradition had been the Commission's action in giving precise instructions to the special rapporteur on the law of treaties at its thirteenth session.<sup>3</sup>

<sup>2</sup> *Yearbook of the International Law Commission 1949* (United Nations publication, Sales No.: 57.V.1), p. 283.

<sup>3</sup> *Yearbook of the International Law Commission 1961*, Vol. II (United Nations publication, Sales No.: 61.V.1, Vol. II), p. 128.

<sup>1</sup> "*Teoria generale della responsabilità dello Stato nel diritto internazionale*", 1902.

24. His proposal was that a small committee of three or four members should, in the interval between the two sessions, consider each of the two topics. Each committee would submit its collective views to the Commission; if a committee were unable to reach agreed conclusions, separate or even dissenting opinions could be submitted. That would be much better than appointing a special rapporteur immediately without giving him definite instructions: a special rapporteur so appointed would have to make a preliminary study of the subject himself and in fact prepare his own instructions. Nor could it be seriously suggested that the Commission should, at that early stage of its consideration of the two topics, give precise instructions to the special rapporteurs immediately.

25. The idea of setting up small committees to work during the interval between the two sessions was admittedly a novel one, but the Sixth Committee had repeatedly invited the Commission to try new methods of work. The Commission should therefore not persist in its old methods but should try the new procedure which he proposed.

26. The CHAIRMAN said that he wished to make three points clear.

27. First, it had become apparent that speakers could not leave out of the discussion the question of substance relating to the scope of the two topics of state responsibility and succession of states. He therefore wished to indicate that, in the exchange of views on item 2, speakers would be free to discuss the scope of the two topics.

28. Secondly, the Commission would on no account disturb the priority which it had allotted to the topic of the law of treaties.

29. Thirdly, the apprehension had been voiced that, by dealing with the topic of state responsibility in its purest sense, the Commission might be excluding altogether the question of the treatment of aliens. He would accordingly remind the Commission of the discussion which had taken place at the 413th to 416th meetings, during its ninth session in 1957, when it had been made perfectly clear that, whatever views members held regarding the substance of the question of the treatment of aliens, none of them wished to exclude it from the study of state responsibility. Two points had been made. First, it had been urged that the subject of state responsibility should be extended so as to cover more than merely the question of the treatment of aliens. Secondly, some members had criticized certain of the rules which had at times been put forward on the treatment of aliens, but no one had suggested that the subject should be dropped. There were, of course, controversies and difficulties connected with the subject, but it was the duty of the Commission to face and overcome those difficulties. However perplexing the problem might appear, nothing would be gained by evading the difficulty. No new level of historic development was expected to emancipate history from vexing problems like those.

30. Mr. TSURUOKA, on the subject of state responsibility, said that in view of its limited possibilities the Commission should not be too ambitious. It should produce work that would prove useful to the international community. Its studies and drafts should cover the various aspects of the subject; at the same time the drafts should prove acceptable to the largest possible number of states.

31. He agreed with Mr. Gros that the topic of state responsibility should be understood in a broad sense as including aspects other than damage to aliens, though the subject of the status of aliens should not of course be excluded.

32. The Commission should not make too many innovations in its procedure. He preferred the direct method of work, by which he meant the preparation of a report by a special rapporteur and the discussion of that report by the plenary Commission, because it was the simplest. Accordingly, although there was much truth in Mr. Tunkin's arguments, he hesitated to accept his proposal for the establishment of special committees.

33. A special rapporteur for the topic of state responsibility should be appointed at the current session; if necessary, the general discussion of the topic might be continued, for from it the special rapporteur could gather useful indications for his work.

34. Lastly, if a small committee were to be set up, he urged that all the members of the Commission should be kept informed of the committee's proceedings and that all members should have the right to address observations to the committee. Those remarks applied whether the proposed committee worked in the course of a session or in the interval between the Commission's sessions.

35. Mr. PESSOU said he shared the views of those who considered that the topic of succession of states was necessarily linked with that of the law of treaties. At previous meetings, both he and Mr. Elias had abundantly demonstrated the connexion between the two topics.

36. With regard to the misgivings expressed by the General Rapporteur regarding the possible invasion of public international law by principles drawn from private international law, it would be difficult to avoid reasoning by analogy with existing rules of law, even if those rules belonged to private law.

37. The basic problem in regard to succession of states and of governments was how far political changes affected the validity of earlier treaties. There were two schools of thought. One held that a new state succeeded only to such treaties as it was willing to accept; the other held that, in international law, by analogy with private law, the principle of succession to such obligations applied. If those two views could not be reconciled, then each particular case would have to be settled on its merits. The questions to be determined would be whether the purpose for which the treaty had been concluded could be achieved in the situation of the new state, in other words, were the clauses of the treaty consistent with the rules of public order of the new state.

38. As regards the category of commercial treaties, often known as treaty-contracts, international practice, at any rate among European states, favoured the extinction of earlier treaties, in application of the principle that a new state could not be bound by obligations to which it had not subscribed. But again, only individual examination of each separate case could provide a satisfactory answer.

39. It was most important that the necessary reference material on the subject of succession of states should be brought together in a single document.

40. Mr. EL-ERIAN said that the current discussion of the Commission's work programme was of special importance in view of the increase in the Commission's membership and of the recommendations of General Assembly resolution 1686 (XVI). He hoped that all members would give their interpretation of that resolution.

41. Such questions as the Commission's composition and the length of the term of office of members should be discussed at the end of the session. Changes might involve a revision of the statute, but the work done during the past twelve years indicated that no basic change in the statute and general method of work was needed. It was specially important to preserve the Commission as a corporate entity. Suggestions had been made in the Sixth Committee for splitting the Commission into two sub-commissions, but that committee had finally agreed that all questions of methods of work should be decided by the Commission itself.

42. There might be other means, such as the appointment of a committee to work in intervals between sessions, of accelerating the Commission's work without prejudice to its corporate personality; the financial implications of such procedures would have to be taken into consideration.

43. In its resolution 1686 (XVI) the General Assembly had recommended the Commission to consider its future programme of work, to continue its work in the field of the law of treaties and of state responsibility and to include on its priority list the topic of succession of states and governments. The Commission would shortly proceed with its study of the law of treaties.

44. State responsibility was in a different position, as no special rapporteur had been appointed and the method to be employed in the study of that topic was still in question. He welcomed the statement by the Secretary that the Commission would do well to consider the general approach to be adopted as well as the actual scope of the subject of state responsibility. At the ninth session he himself had expressed the view that certain aspects of international responsibility, other than the responsibility of the state for injuries caused in its territory to the person or property of aliens, merited prior study.<sup>4</sup> He would suggest therefore that the general

discussion be continued so as to enable the Commission to agree on its method of work.

45. After completing the general discussion and before beginning the discussion on the law of treaties, the Commission should consider its general approach to the topics of state responsibility and succession of states and of governments, and whether to appoint a special rapporteur or a small committee to prepare a preliminary study during the present session before the appointment of special rapporteurs. It should then consider its future work and select a new list of topics, for which a special rapporteur or committee of experts might be appointed. Lastly, it should discuss its interim report to the General Assembly, prepared in response to sub-paragraph 3 (b) of resolution 1686 (XVI).

46. At its thirteenth session the Commission had started to consider what its next topic should be and Mr. Verdross had suggested four general principles to govern the organization of future work.<sup>5</sup> While he agreed with those four principles in general, he was opposed to the idea of avoiding controversial subjects. Mr. Verdross also tended to lay more stress on codification than on progressive development, whereas experience showed that the whole trend was towards progressive development. The four Conventions on the Law of the Sea had developed out of the Commission's original intention to confine itself strictly to two topics: the law of the high seas and the law of the territorial sea. It was to be hoped that the rules of state responsibility would develop in a similar way.

47. Mr. CADIEUX said that, so far as the topic of state responsibility was concerned, the main question before the Commission was whether to treat the topic in its entirety or to deal only with the narrower traditional aspect. The latter approach would be preferable, for otherwise the subject would be too unwieldy. Some of the other aspects might be included in the list of topics for future work.

48. Having settled what subject it would study, the Commission would then have to decide how to study it. In theory, logic might be thought to call first for the formulation of general principles; in practice, however, the subject was largely concerned with the treatment of aliens. Consequently, it would be impossible to work out the general principles without considering their incidence on the status of aliens. While it would be appropriate that the Commission should first make an inventory of all the aspects of international responsibility to see which of them were best suited for codification, the topic of the treatment of aliens could not be ignored.

49. So far as the topic of succession of states was concerned, several methods had been suggested, in particular work by the Secretariat, by a working group or by a special rapporteur, but he saw no reason for

<sup>4</sup> *Yearbook of the International Law Commission 1957*, Vol. I (United Nations publication, Sales No.: 57.V.5, Vol. I), p. 161.

<sup>5</sup> *Yearbook of the International Law Commission 1961*, Vol. I (United Nations publication, Sales No.: 61.V.1, Vol. I), p. 206.



departing from the traditional method of a special rapporteur assisted by the Secretariat.

50. In addition, it would be useful if the Commission had some other topics on its agenda, which might be chosen from the catalogue in the secretariat working paper (A/CN.4/145). The Commission had already been asked to study the question of the juridical regime of historic waters including historic bays, the right of asylum, and the relations between states and international organizations. As a consequence, the outline of the Commission's programme for the next ten or more years was becoming discernible.

51. Mr. ROSENNE said that it was essential for the Commission to have a number of projects in hand, whether major or minor, so that it could make progress at each session. He agreed with the Chairman that there was no intention to disturb the continuity and priority of the work on the law of treaties at the current and future sessions, but the Commission's work should not depend on the continuous availability of a single special rapporteur throughout the whole of the next five years.

52. General Assembly resolution 1686 (XVI) assumed the continuation of the work on the law of treaties and on state responsibility, but required a formal answer from the Commission on the question of succession of states and governments; the Commission was under an obligation to include such a reply in its report. It should beware of the danger of thinking that all work in hand or all work which it decided to initiate had to be completed during the current term of office; that had never been the assumption in the past. All preliminary work had a value of its own.

53. As the General Rapporteur had pointed out, it was impossible to divorce procedure from substance, and consequently the Commission was forced to touch upon the substance of state responsibility while taking its procedural decisions. The nature of the task imposed upon the Commission, and the expectations and suppositions of the General Assembly, the Economic and Social Council and the other organs, had been well explained at the previous meeting by Mr. Jiménez de Aréchaga, who had tried to relate the topic of state responsibility to the new problems facing the international community and the current trends of international law and practice. That task itself determined the scope of the topic and he agreed with the broad approach advocated at the same meeting by Mr. Gros. The Commission was not, however, concerned with new rules of substantive law which might give rise to new grounds of responsibility, and he was somewhat puzzled by Mr. Tunkin's remark about new forms of international responsibility. Naturally, international law developed, but developments in the general law did not of necessity lead to fundamental changes in the concept of state responsibility itself. If the matter were to be considered within the context of what was sometimes called the law of the United Nations, the Charter should be examined to see whether it contained any pertinent material. A useful clue for the study of state responsibility could be found in certain provisions of the Statute of the International Court of Justice, which

was an integral part of the Charter. Thus, the reference in Article 36, paragraph 2 (c), to "the existence of any fact which, if established, would constitute a breach of an international obligation", on the one hand, and the reference in paragraph 2 (d), to "the nature or extent of the reparation to be made for the breach of an international obligation", on the other hand, seemed to indicate the direction which the Commission might take.

54. With regard to the immediate preparatory work which had to be undertaken, he was impressed by Sir Humphrey Waldock's suggestion at the previous meeting regarding the necessity for an exploratory paper exposing the issues that arose. If the topic were studied in its broad aspect, the treatment of aliens and their property would become really no more than one facet. The Commission was concerned primarily with state responsibility as such, regardless of the manner in which it was reflected. At the same time he thought that within such a broad framework there were nevertheless two practically independent subjects sufficiently complex and of sufficient practical importance to merit separate and special treatment—namely, the problems posed by the rule concerning the exhaustion of local remedies, and the problems posed by the rule concerning the nationality of the claim. He did not think that either of those was exclusively limited to the question of the treatment of aliens, and they might be studied concurrently with the main topic.

55. Another aspect to be considered was the responsibility of a state for actions performed in the territory of what might be called the plaintiff state; the simplest example was where a vehicle driven by a person enjoying diplomatic immunity injured an inhabitant of the state to which the diplomat was accredited, and the assertion of the immunity prevented the adjudication of any claim in the local courts.

56. With regard to material, he said that on the one hand there was a plethora and on the other a paucity. There were certain dangers in paying too close attention to international case-law at the expense of state practice, for so often the import of a decision of an international tribunal, especially arbitrations and mixed claims commissions, depended on the precise terms of the agreement by which the tribunal had been established, which in turn might be found to depend on the political circumstances in which that agreement had been concluded. The practice of states was probably a better guide.

57. He had no objection in principle to the establishment of a committee to assist in clarifying the problems, provided that it was broadly representative of the Commission as a whole; he doubted whether a small committee could meet that requirement. He also thought it preferable that the work should be initiated, and the special rapporteur or rapporteurs appointed, during the current session.

The meeting rose at 1 p.m.

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**634th MEETING***Wednesday, 2 May 1962, at 10 a.m.**Chairman: Mr. Radhabinod PAL***Appointment of drafting committee**

1. The CHAIRMAN proposed the appointment of a drafting committee consisting of: Mr. Gros as Chairman, Mr. Ago, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Tunkin, Sir Humphrey Waldock and Mr. Yasseen.

*It was so agreed.***Appointment of a committee to consider the future programme of work under General Assembly resolution 1686 (XVI), paragraph 3 (b)**

2. The CHAIRMAN proposed the appointment of a committee to consider the future programme of work, consisting of: Mr. Amado as Chairman, Mr. Ago, Mr. Bartoš, Mr. Cadieux, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Pessou and Mr. Tunkin.

*It was so agreed.***Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)***(resumed from the previous meeting)*

3. The CHAIRMAN said that the officers of the Commission had tried to reach agreement on proposals for the membership of the suggested committees to deal with the topics of state responsibility and succession of states and of governments, but had not been successful owing to a difference of opinion over the function of the committees. His own opinion was that the function of the committees would be solely to define and determine the scope of the subjects. They would then report to the Commission and their functions would be at an end. The special rapporteur might perhaps consult his committee from time to time, if he so wished; but it would not be a standing committee having authority to instruct the rapporteurs. It would be for the special rapporteur to study the law on the subject, keeping within the scope defined, and prepare a first draft. The Commission would then give his report a first reading, circulate it to governments and prepare a final draft in the light of the comments of governments. The other opinion had been that it should be a standing committee always ready to help the special rapporteur and perhaps from time to time to give him instructions. In his view such a procedure would embarrass the special rapporteur.

4. Mr. ROSENNE said that he wished to continue his remarks from the previous meeting by speaking on the subject of succession as such, not succession of states and governments. He had long had doubts whether the topic was suitable for codification. The Commission was, however, under an obligation to give the General Assembly some formal answer to its recommendation in

resolution 1686 (XVI), sub-paragraph 3 (a). He doubted, from the scientific point of view, whether succession existed as a chapter in international law, but the discussion in the Commission and in the Sixth Committee of the General Assembly had convinced him that the Commission should deal with the subject as rapidly as possible, especially as Mr. Elias and Mr. Pessou had pointed out its practical importance.

5. The terms succession of states and succession of governments might be misleading. Succession of states arose primarily from the cession or retrocession of territory together with its resident population. Succession of governments arose in consequence of a revolutionary change in government, which was not necessarily in conformity with the previously prevailing constitutional law. That was not an appropriate subject for the Commission. The problem with regard to which the Commission had to formulate appropriate rules was that of the future of all the international rights and obligations after a fundamental change in the internal regime and international status of a territory, and after the political, economic, social and cultural reorganization of the political community leading to a redefinition of the objectives for which the state existed. It was immaterial whether that was the result of a revolution within the framework of the existing international personality of a state, or of the process of emancipation—that was to say, the creation of a new independent international person where none had previously existed. He had been much struck by Mr. Elias' remark drawing attention to a treaty signed a year before the first elected members had participated in the government of Nigeria.<sup>1</sup> That was the heart of the problem. It therefore seemed that the Commission should not lightly discard the rubric of succession of governments, but should approach it within the context of the broader question of succession as he had described it.

6. He also doubted the advisability of over-stressing the significance of the precedents of the nineteenth century, and of concentrating on material deriving from such events as the unification of Italy and of Germany. Those precedents and the literature dealing with them were not strictly germane. The Commission was concerned with the problems of the second half of the twentieth century. The 1919 peace treaties had given rise to a number of instances of succession, and the resulting jurisprudence had been intimately connected with those treaties and in part with the question of membership of the League of Nations. The practice and the jurisprudence fell into two categories: that concerning the cession of territory as between pre-existing countries, and that concerning the cession of territory to another country brought into existence as the result of the war, such as Poland. The experience had been quite different since 1945, being characterized by the creation of new states where none had formerly existed. There was also the subsidiary question of whether there was any difference in law between independent states which had formerly been territories under mandate or trusteeship, and independent states which had never in modern times been

<sup>1</sup> 629th meeting, para. 26.

persons in international law; possibly, because some of the mandates and trusteeship agreements contained provisions for the eventuality of the termination of the mandate or trusteeship, the questions of succession could be governed by special rules in those cases.

7. The Commission should, therefore, concentrate mainly on the situation prevailing after 1945, though it should not ignore earlier material, especially that relating to the period between 1919 and 1945. It should not, however, be too much attached to the events of the nineteenth century.

8. The practice which had to be collected and analysed appeared to fall into four categories: that of metropolitan or ceding states; that of newly independent states; that of third states not directly parties to the arrangements between the ceding and the newly independent states; and that of international organizations, not only the United Nations but also some specialized agencies, notably the International Labour Organisation and the World Health Organization.

9. He had had personal experience of the complexities involved in succession and had had to deal with such problems as double succession—problems involving at one and the same time the succession which followed the break-up of the Ottoman Empire in 1919 and that which followed the termination of the Mandate for Palestine and the establishment of Israel—as well as such novel issues as succession to the formal state of war after the termination of hostilities in 1945. He would be glad to make such material available to the special rapporteur.

10. Another problem was the connexion of the topic of succession with other topics. He could not agree that the link with the law of treaties was a major part of the topic of succession—although it might be the most immediate issue—for experience showed that many of the more complex questions of succession arose only after a lapse of time. Furthermore, to deal with succession as part of the law of treaties might lead to distortion of the law of treaties, as it might necessitate a classification of treaties different from that commonly envisaged—in so far as there was any substance in any purported classification of treaties. He had, in fact, felt the existence of that problem in reading the latest, the 1961, edition of McNair's *The Law of Treaties*. The Commission would have to solve the problem of the interrelationship of the two topics early in its work, but any decision that it took could be regarded as tentative.

11. With regard to the action to be taken, he agreed that the special rapporteur for succession should be appointed at the current session. The first report should be analytical and descriptive. He had no objection to the establishment of the suggested committee, which could consider now the question of the connexion with other topics. The Commission might have to use the questionnaire method, and such a committee might usefully consider what questions could be put to governments and to international organizations, and give guidance on the collection of materials.

12. In general, he entirely agreed with the Chairman that the proposed committees should define and deter-

mine the scope of the subjects and should not be standing committees. They should be established only for the current session, with the broad terms of reference indicated by the Chairman, but with the modification he (Mr. Rosenne) had suggested with regard to the topic of succession.

13. He would have no objection if the Commission began work forthwith on the subject of special missions, which should be completed within the Commission's term of office. Work should not, however, be too hasty. The normal procedure of appointing a special rapporteur should be followed, as the scope was fairly clear and the subject did not require elaborate preliminary research. The Commission might also initiate at the current session the study of relations between states and international organizations. He agreed with the view expressed by the Secretariat in its working paper (A/CN.4/145, para. 176) that the relations of international organizations among themselves and with governments raised complex legal problems which were not always settled satisfactorily. The work on the juridical regime of historic waters, including historic bays, might be postponed until the Secretariat had prepared its memorandum.

14. With regard to General Assembly resolution 1686 (XVI), sub-paragraph 3 (b), it had been suggested that the general review of international law carried out in 1949 under article 18 of the Commission's statute had been a one-time operation. He did not share that view, and the resolution showed that the General Assembly did not do so either. The reference to the discussions in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and the observations of Member States submitted pursuant to resolution 1505 (XV) obliged the Commission to examine all the topics proposed by governments and report thereon. The report would not necessarily have to be a final one at that stage, nor should the resolution be interpreted as requiring work to be initiated forthwith on any of the topics listed in the programme of future work. The Commission's agenda was full for several years to come and the law of treaties had complete priority. In the course of the examination, however, some topics might be found which might be brought within the topics it had been decided to study. The topic of economic and trade relations, for instance, might have some aspects which could be dealt with under the topic of state responsibility.

15. Mr. AGO said that he would not like his remarks expressing impatience at the late appearance of Sir Humphrey Waldock's report on the law of treaties to be interpreted as criticizing the Secretariat. He appreciated highly the services that the Secretariat was rendering with its very limited resources, but the staff at the Commission's disposal was not large enough and the services provided were not adequate. It was incredible that the secretariat of the Commission should not have at its disposal services capable of reproducing rapidly a report which might, for intelligible reasons, come in late and need to be reproduced and translated urgently. The secretariat also needed to be more generously equipped for preliminary research work on

topics inscribed on the Commission's agenda. The United Nations should make an effort, and an urgent effort, if it really wished the Commission to be in a position to accomplish a task which was much heavier than that of a great many organs.

16. With reference to the topic of state responsibility and to a list of topics which he (Mr. Ago), Mr. Gros and Mr. Amado had suggested, Mr. Tunkin had said that the Commission should not base itself solely on classical international responsibility but should take account of new developments. Mr. Tunkin had implied that in the early twentieth century responsibility had not, for example, covered certain of the gravest breaches of international law. In his (Mr. Ago's) opinion he would have been more nearly right if, instead of saying that responsibility at that time had not covered some of the gravest breaches of international law, he had said that it had not covered breaches of some of the most important rules. The innovation lay not so much in the realm of responsibility itself as in the basic law. International law had made great strides in the past fifty years, especially with regard to the maintenance of peace. It would undoubtedly develop further in future and, of course, more rules would evolve so that there would be more rules to be broken, with the consequence that more cases of responsibility would occur. The Commission should not, however, make the same error as had been made with regard to the treatment of aliens, that was, to confuse basic rules and responsibility for breaches of those rules.

17. He was as anxious as Mr. Tunkin to see responsibility for breaches of major basic rules, breaches which were a greater danger to peace, well established, but he did not think that the evolution in the field of basic rules was followed by a comparable evolution in the field of state responsibility. Of course some changes had occurred and would have to be studied. He thought, for instance, that a clearer distinction would have to be drawn today between acts which called for reparation and torts which called for sanctions. The distinction might be in relation to the nature of the rule violated. There were probably rules whose breach would call only for reparation, but there were others whose breach called not only for reparation but also for sanctions.

18. Mr. Rosenne had raised the question whether it would be preferable to codify the law of state responsibility as a whole, or to concentrate on the more specific aspects of the exhaustion of local remedies and the nationality of the claim. The Institute of International Law had been working for years on the former of those two aspects and, after having drafted only one article, had recognized that it was impossible to treat that matter without considering the whole field of state responsibility. He (Mr. Ago) therefore still believed that it would be relatively futile to work on the detail until the whole had been defined. Moreover, the General Assembly seemed to wish for the codification of the subject as a whole.

19. He disagreed with Mr. Rosenne's suggestion that in its study of state succession the Commission should concentrate only on events since 1945. It was an easy error to believe that what happened in one's own lifetime

was entirely different from that which had happened in the past. He himself had had an opportunity of establishing the resemblance between some present problems in relation to certain African states and the situation in Latin America fifty years previously. It was certainly necessary to work out the modern rules, but one way of doing so would be to compare them with past rules and see where changes had occurred. That was a matter which could very easily be settled by the proposed committee.

20. Besides the essential items, the only other topic the Commission should take up was that of special missions, to fill any gap that might be caused by the absence of the special rapporteurs on the main subjects. There would not be time to do more within the Commission's term of office.

21. So far as procedure was concerned, he preferred the Chairman's suggestion, which was identical with his own earlier suggestion, but would be prepared to accept the alternative if the majority of the Commission so decided. The problem in the alternative was whether the Committee should only assist or should give instructions to the special rapporteur, who would then have to bow to the committee, which would take the responsibility for the report. If the intention was to tie the rapporteur too much, there would certainly be difficulties in finding special rapporteurs prepared to serve.

22. The CHAIRMAN, speaking as a member of the Commission, said that in referring to new developments in international life, Mr. Tunkin had presumably had in mind those new historical factors not yet adequately assimilated in any requisite legal thinking, matters concerning which the conscience of the international community had not as yet presented, in the form of specific norms, any instrument designed to reduce the potential anarchy of forces and interests to a tolerable harmony. As an illustration, he (Mr. Pal) referred to the situation created by the nuclear tests and drew attention to the views expressed by members of the Commission from time to time and recorded in the Commission's yearbooks.<sup>2</sup> The Asian-African Legal Consultative Committee had taken up the question of state responsibility involved in nuclear tests and he drew the attention of the Commission to his report as observer for the Commission at the fifth session of that body (A/CN.4/146).

23. Mr. CASTRÉN said that, in view of the lack of general support, he would not press his suggestion that the Commission should work in two subdivisions, even though he was sure that such a procedure was feasible.

24. He had no objection to the appointment of small committees of perhaps five members to discuss with the special rapporteurs on state responsibility and state

<sup>2</sup> *Yearbook of the International Law Commission 1956*, Vol. I (United Nations publication, Sales No.: 56.V.3, Vol. I), pp. 11-14, paras. 35-62; *Yearbook of the International Law Commission 1957*, Vol. I (United Nations publication, Sales No.: 57.V.5, Vol. I), p. 156, paras. 55-59, and p. 158, para. 4; *Yearbook of the International Law Commission 1960*, Vol. I (United Nations publication, Sales No.: 60.V.1, Vol. I), p. 280, paras. 37-39.

succession how the work on those topics should be carried out. Of course, the Commission would not delegate its own functions to such committees; it would remain free to accept or reject any proposals they might make. It was an open question whether those committees should be appointed for the duration of the current session only or should continue in existence until work on the two topics had been completed. Since the Commission would in the main be engaged on the law of treaties, there was no hurry for the preliminary reports on the other two topics.

25. He agreed with the general view that the subject of state responsibility was so broad and covered such a large part of international law that the Commission should first formulate certain general principles and then pass on to study some topics of special interest, such as the status of aliens.

26. The problems raised by state succession were also vast and complex. The nature of the territorial changes which gave rise to the succession of states would certainly have to be examined, since the consequences were not the same when a state disappeared altogether as when there was a cession of territory. And it could not be said that all obligations of the predecessor were automatically taken over by the successor state.

27. One way of circumscribing the study of state succession would be to leave aside, at least for the time being, the question of the future of the inhabitants of ceded territory. He was inclined to agree with Mr. Rosenne that, after examining the general principles, the Commission should concentrate on more recent instances of state succession, though of course earlier ones and past practice should not be overlooked.

28. Mr. YASSEEN said he was firmly opposed to the idea that the Commission should divide into two sub-commissions; such a course would conflict with the provisions of the statute concerning the functions and character of the Commission, and from the practical point of view would offer no solution because discussions on substance would still have to be conducted in plenary meeting. On the other hand, he saw no objection to the appointment of small committees with clearly defined terms of reference.

29. There seemed to be no practical reason why the work of a special rapporteur should not be carried out by a special committee though, to be representative, such a committee should not be too small. However, he would prefer a system analogous to that adopted by the Institute of International Law, under which a committee of persons specially interested in a particular topic would be appointed to advise and help the special rapporteur. Such a committee would in no way restrict the freedom of the special rapporteur, who after all was engaged not in a personal task but in preparing the ground for a collective effort of codification and progressive development of law. A further advantage of that method would be that members of the committee could give the special rapporteur valuable assistance in explaining particularly difficult issues in plenary meeting.

30. Either of those two methods was suitable for broad

subjects, and whichever was chosen the Commission itself should always keep full control over the work and give precise instructions to the special rapporteur or committee.

31. As far as state responsibility was concerned, the first step should be to extract general principles from theory and practice. It would be illogical to study first the application of general principles in a specific sphere, however important, such as the treatment of aliens. At the same time, he did not wish to imply that that particular subject would not be extremely useful as a source of general principles; it should be given a fairly high place on the list of topics to be discussed later.

32. Mr. PADILLA NERVO said that the two trends of opinion which were emerging from the discussion—that on the one hand the Commission should be careful to avoid drafting rules which would not gain acceptance and on the other that it should take account of new factors affecting international relations—were not, as might seem at first sight, divergent but complementary and could easily be reconciled with the Commission's dual task of codification and the progressive development of law. For the purpose of truly constructive and collective work on state responsibility, members should be prepared to make concessions and to recognize the sincerity of the views of others which might derive from differences in educational, social and economic background. If international law were to evolve in such a way as to influence the behaviour of states, the Commission had to play its part in breaking down the barriers which stood in the way of understanding between nations.

33. Traditional concepts of state responsibility had been radically altered by a series of revolutionary changes, such as the appearance of many new states, the end of colonialism and the improvements in communications. In a disarmed world—and no other offered a future for mankind—the rule of law for the pacific settlement of disputes would prevail.

34. In considering the effects on the rights and duties of states of recent scientific and sociological changes which had destroyed the old legal framework of international relations, the Commission would still have to take into account the essential elements of the traditional theory of state responsibility.

35. Among the matters that would have to be re-examined in the light of modern needs were the self-determination of states and economic, political or military interference in the domestic affairs of states. The events of the past five years had confirmed his view that the recent history of Latin American countries had been largely that of safeguarding independence, gaining control of natural resources and moving towards social integration. A comparable process was probably taking place in other parts of the world.

36. The Commission's preliminary report on state responsibility, which would presumably outline its future work on the subject, should be submitted at the seventeenth session of the General Assembly in order that delegations could comment on it. The discussion in the

Sixth Committee would show whether or not the rules that the Commission was formulating and the concepts on which they were based corresponded to modern realities.

37. It would be of help if the Secretariat could prepare a digest of relevant national laws and practice on state responsibility.

38. Mr. ROSENNE said he was anxious that Mr. Ago should not be under any misapprehension: he (Mr. Rosenne) considered that the whole topic of state responsibility should be codified, and his remarks should not be construed as suggesting that the Commission should study only the rules concerning the exhaustion of local remedies and the nationality of the claim. However, the problems posed by those particular rules were so broad that they deserved separate treatment, and since the Commission had more facilities at its disposal than the Institute of International Law it should, with the assistance of the Secretariat, be able to make more progress with them than had been possible in the past.

39. Referring to Mr. Ago's observations concerning state succession, he explained that he had not urged that the Commission should ignore all the experience of the past, but that it should concentrate on the practice of the past twenty years or so, which was more likely to yield material of immediate practical relevance.

40. Sir Humphrey WALDOCK said that the committee set up to consider the programme of work might also discuss in detail the Commission's requirements in regard, for example, to secretariat services and other matters on which it should report to the next session of the General Assembly.

41. As far as state responsibility was concerned, it seemed to be generally agreed that the Commission should first study the general principles rather than specific aspects, such as the treatment of aliens, although the latter would yield useful illustrations of some of those principles.

42. Past practice could certainly not be disregarded in the study of state succession; the problems had remained much the same, and the sources of the nineteenth century would certainly be instructive.

43. The choice of other subjects for inclusion in the Commission's programme of work could perhaps be left to the committee. In his opinion the list should not be too long.

44. So far as the small committees were concerned, he considered that each should have a rapporteur, whatever the basis on which the work was to be conducted; otherwise, it was difficult to see how any progress could be made. He did not think that a committee of rapporteurs would be at all helpful. The Chairman had indicated that he was thinking in terms of a special rapporteur for each topic, with a committee to assist him during the current session. It was most desirable that special rapporteurs should be appointed soon, for then they would be able to consult, albeit informally, during the session with the members of the committees concerned.

45. He would have no objection if the committees were not actually disbanded at the end of the session, provided that they remained in being in a purely consultative capacity only; the Commission would thus be following a method similar to that followed by the Institute of International Law. On no account, however, should any such committee be empowered to give instructions to the special rapporteur.

46. Each of the committees should be large enough, consisting of perhaps ten members, to constitute a useful consultative body.

47. The CHAIRMAN said that he would have no objection to the idea that committees should continue in being even after the end of the session, provided that it was clearly understood that they would act in a purely consultative capacity. He could not agree to permanent committees with powers to give instructions to the special rapporteurs for the two topics.

48. Mr. TUNKIN said that some of the remarks made during the discussion, as well as some of those made to him during informal talks, had convinced him of the need to dispel some misunderstanding of his earlier comments on the topic of state responsibility.

49. As he had stated, the new developments which had taken place in regard to state responsibility involved certain changes in the very concept of that responsibility. It was well known that the doctrine of state responsibility had developed on the assumption that it covered mainly — he did not say exclusively — the liability for damage caused to aliens in the territory of the respondent state.

50. Patently, however, the Commission could not study the topic on the basis of that traditional assumption. In modern international law, state responsibility arose not so much out of the treatment of aliens, as out of actions which endangered, or could endanger international peace or friendly relations between states and out of breaches of the United Nations Charter as developed by General Assembly resolution 1514 (XV) of 14 December 1960, the declaration on the granting of independence to colonial countries and peoples. Accordingly, the very concept of state responsibility in international law needed to be re-examined in the light of those new developments.

51. For instance, in the traditional international law of state responsibility, attention had been focused on such problems as denial of justice, the exhaustion of local remedies, responsibility for *ultra vires* actions and the problem of reparation. Those problems had, of course, not become obsolete, but their relative importance had greatly diminished. In the modern law of state responsibility for actions which violated or threatened international peace, such questions as denial of justice and the exhaustion of local remedies were quite irrelevant.

52. On the other hand, in the new fields of international responsibility, the problem of sanctions and other consequences of breaches of the rules of international law became more prominent. He would not at that stage dwell at length on certain other changes, such as those connected with the formulation of new rules governing the legal relationships arising from breaches of international law.

53. He did not wish to suggest for a moment that he had arrived at any very definite views at that early stage on all those important questions. That was precisely the reason for his belief that a thorough preliminary study of the topic of state responsibility was absolutely necessary.

54. With regard to the Commission's more immediate problems, he agreed with Mr. Ago that the list of topics for the Commission's future programme of work should not be a very long one. Experience had shown that when a report was prepared on a particular topic by a special rapporteur which the Commission was unable to consider for a number of years, it almost invariably became necessary to review the work.

55. The Commission already had on its programme three major topics: the law of treaties, state responsibility, and the succession of states and of governments. It was quite conceivable that as many as fifteen reports might be submitted to the Commission, which would not be able to study them thoroughly for a number of years. In addition, it was generally agreed that the Commission should take some action in respect of certain lesser topics, such as special missions and the relations between states and intergovernmental international organizations. It was right that the Commission should have such topics in reserve to be dealt with as occasion permitted; indeed it might well happen that the Commission would be in a position to report to the Assembly on the one or other of those smaller topics before completing its consideration of the main topics on its programme.

56. In view of the dimensions of its task, the Commission should not take any formal action which would have the appearance of advancing its work but would only lead to waste of effort and resources. The Commission should take action only in regard to the topics of state responsibility and succession of states and some of the lesser subjects, and keep the list of topics for future work reasonably short.

57. With regard to the proposed appointment of special committees, he would not be in favour of standing committees, whether consultative or otherwise. In any event, he did not think purely consultative committees would serve any useful purpose. Committees of that type were familiar to the practice of the Institute of International Law, but the Institute was completely different in character from the Commission: it had a membership of over 100 and at each of its sessions had a great variety of subjects on its agenda. The Commission's membership was much smaller and it concentrated on one topic, or at most two topics, at each of its sessions.

58. The idea of creating a consultative committee implied that a rapporteur should consult the members of the committee. But why should not all the members of the Commission be given an opportunity of commenting on the preliminary reports?

59. With regard to the special committees to be set up to consider the topics of state responsibility and succession of states, the Chairman had indicated his preference for committees which would consider the scope of each

topic. While in principle he had no objection to that suggestion, he thought that the committees' terms of reference should be more flexible; each committee should be allowed not only to deal with the scope of the topic referred to it, but also with any other preliminary questions.

60. Each special committee might consist of some five members, as suggested by Mr. Castrén. Those few members would make a special study of the topic, and not merely the general study in which they would participate as members of the Commission; in a sense, each committee would constitute a collective rapporteur. Furthermore, each of the committees should be allowed adequate time to give its considered opinion on the two difficult topics of state responsibility and succession of states.

61. The new developments which had taken place regarding both topics had rendered them more complicated than ever. Not only new principles of international law which had already come into force, but also new principles of international law which were in process of emerging should be taken into consideration. That complex situation made it all the more necessary to avoid haste in the preliminary study of both topics. It also meant that the future work of the Commission would be both facilitated and expedited by the collective reports of the two committees, even if they took the form of the separate or dissenting reports of members.

62. He wished to make it clear that the committees in question would be purely *ad hoc*, their sole purpose being to report on the preliminary aspects of the two topics and make suggestions regarding future work thereon. They would cease to exist as soon as they had reported to the Commission; the Commission would then discuss their reports and appoint one or more rapporteurs for each topic.

63. He could not understand the haste of some members in regard to the appointment of special rapporteurs. As had been pointed out by the Chairman, the whole of the session would be taken up with the law of treaties; that same topic, perhaps together with that of special missions, would absorb the next session. There would, therefore, be no loss whatsoever if the designation of the special rapporteurs were deferred until the two committees had submitted their reports on the preliminary problems involved. If special rapporteurs were to be appointed at the current session, they would only duplicate the work of the committees; moreover, in view of the complexity of the two topics, the preliminary work could best be carried out in committee. The Commission itself would not be able to discuss the substance of either state responsibility or succession of states for years.

64. The CHAIRMAN asked Mr. Tunkin whether he had any objection to the appointment of committees to report if possible during the current session. If a committee, after considering the topic referred to it, arrived at the conclusion that it could not report during the present session, the Commission could then decide to extend until the next session the time limit for the submission of that committee's report. Moreover, the

Commission's ultimate purpose was to appoint a special rapporteur for each topic; it was therefore appropriate that the future special rapporteurs should be members of their respective committees.

65. Mr. TUNKIN said that in principle there would be no objection to a committee reporting to the Commission at the current session. Viewing the position realistically, however, he could not help thinking that such a development was extremely unlikely. Sir Humphrey Waldock's first report on the law of treaties, to be circulated shortly, would have to be studied. It was therefore apparent that, in regard to the main topic before the Commission, members were faced with a difficult situation. A committee had been set up to deal with the programme of work of the Commission; the drafting committee would begin its work within one or two weeks. The members would therefore be unable to give sufficient study to the topic of state responsibility.

66. Mr. GROS said he disputed Mr. Tunkin's contention that, in the traditional doctrine, the rules of state responsibility applied mainly to the treatment of aliens. He could not, therefore, agree that there had been any change in the very conception of state responsibility. While it was perfectly true that many of the rules of the law of state responsibility had arisen out of cases concerning the treatment of aliens, in traditional international law state responsibility covered a good deal more than the treatment of aliens.

67. Many instances could be cited of important arbitration cases, and many in which international commissions of inquiry had been instituted, relating to state acts involving direct state-to-state responsibility. For example, the *Dogger Bank* incident<sup>3</sup> had led to the institution of a commission of inquiry (1904). Another example of direct responsibility had been that of the case of the *Casablanca* deserters, a case between France and Germany which had been decided by the Permanent Court of Arbitration in 1909.<sup>4</sup>

68. Numerous other examples could be given to show that international responsibility had always been studied independently of the treatment of aliens. Of course, in any case of international responsibility, there were always innocent bystanders involved who had no connexion with the state responsible: in the *Dogger Bank* incident, for example, a number of fishermen had been the victims of the act of the Russian State. Undoubtedly, however, the case in question had been one of direct state responsibility and had had no connexion whatsoever with the treatment of aliens in the territory of the respondent state.

69. It was generally admitted that the field of application of the rules relating to international responsibility had broadened considerably in recent years. That fact, however, did not affect in any way the basic concept of that responsibility. All it meant was that there were new

causes of responsibility and new occasions for bringing claims based on the responsibility of the state. To sum up his position, he would say that the concept of a wrongful act had always existed in international law; it was only the instances of such acts that had increased in number. It was also true to say that modern examples of wrongful acts tended more often to involve directly the states themselves.

70. The discussion being conducted by the Commission was just the kind of study which should have been entrusted to a special committee. It was hardly necessary to undertake an entirely new study of the topic of state responsibility simply because in the past many of the rules governing that responsibility had been evolved from cases concerning the treatment of aliens.

71. He did not think that the two committees should do more than draft the table of contents of the study of each of the two topics. In the circumstances, he saw no reason why the committees should not meet during the session, for a few hours a week for four weeks. In that time each committee should be able to complete its task. Each special rapporteur would, of course, be solely responsible for his own report on his particular topic.

72. Mr. LIU said that one of the outstanding characteristics of modern international life was the increasing interdependence of states, particularly in economic matters. The newly independent states needed a flow of new capital and skills from outside. It was necessary to facilitate that flow, and the time had therefore come to codify the rules governing the protection of the capital and of the skilled persons concerned.

73. Another new fact of international life, and one which tended to be overlooked, was that many persons resident in the territory of newly independent states had become aliens. They were non-indigenous persons who had settled in those countries in former colonial times; in some countries they numbered thousands, in others millions. The problem was a very real one both in South-East Asia and in Africa and it was essential that some measures should be taken to safeguard the life, liberty and economic security of those persons. The problem was much wider than that of responsibility in the event of damage; it involved the responsibility of the state concerned to guard those persons against persecution or discrimination.

74. With regard to the methods of work of the Commission, he was at a loss to understand why it should be assumed that work on state responsibility should have to be begun afresh. Several reports had been submitted by the former special rapporteur; those reports represented a comprehensive study of the topic and covered most of the points mentioned in the discussion. It would be setting a bad precedent to discard all that work, which properly belonged to the Commission.

75. The CHAIRMAN pointed out that the topic of state responsibility was not the only one in respect of which that problem had arisen. The topic of the law of treaties, for example, had been given priority before 1953, but, owing to lack of time, the Commission had not been able to deal with it. The latest special rap-

<sup>3</sup> Hague Court Reports, Carnegie Foundation publication, Oxford University Press, New York, 1916, p. 403.

<sup>4</sup> *ibid.*, p. 110.



porteur was the fourth one to be appointed and, like his predecessors, he had found it necessary to submit his own report on the topic.

The meeting rose at 1 p.m.

### 635th MEETING

Thursday, 3 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

#### **Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686(XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)**

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.
2. Mr. TUNKIN said that Mr. Gros had misunderstood him at the previous meeting. He had never suggested that the traditional doctrine of state responsibility had developed exclusively under the influence of cases concerning the responsibility of the state for damage to the life and property of aliens. What he had said was that the concept of state responsibility had developed on the assumption that its main field of application was the matter of damage to aliens.
3. On the basis of that misunderstanding, Mr. Gros had suggested that he (Mr. Tunkin) favoured the complete rejection of the traditional rules of state responsibility. Nothing could be further from his mind; he had merely called for a re-examination of those rules in the light of new circumstances, without prejudice to the results of that re-examination.
4. Mr. BRIGGS said he agreed with the view expressed earlier by Mr. Tunkin that the Commission should confine its formal action to dealing with a limited number of topics. It should not go beyond the appointment of special rapporteurs on the topics of state responsibility, succession of states and possibly special missions, and relations between states and intergovernmental international organizations.
5. He recalled the statement by Mr. Tunkin in the 729th meeting of the Sixth Committee of the General Assembly that four topics were the maximum number with which the International Law Commission could effectively deal. He was certain that the committee on the future programme, which the Commission had set up at its previous meeting, would take that important point into consideration.
6. With regard to state responsibility, he noted the important statement by Mr. Jiménez de Aréchaga that the question of the treatment of aliens raised such issues as expropriation, nationalization and compensation, on which other United Nations organs expected leadership from the Commission. Those problems were thorny, but the Commission could not evade its responsibility in regard to them.
7. He disagreed with Mr. Tunkin that the whole concept of state responsibility had changed. Assertions to that effect were mere speculation and no evidence had yet been put forward to substantiate them. In reality, the only change that had taken place in regard to the law of state responsibility was the emergence of new fields for its application.
8. It had been mentioned that certain rules on the subject were in the process of formation. That was tantamount to saying that there was an element of progressive development in the study of the topic of state responsibility, which was incidentally an argument in favour of appointing a special rapporteur in accordance with the statute of the Commission.
9. There had been many references to the practice of the Institute of International Law. The practice of the Institute was, first, to appoint a special rapporteur for each chosen topic and then to appoint a commission to assist him; the rapporteur then made a preliminary statement to the commission, received its comments, decided which of those comments he would take into account, and finally prepared his report for submission to the plenary meeting of the Institute. Although he did not suggest that the Commission should follow that practice in every respect, it was clear that it did not involve a departure from the system of appointing a rapporteur who was responsible for the report.
10. The preliminary study of the special rapporteur should — as Mr. Tunkin had said — be circulated to all the members of the Commission and not merely to a few of them. If, however, other members of the Commission preferred to set up a committee of ten members to conduct the preliminary survey, he would not object, though his consent on that point would depend on the terms of reference of the committee. It was essential, for example, that it should in no sense be a standing committee.
11. Moreover, he was opposed to the idea of a collective rapporteur. If the committee were to be asked to report as a body, there could only be one of two results. Either the committee presented a majority report and a minority report, thus referring in effect the issues back to the Commission, or else it presented a compromise solution with the suggestion that the compromise was too delicate for the Commission to upset. Neither result would be satisfactory.
12. He urged the Commission to appoint a single rapporteur for each topic who would be responsible to the Commission; the report should not be the work of the majority in a committee. Nor did he favour the appointment of multiple rapporteurs. He recalled that a single rapporteur had dealt with the immense subject of the law of the sea, including the régime of the high seas, that of the territorial sea, the problem of the continental shelf and the question of fisheries.
13. The CHAIRMAN said that until the 631st meeting there had appeared to be general support for Mr. Tunkin's proposal that a special working group or committee



of some ten members should be appointed to consider the scope of the topic of state responsibility and report to the Commission at its next session. Subsequently, after the Secretary had spoken on the financial implications, a divergence of views had developed on two questions: first, whether the committee should report to the Commission at the present or at its next session, and secondly, whether the special rapporteur should be appointed immediately.

14. Since the Commission clearly could not take up the topic at the present session owing to lack of time, there should be no difficulty in agreeing that the committee should report at the next session. Mr. Tunkin ought to be a member of the committee but had said that he could not serve on it during the present session owing to the volume of other work in the Commission.

15. In his view, the special rapporteur on the topic of state responsibility should be appointed from among the members of the proposed committee and he would prefer that the chairman of the committee should undertake that duty.

16. Mr. JIMÉNEZ de ARÉCHAGA, referring to his earlier statement that fully representative committees should be appointed to consider the topics of state responsibility and succession of states, said that each committee would draw up a table of contents for the study of its topic and decide on the priority of the various sub-topics. The reports, however, should be prepared by the special rapporteurs. Of course, more than one rapporteur could be appointed for one topic, if the appropriate committee so recommended.

17. The remaining divergence of views in the Commission concerned the timing of the report and the designation of the special rapporteur for state responsibility. He thought that the time when the report should be submitted might be decided by the committee itself in the light of its deliberations.

18. Mr. LIANG, Secretary to the Commission, said that he wished to dispel any impression that it was his remarks on the financial implications that had led to the divergence of views in the Commission. He recalled, in that connexion, Mr. Tunkin's statement that every effort should be made to minimize the expense involved.

19. As he had pointed out earlier, committee meetings with limited language services would involve no expense if held during the session. It would also be possible to arrange for committee meetings a day or two before the next session; in that case, if given notice, the Secretariat could make arrangements to add to the budget of the Commission the small additional expense involved.

20. Mr. TABIBI suggested that informal consultations might constitute the best means of reconciling the views of the members of the Commission regarding the committee which was to consider the scope of the topic of state responsibility. The views of all members were on record, and there appeared to be no need to prolong the formal discussion.

21. Mr. CADIEUX said that his own choice would be that no committee should be set up at all. As a

compromise, he would be prepared to agree to a committee, provided other members were prepared to make concessions on other points.

22. The CHAIRMAN said that if members considered that their views had been sufficiently expressed in the discussion and placed on record, it might be appropriate to close the discussion on the question of the proposed committees; the officers of the Commission would meet to agree on nominations for the membership of the two committees.

23. Mr. GROS, speaking on a point of order, complained that, for most of the meetings of the current session, the French version of the summary records had not yet been distributed. He said he could not accept the summary records in English as authentic; they were not based on what had been said in French, and they only gave a rough and often wrong idea, at any rate so far as his own views were concerned, of what had been said, because they reproduced only the views that the English interpreter attributed to the speaker. The summary records in English, the only ones available so far, could not be used as a guide to the views of the French-speaking members of the Commission; those members would therefore have to wait until they received the summary records in French in order to submit their corrections. Now it must be remembered that statements made in French were not reproduced direct in the summary record drafted in English. That meant that there were two successive translations and that thereby any real value the summary record in French might have possessed was effectively destroyed.

24. As regards the appointment of a consultative committee, he said that he could only accept it with reservations. In particular, it was essential to define very clearly the manner in which the committee would function.

25. He had no objection to informal discussions among members with a view to reconciling opinions—for it could not be denied that there were differences of opinion on the substance—indeed, it was generally the most effective method of settling such differences.

26. A committee should not be appointed unless it was made perfectly clear that it would not be a standing committee and that it would disband upon completing the preliminary survey of the approach to the topic referred to it, but in any case not later than the opening of the 1963 session; it would not have power to give instructions to the special rapporteur, only to supply him with information on the various standpoints in order to assist him in his work.

27. Mr. LIANG, Secretary to the Commission, said that he also was very concerned at the delay in the production of the summary records in French. With regard to the fundamental problem, the reporting of statements made in French, it had been raised with Mr. Palthey, the Deputy-Director of the European Office, but no solution had yet been found. The problem of the reporting of statements in a language other than that of the speaker was a far-reaching one. If all statements had to be taken down in the original language for the purposes of the

summary record, a substantial increase in the number of *précis*-writers provided would be needed. In fact, the whole United Nations practice in regard to summary records would have to be changed, and such a change could only be effected in the General Assembly by the action of delegations of Member States.

28. He stressed, however, that the summary records were never intended to be an authentic reflection of the decisions of the Commission. They were first produced in provisional form, and were subject to correction by members. When all corrections had been received and incorporated, the records were printed in the *Yearbook* of the Commission; even then, however, he did not think that they could be regarded as authentic or binding. It was the decisions adopted by the Commission which were binding. The summary records merely served to show the trend of the discussions in the Commission.

29. Mr. AGO said that it was not only for delegations to the General Assembly to take up the question of improving the material organization of the Commission's work; it was first of all for the Commission to remedy a situation to which attention had been drawn on many occasions in the past. Members who spoke in French were undoubtedly at a disadvantage when their statements were recorded in English and subsequently translated back into French. It was true that members could send in corrections for the purposes of the final printed record, but during the Commission's day-to-day work, the only records to which it was possible to refer were the provisional uncorrected summary records. He urged, therefore, that action should be taken to remedy the situation, and invited the Secretary of the Commission to take steps in that direction.

30. Turning to the question of the appointment of a committee to make a preliminary study of the topic of state responsibility, he said that if a committee were to report to the Commission that would represent an innovation. He asked the Secretary whether there was any precedent in the history of the Commission for the appointment of a committee as rapporteur instead of a member.

31. Mr. LIANG, Secretary to the Commission, on the question of the summary records, said that what he had pointed out was that the method of preparing the summary records was part of the whole United Nations system, and that in view of the financial implications involved that system could only be changed by the Fifth Committee of the General Assembly. For the time being, the Secretariat could only conform to existing regulations and practice.

32. He agreed, however, that for a scientific body like the Commission, the system of recording statements in a language different from that in which they were made might not be the best. If the Commission so wished, a reference to the question could be included in the report on the session.

33. In reply to the question by Mr. Ago, he said that there was one occasion on which a committee had been appointed to report back to the Commission. That was at the 404th meeting, during the ninth session in 1957,

in the course of the discussion on arbitral procedure. At the 418th meeting, however, the Commission had reversed its decision and agreed itself to reconsider the draft. That unsuccessful experiment had sometimes been mentioned as an argument against the appointment of committees to report to the Commission.

34. Mr. AMADO said that, like the other French-speaking members, he objected to the practice of drafting the original records entirely in English. He had a very personal style in French, which reflected his Brazilian background, and the English summaries of his statements did less than justice to it.

35. Mr. BARTOŠ said that in the past he had found the summary records satisfactory. At the present session, however, he had noted an unfortunate tendency to summarize statements excessively. Statements so mutilated lost all point and distorted the speaker's meaning. In at least one instance his own standpoint had been completely misrepresented because of the excessive brevity of the record. The position of French-speaking members was even more difficult, because the method of drafting the summary records confronted them with a language problem as well. Readers of the summary records might get the impression that the speaker had abandoned his underlying idea and taken up a position opposed to that which he had actually upheld. It must be realized that the Commission dealt with legal arguments and that subtle changes or excessive abridgement could render the record worthless. The summary records should serve as a documentary record of the reasoning of members of the Commission, particularly of their legal arguments.

36. Mr. VERDROSS, while supporting the suggestion for improvements in the production of records and documents, paid a tribute to the work of the secretariat; in particular, he commended the Secretary and his staff for the excellent working documents which they had provided for the Commission.

37. The Commission was about to undertake the study of extremely complex problems. The topics of state responsibility and succession of states were in process of development; they could not be studied on the basis of a fairly consistent practice, as had been possible in the case of the topics of diplomatic relations and consular relations. There were few post-Second World War books on state responsibility and state succession based on current practice; there were none on the subject of relations between states and intergovernmental international organizations. It was, therefore, very important for the future work of the Commission that the research services of the secretariat should be expanded in order to be able to prepare working papers on the topics on the Commission's agenda.

38. The CHAIRMAN pointed out that when, in the past, the summary records had been drafted entirely in French, it was the English-speaking members of the Commission who had found themselves at a disadvantage.

39. Sir Humphrey WALDOCK said he agreed with his French-speaking colleagues that their reasoning ought to be reproduced as fully as possible in the summary

records, not only as a matter of importance for the personal reputation of members but also for the prestige of the Commission as a whole. The summary records of its proceedings ought to be extremely accurate because they were closely studied and even sometimes quoted in courts.

40. With regard to the Chairman's proposal concerning the appointment of a committee on state responsibility, he said that the committee's function should be precisely defined. Personally, he felt it would be difficult to draw up a report unless a special rapporteur had already been appointed.

41. Mr. CADIEUX said that, coming from a country in which both French and English were official languages, he was familiar with the problems of bilingual proceedings. Requests for more staff were bound to compete with other claims on the resources of the United Nations. It was for representatives in the Sixth Committee of the General Assembly and not for the secretariat to press the Commission's claims, and it should be remembered that budgetary processes were necessarily slow.

42. Mr. BRIGGS said he shared the view expressed by Sir Humphrey Waldock that it might be unfortunate to appoint a committee on state responsibility without having appointed a special rapporteur. He accordingly proposed that the Commission decide to appoint a special rapporteur for the topic of state responsibility and that he be assisted until the next session by a consultative committee of ten members whose function would be to make an exploratory study of the scope of the topic with him. The special rapporteur would be expected to submit a preliminary report to the next session on the scope of the topics, after consulting that committee; the committee's functions would then cease.

43. Mr. TABIBI said that the secretariat had no authority to argue the case for higher appropriations for the work of the International Law Commission in the Sixth Committee. The Commission's reputation was so great that no proposal affecting its method of work had ever been rejected by the General Assembly. The wisest course would therefore be to put forward definite proposals for consideration at the General Assembly's seventeenth session.

44. In answer to a question by Mr. TUNKIN, Mr. BRIGGS explained that the committee he had in mind would meet a few times during the present session to examine with the special rapporteur, in the light of the discussions of the past few days, the scope of the study to be undertaken. The special rapporteur would then prepare the report for the next session. If he so wished he could, of course, continue to consult members of the committee by correspondence.

45. Mr. TUNKIN said that members of the Commission had now had ample opportunity to state their general views and he doubted whether anyone in the committee would have anything new to say during the present session.

46. In view of the complexity of the subject, the Commission should not be over-hasty in appointing a special

rapporteur; the preliminary work should preferably be undertaken by a group of joint rapporteurs who would have time to ponder the whole topic and how it should be approached. The outcome of their examination would be a preliminary report, on the basis of which the Commission could decide at its next session whether one or more special rapporteurs should be chosen and what instructions it should give.

47. The CHAIRMAN said that he had been thinking of a committee of, say, ten members which would prepare a report that would enable the Commission to decide how to delimit the subject of state responsibility. It was relatively immaterial which member of the committee presented its report at the next session, but it should preferably be the Chairman.

48. Mr. BRIGGS pointed out that the Chairman's proposal differed radically from his own proposal by which the special rapporteur himself would be responsible for the preliminary report.

49. Mr. TUNKIN said that although the Chairman's plan differed from his own he could support it because he considered that the preliminary report should come from a committee rather than from an individual.

50. Sir Humphrey WALDOCK said that he had even more serious doubts about how the kind of committee envisaged by the Chairman would operate than about Mr. Briggs' proposal. The special rapporteur should be appointed by the Commission itself at a very early stage; only in that way could the latter proposal be made workable. After some discussion with such a committee the special rapporteur would have a fairly clear idea of the lines which his provisional draft should follow, and there would be nothing to stop members of the committee or, indeed, of the Commission itself from circulating memoranda to assist him in his work, as was done in the Institute of International Law.

51. The CHAIRMAN said he had gathered that the Commission felt it necessary to depart from its usual practice because of the special difficulties of the topic of state responsibility. It seemed appropriate that the preliminary study on the scope of the topic should be undertaken by a committee, whose report would be discussed at the next session and would form the basis for the Commission's ultimate decision. It would be necessary at that stage to consider the appointment of a special rapporteur. What mattered was that the Commission should have something on paper in front of it; a discussion *in vacuo* would lead nowhere.

52. Mr. de LUNA said it would be putting the cart before the horse to appoint a special rapporteur before a committee was set up and had given him directives. For if the special rapporteur found himself in fundamental disagreement with the committee's ideas about how the subject should be approached, he would be obliged to withdraw. On the other hand, if the proper sequence was followed and they started with a committee, once it had drawn up its directives, a special rapporteur could be appointed who would be agreeable to following those directives in his work.

53. Mr. GROS said he did not think that the possibility which Mr. de Luna seemed to envisage could arise. Any work of codification or progressive development of law called for the reconciliation of differing views. He could not see why a special rapporteur who found himself in a minority in the Commission in part of his draft should have to withdraw. The rapporteur should in any event indicate in his report the various trends of opinion, and his first report would have to be in the nature of a working paper outlining the various solutions. There should be no real objection in the Commission to the immediate appointment of a special rapporteur, particularly as an immediate appointment would mean that he would have an extra year at his disposal.

54. The Commission should have no illusions about the usefulness of a committee of ten. Once its composition were announced it would be easy to guess what the pattern of opinion would be, and it was unlikely that its members, as men of settled views with a long familiarity with the subject, would revise their views to any extent as a result of its deliberations.

55. Mr. VERDROSS said that, although the Institute of International Law was a private body, the Commission might with advantage copy its method of work. Experience had shown that discussions in the Commission on preliminary reports by special rapporteurs greatly influenced the form and content of subsequent reports. Any special rapporteur was bound to take into account the comments made on his preliminary draft, or if he was unable to do so, should relinquish his task. As in the Institute, the ultimate aim was to obtain a collective expression of opinion.

56. Mr. JIMÉNEZ de ARÉCHAGA said that the appointment of a consultative committee should help to avoid the pitfalls of asking a special rapporteur to set to work before the question of the scope of his study had been settled. That task could be better accomplished by a representative group than by an individual acting in his personal capacity, but he agreed with Mr. Briggs that the special rapporteur should be appointed forthwith so that he could begin work as soon as possible.

57. Mr. ELIAS said he was in favour of the proposal for a committee to discuss the scope of the study on state responsibility so as to give the special rapporteur some guidance before the end of the session; further assistance could be given him in the form of memoranda or by correspondence. It was important, however, to decide when the preliminary report should be submitted.

58. Mr. LACHS said that Mr. Gros seemed to be moving away from the agreement that appeared to be emerging on the need for a committee to discuss the scope and method of the study on state responsibility. He (Mr. Lachs) did not believe either that the attitude of members of such a committee could be predicted, or that its creation would in any way prejudice the Commission's own responsibility for choosing the special rapporteur and issuing final directives.

59. The committee might meet two or three times during the session, draw up a list of subjects and discuss how they might be studied; a further exchange of ideas could be carried out by correspondence. If necessary, the

committee could also meet for a few days before the opening of the fifteenth session. After the Commission had discussed the committee's report, a final decision could be taken.

60. Mr. AGO said that the problem of procedure had not been sufficiently clarified and a number of points still remained in doubt. There were two distinct schools of thought: some members seemed to favour a committee to decide on the content of the different chapters under which state responsibility might be treated; others held that the committee should consider very thoroughly the substance of the topic.

61. If a committee of ten were set up, one of its members would have to be designated to report to the Commission; however, he (Mr. Ago) categorically opposed the idea that the Commission should delegate to a subsidiary body its prerogative of the appointment of the Commission's special rapporteur for a given subject. A clear decision on that point was imperative. There would, however, be no objection if the committee chose a spokesman to present its report to the Commission.

62. Mr. AMADO said he had been among the first to urge that the special rapporteur should receive strict and precise instructions, so that he would not stray beyond the confines of his proper task. He agreed accordingly with Mr. Ago that the Commission itself should make the appointment, though admittedly there was no reason why a committee should not be established to explore the full scope of the subject. Such a committee could certainly be representative of different trends of opinion. His personal view — which he did not expect Mr. Tunkin, for example, to share — was that the essence of state responsibility was the duty to make reparation and that the source of rules *de lege ferenda* was in the customary law and in the case-law.

63. Sir Humphrey WALDOCK said that not enough attention had been given to the practical problems associated with the writing of a report. Mr. Tunkin had said that he would not be able to participate in the discussions of a committee at the present session. How much, in fact, would a committee be able to accomplish during the coming two months? It would be unrealistic to expect more than a few meetings with the special rapporteur for the purpose of exploratory discussions to guide him in preparing an objective report.

64. In suggesting that a preliminary report would not be needed before the next session, Mr. Lachs had perhaps overlooked the great technical difficulties of producing a report at the last minute.

65. Surely, it was essential to appoint a special rapporteur immediately, if necessary on an interim basis, for otherwise the Commission might have nothing to discuss at its next session; besides, there was no budgetary provision for committee meetings in the interval between the two sessions.

66. Mr. TUNKIN said it would be difficult to prepare clear and precise directives for a special rapporteur on so complex a subject as state responsibility. He was quite unconvinced of the need to appoint a special rapporteur at once and still maintained that the task could be

accomplished by a small group of members who, after thorough study of the topic, would present a report for consideration during the next session.

67. There was no reason why a procedural issue of that kind should not be settled by a vote.

68. Mr. YASSEEN suggested that, in view of the importance of the subject of state responsibility, it should perhaps be approached in stages. During the first stage, the scope of the study and the method to be followed would be determined. Decisions in that regard would certainly greatly influence the final content of the report. That first stage of the study, for which a special rapporteur would be designated by the Commission, could be entrusted to a committee. At the second stage, the Commission would be in a position, in the light of the committee's report, to settle the precise instructions to be given to the special rapporteur, and he agreed with Mr. Amado that the instructions should be very specific. There were obvious drawbacks in deciding forthwith on the special rapporteur for the whole of the study since the one chosen for the preparatory stage might not feel able to undertake the study as ultimately defined after the committee had submitted its report.

*It was so agreed.*

The meeting rose at 12.25 p.m.

### 636th MEETING

Friday, 4 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

**Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)**

1. The CHAIRMAN said that the consensus of opinion appeared to be that a sub-committee on state responsibility should be appointed. Consequently, after consulting the other officers of the Commission, he would at the next meeting submit suggestions for the composition of the sub-committee, which should begin work during the present session and report some time during the next session.

*It was so decided.*

2. The CHAIRMAN said he believed the Commission would also wish to appoint a similar sub-committee on the succession of states and of governments.

*It was so decided.*

3. Mr. EL-ERIAN urged that the latter decision should be treated as provisional because it was not clear from the discussions on item 2 whether, in the case of the topic of the succession of states and governments, the Commission would be justified in following the same procedure as in the case of the topic of state responsibility;

he would not, however, press the point if the majority took a different view.

The meeting rose at 10.25 a.m.

### 637th MEETING

Monday, 7 May 1962, at 3 p.m.

Chairman: Mr. Radhabinod PAL

**Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)**

1. The CHAIRMAN said that at the previous meeting it had been decided that sub-committees should be appointed to consider the two topics of state responsibility and succession of states and of governments. The officers of the Commission now suggested that the sub-committee on state responsibility should be composed of Mr. Ago as Chairman, Mr. Briggs, Mr. El-Erian, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka and Mr. Tunkin. They also suggested that the sub-committee on the topic of succession of states and governments should be composed of Mr. Lachs as Chairman, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. Liu, Mr. Elias, Mr. Tabibi, Mr. Tunkin, Mr. Rosenne and Mr. Yasseen.

2. Mr. YASSEEN said that, as a matter of principle, it would have been preferable to consult the Commission as a whole on the composition of the sub-committees, since some members might have special interests. He personally would have preferred to serve on the sub-committee on state responsibility.

3. The CHAIRMAN said that the officers were merely suggesting names; any changes might be made if desired.

4. Mr. AMADO proposed that Mr. Yasseen should serve on the sub-committee on state responsibility rather than on the other sub-committee.

5. Mr. EL-ERIAN said that he was prepared to serve on the sub-committee on succession of states and governments in order to maintain parity of numbers.

*It was so agreed.*

**Co-operation with other bodies (item 4 of the agenda)**

6. Mr. LIANG, Secretary to the Commission, said that he had received a letter from Dr. Charles Fenwick, Director of the Department of International Law and Organization, Pan-American Union, dated 24 April 1962, stating that Dr. Hugo Juan Gobbi of Argentina, a member of the Inter-American Juridical Committee, had been designated at the session held from July to September 1961 as its official observer at the 1962 session of the International Law Commission. He had also

received a letter from Mr. B. Sen, Secretary of the Asian-African Legal Consultative Committee, dated 10 April 1962, stating that, owing to the shortness of the notice, the Committee had found it impossible to send an observer. He suggested that he be authorized to reply that the Commission would welcome the observer designated by the Inter-American Juridical Committee at the current session and also an observer for the Asian-African Consultative Committee at any subsequent sessions.

*It was so agreed.*

**Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda)**

7. The CHAIRMAN invited Sir Humphrey Waldock, the Special Rapporteur for the topic of the law of treaties, to introduce his first report (A/CN.4/144 and Add.1).

8. Sir Humphrey WALDOCK, Special Rapporteur, said that it was with a great sense of responsibility that he placed his report before the Commission. As he had stated in the introduction to his report, he owed a great debt to his predecessors, Mr. Brierly, Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice. The discussions conducted by the Commission, especially at its eleventh session in 1959, had provided invaluable guidance, and it was to be regretted that the debate had not covered all the subjects with which he had had to deal. He also wished to acknowledge his debt to jurists outside that Commission, especially Lord McNair and Mr. Rousseau, and to the Harvard Research draft of 1935.

9. By a decision taken at the previous session and which was quoted in paragraph 7 of his introduction, the Commission had instructed its special rapporteur to prepare draft articles as the basis for a convention. The scope of the draft articles had been determined accordingly. His draft was intended to be a general convention on the treaty-making process, leaving aside certain matters such as the question of validity. That was why he had omitted articles 3 and 4 of the 1959 draft which had dealt with the "concept of validity" and "general conditions of obligatory force". The question was whether the Commission was in general agreement with the scheme and scope of his draft articles, leaving aside for the moment the question of their content.

10. In addition to the four chapters which were before the Commission, he was preparing a fifth which would deal with the treaties of international organizations. He had made some progress on that chapter, but was finding it less easy to align with chapter II, Rules governing the conclusion of treaties by States, and chapter III, Entry into force and registration of treaties, than he had expected. As there were arguments both for and against the inclusion of such a chapter, he would suggest that the Commission leave that particular subject in abeyance until it saw what progress it made on the remainder.

11. The question would then be whether the Commission was in general agreement on the subject-matter of the first four chapters, which covered such matters as

the capacity to become a party to treaties, registration of treaties, corrections of errors and the functions of depositaries. His attention had been drawn to General Assembly resolution 1452 B (XIV), in which the Secretary-General had been requested to obtain information with respect to depositary practice in relation to reservations and to prepare a summary of such practices. The relevant secretariat paper was apparently not yet available. The General Assembly had seemed anxious at its fourteenth session that the International Law Commission should study the functions of depositaries; he suggested, however, that provisions on that subject in his draft should for the time being be regarded as purely tentative.

12. He had been uncertain about draft article 6, Authentication of the text as definitive, which laid down general rules. The problem arose in connexion with treaties concluded in more than one language, and especially their interpretation. He would welcome the Commission's views on that matter.

13. The general structure of the draft was modelled on that of the draft articles on consular intercourse and immunities. He thought it would be more elegant to group the definitions together in a single article, but would suggest that each definition should be dealt with in conjunction with the article to which it related. Particular attention should be paid to the distinction drawn in his draft between plurilateral and multilateral treaties.

14. Mr. Rosenne had drawn his attention to an omission from the historical summary attached as an appendix to his report, namely, the debate in the General Assembly, at its fourteenth session, on the Indian Government's reservation to the Convention on the Inter-Governmental Maritime Consultative Organization. That reservation did not affect the substance of the article to which it related, but he would in due course supply the Commission with the salient points of the incident.

15. Treaty practice was developing in response to the needs of international life, as a reading of the *United Nations Treaty Series* would show. In his draft he had endeavoured to reconcile considerations of the development of the law with the need for the certainty of the law. He hoped that the text which the Commission ultimately approved would maintain a judicious balance.

16. Mr. BRIGGS said that the Commission had been well served by the admirable working instrument submitted to it by its special rapporteur, Sir Humphrey Waldock. He agreed with both the general scheme and the scope of the draft.

17. He also fully endorsed the Commission's decision at its thirteenth session to prepare, instead of a draft code, draft articles intended to serve as the basis for a convention.

18. With regard to a possible article on the authentic text of treaties, he recalled Manley Hudson's insistence that a treaty might be in several languages but that there was only one text.

19. With regard to the draft articles themselves, he was impressed by the practical approach of the special rapporteur, who had skilfully avoided theoretical issues which had been a source of schism in past efforts to codify the law of treaties. He had also shown a commendable concern for current practice and an awareness of the needs of an enlarged international community, while laying proper emphasis on the feasibility and practicability of the proposed rules.

20. He would not discuss the draft articles in detail at that stage but would give certain illustrations to show how they could be improved. For example, with regard to the acceptance of reservations to multilateral treaties, he had some doubts regarding the so-called unanimity rule. As was pointed out in paragraph 7 of the appendix to the report, most modern multilateral conventions were adopted by a majority vote, usually a two-thirds majority, for example, the Geneva Conventions on the Law of the Sea, 1958,<sup>1</sup> and the Vienna Convention on Diplomatic Relations, 1961. In the case of a convention thus adopted by a qualified majority, it might be appropriate to replace the requirement of unanimous consent to a reservation by one of acceptance by a similarly qualified majority of the states which had actually become parties to the convention.

21. He drew attention in that connexion to the considerations put forward by the late Sir Hersch Lauterpacht, quoted in paragraph 8 of the appendix to Sir Humphrey's report, although he personally would reverse the order of the three propositions: first, proposition 'C', which stated the general principle that the requirement of unanimous consent of all parties to the treaty as a condition of participation in it of a state appending reservations was contrary to the necessities of international intercourse; second, proposition 'B', to the effect that the unlimited right of any state to become party to a treaty with sweeping or destructive reservations was not admissible; and last, proposition 'A', that it was desirable to recognize the right of states to append reservations, provided that those reservations were not disapproved of by a substantial number of the states which finally accepted the obligations of the treaty. As proposed by the special rapporteur, article 19 of the draft seemed to exclude the possibility of such a system and, at the appropriate stage, he would like to see the question discussed by the Commission.

22. With regard to accession, he felt that no convincing case had been made for the system of accessions subject to ratification; the provisions of draft article 14, paragraph 3, which permitted accession subject to ratification, were not consistent with the definition of accession in draft article 1 (j), which indicated that, by acceding to a treaty, a state "definitively gives its consent to be bound by the treaty".

23. He also felt that no convincing case had been made for accession to a treaty which was not yet in force, as provided in article 13, paragraph 2 (b) (i).

24. With regard to article 1, Definitions, he said that in the past it had been the Commission's practice to consider the "definitions" article after the whole draft had been discussed; he agreed, however, with the special rapporteur's suggestion that each definition should be taken up in connexion with the article to which it related.

25. He did not believe that, on balance, there was any advantage in making a distinction between plurilateral and multilateral treaties. There existed a distinction between two types of multilateral treaties, but that distinction was only valid for certain purposes. He feared that the introduction of the term "plurilateral treaty" would create more problems than it would solve.

26. The CHAIRMAN suggested that, in view of the limited time at its disposal, the Commission should dispense with a general discussion and concentrate on the actual draft submitted by the special rapporteur, article by article.

27. Mr. TUNKIN said he supported the Chairman's suggestion. There was only one preliminary question to be decided: would the draft deal only with treaties concluded by states, treaties entered into by international organizations being disregarded for the moment?

28. The CHAIRMAN said that the Commission would discuss the present draft on the understanding that treaties entered into by international organizations were not within its scope.

29. Mr. AGO suggested that it would be desirable to dispose first of the texts which had been adopted by the Commission in 1959. He would prefer some of the material in the 1959 draft to be retained, particularly in regard to definitions; he thought that, wherever applicable, a comparison should be made with the 1959 texts.

30. The CHAIRMAN said that the special rapporteur would no doubt, when introducing each of his draft articles, compare it with the corresponding provision of the 1959 text, where appropriate.

31. Sir Humphrey WALDOCK, Special Rapporteur, asked members to inform him of any matters omitted from the draft which they considered should be included, since that would enable him to prepare any necessary drafts.

32. As he had stated in his introductory address, he planned to take up each definition in connexion with the article where it first arose. The definition of "party", however, could be left until a later stage of the discussion. The definitions of "plurilateral treaty" and "multilateral treaty" might be discussed in connexion with article 5, where those terms were first used.

33. With regard to article 2, its provisions were closely connected with the definitions contained in article 1, paragraphs (a) and (b). The whole subject had been very fully discussed by the Commission in 1959 and, in substance, the definitions in article 1, paragraphs (a) and (b), conformed with those contained in articles 1 and 2 of the 1959 draft. The main change was that the definition of "international agreement" preceded that of "treaty". The 1959 draft had not been altogether logical in defining "treaty" first, for treaties were a particular

<sup>1</sup> *United Nations Conference on the Law of the Sea* (United Nations publication, Sales No.: 58.V.4), Vol. II.



instance of international agreements, and it was more correct to define the more general term first.

34. Mr. EL-ERIAN said that it might be difficult for the Commission to take up the articles *seriatim* at that stage, for certain general questions affected the whole draft; it might perhaps therefore spend some time on a general discussion. Such a discussion would help the special rapporteur in preparing his second report, because some of the points raised could relate to subsequent articles in his draft. Moreover, in the light of the discussion, the special rapporteur might decide to redraft some of his draft articles in a more condensed form, or split them up into a number of articles, instead of grouping them in long single ones like articles 17, 18 and 19, relating to reservations to multilateral conventions, which appeared rather cumbersome in their present drafting.

35. He noted that it had been the Commission's practice to adopt the definitions at the end of its discussion of a draft; however, that had not usually prevented the Commission from discussing the definitions article and adopting it provisionally.

36. Mr. TUNKIN said that a general discussion might lead the Commission too deeply into theoretical issues. It was usually difficult to agree on theoretical points, but much easier to agree on practical rules.

37. He agreed with the special rapporteur that the Commission should discuss each definition in connexion with the article to which it related. It might adopt article 2, paragraph 1, provisionally and consider it again at a later stage, together with the definitions to which it referred.

38. Mr. VERDROSS congratulated the special rapporteur on his report. Turning to article 2, he criticized the reference in paragraph 2 to unilateral declarations. He saw no reason for that statement; the draft articles were concerned with treaties only, so patently would not cover acts other than treaties. Of course, he agreed that unilateral declarations could give rise to international obligations, but that consideration did not affect his argument.

39. The CHAIRMAN said that the issues to which Mr. El-Erian had referred would no doubt be discussed in connexion with the various draft articles; he therefore saw no need for a general discussion.

40. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin that the Commission was much more likely to make progress if it concentrated on the draft articles instead of discussing theoretical issues.

41. In reply to Mr. Verdross, he said that article 2, paragraph 2, reproduced in substance the terms of article 1, paragraph 4, of the 1959 draft; *ex abundante cautela*, the provisions reserved the question of the force of unilateral declarations, which in certain instances had a consensual element. The Commission had not wished in 1959 to cast any doubt upon the force of such declarations.

42. Mr. BARTOS said that he too agreed with Mr. Tunkin that the Commission should not at that

stage discuss so-called academic questions, even though they might come up later. He also agreed with the special rapporteur's suggestion that each definition should be discussed in connexion with the article to which it related. The need to follow that procedure, instead of leaving the definitions until the end of the discussion, was demonstrated by the fact that article 2 depended on the definitions in article 1, paragraphs (a) and (b), while in turn article 1, paragraph (a), referred to article 3.

43. The provisions of article 2, paragraph 2, should be retained, although there was much force, from the purely formal and technical points of view, in the remarks of Mr. Verdross. Over and above the purely formal question, however, it was necessary to bear in mind an international practice under which certain unilateral declarations, if made *urbi et orbi*, could give rise to international obligations.

44. Two examples of such declarations were, first, the 1917 declaration by the United Kingdom relating to the setting up of a Jewish National Home in Palestine. That unilateral declaration, before it was incorporated in the mandate, had been invoked on several occasions by the United Kingdom Government itself, and of course also by the Jewish Agency, as imposing upon that government obligations comparable to those arising out of a treaty.

45. His second example was drawn from the history of his own country. The autonomy of Serbia had been the subject of the Ottoman Empire declarations known as the Hatti Sherif of 1831 and 1833, subsequently approved by the Conference of Ambassadors at Constantinople. At the Congress of Paris in 1856, those declarations had been treated as having an international character. They had originally been formulated unilaterally because of the desire of the powers to spare the susceptibilities of the Sublime Porte.

46. The declarations to which he had referred had thus been accepted as having certain consequences of an international character. The whole subject of unilateral declarations had been discussed at the Commission's eleventh session in 1959, and the then special rapporteur, Sir Gerald Fitzmaurice, had agreed on the need to include a provision on the subject in order to avoid any misunderstanding.<sup>2</sup>

47. Furthermore, under article 1, paragraph (b), of Sir Humphrey's draft the term "declaration" could also be used to designate a treaty. An example of that type of treaty was the London declaration on restitution of looted property of 3 January 1943, which had been made by several states and had the character of a treaty, at least for the states making that declaration.

48. The retention of the passage under discussion would not affect the substance. The Commission was not called upon to consider the force which unilateral declarations might have in international law; that was a question for the courts.

49. Mr. YASSEEN said that the Special Rapporteur's

<sup>2</sup> Yearbook of the International Law Commission 1959, Vol. I, United Nations publication, Sales No.: 59.V.I, Vol. I, pp. 6-7, paras. 42-59.



clear and precise draft would enable the Commission to make rapid progress with the topic of the law of treaties.

50. He agreed with Mr. Verdross that it was not appropriate to mention unilateral declarations in article 2. He noted that Mr. Bartoš, who thought the passage in question should stand, agreed that it did not deal with the question of substance—the binding force of unilateral declarations. Since no question of substance was involved, the matter becomes one of drafting and, as a matter of drafting, it was unnecessary to exclude expressly unilateral declarations from the scope of the draft. Since the draft dealt with the conclusion of treaties, it clearly covered only conventions, in other words, instruments which by definition required the consent of two or more states. It would be correct, of course, to state that unilateral declarations were not included in the scope of the draft, but such a statement would be superfluous and therefore harmful.

51. In cases where two concurrent unilateral declarations related to the same subject, they would together constitute a tacit convention. Such conventions would not be excluded from the draft, but genuine unilateral declarations were, by definition, completely outside its scope and should not be mentioned at all.

52. Mr. AMADO said that the special rapporteur's draft articles reminded him of Boileau's words: "Ce que l'on conçoit bien s'énonce clairement."

53. Commenting on article 2 in conjunction with the definitions in article 1, paragraphs (a) and (b), he said that it merely amplified those definitions. Also, paragraphs (a) and (b) of article 1 could with advantage be combined, by amending the opening words of the definition of "treaty" to read:

"'Treaty' means any international agreement between two or more States in any written form..."

54. He did not think that the proposed separate definition of "international agreement" was really necessary. He noted, moreover, that that definition itself used the word "agreement" which was part of the expression to be defined.

55. If paragraphs (a) and (b) of article 1 were merged in the manner he suggested, they would contain all the substance expressed in article 2, paragraphs 1 and 2.

56. He asked for clarification of the meaning of article 2, paragraph 3.

57. Mr. VERDROSS said that it was in a sense contradictory to refer to a unilateral declaration in article 2, paragraph 2, when an "international agreement" was defined in article 1, paragraph (a), as one concluded between two or more states. He was not, of course, denying that a unilateral act could create international obligations, or that a convention could carry the title "declaration".

58. If the Commission decided that the draft should refer expressly to unilateral acts, it should prepare a separate clause on that point.

59. Mr. de LUNA commended the special rapporteur for his clear, concise and convincing report.

60. He agreed with Mr. Verdross that the passage in article 2, paragraph 2, dealing with unilateral declarations, was superfluous; it would be better in the commentary.

61. He also agreed with Mr. Amado's suggestion that paragraphs (a) and (b) of article 1 should be amalgamated. The separate definition of "international agreement" would then disappear; it was inelegant, because it used the word "agreement" in defining an expression which contained that same word.

62. He could not accept the expression "subjects of international law possessing international personality" in article 1, paragraph (a). All subjects of international law possessed international personality. As taught by such great authorities as Anzilotti, the two concepts were synonymous: personality expressed a relationship between an individual or collective entity and a given legal system. But whereas every subject of international law possessed, by definition, legal capacity, every subject of international law did not possess capacity to act through organs of its own or, at any rate, not to an unlimited extent. *Jus contrahendi* was a sub-species of capacity to act. Rebels recognized as belligerents possessed a limited *jus contrahendi*; and Trust Territories, for example, did not possess capacity to conclude treaties. He accordingly proposed the deletion of the words "possessing international personality and".

63. Mr. AGO said that the Commission should not be too hasty in deciding to dispense with discussion of the definitions article at that stage. Little progress would be made with article 2 until agreement had been reached at least on the first four paragraphs of article 1.

64. He agreed with Mr. de Luna that to speak of "subjects of international law possessing international personality" was tautologous, as Sir Gerald Fitzmaurice had admitted during the discussions at the eleventh session. It would suffice to refer to "subjects of international law": the important element from the point of view of the definition in article 1 (a) was treaty-making capacity.

65. With regard to the text of article 2, he had some doubts as to the utility of a provision expressly indicating that the fact that "unilateral declarations or any other form of international acts" were excluded from the application of the present articles did not affect the force of such acts. The 1959 draft had a different purpose when it included certain kinds of unilateral declarations in the acts to which the article was applicable in the then article 1, paragraph 3. He also suggested that, in the draft submitted by Sir Humphrey, the provision now appearing in article 2, paragraph 3, should appear in article 1, immediately after the definition of "treaty".

66. His comments related largely to matters of form; he was in broad agreement with the meanings ascribed to the terms used in articles 1 and 2 by the special rapporteur.

67. Mr. ROSENNE congratulated the special rapporteur on his report. He agreed with Mr. Ago that the Commission would have difficulty in discussing the articles

without first considering the most important of the definitions.

68. Referring to the point raised by Mr. Verdross, he said that it could happen that negotiations between two or more states resulted in a text which took the form of one or more apparently unilateral declarations; such declarations should not be excluded from the scope of the draft. The matter was of some importance because the Secretary-General of the United Nations, following the practice of the Secretariat of the League of Nations and in accordance with decisions of the General Assembly, did accept certain unilateral texts for registration in accordance with article 102 of the Charter.

69. The element of negotiation was fundamental for all treaties, including those expressed in the form of a unilateral declaration, and that should be stressed, and was indeed implied in the word "concluded" in article 1 (a). Nor did the definition of an international agreement as being one in "written form" exclude a unilateral act if the circumstances in which it was made brought it within the concept of a treaty.

70. Mr. BARTOŠ said he was not surprised at the divergence of views provoked by Mr. Verdross's remark, which, like that of Mr. Yasseen, had been prompted by considerations of formal logic with a view to keeping the text clear at any price of any notion of municipal law. His own view, based rather on state practice, was that unilateral declarations to which other states attributed a contractual character fell into at least four groups: declarations *urbi et orbi* such as the Balfour Declaration; declarations required and made under a treaty; declarations such as those on the breadth of the territorial sea, which were notified to but not expressly accepted by third states; and declarations followed by the conclusion of a treaty.

71. The special rapporteur had been right in referring to unilateral declarations as acts which were not treaties in the technical sense and to which the draft articles could not be applied in a formal manner. The international consequences of such unilateral acts would have to be determined by judicial decisions or by other means, and not regulated by the conventions they were preparing.

72. Mr. TABIBI said that the Commission was indebted to the special rapporteur for his report and for following its instructions so closely.

73. He agreed with Mr. Bartoš that certain unilateral declarations affected relations between states and should come within the scope of the law of treaties. Some of them, such as those relating to the right of self-determination, were of vital importance to the cause of the protection of human rights. The point was certainly not of a drafting character.

74. Like other speakers, he considered that it would have been preferable to discuss article 1 before article 2.

75. Mr. TUNKIN congratulated the special rapporteur on his report. Whatever procedure the Commission adopted, once it came to article 5 it would certainly have to take up the question of definitions.

76. There was much force in the objection raised by Mr. Verdross to article 2, paragraph 2, but perhaps it could be retained for the time being, pending receipt of the comments of governments.

77. He would be interested to know for what reason the special rapporteur had added the words "or otherwise" in article 2, paragraph 3; those words did not appear in article 1, paragraph 2, of the 1959 draft and might so broaden the clause as to make it unacceptable.

78. Mr. CASTRÉN, after congratulating the special rapporteur on his report, suggested that the Commission should follow the example of the Vienna Conference of 1961 and consider the definitions before discussing the other articles. At the conclusion of the first reading, it could then go back to article 1 to see whether it required revision.

79. He saw no objection to combining paragraphs (a) and (b) of article 1, but the definition should proceed from the general to the particular.

80. He agreed with Mr. de Luna that the words "possessing international personality" were superfluous.

81. Article 2, paragraph 1, might with advantage be condensed by substituting the words "treaty as defined" for the words "international agreement which under the definitions laid down".

82. Sir Humphrey WALDOCK, Special Rapporteur, replying to comments on the order of the articles, explained that he had deliberately chosen the method of laying down definitions in article 1 and defining the scope of the draft in article 2, which referred back to article 1. He had contemplated the alternative possibility of including the definitions of "international agreement" and "treaty" in article 2, but had decided that his own choice was neater and more consonant with the general structure of the draft. The same problem of method was likely to arise again in connexion with the articles dealing with ratification and accession.

83. He believed that the Commission should maintain the distinction between international agreements and treaties.

84. Mr. AMADO considered that each term should be defined in the substantive provision in which it was first used.

The meeting rose at 6 p.m.

### 638th MEETING

Thursday, 8 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

#### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of item 1 of its agenda; he suggested that it might be preferable to try and reach agreement on

paragraphs (a) and (b) of article 1 before proceeding with article 2.

*It was so agreed.*

#### ARTICLE 1. DEFINITIONS

##### *Paragraphs (a) and (b)*

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, in the light of the discussion at the previous meeting, he had concluded that it should be possible to combine paragraphs (a) and (b) to form a single definition, even though in the past the Commission had seemed inclined to keep the definition of "international agreement" separate from that of its form and attributes which conferred upon it the character of a treaty.

3. He accordingly suggested that the Commission should refer to the drafting committee a text which would read:

"'Treaty' means any international agreement in any written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol... or any other appellation) which is intended to be governed by international law and is concluded between two or more states or other subjects of international law having capacity to enter into treaties under the rules set out in article 3."

4. That redraft took account of the objections to the phrase "possessing international personality" which, though admittedly not essential, he had inserted because subordinate units of a state might have some constitutional rights to enter into treaties directly. In such cases the question arose whether it was the subordinate unit or the parent state that was the party to the treaty. The problem was a real one, but it might perhaps be considered in connexion with article 3.

5. Mr. TSURUOKA asked why the special rapporteur had introduced the phrase "intended to be" in his definition. The phrase did not appear in article 2 of the 1959 draft. He thought it was not necessary to inquire into the intentions of the parties.

6. With regard to the phrase "possessing international personality", which the special rapporteur had agreed to omit, it was not clear from the provision as originally drafted whether the phrase applied only to "other subjects of international law"; if that was the case, it was redundant. Some authorities held that even an individual could be a subject of international law, and that view had been admitted in certain reparation cases.

7. Mr. CADIEUX, after congratulating the special rapporteur on his report, said that, while he had no objection to the procedure being followed in the discussion, the Commission should answer the questions posed by the special rapporteur in his introduction, in particular, whether the articles should form a single convention or several conventions, and whether the proposals concerning the scope of the articles were acceptable. Personally, he would reserve judgement on the question whether the treaties of international organizations should be covered, until he had studied the special rapporteur's chapter on that subject.

8. Referring to the comments made at the previous meeting on article 2, he welcomed Mr. Castrén's suggestion for condensing paragraph 1. He also agreed with Mr. Bartoš that in paragraph 2 reference should be made to unilateral declarations which could have a contractual character and some of the attributes of a treaty, and might affect third states which had had no part in the preceding negotiations. An example was the Inter-American Treaty of Reciprocal Assistance, signed at Rio de Janeiro on 2 September 1947,<sup>1</sup> which imposed obligations for the maintenance of peace and security in the American continent, but in the drawing up of which Canada had not participated. The status of unilateral declarations was not clear, and the Commission should not give the impression that its decision that they would not be covered by the draft implied any legal judgement as to their nature. Perhaps the matter could be dealt with in the commentary.

9. He would be grateful if the special rapporteur would explain why article 2, paragraph 2, referred to "or any other form of international act" and why the words "or otherwise" had been added at the end of paragraph 3.

10. Mr. JIMÉNEZ de ARÉCHAGA, after congratulating the special rapporteur on his report, said that apart from the divergence of view on the point raised by Mr. Verdross concerning article 2, paragraph 2, the suggestions made during the discussion were not incompatible; indeed, the comments indicated a general consensus of opinion on the main issues. It was agreed that treaties were written agreements between two or more states or other subjects of international law and were governed by international law, and that the draft should not apply to all types of international agreements or unilateral declarations. It should not be difficult for the drafting committee to prepare a text in the light of the discussion, and of the decisions reached at the eleventh session.

11. Mr. GROS said he did not think that the Commission could turn itself into a drafting committee. The discussion had now reached the stage where the new combined text for paragraphs (a) and (b) proposed by the special rapporteur could be referred to the drafting committee.

12. Mr. Tsuruoka had asked whether the intention that it should be governed by international law had to be present for an agreement to be an international agreement. The answer to that question depended on the content of the treaty concerned. Whatever wording was adopted in the Commission's draft, the intention of the parties would always have to be sought in order to ascertain whether any given treaty was "intended to be governed" by international law. In the 1959 draft, article 2 expressly stated that an international agreement meant. The answer to that question depended on the substance was discussed in paragraph 2 of the commentary on article 1 of the draft now before the Commission (p. 15).

13. Technically, any agreement between states, of

<sup>1</sup> *United Nations Treaty Series*, Vol. 21, p. 77.

however minor a character, could be made into an international agreement or formal treaty by the will of the states, if they wished to create international obligations. An example was the agreement between France and Switzerland to enable the runway of the Geneva airport to be extended; it was in the form of a treaty, although the specific purpose of the agreement was comparatively trivial and scarcely involved the rules of international law.

14. It was not always easy to determine the line of demarcation between an international obligation entered into by states by virtue of an undertaking governed by international law—in other words by a treaty—and an obligation arising out of an undertaking which was not a treaty, drawn up by states which had not chosen to employ the treaty procedure, though they intended to enter into an undertaking which could at least in part be governed by international law, such as, for example, a contract or a loan agreement involving arbitration subject to the rules of international law. The Commission should state explicitly that its draft would not cover cases where contractual obligations between states, not in the form of treaties, were nevertheless to some extent subject to some of the rules of international law. For example, loan agreements with an international organization or between two states frequently provided that the law applicable was either international law or the law of a third state and that the competent jurisdiction was a court of a third state or an arbitral tribunal whose competence was defined by reference to general principles and to the rules of international law.

15. The commentary on paragraphs (a) and (b) should state clearly that the Commission had adopted a formal distinction to the effect that the law of treaties was solely the law of international obligations deriving from international agreements governed by international law. The fact that the Commission's draft did not deal with other instruments creating international obligations between states and did not affect the binding force or the obligatory character of such instruments should perhaps be stated in the body of the articles.

16. Mr. TUNKIN said that the special rapporteur's suggested redraft of paragraphs (a) and (b) should be broadly acceptable and might be referred to the drafting committee. The reference to "other subjects of international law", which presumably meant almost exclusively international organizations, might be retained in the definition, even if the draft did not cover that particular subject.

17. He had some doubt as to the wisdom of including the phrase "intended to be", and would welcome an explanation on that point from the special rapporteur.

18. Mr. AGO said that the special rapporteur's redraft of paragraphs (a) and (b) was a great improvement and wholly acceptable. The Commission should not be too theoretical in its definitions; its draft on the law of treaties should certainly open with a definition of "treaty", but should avoid defining the notion of "international agreement".

19. He did not think the phrase "intended to be" should be retained, for it would imply—erroneously—

that the parties would be free to decide whether the treaty made between them would or would not be governed by international law. For example, an arrangement for an exchange of territory inevitably affected territorial sovereignty and thus had to be regarded as an international agreement, different in nature from an agreement for the acquisition of premises for a diplomatic mission—an example mentioned in paragraph 2 of the commentary on article 1 of the special rapporteur's draft—and that independently of the will of the parties.

20. He considered that paragraph 3 of article 2 should be transferred to the definitions article to follow the redraft suggested by the special rapporteur for the existing paragraphs (a) and (b).

21. Mr. PAREDES agreed with Mr. Amado that the draft should not contain too many definitions and that the first two in article 1 should be combined.

22. In his view, not only states and international organizations, but also individuals could be subjects of international law; that view should be reflected in the definition.

23. The Commission should throw some light on the thorny problem of what types of agreement, though possessing the formal aspects of a treaty, could not be regarded as such by reason of their scope and subject matter and would therefore remain outside the application of the present articles.

24. Mr. YASSEEN said he could not agree that only a drafting point was raised by Mr. Tsuruoka's question concerning the words "intended to be". They seemed to imply that it would depend on the will of the parties whether an agreement was or was not governed by international law. That was certainly not always the case; the character of the agreement was surely one of the decisive elements. For instance, it was inconceivable that a treaty concerning the territorial sea should not be subject to international law, whatever might be the will—even the expressly declared will—of the parties.

25. Mr. VERDROSS said he did not believe there was any substance in the special rapporteur's argument that the qualifying phrase "possessing international personality" was necessary to cover the case of subsidiary units of a state which could conclude treaties; it was self-evident that, if they could do so in their own name, they were subjects of international law and hence *ex hypothesi* possessed international personality, even though to a limited extent. He therefore urged the deletion of that tautologous phrase.

26. Mr. ELIAS pointed out that the phrase in question had been dropped in the special rapporteur's suggested redraft of paragraphs (a) and (b) which should be generally acceptable, if agreement could be reached on the deletion of the words "intended to be". So far as those words were concerned, he said there was a close analogy between municipal and international law. Under English law the parties to a contract, defined as an agreement between two or more parties which was enforceable at law, could still provide in particular cases that it was a gentleman's agreement and therefore not intended to be subject to law. It could hardly be

contended that such an issue might be left to the will of the parties and that a dispute submitted to the International Court of Justice could not be considered by that body because the parties had stipulated that the agreement in question would not be governed by international law. In such a case, provided that the parties had accepted in advance the Court's compulsory jurisdiction, it would be proper for the Court to determine whether an agreement was an international agreement in the commonly accepted sense.

27. The word "governed" should not be construed to mean that an international agreement, to be subject to interpretation by the International Court of Justice, had to comply in every respect with the legal concept of a treaty under international law.

28. Mr. TUNKIN said that he had some doubts about the phrase "or other subjects of international law", which might create confusion in the application of the convention. He wished merely to bring the point to the attention of the drafting committee, which would undoubtedly have to discuss it when it came to article 3. He would prefer that the words "intended to be" should be omitted.

29. Mr. LIANG, Secretary to the Committee, said that there had been some confusion in the meaning attributed to the expression "intended to be governed by international law". It was clear that, in a sense, all treaties had to be governed by international law, although the provisions of a particular treaty might, by agreement of the parties, be regulated by specific rules. That was perfectly permissible under international law and did not mean that such an agreement was not, in fact, governed by international law. In that case, the problem was that of the application of rules under special law, which might differ from the general law. He agreed with Mr. Tunkin that the phrase "intended to be" was unnecessary and might give rise to complications.

30. Mr. ROSENNE said that the drafting committee might consider whether the words between brackets in paragraph (b), as well as article 2, paragraph 3, should not be removed from the definition and placed in the commentary. The appellation would not matter greatly so long as the instrument came within the scope of the definition of "treaty", and the list might be confusing as it was not exhaustive. The question whether the phrase "intended to be governed" or simply the word "governed" was preferable might ultimately be a matter of drafting; he personally would prefer the 1959 text, and it should be made clear that the expression "international law" meant "general international law". Furthermore, an agreement between the parties to the effect that some other system of law should be applied to a treaty entered into between them would itself be governed in the first instance by international law; the International Court of Justice would undoubtedly apply the basic rules of international law before going on to examine the other system of law agreed upon by the parties as applicable to the treaty.

31. With regard to the remarks of Mr. Paredes, he said that a written agreement between an individual and an

international organization would not necessarily be governed by general international law. The International Court of Justice, in its Advisory Opinion on the Effect of Awards of Compensation made by the United Nations Administrative Tribunal of 13 July 1954,<sup>2</sup> had stated that those contracts of service were governed by the internal law of the United Nations, which was different from general international law.

32. Sir Humphrey WALDOCK, Special Rapporteur, said that he had included the words "intended to be" because transactions between states were of various kinds and included transactions in the nature of commercial contracts. Sometimes those transactions were expressed to be governed by a particular system of private law—in other words, by the rules applicable to contracts in that system. Even if the hypothesis were to be accepted that it was international law which determined that such a transaction was governed by private law, still it seemed clear that the transaction was outside the concept of a treaty. It seemed to be analogous to "choice of law" in conflicts of law. However, the point would still be covered, even without the words "intended to be" and he was ready to omit those words, since they might give rise to misunderstanding. The other points, he thought, could be referred to the drafting committee.

33. Mr. EL-ERIAN said that suggestions for the deletion of the phrase "possessing international personality", and that it was identical in meaning with "subjects of international law", raised some doubts. He was not sure that a subject of international law necessarily possessed international personality. The position of the individual in international law, for example, had been changed by the inclusion of the provisions on fundamental human rights in the United Nations Charter and by the Convention on Genocide. The individual might be recognized as a subject of international law, but he did not possess international personality, for all purposes, as appeared from the International Court of Justice's exposition of the concept of limited international personality in the case of Reparation for Injuries suffered in the Service of the United Nations.<sup>3</sup>

34. Mr. de LUNA, commenting on the phrase "intended to be governed by international law", said that in the case of a treaty between states or between a state and an international organization, the status of the instrument in international law would not depend entirely on its nature but also partly on the will of the parties. He did not think that a general principle could be laid down by reference to which one could divide interstate contracts into "*jure imperii*" contracts which were governed by international law, and contracts which by their nature were "*jure gestionis*" contracts and were not governed by international law. Each case would have to be considered in the light of the circumstances.

35. The CHAIRMAN observed that the special rapporteur had defended but abandoned the words "intended to be governed". There were many points

<sup>2</sup> I.C.J. Reports, 1954, p. 47.

<sup>3</sup> I.C.J. Reports, 1949, p. 182.

which were mainly matters of drafting. The drafting committee would take the discussion into account and submit a revised draft to the Commission.

36. He suggested that paragraphs (a) and (b), as amended, should be referred to the drafting committee and that the Commission should proceed to consider article 2.

*It was so agreed.*

#### ARTICLE 2. SCOPE OF THE PRESENT ARTICLES

37. Sir Humphrey WALDOCK, Special Rapporteur, said that if article 2, paragraph 1, was read in the light of the decision taken on article 1, paragraphs (a) and (b), it would be possible to accept Mr. Castrén's suggestion for simplifying it to read, in part: "The present articles shall apply to every treaty as defined in article 1, paragraph (a)."

38. Paragraph 2 raised more complications, because Mr. Verdross had criticized the reference to unilateral declarations and the phrase "or any other form of international act". He (Sir Humphrey) could accept the omission of the latter phrase, which had been inserted *ex abundante cautela*, but a more substantive problem arose in connexion with the passage concerning unilateral declarations. It had been suggested by some members that a provision concerning such declarations should appear elsewhere in the draft; others had said that the passage should stand. He had not reached any final conclusion. One course might be to deal with the matter in the commentary, but it might be possible to find a form of words if the reference were placed in a different context.

39. Mr. TSURUOKA said he was somewhat uneasy about the drafting of paragraph 2, which at first sight gave the impression that an international agreement not in written form was being placed on the same footing as a unilateral declaration. The obscurity could probably be removed by redrafting. The paragraph should refer to international agreements not in written form which were excluded because they were not treaties within the meaning of the definition, and state that the provisions would not apply to unilateral declarations to the extent that they were not treaties.

40. Mr. TUNKIN said that article 1 stated that, for the purposes of the draft convention, a treaty meant an international agreement in written form, and article 2, paragraph 1, said in essence that the convention would apply only to such treaties. Logically, therefore, paragraph 2 should state simply that the convention would not apply to agreements not in written form; the words "or a unilateral declaration or any other form of international act" could be omitted. It would probably be better to retain the language of article 1, paragraph 3, of the 1959 draft. The phrase "is excluded" was not a very happy one; the phrase "does not relate" used in the 1959 draft was preferable.

41. Mr. LIU said that, since Mr. Verdross had raised the question of unilateral declarations, many members had spoken about the importance of a provision concerning such declarations. He was inclined to think that the

passage was not really necessary; but if so many members considered that it was, he would have no strong objection.

42. Mr. LIANG, Secretary to the Commission, agreed that it would be undesirable to place international agreements not in written form and unilateral declarations on the same footing. He was somewhat perturbed about the classification as a "unilateral declaration" of the declaration under article 36(2) of the Statute of the International Court of Justice, as the special rapporteur did in paragraph 2 of the commentary on the article under discussion. As a matter of theory that was perhaps possible, but such declarations could not be regarded as anything other than agreements or treaties within the meaning of the definition in article 1, paragraph (a), of the draft. He held the view that those declarations constituted treaties themselves, though contained in separate instruments, and he thought that was also the view of many states. In fact those declarations were in practice required to be submitted to the legislature for action in accordance with the ratification process provided for in the laws and constitutions of the states.

43. Sir Humphrey WALDOCK, Special Rapporteur, said that his own view was that declarations under article 36(2) of the Court's Statute were similar in nature to instruments of accession. The answer to the question would depend on whether the Commission wished to speak of treaties in the absolute sense, or of treaties for the purpose of the draft articles. The 1959 draft, which had taken the form of a code, contained an express provision, in article 1, paragraph 3, which stated: "nor does it [the code] relate to unilateral declarations or other instruments of a unilateral character, except where these form an integral part of a group of instruments which, considered as a whole, constitute an international agreement, or have otherwise been expressed or accepted in such a way as to amount to or form part of such an agreement." He had assumed that, by including a definition of "treaty", his draft would cover all forms of transactions between states. Admittedly, the draft did not show clearly enough whether unilateral declarations were to be covered by the definition of "treaty". The International Court of Justice in the *Anglo-Iranian Oil Company Case*<sup>4</sup> had adopted a somewhat different attitude towards the interpretation of a text which was in the nature of a unilateral declaration.

44. Mr. BRIGGS said that paragraph 2 seemed to say not only that nothing in the draft articles would affect the legal force of unilateral declarations but also that nothing in those draft articles related to such declarations. Such a statement might be appropriate in a draft on the conclusion of treaties, but was questionable in a draft on the interpretation or the termination of international agreements; it would be undesirable to exclude by implication the possibility of applying by analogy, to unilateral declarations, such as those accepting the compulsory jurisdiction of the International Court of Justice, the rules relating to the interpretation and termination of treaty obligations.

<sup>4</sup> *I.C.J. Reports*, 1952, p. 93.

45. In the same paragraph, he was unable to see the purpose of the words "or any other form of international act". It was clear from the context that "other form" meant neither written international agreements, nor unwritten international agreements, nor unilateral declarations. What then did it mean?

46. He strongly supported the proposal by Mr. Tunkin that paragraph 2 should deal only with the position of international agreements not in written form; also, the paragraph should be in the same terms as the 1959 text, which stated that the draft articles did not relate to such agreements, instead of stating that those agreements were excluded.

47. Mr. AGO said he approved the special rapporteur's amended text for paragraph 1.

48. Paragraph 2 raised a question of substance. The proposed text was very different from that accepted in 1959; in a sense it said almost the opposite. Article 1, paragraph 3, of the 1959 text, after stating that the draft code did not relate to unilateral declarations, added: "except where these form an integral part of a group of instruments which, considered as a whole, constitute an international agreement, or have otherwise been expressed or accepted in such a way as to amount to or form part of such an agreement". That language made it clear that, for example, declarations under article 36 (2) of the Statute of the International Court of Justice were intended to be covered by the code. The provision before the Commission, on the contrary, stated only that unilateral declarations were not covered by the draft articles, adding that that fact did not affect such legal force as those declarations might possess.

49. He was, therefore, inclined to agree with Mr. Tunkin that the reference to unilateral declarations should be dropped from paragraph 2. That question of substance once decided, the drafting would be greatly simplified. It was even possible to say nothing on the subject; since the Commission was concerned with the codification of the law of treaties, there was no reason why anyone should infer from its draft articles that the legal force of acts other than treaties was in any way affected by those draft articles. Perhaps an indication in the commentary to that effect would be sufficient.

50. If it were desired to go even further in the direction of safeguarding the validity of international obligations created by unilateral declaration, a provision might be added to the effect that there existed acts other than treaties which were capable of giving rise to international obligations; he did not himself favour the inclusion of such a provision, although he might accept it if there was a strong feeling in its favour.

51. Mr. ELIAS suggested as a compromise solution to the difficulty the deletion of paragraph 2 and its replacement by a redrafted paragraph 3 reading:

"2. Nothing contained in the present articles shall affect in any way the enforceability of an unwritten international agreement which is otherwise valid or the characterization or classification of particular international agreements under the internal law of any state in accordance with its domestic constitutional processes."

52. That text would be much shorter and would contain the essence of the provisions in the existing paragraphs 2 and 3. An explanation could be provided in the commentary on the subject of unilateral declarations.

53. Mr. AMADO said he agreed with the statements by Mr. Tunkin, Mr. Ago and the special rapporteur. The Commission had been invited to study the subject of treaties, not that of unilateral declarations. He commended the special rapporteur for his sense of proportion which had led him to avoid many issues with which earlier rapporteurs had endeavoured to grapple, as the result of a somewhat perfectionist approach. The more modest and practical aims set for himself by the special rapporteur would ensure the approval of his report by the Commission.

54. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Tunkin's view that the question of international agreements not in written form and that of unilateral declarations should not be mentioned in the same clause. He could not agree, however, that they should be placed on different levels and that article 2 should refer to the former, but that the draft should not mention the latter. The two questions should be treated separately but in the same manner, and he suggested that the Commission should agree on provisions to cover them both. Those provisions would be based on the 1950 text and on the special rapporteur's report. After the Commission had agreed on a formulation, it could decide whether the two questions should be treated in the text or in the commentary. He would prefer that both should be dealt with in the commentary.

55. A reference to the question of the validity of unilateral declarations was necessary in order to cover the practice of joint unilateral declarations.

56. Mr. TSURUOKA pointed out that the decision on the retention of the provision on unilateral declarations depended on the answer to a question which the Commission had not as yet settled. If, as the special rapporteur proposed, there was to be a separate convention on the subject of the conclusion of treaties, there would be no objection to dropping the reference to unilateral declarations. There was little or nothing in the rules on the conclusion of treaties which could apply to such declarations. When, however, the Commission undertook the codification of the rules governing the law of treaties as a whole, including in particular those relating to the validity of treaties, it would perhaps be necessary to refer to unilateral declarations; some of the rules on the validity of treaties could be pertinent in relation to such declarations.

57. Sir Humphrey WALDOCK, Special Rapporteur, said that, apart from the question of joint unilateral declarations, there was another problem for the Commission in connexion with unilateral declarations. He would be prepared to adjust the language of article 2, paragraph 2, so as to bring it closer to that of article 1, paragraph 4, of the 1959 text: the net effect of both texts was the same.

58. If paragraph 2 were confined to the question of international agreements not in written form, the ques-



tion would arise whether a further paragraph dealing with unilateral declarations should be added.

59. As far as the question of unilateral declarations of the pure kind was concerned, he would prefer it to be dealt with in the commentary. Because of the very nature of the draft articles on the law of treaties, such declarations were outside the scope of the draft.

60. He was, however, concerned at the question of unilateral declarations which were closely interconnected. Some forms of treaties appeared as joint unilateral declarations, and such declarations were covered by the very comprehensive language of article 1, paragraph 3, of the 1959 text. There occurred in international practice exchanges of declarations so similar to exchanges of letters that it was not easy to see the difference between the two; some formula should be found to cover that class of instrument and to distinguish between pure unilateral declarations and unilateral declarations which were so closely related that they constituted nothing more than a technique for the conclusion of an agreement.

61. Mr. AGO asked whether the question of closely related unilateral declarations was not already covered by the definition of a treaty in article 1, paragraph (b): "any international agreement... whether embodied in a single instrument or in two or more related instruments"; in fact, the definition went on to add "whatever its particular designation", mentioning parenthetically a number of examples of such designations, one of which was "declarations".

62. Sir Humphrey WALDOCK, Special Rapporteur, said that that was his own interpretation of the definition. However, in view of the discussion which had taken place in the Commission, it was perhaps desirable to make the matter clear in the commentary.

63. Mr. EL-ERIAN said that Mr. Amado had rightly pointed out that the Commission was dealing with the law of treaties proper; the main point, therefore, was to make that fact clear either in the text or in the commentary, so as not to prejudice the validity which other acts might possess in international law. In that connexion, he recalled the teaching of Anzilotti on the doctrine of juridical acts [*théorie des actes juridiques*]; that doctrine started from a study of unilateral acts and then went on to consider treaties.

64. The whole question of unilateral acts was therefore important and he asked the special rapporteur and the Secretary to the Commission whether a later study of unilateral acts was envisaged.

65. Mr. YASSEEN said he agreed with the special rapporteur and Mr. Ago. However, since it was possible to conclude a treaty by an exchange of notes, he could not see why it was not possible to conclude a treaty by an exchange of written declarations. As intimated by the special rapporteur himself, such an exchange would be only one special technique among others for concluding a treaty; that technique should not be excluded from the scope of the rules formulated in the draft articles.

66. Mr. TUNKIN pointed out that his suggestion

regarding article 2, paragraph 2, had been made on the understanding, expressed by Mr. Ago, that the definition in article 1 covered all written forms of international agreements. Even if, as suggested by Mr. Rosenne, the enumeration of possible designations were transferred to the commentary, the definition in the text would still be broad enough to cover any international agreement in written form, howsoever designated. It would therefore cover an exchange of unilateral declarations which was considered as a treaty.

67. He would not be opposed to such an explanatory paragraph, but it would not add anything to the rules of the law of treaties.

68. Mr. ROSENNE thought that the explanations given by previous speakers showed that the problem was beginning to resolve itself. There was no doubt that an actual exchange of declarations constituted an international agreement. That, however, did not solve the problem of unilateral declarations which were not so exchanged. In certain cases, there was some element of agreement in the negotiations preceding declarations which were ostensibly unilateral. That element of agreement could have the effect of turning such declarations into a treaty.

69. Mr. CADIEUX said that if there were two concurrent unilateral declarations the case was covered by the definition. However, there were cases where a unilateral offer might be made otherwise than in writing, but the acceptance be given in writing. Some writers considered that the acceptance created treaty relations; others held the contrary view. It was important for the Commission to say that nothing in the draft articles prejudiced the validity which such exchanges of declarations might have.

70. Mr. LIANG, Secretary to the Commission, said that the special rapporteur, by introducing the term "unilateral declaration of a pure kind", had clarified the question under discussion and taken the Commission a step further in its exploration of the subject.

71. A declaration made by a state under article 36 (2) of the Statute of the International Court of Justice was a declaration in name only. In nature, it was no different from a declaration under the Optional Protocol concerning the Compulsory Settlement of Disputes signed at Vienna in 1961<sup>5</sup> in connexion with the Convention on Diplomatic Relations. There was no reason to treat declarations under article 36 (2) of the Statute differently from declarations under the Vienna Protocol.

72. A declaration under article 36 (2) of the Statute of the Court, although labelled a unilateral declaration, constituted an instrument ancillary to and an implementation of article 36. It was important to make it clear that the rules relating to such matters as the interpretation and the termination of treaties applied to declarations under article 36 (2) of the Statute; otherwise much of the value of the draft articles would be lost.

73. Mr. AMADO urged Mr. El-Erian and Mr. Yasseen not to press for the consideration of exchanges of

<sup>5</sup> United Nations Conference on Diplomatic Intercourse and Immunities (A/CONF.20/12).



unilateral declarations. An exchange of declarations would merely duplicate an exchange of letters or an exchange of notes. The procedure of exchange of notes was part of established state practice; he did not think that states would accept provisions of the draft articles which referred to unilateral declarations.

74. As he had pointed out earlier, the whole of article 2 was superfluous. There was an infinite variety of unwritten agreements, and there could be no doubt that the Commission's codification would not affect such validity as those agreements might possess.

75. Of course, unilateral declarations could constitute an international agreement or amount to or form part of such an agreement, as set forth in article 1, paragraph 3, of the 1959 text.

76. Mr. YASSEEN, replying to Mr. Amado, said that it was the expression of the will of the parties which was the important characteristic of treaties; the form which it took was immaterial. There was therefore no heresy in suggesting that it was possible to conclude a treaty by means of an exchange of unilateral declarations. If those declarations were made in writing, there was no reason why that technique should not come within the scope of the draft article under discussion.

77. Mr. EL-ERIAN, also replying to Mr. Amado, said that there had been no intention on his part to confuse the question of unilateral declarations with that of an exchange of notes, which was clearly a case of a treaty proper. As an instance, just before he left for the session of the General Assembly last autumn, a treaty on cultural matters had been concluded by his country with the United Kingdom. The Under-Secretary of the Ministry of Education of the United Arab Republic had been anxious to leave for London for the purpose of implementing the agreement, but as the British Ambassador had not at that time received full powers to sign the treaty, the possibility had been considered of adopting the form of an exchange of notes, for which the British Ambassador did not require full powers of signature.

78. His remarks had been made in a different context. He had merely wished to learn from the special rapporteur and the secretariat whether, as a matter of long-term planning, a study of the question of unilateral declarations was proposed and he looked forward to receiving a reply on that point.

79. Mr. AGO said that there was no disagreement with regard to substance. Declarations under article 36 (2) of the Statute of the International Court of Justice were certainly covered by the draft articles; in that respect, he fully agreed with the view put forward by the Secretary to the Commission.

80. It was also agreed that, for the purposes of the article, an exchange of related declarations by two states constituted a treaty. That was made clear by the definition of "treaty" in article 1. The relation between the two declarations would result from their subject matter.

81. A different case had been mentioned by Mr. Cadieux, that where one of the declarations was in

writing and the other was not; in fact, there might also be only one declaration, followed by the silence of the other party, where silence could be construed as consent. Those forms of tacit agreement were not covered by the draft articles.

82. For those reasons, he supported Mr. Tunkin's proposal that the draft articles should contain a provision reserving the validity of tacit agreements.

83. He proposed that article 2 should be referred to the drafting committee.

84. Sir Humphrey WALDOCK, Special Rapporteur, supported Mr. Ago's proposal; the views of all members had now been made clear and he would have no difficulty in accepting a draft prepared by the drafting committee in the light of the discussion.

85. Mr. BARTOŠ also supported Mr. Ago's proposal. Mr. Cadieux had aptly illustrated the problem of substance arising from the claim made on occasion that certain circumstances could give rise to a treaty. As he had pointed out earlier, the draft articles would not aspire to judge the question whether the rules relating to treaties applied to certain unilateral declarations; the question whether there was any contractual element in such declarations and the applicability of the law of treaties to them were questions for the competent international court or arbitral tribunal in each case.

86. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 2 to the drafting committee, together with the comments made by members during the discussion.

*It was so agreed.*

The meeting rose at 1 p.m.

## 639th MEETING

Wednesday, 9 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

#### ARTICLE 3. CAPACITY TO BECOME A PARTY TO TREATIES

1. The CHAIRMAN invited the special rapporteur to introduce article 3 of his draft.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like first to make some general remarks on the article, which dealt with the international capacity of the parties to the treaty, their treaty-making power from the purely international point of view; he realized that it was a complex and controversial matter but thought that some such provision was necessary. The question of the authority of the representatives to conclude a treaty was dealt with in article 4.

3. Article 3 did not touch on the question of the internal processes of constitutional law relating to the conclusion of treaties; that question belonged to the subject of the

essential validity of treaties and would arise in connexion with the next group of articles.

4. Nor did it deal with restrictions on international capacity, especially restrictions flowing from a treaty which limited the capacity of a state to conclude other treaties. That question also seemed to belong to the next group of articles.

5. With regard to the question of constitutions which permitted subordinate units of the state to enter into treaties, he had considered the fundamental question to be: Which state or entity was ultimately the real party to the treaty? The subordinate state could well negotiate a treaty but be in fact only an organ of the parent state, which was the real party to the treaty. For example, if the Canton of Vaud concluded a treaty with the United Kingdom, and subsequently failed to carry it out, would the United Kingdom be entitled to institute proceedings against Switzerland in the International Court by reason of that breach?

6. Introducing paragraph 1, he said that the provision was intended to be a general statement of the rule in the matter. The reference to "other subjects of international law" was intended to cover such entities as the Holy See and international organizations. It also covered insurgent communities, which in practice entered into certain forms of agreement with neutral states; in a recent book, Lord McNair had stated that, although there was exceedingly little authority on the matter, there appeared to be no ground of principle which would prevent a neutral state from making agreements with the government of an insurgent community which it had recognized as belligerents.<sup>1</sup> The Commission might perhaps wish to make a separate reference to that question.

7. Mr. VERDROSS said that the special rapporteur had not drawn a clear distinction between a federal state on the one hand and a federation or union of states on the other. The distinction was not a purely academic one; it went to the root of the problem of treaty-making power.

8. In a federal state, the international capacity to become a party to a treaty was vested in principle in the federal state. There were, of course, a few exceptions in which member states were allowed a limited treaty-making capacity.

9. By contrast, in the case of unions or federations of states, the member states retained their sovereignty and, in principle, their international capacity to enter into treaties. They could, of course, delegate certain limited treaty-making powers to the union or federation as such.

10. To take the example of the United States of America, between 1776 and 1783 the thirteen colonies had constituted a union or federation of states of which the constituent entities had remained sovereign states. In 1783, the union had been transformed into a federal state and the United States of America had taken over from the constituent states the international capacity to enter into treaties.

11. To take another example, before 1848 Switzerland had been a confederation of sovereign cantons. The 1848 Constitution had superimposed on the cantons a federal state, although for historical reasons that state had continued to be called the Swiss Confederation. For the same historical reasons, the federal State of America was called the United States of America.

12. For those reasons, he could not accept a formulation which mentioned at the same level federal states and federations or unions of states. The status of unions or federations for the purpose of the law of treaties should be dealt with in subsequent articles.

13. Mr. JIMÉNEZ de ARÉCHAGA said he questioned the need for an article on the capacity to become a party to treaties. As was indicated by the special rapporteur in paragraph 9 of the introduction to his report, the emphasis had been shifted in his draft "from the 'validity' to the 'process' aspect of conclusion of treaties".

14. The Commission was at the moment dealing with the conclusion of treaties as a process; the question of international capacity would find a more appropriate place in the second draft convention, which would deal with the substantive validity of treaties.

15. The Commission had taken a decision on that question at its eleventh session, for article 3, paragraph 3, of the 1959 draft stated: "Validity in its substantial aspect denotes those intrinsic qualities relating to the treaty-making capacity of the parties..." The Commission was being asked to reverse that decision, and he did not consider that there were very convincing reasons for such a reversal.

16. In paragraph 1 of his commentary on article 3, the special rapporteur stated that, since treaties had been defined as agreements between States or other international subjects, it might be convenient to indicate "what kind of legal persons are necessary as parties to an agreement if it is to be considered as a treaty". That approach reflected a desire to cover fully all points which might arise in connexion with the subject. But if that tendency were pursued too far in the particular instance, the Commission would find itself in the position of codifying the whole law of the subjects of international law. It would then have to consider not only the definition of federal states, but also the status of the Holy See, of protectorates, of dependent self-governing territories and even of insurgent communities recognized as belligerents.

17. He therefore suggested that the position should be left as it stood; it would be for states to define what different types of states or organizations of states possessed the right to enter into treaties. There was no fear of abuse in that respect, because treaties were entered into with either one or more states or with an international organization, and those other parties would have to accept the treaty-making power of the entity claiming to have the right to enter into a treaty with them.

18. For those reasons, he urged that the article should

<sup>1</sup> Lord McNair: *The Law of Treaties*, Oxford, 1961, p. 680.

be deferred until a later stage when the Commission would deal with the essential validity of treaties.

19. From the point of view of essential validity, it might be legitimate to draft provisions covering certain aspects of international capacity to enter into treaties, since that capacity was a necessary condition of the validity of a treaty. Another reason for that course was that the subject was closely connected with that of treaties concluded in violation of prior treaties, a question which could only be dealt with in the second draft convention.

20. Mr. BRIGGS said he supported the special rapporteur's proposal that the draft should include an article on international treaty-making capacity. He would suggest a provision differing little from that proposed by the special rapporteur, and embodying the following propositions: first, that the international juridical capacity to become a party to a treaty was determined by international law; second, that every independent state possessed the capacity to become a party to treaties; third, that the treaty-making capacity of not fully independent entities depended upon the recognition of that international capacity by the state which conducted its international relations and by the other contracting parties; and fourth, the substance of the special rapporteur's paragraph 4.

21. With regard to paragraph 1, he suggested that the first sentence should end with the words "is possessed by every independent state"; the words "whether a unitary state, a federation or other form of union of states" should be deleted. He made that suggestion because he was largely in agreement with the remarks of Mr. Verdross. He did not believe there existed a division of states into unitary states and federal states: all states were unitary, but some states had a federal form of government and others had a unitary form of government.

22. For the same reasons, he suggested the deletion of sub-paragraphs 2 (a) and 3 (a), which contained descriptive statements. It was a fact that a state with a federal form of government normally conducted its foreign relations through the central government, but the question was not one of international law but of constitutional law or even of policy.

23. If it were intended to refer not to a state but to a confederation of states, then he would say that the members of a confederation were independent states and under article 3, paragraph 1, had the capacity to enter into treaties; they might, of course, have delegated that capacity to the confederation to some extent.

24. He thought that the useful reference to "other subjects of international law invested with such capacity by treaty or by international custom" should, however, be retained. For that purpose he suggested that an additional paragraph should be introduced into article 3 to read:

"Subjects of international law other than states may be invested with the capacity to become a party to treaties by treaty or by international custom."

25. That redrafting avoided the inelegance of defining

capacity in terms of itself, as was done in the special rapporteur's paragraph 1.

26. Lastly, he thought that the substance of sub-paragraphs 2 (b) and 3 (b) should be retained, but could be contained in a single paragraph to read:

"The international capacity of an entity which is not fully independent to become a party to treaties depends upon: (1) the recognition of that capacity by the state or union of states of which it forms a part, or by the state which conducts its international relations; and (2) the acceptance by the other contracting parties of its possession of that international capacity."

27. Mr. TUNKIN said that he had not reached a definite view on article 3, but had some doubts as to the advisability of including its provisions in the draft.

28. The rules of traditional international law on the subject of international capacity reflected a structure of international society in which such entities as colonies and protectorates had the status of dependent territories.

29. By contrast, one of the leading principles of modern international law was that of the self-determination of peoples, which had been embodied and elaborated in the formal "Declaration on the granting of independence to colonial countries and peoples", adopted by the General Assembly of the United Nations on 14 December 1960 as its resolution 1514 (XV).

30. The consequence of the recognition of the principle of self-determination was that every nation had the right to determine its own legal status; if it chose to become part of a unitary state, it would not be a subject of international law. If it decided to become an independent state, it had the international capacity to enter into treaties.

31. The contemporary rules of general international law did not impose on any nation or state any restrictions regarding its capacity to conclude treaties; nor did they sanction directly or indirectly the state of affairs which had so frequently existed under the old rules of international law regarding colonies and protectorates. Of course, some limitations existed: a state which was a member of a federation might not possess, under the federal constitution, the capacity to enter into treaties with other countries. As had been pointed out by Mr. Briggs, that was a problem not of international law but of constitutional law.

32. Limitations on a state's treaty-making capacity could, on the other hand, be imposed by an international treaty. Such limitations were valid in international law because states were free to enter into such treaties. In most instances, the limitation took the form of an undertaking by a state that it would not enter into certain types of treaty.

33. However, a limitation of that type was imposed, not by general international law but by the special agreement entered into by the country concerned. Since the draft articles were intended to become a convention and to express general rules of international law, there

was no reason why they should reflect limitations which were laid down either by constitutional law or by special international law.

34. When preparing its draft articles on diplomatic relations, which had formed the basis of the Vienna Convention of 1961 on Diplomatic Relations, the Commission had discussed the question whether a provision should be included on the right of legation or, as Mr. Ago had termed it, the capacity to establish diplomatic relations and to set up diplomatic missions. After considerable discussion, the Commission had decided not to include an article on that subject. A similar course had been adopted in the draft on consular relations. The position with regard to the international capacity to conclude treaties was similar in many respects to that of the right of legation.

35. Mr. CASTRÉN said that, although he had at first thought that the provisions of article 3 might be useful, after listening to the discussion he now had doubts. He was a strong believer in the principle of self-determination within reasonable limits. It could not be denied, however, that there still existed unions of states and states which had accepted, on a purely voluntary basis, a status of dependency. Such was, for example, the relationship between Liechtenstein and Switzerland.

36. With reference to the remarks of Mr. Verdross and Mr. Briggs, he said that the special rapporteur's formulation was correct, in that it drew a perfectly valid distinction between unitary states on the one hand and federations or other forms of unions of states on the other.

37. Mr. PAREDES said that article 3 dealt with the purely formal question of international capacity to become a party to a treaty.

38. He thought that the Commission should explore other and more fundamental questions. As he understood it, it was the aim of the Commission that treaties which were valid in international law should not only be observed by the parties, but should also enjoy a measure of international guarantee of their observance. It should, therefore, not be left to the parties to decide whether a matter was governed by international law or by municipal law. The answer to that question should depend on the nature of the subject-matter.

39. The reference to unitary states on the one hand and to federations or other forms of unions of states on the other did not cover the whole ground; there was also the question of protectorates. It had happened in the past that the protected state had given its consent to a treaty in circumstances which made the reality of that consent doubtful.

40. There were, moreover, the recently formed associations of states, such as the European Economic Community. Did those associations possess international personality and the capacity to enter into treaties? One interesting feature of those associations was that they could comprise states which had very different political systems, such as republics and kingdoms.

41. The draft should not only define what was a treaty

in the formal sense, but should also go deeper into the essential questions of the determination of the relations which could be governed by a treaty and of the nature of the acts to which a treaty could refer.

42. Mr. BARTOŠ said that, if the Commission proceeded on the premise that general principles should find no place in a draft dealing with a limited topic, there would be little left to include. It was often urged to refrain from academic philosophizing, but should nevertheless start with the constituent elements of the law of treaties even if they were embodied in rules which came under the heading of general principles. A draft on treaties should state not only the general principles but also the particular and specific rules by which they were to be applied.

43. The question of treaty-making capacity or, perhaps better, of capacity to conclude treaties, arose naturally out of the question who could be a party to a treaty, and that was a question which had to be dealt with when speaking of the constituent elements in any draft on the law of treaties. And as the question was a fundamental one, it should be dealt with in the present draft rather than in the draft on the validity of treaties, since under that heading the Commission would be primarily concerned with the problem of lack of capacity.

44. He agreed with Mr. Verdross that the phrase "federation or other form of union of states" was open to misinterpretation. It would probably be necessary to specify in the draft that, for the purpose of determining the treaty-making capacity of certain types of state, the provisions of the constitution were decisive.

45. Without expressing any final opinion on the special rapporteur's conception of the manner in which the position of so-called dependent states should be treated in the draft, he shared the doubts, both legal and political, expressed by Mr. Tunkin. There were two aspects to the problem. A dependent state which possessed treaty-making capacity should be regarded as a subject of international law, at least in embryo; but the other question was whether treaties concluded on behalf of such a state before it had acquired independence retained their validity after its emancipation. The problem would require very careful thought; for the time being there were very grave objections to the proposition that treaties concluded by the protecting power bound the protected state when it became independent. To illustrate the difficulty of the subject, he said that there were four schools of thought on the question of the fate of treaties concluded by the former territorial sovereign where the state acquired independence—namely, the *tabula rasa* theory; the theory of absolute succession; the theory of optional succession at the option of the emancipated state; and the recent theory, created by the statement in connexion with Tanganyika's independence, that treaties would remain in force for two years after the date of the proclamation of independence, during which the new state would decide which treaties would continue to be binding.

46. Another question to be decided was whether the expression "other subjects of international law" was

intended to cover dependent states. What did that expression mean? Did it refer to those subjects of international law known as "irregular persons" such as, for example, the Order of Malta? The point should be clarified.

47. While he was ready to accept paragraph 1, he hoped the drafting committee would consider the possibility of explaining in the commentary what was meant by the phrase "subjects of international law invested with such capacity by treaty or by international custom". He was personally of the opinion that the word "custom" could only be taken to mean rules of general customary law, including even regional custom of general scope, but he was absolutely opposed to custom of particular scope being taken into consideration. Furthermore, what was meant by "invested with such capacity by treaty"? Did it mean that every treaty between any subjects of international law whatever could create a status which had to be recognized by all states, or did it apply only to those states which were bound by the treaty in question? Did it mean, for example, that if the Holy See or the Order of Malta signed a treaty with a particular state, therefore the treaty-making capacity of the Holy See or of the Order of Malta was recognized by all states or just by that particular state? He thought that, in order to apply generally, such capacity could be conferred on an entity in that category only by some act which was universally recognized in international law as the source of the rule establishing the legal status of the entity in question—a kind of collective recognition.

48. Mr. AMADO said that Mr. Jiménez de Aréchaga had covered many of the points he had wished to raise. It was a pleonasm to say that any independent state had the capacity to conclude a treaty, for without that attribute it would not be a state in the accepted sense of the word.

49. Article 3 as proposed by the special rapporteur was too broad. There was no need to go into matters belonging to the realm of constitutional law. If a provision on treaty-making capacity was to be retained—a course he did not particularly favour—it should be in the form proposed by Mr. Briggs.

50. Mr. YASSEEN said he saw no objection to including in the draft an article on the capacity to become a party to treaties. From both the theoretical and the practical points of view, the moment for determining whether a party had such capacity was at the conclusion of a treaty. The consequences of lack of capacity could be discussed by the Commission in connexion with the articles concerning the validity of treaties.

51. It seemed hardly appropriate, at a time when the colonial system was disappearing, to draft provisions dealing with the position of dependent states; the Commission should not legislate for a state of affairs which would soon belong to the past.

52. Furthermore, in those cases where a state entrusted the conduct of its foreign affairs to another, the arrangement could never be regarded as definitive and as depriving the former for all times of the possibility of

exercising its essential rights as an entity possessing international personality.

53. Mr. TABIBI said that, in the light of the commentary on article 3 and of the discussion, he thought that paragraph 1 should be retained, since it stated a fundamental and generally accepted principle of the law of treaties. On the other hand, he shared the doubts expressed by other members about the rest of the article, which dealt with matters that pertained either to constitutional law or to bilateral or multilateral agreements not governed by general rules of international law. The points covered in paragraphs 2 to 4 should be dealt with in the commentary.

54. The provision in sub-paragraph 3(a) concerning the position of dependent states seemed to be at variance with that in paragraph 1, concerning the treaty-making capacity vested in independent states. A provision which implied that treaties entered into on behalf of newly independent states by the former colonial powers still retained their validity would undoubtedly create difficulties, particularly for African and Asian countries.

55. Mr. AGO said that a careful reading of the special rapporteur's text, notwithstanding that he approved generally the principles stated in it, left him with an indefinable feeling of dissatisfaction.

56. Perhaps some of his objections to article 3 were due to the approach adopted by the special rapporteur, but he considered Mr. Tunkin's suggestion that the article should be deleted would be altogether too radical a step. Capacity to become a party to treaties was an essential expression of international personality. For the purpose of determining whether certain entities were or were not subjects of international law, one of the tests applied was: Did they possess the capacity, whether limited or not, to become parties to a treaty? Incidentally, the expression "capacity to conclude a treaty" was to be preferred to the expression "international capacity", which some authorities equated with international personality.

57. According to existing law, all subjects of international law had, as a rule, the capacity to become parties to a treaty. If the rule was stated in that way, it then became simpler to specify the cases in which that capacity was restricted. For example, certain limitations could derive from internal rules, as in the case of some federal states whose constituent states, although possessing the status of autonomous subjects of international law, could conclude certain types of treaty only. In other cases, for example, those of states in territories under trusteeship, the limitations might have their source in an international treaty. Yet another case was exemplified by the relationship between Luxembourg and Belgium: though Luxembourg was indisputably an independent state, Belgium negotiated commercial treaties on behalf of both, and from that it might be inferred that a limitation on the capacity of Luxembourg to negotiate treaties was established by an international treaty.

58. If article 3 were redrafted in terms providing that each state and any other subject of international law

had the capacity to conclude treaties, subject to the limitations imposed by the constitutional law of certain unions of states or by international treaties in force, the ground would have been covered: the practical effect would be the same as that of the special rapporteur's draft article 3, and the particular political and legal stumbling blocks mentioned during the discussion would have been avoided.

59. Mr. ROSENNE said that he, too, had some doubts about the special rapporteur's draft for article 3. The question arose whether, in international law and international relations, international capacity was a matter of concern to the parties to a treaty alone, or whether it was also of concern to the international community as a whole. In his opinion, it was primarily of concern to the parties, including in the case of certain multilateral treaties those states which might become parties subsequently. International personality had many facets and consequences, of which the treaty-making power was only one. He had been much struck by the way in which state responsibility, for example, and diplomatic and consular intercourse and immunities, were connected in the literature and in practice with international personality. He had therefore been impressed by Mr. Tunkin's remark drawing attention to the solution reached in the 1959 draft, *mutatis mutandis*, and in article 2 of the Vienna Convention on Diplomatic Relations, in which the treaty-making capacity was simply postulated. The topic of international personality was a vast subject, which the Commission might eventually investigate, but at that stage it might simply be taken as existent.

60. Another question was, for what purpose the Commission was concerned with international capacity. Some international lawyers might be subconsciously influenced by legal concepts that flowed initially from domestic law, where capacity served quite a different purpose from that which it served in international law. In domestic law, the question of capacity arose in connexion with contracts made with a person not *sui juris*, such as a lunatic or infant. In such cases, the notion of capacity had an economic function which was irrelevant to international law. The International Court of Justice had on several occasions issued a warning against drawing too close analogies with notions of domestic law: a general warning in connexion with its Advisory Opinion on the International Status of South-West Africa,<sup>2</sup> and a warning connected specifically with the law of treaties in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>3</sup>

61. It might also be asked whether the possession of international capacity was not implicit in the definition of "treaty" already provisionally adopted. In the last resort the answer would depend on the facts and circumstances of each case, including the intentions of the parties, which themselves constituted a fact. For instance, in that part of the judgement of the Interna-

tional Court of Justice in the Anglo-Iranian Oil Company case which dealt with the question whether the concession contract of 1931 was or was not a treaty—a treaty binding on the United Kingdom and on Iran, not the oil company—the Court had not said that a transaction concluded in that particular form might not ultimately create an international treaty, but it had said that, in the particular circumstances of that case, it had not in fact brought into being an international treaty.<sup>4</sup> The solution depended not so much on a notion as on the facts; it might very well be similar to that reached by the Commission in 1959 and be expressed by inserting in the definition of the term "international agreement" the phrase "possessing international capacity".

62. The possession of treaty-making power was inherent in the very conception of the state for the purposes of international law, whether the state was independent or dependent. For extrinsic reasons there might be limitations on the power to make treaties in the case of dependent states, either imposed on those states or sometimes deriving from the treaty by which another state became responsible for the conduct of the dependent state's foreign relations. Under the Mandates System of the League of Nations, for example, it had been possible for mandated territories themselves to be parties to international treaties, but the Mandatory Power might also in some cases conclude treaties in their name or extend its own treaties to theirs. Thus the limitation might work both ways. An account of the situation drawing attention to some of the subsequent difficulties that had arisen had been given by the Israel Government in its reply to an earlier questionnaire by the Commission.<sup>5</sup>

63. Mr. Briggs had referred to the recognition of the treaty-making power by the other party concerned. That might be a pleonasm, because the treaty itself was surely evidence that the parties recognized each other's capacity. It might well be that the problem raised by Mr. Briggs was solved by the provisions in draft article 4 relating to the acceptance of a representative's full powers, although that might be a rather pragmatic solution.

64. He was inclined to agree that sub-paragraph 2 (a) might not be wholly relevant to the topic before the Commission, which was the conclusion, entry into force and registration of treaties. The question of who had capacity to make treaties differed somewhat from the questions of who had authority under domestic constitutional law to make treaties on behalf of the state and what part of a federal state was bound by a treaty made by a component unit of the federation. He was not at all sure that such questions could be regulated by general international law.

65. In all those questions the individuals actually engaged in the negotiations would always have to satisfy themselves whether the negotiations were intended to

<sup>2</sup> *I.C.J. Reports*, 1950, p. 128.

<sup>3</sup> *I.C.J. Reports*, 1951, p. 15.

<sup>4</sup> *I.C.J. Reports*, 1952, p. 93.

<sup>5</sup> Document A/CN.4/19, paras. 5-13 and 19-28.

become an international treaty, and on whom that treaty would be binding, and whether they, as individuals, were empowered to perform the acts in question.

66. Certainly, some mention of international capacity should appear in the draft, even at that stage, but the Commission should not concern itself for the time being with the many variations in the structure of states which might influence their treaty-making power. Mr. Ago's suggestion for simplification commended itself as a method of dealing with the draft article.

67. Mr. GROS said he considered that draft article 3 was essential. He shared the special rapporteur's view that some provision relating to capacity to conclude treaties should be included in the draft articles. The Commission should examine the subject in all its aspects and it was essential to state who could conclude treaties. Mr. Rosenne had suggested that the question settled itself, but as the commentary pointed out, difficulties would arise if a person lacking international capacity concluded an agreement described as an international treaty. The Commission should therefore establish a rule. In every textbook on international law there was a chapter on the treaty-making power from the aspect of international law, not merely of domestic law.

68. The draft article should, however, be simplified, since it contained elements too nearly relating to comparative constitutional law to be included in a draft convention, and those elements should be transferred to the commentary. He agreed with Mr. Ago and supported the formulation he had suggested, as it was a perfect description of the situation in law. It was true that only a subject of international law could conclude a treaty, but it was not sufficient just to say that, because it was equally true that limitations were recognized by international law in certain cases for certain subjects of international law. Any jurist perusing the draft articles and failing to find any reference to capacity to conclude treaties would think that the Commission had overlooked a question which was entirely a matter of international law. When the general discussion had been concluded, the Commission should accept Mr. Ago's suggestion in principle and refer draft article 3 to the drafting committee.

69. Mr. LIANG, Secretary to the Commission, said that in his opinion it was of importance that the draft articles should include an article on capacity to make treaties. He agreed with Mr. Bartoš that it should not be placed under the heading of validity of treaties, which dealt rather with the consequences of its lack of capacity.

70. Since the Commission had made at least a tentative decision that the draft should be presented in the form of a convention, the method of drafting the articles would necessarily differ from that of the code drafted in 1959. Greater latitude was possible with a draft code, but if the convention form was used, he would hesitate to subscribe to the use of terms that were theoretically valid but might be unacceptable to states, such as "international personality" and "subject of

international law", whose connotations were much debated even in scientific circles. States would be reluctant to adopt those terms in treaties. The 1928 Havana Convention,<sup>6</sup> the Harvard draft<sup>7</sup> and the draft worked out by the Commission itself in 1951<sup>8</sup> might suggest more appropriate terminology.

70. He agreed with the criticism of paragraph 1, that it was difficult to speak of treaties that invested a state with treaty-making capacity. However, it was doubtful whether the capacity of international organizations to make treaties could be based on international custom instead of on express provisions in the constitutions of those organizations, which were international treaties in themselves, or on implied powers granted in those constitutions.

71. Dependent states raised wider constitutional questions within the realm of the United Nations family. The question whether they could make treaties was a part of the general question connected with their effort to achieve statehood, and that general question was now in a state of flux.

72. Mr. BRIGGS said that Mr. Rosenne had argued that only the parties to a treaty were concerned with international capacity and had seemed to doubt whether capacity could be regulated under general international law; but an analogous remark could be made about the subjects of most of the draft articles. The Commission should give guidance on the law of treaties, and therefore it was very important to include an article on international capacity. Mr. Ago's suggestion was ingenious, but might not provide sufficient guidance.

73. The CHAIRMAN, speaking as a member of the Commission, noted that, in the definitions article, states were mentioned without qualification, while other subjects of international law were qualified by the phrase "having capacity to enter into treaties"; states were presumed to possess the capacity. It was unnecessary to repeat in article 3 the self-evident proposition that states possessed international capacity, though in the case of "other subjects of international law", such a phrase might be appropriate.

74. Speaking as Chairman, he said that if the Commission decided to accept the proposals made by Mr. Jiménez de Aréchaga and Mr. Tunkin, no further discussion would be needed. Mr. Jiménez de Aréchaga had suggested that article 3 should be removed from the draft and placed in a second convention, while Mr. Tunkin had suggested that it might be omitted altogether; for immediate purposes, the two suggestions were practically the same.

75. Mr. JIMÉNEZ de ARÉCHAGA replied that members who had spoken after him had suggested a simpler formulation of the article. As a consequence

<sup>6</sup> Supplement to the *American Journal of International Law*, Vol. 29, No. 4, 1935, p. 1205.

<sup>7</sup> *ibid.*, p. 686.

<sup>8</sup> *Yearbook of the International Law Commission 1952*, Vol. II (United Nations publication, Sales No.: 58.V.5, Vol. II), pp. 50-56.



the matter appeared in a different light, and he would appreciate further discussion of those suggestions after they had been circulated in writing.

76. Mr. AMADO said that his reply to Mr. Gros had already been given by Mr. Rosenne with his reference to negotiators of treaties and to article 2 of the Vienna Convention on Diplomatic Relations.

77. In his usual conciliatory spirit, he was perfectly willing to entertain Mr. Ago's suggestion.

78. Mr. AGO said that he could not agree with the Chairman's interpretation of the phrase in article 3 concerning capacity to enter into treaties. The Chairman had evidently assumed that the phrase applied only to "other subjects of international law", not to states. He (Mr. Ago) had assumed that it also applied to states, for there were some states which might not possess the capacity. The question therefore remained open.

79. He suggested that the special rapporteur should produce a simplified text for draft article 3 and submit it to the next meeting.

*It was so agreed.*

The meeting rose at 12.55 p.m.

#### 640th MEETING

Thursday, 10 May 1962, at 10 a.m.

Chairman: Mr. GROS

#### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)

*In the absence of Mr. Pal, the Chairman, who was indisposed, Mr. Gros, first vice-chairman, took the chair.*

1. The CHAIRMAN invited the Commission to continue its discussion of article 3.

#### ARTICLE 3. CAPACITY TO BECOME A PARTY TO TREATIES (continued)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he was still of the view, shared by a number of members, that an article on capacity to become a party to treaties should be included in the draft. He appreciated the argument that there was a certain analogy between the establishment of diplomatic relations and that of treaty relations, but the question of capacity assumed a far greater prominence in connexion with the law of treaties than with diplomatic intercourse and immunities. That was clear from almost every textbook on the subject, as Mr. Gros had pointed out, and even from almost every course of lectures. Mr. Lachs had included it in his series of lectures at The Hague in 1957 on the development of multilateral treaties. It was not merely an academic point. In the case of a federal state, the other contracting state would want to know to whom it could look for the observance of the treaty. He had illustrated the point by posing the question whether it would be possible to bring Switzerland

before the Court in connexion with a treaty concluded by one of the Swiss cantons. But the same question could equally arise before any organ of the United Nations. To take a theoretical and perhaps absurd example, if a province or state of a federation was a party to the Genocide Convention, would it alone be responsible before the General Assembly for a violation of the Convention or would the federal state also be responsible? Another practical aspect of the question of capacity was state succession, as Mr. Bartoš had emphasized.

3. He had attempted in draft article 3 to deal with what appeared to be the existing situation. He had not merely followed the textbooks, but had based himself on the great mass of treaties published in the United Nations *Treaty Series*. He agreed that the wording might be simplified and improved, but he did not wish to delay the Commission by commenting on all the suggestions made, for it was evident that the draft would have to be recast, not merely amended. He wished, however, to explain that he had not confused confederations and federations, as Mr. Verdross had suggested. In the English language, "federal state" and "federation" were interchangeable terms. The reference in paragraph 1 to a union of states was intended to cover such classical unions as those between Norway and Sweden and between Denmark and Iceland, in which the component states had the capacity to make treaties, but some treaties had been concluded on behalf of both states. New forms of union had arisen more recently, notably the European Economic Community. If the Commission could have reached agreement on rules giving rather more guidance on some of those specific problems of capacity, it would have been helpful, and Mr. Briggs seemed to be of the same opinion. However, it was clear that there was going to be the greatest difficulty in arriving at an agreement on some of the specific problems of capacity. Accordingly, he agreed with Mr. Ago that the provision should be drafted in more general, if less informative, terms.

4. What Mr. Ago was suggesting was, in effect, that the article should state that the capacity under international law to conclude treaties was possessed by every state or other subject of international law save for the limitations imposed by internal constitutional provisions or by treaties in force. He (Sir Humphrey) could not quite accept that; he considered that the article should retain, if possible, some indication of the distinction between the capacity of a state or subject of international law as such, under international law, to conclude treaties and the exercise of such capacity through constitutional organs.

5. A more substantial point was that the words "apart from the limitations which may result from an international treaty in force" contained an ambiguity. If they referred simply to treaties like the European Community Treaty, which were constitutional in character and affected the status of the several member states in particular spheres, there was no objection. But if they referred to any treaty, they were too wide; there was then a confusion between capacity and



essential validity. For most authorities would regard a situation in which a state lacked "capacity" because disabled from entering into a treaty by reason of having concluded prior treaty obligations, as pertaining to "validity" rather than "capacity". Of course, there were special cases, such as the provision in the Charter declaring that, in case of conflict, the obligations in the Charter were to prevail.

6. There might, furthermore, be certain difficulties in referring to the limitations imposed by internal constitutions, since that reference might raise internal questions irrelevant to the larger question of international capacity and the question whether a state which had concluded a treaty might subsequently attempt to elude its consequences by pleading the terms of its internal constitutional law. At least two divergent views existed on that topic. The question arose in the later sections of the Law of Treaties and would then have to be considered thoroughly.

7. It had been proposed that draft article 3 should be referred to the drafting committee in its new form. He had not yet been able to arrive at a really satisfactory formulation, but if the Commission agreed to abandon the attempt to be specific and to follow the line which Mr. Ago had suggested, the main work might be done by the drafting committee.

8. If the reference to internal constitutional law was to be retained, he would suggest that a redrafted paragraph 1 should read as follows:

"1. Capacity under international law to conclude treaties is possessed by every state or other subject of international law. Such capacity may, however, be limited by the provisions of its internal constitution or by the provisions of any international instrument restricting or defining its functions or powers."

9. In the case of confederations such as the European Economic Community, there might be certain areas in which the treaty-making capacity of the member states was controlled by an international instrument in some respects and not in others. He would therefore wish to include a second paragraph, in the following terms:

"2. The capacity of any state or other subject of international law to conclude treaties is exercised through such organ or organs as its constitution, constituent instrument, internal laws or usages may prescribe."

A paragraph of that kind showed that the exercise of capacity was governed by internal law. Admittedly, it did not add a great deal, but the addition was logical because it led on to the draft articles in chapter II, Rules governing the conclusion of treaties by states.

10. He could not endorse the Secretary's suggestion that the expression "other subjects of international law" should not be used, for it would be extremely difficult to find an alternative expression of equivalent meaning. The only difficulty was that some critics might argue that individuals were subjects of international law, but that should not dissuade the Commission from using the term, as the entire context showed that the draft article

could not possibly have any bearing on the status of individuals.

11. Mr. JIMÉNEZ de ARÉCHAGA said that the discussion had shown conclusively that the law concerning international legal persons was not ripe for codification. Proposals had been made for a provision which amounted simply to a reminder that the subject existed; but the new drafts raised very serious questions of substance which were not within the competence of the drafting committee.

12. The limitations of capacity imposed by the provisions of a state's internal constitution had been dealt with very clearly by Sir Gerald Fitzmaurice, the previous special rapporteur, in article 8, paragraph 6, of his third report and in the third sentence of paragraph 29 of the commentary.<sup>1</sup>

13. From a practical point of view, by including such a provision the Commission would be entering a new field—the effects of constitutional limitations on the validity of treaties—and in a very dangerous way, and one contrary to its own earlier decisions, by proposing a rule which in effect might authorize a state to plead its own constitutional limitations for the purpose of evading its obligations under a treaty which it had concluded. That was specifically prohibited by article 13 of the Draft Declaration on the Rights and Duties of States approved by the Commission at its first session.<sup>2</sup>

14. With reference to the limitation imposed by the provisions of other international instruments, Sir Gerald Fitzmaurice's commentary, notably passages in paragraph 28, was very clear. The limitation did not arise from status but from contract. That had also been the view of the late Sir Hersch Lauterpacht.<sup>3</sup> The question had been raised whether the provision covered protectorates. If a state established a protectorate, it was not possible to say that the protected state lost the treaty-making power in general, but it lost the power with regard to certain types of treaties. The draft articles tentatively adopted by the Commission in 1951 contained a provision stating that the capacity of a state to enter into certain treaties might be limited.<sup>4</sup>

15. The new draft also dealt with subjects of international law other than states. If the component units of a federal state were regarded as states, the Commission would be proposing a rule the consequence of which would be that all federal states would have to enact laws forbidding their component units to conclude treaties, whereas the existing situation was precisely the reverse, in that only those component units authorized to do so could conclude treaties. Trust Territories, considered by many authors to be subjects of inter-

<sup>1</sup> *Yearbook of the International Law Commission, 1958* (Sales No. : 58.V.1, Vol. II), pp. 25-33.

<sup>2</sup> *Yearbook of the International Law Commission, 1949* (Sales No. : 57.V.1), p. 288.

<sup>3</sup> *Yearbook of the International Law Commission, 1953* (Sales No. : 59.V.4, Vol. II), pp. 137-141.

<sup>4</sup> *Yearbook of the International Law Commission, 1951* (Sales No. : 57.V.6, Vol. II), p. 74.

national law, would by the proposed new provision acquire authority to make treaties unless specifically forbidden to do so by treaty or constitutional provision. The rule governing international organizations was that they possessed treaty-making capacity if expressly or implicitly authorized by their charter or constitution, but, under the new proposal, the reverse would obtain. Those were considerations which exceed the competence of the drafting committee.

16. It would certainly be very difficult to incorporate such a provision in the draft. That was why Lauterpacht, when examining that matter in his commentary on article 1 of his first draft,<sup>5</sup> had not proposed any such provision and had dropped the provision tentatively approved by the Commission in 1951. He agreed with Mr. Gros that the total omission of any reference to the capacity to become a party to treaties might give the impression that the Commission had ignored so important a subject, but it might be possible to make the position clear in the commentary. Equally, the reference to the treaty-making power as a necessary element of a treaty in the definition of "international agreement" might be sufficient. That would follow the precedent of the articles on diplomatic intercourse and immunities, in which it was not stated who had *jus legationis*. The treaty-making capacity might well be regarded as postulated.

17. Mr. TUNKIN said that his doubts about the advisability of including a draft article on the capacity to become a party to treaties had increased after hearing the debate, especially the remarks of the special rapporteur and Mr. Jiménez de Aréchaga. Even the shorter formulations suggested by Mr. Ago and the special rapporteur gave rise to many doubts. In suggesting that the draft article should preferably be omitted, he had not meant to deny the existence of the problem of international capacity; he had clearly indicated that it did exist. There were, however, many problems with which the Commission was not obliged to deal, especially when drafting a convention; his view was supported by the Commission's past practice.

18. The theoretical problem whether the impediments to capacity arising from internal constitutional provisions or previous treaties should be reflected in a draft intended to include rules for future international law was a serious one. It was doubtful whether those particular situations which existed and gave rise to problems of capacity should be regarded as governed by general international law. Mr. Jiménez de Aréchaga had rightly pointed out the danger of referring to constitutional problems and to previous treaties. The Commission would be treading very delicate ground if it referred to them even in the form suggested by the special rapporteur. It was doubtful whether any treaty could be regarded as a limitation of sovereignty, since it was itself a manifestation of the exercise of sovereignty. Undoubtedly, there were treaties which created specific situations, but it might be unwise to reflect them in the

draft, for they in turn reflected circumstances prevailing under the colonial system. The Commission might prefer to agree to the suggestion made earlier that it would suffice if the draft provided that every state possessed the capacity to make treaties so far as general international law was concerned; a provision having virtually that effect occurred in draft article 1. It might be wiser to omit draft article 3 for the time being and possibly return to it later when the Commission had a clearer view of what was involved.

19. Mr. de LUNA said that although the article was extremely difficult to draft, the Commission should make every effort to do so and to settle outstanding questions before referring it to the drafting committee. In his opinion, an article on the *jus contrahendi* should be included in the draft convention. It was not pleonastic to say that the state had the capacity to conclude treaties, since that right was an attribute of state sovereignty. The Permanent Court of International Justice had used those identical terms, if his memory served him, in its judgement in the s.s. *Wimbledon* case.<sup>6</sup>

20. At the same time, the Commission should beware of a confusion between the treaty-making capacity of a subject of international law and the competence of the state's organ to declare internationally the will of the state to enter into a treaty.

21. Nor should the Commission confuse the limitations imposed on the state's treaty-making capacity by internal constitutional law with the limitations on the *jus contrahendi* which were the consequence of earlier treaties.

22. The special rapporteur had said it would be evident from the context that "other subjects of international law" could not be construed as meaning individuals. Nevertheless, he (Mr. de Luna) considered that a practical problem existed. For instance, individuals could be subjects of international law without *jus contrahendi* and belligerent insurgents did not in principle possess the international *jus contrahendi*, though treaties made with insurgents had been recognized by virtue of customary international law.

23. Mr. AGO said that, in his earlier remarks concerning the limitations placed on a state's treaty-making capacity, by internal constitutional law, he had not meant to refer to the case where a state might be debarred by its own constitution from concluding certain treaties. That case fell outside the Commission's scope. He agreed with Mr. Jiménez de Aréchaga that a state could not plead its constitution or changes in its constitution for the purpose of evading the consequences of a treaty which it had entered into. What he had been referring to had been the position of a subject of international law which was a member of a federal state or of a federation. That question should probably be determined more clearly than it had been in either the draft suggested by himself or that proposed by the special rapporteur.

<sup>5</sup> *Yearbook of the International Law Commission, 1953* (Sales No.: 59.V.4, Vol. II), p. 95.

<sup>6</sup> Publications of the Permanent Court of International Justice, Series A, No. 1, *Collection of Judgments*, 1923, p. 25.

24. With regard to the limitation of a state's treaty-making power in consequence of a previous treaty, that limitation was rather exceptional. More frequently a treaty imposed on a state only an obligation to refrain from concluding certain other treaties, and in such cases a treaty in breach of such an obligation was valid, even if it involved a responsibility of the state towards the other state with which it had assumed the said obligation.

25. In a very few cases the capacity itself of a state to conclude treaties was affected by a treaty, and then the subsequent treaty was not valid. He had thought that the idea was clear because, when he had referred to the limitation of capacity, he had not been speaking in general and had not been referring to treaties which only imposed on a state the obligation not to conclude certain types of treaties. The text submitted by the special rapporteur covered much the same ground. The Commission could not go further, since in each case the treaty had to be interpreted to see whether it imposed obligations it might or might not respect or had the effect of depriving it of capacity.

26. The special rapporteur's revised text was very effective. It was impossible to avoid using the term "subject of international law", since there was no other way of expressing the idea. In passing, he agreed with Mr. de Luna that not all insurgents had treaty-making capacity; but he wished to point out that they possessed it if they were subjects of international law. Thus the term "any other subject of international law" would include such insurgents.

27. The draft should include some provision dealing with treaty-making capacity. The definition of "treaty" raised the question of who possessed capacity to be a party to a treaty. If any states or other subjects of international law did not possess it, that should be stated, even if only one such case existed. The analogies with the establishment of diplomatic relations which had been suggested were too facile. The consequences of incapacity to establish diplomatic relations were relatively trifling in comparison with the consequences of incapacity to conclude treaties, for a treaty with a state which did not possess such capacity would be null and void, and that would be evident if the case were brought before the International Court of Justice or some other international tribunal.

28. Mr. VERDROSS explained that some of his earlier remarks on article 3 had been based on a misunderstanding of the special rapporteur's use of the term "federation of states".

29. As regards substance, he accepted Mr. Ago's suggested shorter form of article 3, but drew attention to the need to cover three different situations.

30. The first was that of two or more sovereign states setting up, by treaty, a new subject of international law on which they conferred competence to enter into treaties on their behalf in respect of certain matters; such was the case of the European Economic Community.

31. The second was that of a subordinate unit of a

sovereign state, upon which the capacity to enter into treaties had been conferred, either by the constitution of the sovereign state or by an international treaty; the Swiss Constitution for instance, gave a limited treaty-making capacity to the cantons, while the Covenant of the League of Nations had recognized the treaty-making capacity of certain dominions and former British colonies. Those two situations had no connexion with colonial problems.

32. The third was that of two states entering into a treaty by virtue of which one of them renounced its treaty-making capacity in whole or in part and delegated its competence in that respect to the other party. Protectorates of the colonial type were fast disappearing, but the protectorate phenomenon was not confined to relations between European states on the one hand and African or Asian states on the other; Bhutan, for example, was linked by treaty with India as a protectorate. Again, it would not be true to suggest, as was done in paragraph 3 of the special rapporteur's draft, that the third situation arose only in regard to a state dependent upon another state. Liechtenstein's relationship with Switzerland and Luxembourg's relationship with Belgium were examples of such a situation between two states which were absolutely equal in law.

33. If, therefore, a formulation valid for all cases was to be drawn up, the drafting committee would have to take into consideration all the three situations he had described.

34. Mr. TUNKIN, replying to Mr. Verdross, said that he had never disputed that the problem of treaty-making capacity could arise otherwise than in the context of colonial relations. But under traditional international law, such instances had been the exception; the main preoccupation of writers who had dealt with the problem had been the colonial system. In practice also, under traditional international law, it was protectorates, colonies and dependent territories which had given rise to discussion of that problem.

35. Mr. AMADO said that Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice had endeavoured to cover very thoroughly every problem which might arise in connexion with the law of treaties, in the light both of history and of theoretical and practical considerations. Both had nevertheless managed to draft concise articles on treaty-making capacity.

36. It was therefore with some concern that he saw the special rapporteur, who had otherwise shown a more practical approach to the subject than his predecessors, put forward an elaborate draft article on the question.

37. Since the draft articles were intended to serve as a basis for a convention, and in view of the clear and concise terms of the Havana Convention on Treaties of 20 February 1928,<sup>7</sup> he preferred a formulation which would confine itself to the essential points.

38. He was not convinced by the arguments for introducing article 3 put forward by the special rapporteur

<sup>7</sup> Supplement to the *American Journal of International Law*, Vol. 29, No. 4, 1935, p. 1205.

in his commentary. Examining the writings on the subject of the law of treaties, he had not found any chapter on the treaty-making capacity of states. All sovereign states, by virtue of their sovereignty, enjoyed that capacity. Nor did he find a reference by any writer to the subject of the capacity to exercise treaty-making powers.

39. When two parties negotiated a treaty, the negotiators took care to verify the full powers of those with whom they were dealing; one of their foremost preoccupations was to avoid all possible grounds of nullity of the treaty they were negotiating.

40. The introduction of an article on treaty-making capacity raised far too many issues. If such an article were to be included in the draft, it would be necessary to deal with the status of dependent states, semi-sovereign states [*états incomplets*] and also of constituent states forming part of a sovereign state. He saw no need whatsoever to enter into such considerations. Those who negotiated a treaty would always be careful not to deal with an entity which was not a state or other subject of international law.

41. If article 3 were omitted, there would be nothing lost. Regardless of the absence in the draft of a reference to treaty-making capacity, an independent sovereign state enjoyed *jus contrahendi* by virtue of that very independence.

42. Mr. YASSEEN urged the need to include in the draft an article on the capacity of subjects of international law to enter into treaties. A provision on the matter was needed in the articles dealing with the conclusion of treaties; it was essential to make clear whether or not a prospective party to a treaty had the capacity to enter into a treaty.

43. He had, however, certain doubts regarding the so-called incapacity to enter into treaties, though the discussion appeared to have narrowed considerably the area of disagreement.

44. First, it was clear that a limitation imposed by a state's own constitution did not involve any incapacity to enter into treaties, in the sense indicated by Mr. Jiménez de Aréchaga.

45. Secondly, any limitations that might arise from a prior treaty signed by a state were foreign to the issue of that state's treaty-making capacity; the problem was simply one of conflict between two treaties.

46. There remained the question of a treaty which determined the status [*status*] of a state. A treaty of that type sometimes imposed limitations on the treaty-making capacity of the state concerned.

47. Mr. Ago, at the previous meeting, had said that it was difficult to imagine how a treaty could establish the treaty-making capacity of a state. He (Mr. Yasseen) would add that a treaty was not an appropriate instrument whereby to deprive a state of the capacity to enter into treaties — in other words, to determine its international incapacity.

48. States possessed the right to enter into treaties by virtue of general international law; in fact, the provi-

sions of international law which conferred that right were in a sense constitutional in character. Therefore, neither a bilateral treaty nor even a so-called "pluralateral treaty" could, in conferring a particular status on a state, impose upon it an international incapacity.

49. In fact, the so-called status [*statut*] was simply the consequence of international obligations derived from a treaty. There was no difference between international obligations of that type and those that might result from any other treaty. Most treaties limited in some way the freedom of action of the signatory states in respect of some field of international activity.

50. There could therefore be no doubt that obligations of that type could not impose an international incapacity in defiance of the principles of general international law. If, accordingly, the state which had been made subject to a particular status entered into a treaty with a third state in disregard of the status imposed upon it, the treaty thus signed would not be null and void. In fact, the treaty in question would not even be voidable [*annulable*]. The treaty was valid, although of course it conflicted with the earlier treaty which had imposed a particular status upon one of its signatories; the problem should be dealt with in the light of the principle of the relative effects or binding force of treaties. The question to be determined was the effect or force of the earlier treaty vis-à-vis third parties.

51. The CHAIRMAN said that the Commission had before it four proposals. The first was the special rapporteur's redraft of article 3, introduced at the opening of the present meeting. The second was Mr. Ago's proposal which, so far as paragraph 1 was concerned, coincided in substance with that of the special rapporteur. The third was Mr. Briggs' proposal from the previous meeting, which he had since revised to read:

"1. Capacity in international law to become a party to treaties is possessed by every independent state.

"2. Subjects of international law other than states may be invested with the capacity to become a party to treaties by treaty or by international custom.

"3. The international capacity of an entity which is not fully independent to become a party to treaties depends upon:

"(i) The recognition of such international capacity by the state or union of states of which it forms a part or which conducts its foreign relations; and

"(ii) The acceptance by other contracting parties of its possession of this international capacity."

The fourth was Mr. Tunkin's proposal that consideration of the subject-matter of article 3 should be deferred.

52. There were two courses open to the Commission. The first was to refer the special rapporteur's redraft to the drafting committee, together with the observations made during the discussion; in the light of that discussion, the Committee would submit to the Commission a

text covering only the essential points. A text of that kind would enable the Commission to continue its study of the question of principle, whether the draft should or should not contain a provision on international capacity to conclude treaties.

53. The second course was for the Commission to consider the four proposals itself.

54. Speaking as a member of the Commission, he said he favoured the first course, because it seemed likely to facilitate the work of the Commission.

55. Mr. LIU said that the special rapporteur, in an endeavour to take into account the various suggestions made during the discussion, had departed so far from his original text that the proposed redraft was less satisfactory.

56. He had no comment to make on paragraph 2 of the special rapporteur's redraft, which was similar to article 1 of the Havana Convention. Paragraph 1, however, introduced a fresh complication; it actually enlarged the scope of the Commission's work by entering the field of constitutional law.

57. The terms of paragraph 1 suggested that a state might invoke its own constitutional limitations in order to evade certain international obligations: also, that the contracting parties to a treaty could inquire into each other's constitutional provisions in order to ascertain the treaty-making capacity of their prospective partners to the treaty. That type of provision would give rise to complications in the negotiation of treaties.

58. He was inclined to agree with Mr. Rosenne that capacity was largely a matter of constitutional law. In international law the conclusion of a treaty was itself evidence of treaty-making capacity. He was not, however, necessarily of the opinion that the whole subject should be left out of the draft articles.

59. What really mattered in the treaty-making process was the recognition of capacity by the other party or parties to the treaty.

60. Mr. AGO said he favoured the second of the two courses indicated by the Chairman. The special rapporteur's new text was still in need of improvement; a formula would have to be worked out to express what the members of the Commission had in mind.

61. The reference to the "internal constitution" had been introduced in order to cover the case of constituent states. He recalled that, between 1776 and 1783, a member state of the United States like Virginia had retained the right to enter into treaties, and serious complications for the Federation had arisen as a consequence. Under the 1783 Constitution of the United States, the constituent States of the Union no longer had treaty-making capacity. In other cases, for instance in Switzerland, the constituent states, or cantons, retained a limited treaty-making capacity.

62. He agreed with Mr. Yasseen that a treaty could not of itself either confer or take away a state's treaty-making capacity. A treaty could, however, give rise to a situation the effect of which would be to affect and

limit that capacity. For example, the treaty setting up the Belgium-Luxembourg Union had created a situation in which one member state of the Union probably no longer had the capacity to enter into treaties with other countries in respect of certain matters. There could therefore be cases in which an incapacity to enter into treaties could arise from the terms of a treaty.

63. It was accordingly essential that, without prejudice to the Commission's final decision, the drafting committee should be instructed to work out a formula accurately reflecting the concept which the members had in mind.

64. He urged, however, that the drafting committee's task should be limited to the consideration of paragraph 1 of the special rapporteur's redraft of article 3. Paragraph 2 did not deal so much with treaty-making capacity as with the powers of the organs which negotiated the treaty; it was therefore desirable to keep the discussion of that proposed provision separate from that of paragraph 1. In any event, the subject-matter of that provision had not been sufficiently discussed, whereas that of paragraph 1 was ripe for consideration by the drafting committee.

65. Mr. TABIBI and Mr. CADIEUX said they agreed with the Chairman that article 3 should be referred to the drafting committee.

66. Mr. TSURUOKA, also agreeing, said that members would have another opportunity to comment on article 3 in the new version to be prepared by the drafting committee.

67. He felt some hesitation in expounding his own point of view because it was so simple, namely, that a draft of the kind under consideration should state existing law in the form of systematic rules. Having defined a treaty at the beginning of the draft, it would seem logical then to indicate by what entities treaties could be concluded. While convinced of the need for a general rule on treaty-making capacity, he was not at all sure that the Commission should enter into the details mentioned in the special rapporteur's original text of article 3, some of which related to situations which were becoming more and more exceptional.

68. Mr. TUNKIN, also agreeing that the article should be referred to the drafting committee, said that that course would have the advantage of allowing members time for further reflection.

69. The general view seemed to be in favour of a somewhat brief provision, and his tentative conclusion was that paragraph 1 in the special rapporteur's redraft might be recast in shorter form on the lines of the suggestion made by Mr. Ago at the previous meeting, to the effect that capacity under international law to conclude treaties was possessed by every subject of international law.

70. He disliked the reference to internal constitutions in the second sentence of paragraph 1 of the special rapporteur's redraft, for they might conceivably conflict with basic principles of *jus cogens*. Similarly, there might be serious objection to referring to international instru-

ments, because they too could be at variance with basic principles of international law.

71. He agreed with Mr. Ago that the subject matter of paragraph 2 of the special rapporteur's redraft should not be dealt with in the same article as the subject matter of paragraph 1.

72. Mr. BARTOŠ said that, as he had indicated at the previous meeting, it was indispensable to include in a draft convention on the law of treaties a provision on the capacity to conclude treaties. However, even though he had been in favour of a shortened version of article 3, the special rapporteur's redraft did not give him satisfaction, for the reasons given by Mr. Verdross and Mr. Ago. It was essential to insert a proviso to the effect that the capacity of independent states to conclude treaties might in exceptional cases be restricted.

73. He also shared Mr. Ago's views about the second sentence in paragraph 1, on which Mr. Yasseen had made some pertinent observations.

74. With regard to "other subjects of international law", he said the question to be settled in the draft was whether all other subjects possessed treaty-making capacity *a priori*—a view he could not accept—or whether some indication should be given of the limitations which were peculiar to the capacity of persons in that category, seeing that their capacity was habitually limited. Those limitations arose out of the functional theory that such persons possessed only the degree of capacity necessary to allow them to fulfil the purpose of their existence.

75. The subject of paragraph 2 was extraneous to the problem of capacity and should be dealt with in another article.

76. The wording proposed by Mr. Briggs seemed more consonant with the general line taken by Mr. Ago, Mr. Verdross, and himself.

77. The Chairman's procedural suggestion was acceptable.

78. Mr. CASTRÉN said he agreed that the special rapporteur's redraft, and that of Mr. Briggs, could be referred to the drafting committee for consideration in the light of the discussion.

79. The first sentence in paragraph 1 of the special rapporteur's redraft would be acceptable with the change suggested by Mr. Tunkin; it was preferable to speak of subjects of international law rather than states as possessing capacity to conclude treaties, for not all states had that capacity. Paragraph 1 of Mr. Briggs' text was not entirely satisfactory, since dependent states might also have treaty-making capacity, but of a limited nature.

80. The second sentence in paragraph 1 of the special rapporteur's redraft had given rise to a number of problems which suggested that it would be wiser to adopt a more general formula to the effect that the capacity to conclude treaties might be limited in different ways. Such a text would not say much, but would have the virtue of being unobjectionable.

81. Mr. JIMÉNEZ de ARÉCHAGA explained that he was not opposed to a provision on the capacity to become a party to treaties, provided an acceptable text could be worked out by the drafting committee.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that as members would realize from his introductory remarks on article 3, he had envisaged a somewhat more extensive provision and had prepared the redraft in response to the Commission's request; it should not therefore be regarded as his own. Some of the criticism it had provoked was justified, particularly in regard to the reference to internal constitutional rules.

83. Consideration of paragraph 2 might with advantage be deferred until later in the discussion.

84. He had no objection to the procedure suggested by the Chairman.

85. Mr. VERDROSS pointed out that the second sentence in paragraph 1 of the special rapporteur's redraft failed to cover the case where some degree of capacity to become a party to treaties was conferred upon the subdivisions of a state, either by the sovereign state or by an international treaty.

86. The first two paragraphs suggested by Mr. Briggs should be acceptable to all members. The first stated a general rule of law and the second covered such cases as that of the United Nations, which had become a subject of international law by virtue of the Charter.

87. He recognized that paragraph 3 in Mr. Briggs' text might provoke difficulties.

88. Mr. de LUNA said that, like Mr. Verdross, he preferred paragraphs 1 and 2, as formulated by Mr. Briggs, to the special rapporteur's redraft of paragraph 1, because it might be inferred from the latter that all subjects of international law, other than states, possessed treaty-making capacity, which clearly was not the case. For example, in certain circumstances and for certain purposes, individuals might be regarded as subjects of international law, but they had no treaty-making powers.

89. It should be stated clearly that, whereas normally it was states that possessed capacity to enter into international contractual obligations, other subjects of international law could, by way of exception, also possess treaty-making capacity.

90. Mr. EL-ERIAN said that at that stage he wished to advance only two considerations. First, the provision should lay down general principles without going into detail, and secondly, the epithet "independent" should be avoided; it did not appear either in articles 3 and 4 of the United Nations Charter, or in the Commission's draft declaration on the rights and duties of states.<sup>8</sup> There had been cases where a state, though under the suzerainty of another, like Egypt during its subjection to the Ottoman Empire from 1841 to 1914, had nevertheless enjoyed a considerable measure of autonomy

<sup>8</sup> *Yearbook of the International Law Commission, 1949* (Sales No.: 57.V.1, Vol. I), p. 286.

enabling it to enter into treaties. But such cases were mostly a thing of the past, as a result of the attainment of independence of so many countries in Asia and Africa. Remaining cases were few or in process of disappearance. There would consequently appear to be little ground for specific reference to such cases, which would raise controversial issues of a theoretical as well as a political character.

91. The CHAIRMAN proposed that the two texts should be referred to the drafting committee, which would be requested to prepare a new version in the light of the discussion.

*It was so agreed.*

The meeting rose at 12.45 p.m.

### 641st MEETING

Friday, 11 May 1962, at 10 a.m.

Chairman: Mr. GROS

#### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

1. The CHAIRMAN invited the special rapporteur to introduce article 4 of his draft.

#### ARTICLE 4. AUTHORITY TO NEGOTIATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

2. Sir Humphrey WALDOCK, Special Rapporteur, said that he had brought together in one article, with some modifications and additions, the provisions discussed by the Commission at its eleventh session and incorporated in articles 6 and 15 of its 1959 draft.<sup>1</sup> As he explained in the commentary, the question of authority arose not only in connexion with signature but also in connexion with ratification, and for that reason he had decided in favour of a composite article. He had introduced a reference in sub-paragraph 2 (c) to the important modern practice under which permanent representatives to international organizations might issue "full-powers".

3. Mr. CASTRÉN said that on the whole he found the article acceptable, but thought it might be amplified to cover not only states but also other subjects of international law possessing capacity to participate in the negotiation of a treaty.

4. It was not necessary to mention ratification in paragraph 2, for ratification was governed by internal constitutional law; only the exchange of instruments of ratification was governed by international law. Indeed, a ratification was revocable so long as it had not yet been notified to the other parties.

5. The order of sub-paragraphs 3 (a) and (b) should be

reversed so as to deal with the more important organs of state first.

6. Mr. TUNKIN asked why the special rapporteur had thought it necessary to include the second sentence in sub-paragraph 2 (c). It seemed that the permanent representative to an international organization was considered as issuing full powers.

7. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Castrén's first question, said that chapter II of the draft had been restricted to states advisedly. Considerable drafting difficulties would arise if it were extended to cover other subjects of international law, such as the Holy See. Certain problems of applying such rules to international organizations might require special treatment.

8. Reference to ratification anywhere in the draft should be understood to mean ratification in the international sense as defined in article 1 (i).

9. In reply to Mr. Tunkin, he said that he had been unable to learn from the secretariat document, "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7) what was the form of full-powers issued by permanent representatives. Perhaps they were the same kind of instrument as that mentioned in the first sentence of sub-paragraph 2 (c), or they might be more in the nature of a letter of authority.

10. Mr. CASTRÉN, while thanking the special rapporteur for his reply, said he still maintained that the article should deal also with other subjects of international law.

11. Mr. CADIEUX said he agreed in general with the draft, on which he wished to offer some comments relating more to form than to substance. It might be inferred from sub-paragraph 3 (a), which stated that heads of a diplomatic mission had authority *ex officio* to negotiate but not to sign or ratify a bilateral treaty, if read in conjunction with sub-paragraph 2 (c), that a head of mission could give to another person by means of a letter authority to sign or ratify which he did not himself possess. Presumably the special rapporteur had in mind negotiations with an international organization or at an international conference rather than a bilateral agreement negotiated by an ambassador, but the inference gave rise to problems that ought to be faced.

12. It also seemed undesirable to suggest, as did sub-paragraph 3 (b), that Heads of State, Heads of Government or Foreign Ministers might need to provide some other kind of evidence of their authority to execute the acts in question. That construction could be avoided by substituting the word "additional" for the word "specific".

13. Finally, since no definition had been given of what was meant by an instrument of full-powers, it might be preferable to use the term "written authorization" instead.

14. Mr. LACHS said that the special rapporteur had been right to cover in article 4 all the possible ways by which a state could become party to a treaty.

<sup>1</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), pp. 98 and 105.



15. In recognition of the new practice referred to in the "Summary of the Practice of the Secretary-General", whereby the procedure was sometimes simplified so as to consist of the act of signature, acceptance or accession or possibly a combination of the first and one of the two others, the words "or acts" might be inserted before the words "in question" at the end of sub-paragraph 2 (a).

16. Some thought should be given to the practice of the exchange of notes by diplomatic representatives without special authority to do so, though the notes had the attributes of a treaty. Such a practice should presumably be subject to the same rules as those governing the conclusion of treaties, but might require a simplified procedure and less rigid treatment. The matter could be extremely important, as in the case of the notes on destroyers and bases exchanged between the United Kingdom and the United States in 1940.

17. Perhaps Mr. Castrén's point would be met if article 4 dealt with states but contained a general clause at the end concerning the applicability of the foregoing rules to other subjects of international law.

18. Mr. ROSENNE said that the special rapporteur's draft very appropriately combined in a single article all the elements involved; he agreed that for the time being the article should relate only to states.

19. His observations would be mainly directed to the drafting committee. It would be clearer if the different processes were more precisely described; for example, the process of evidencing the grant of full-powers was rather telescoped in sub-paragraph 2 (c).

20. It might be preferable to refer always to the exchange of instruments of ratification, rather than to ratification, particularly in the provision concerning bilateral treaties for which full-powers were sometimes required.

21. He agreed with Mr. Lachs that some measure of flexibility was needed in the case of the exchanges of notes which, without wishing to generalize too much, he believed mostly took the form of letters exchanged between a foreign minister and senior diplomatic representatives accredited in his country. Perhaps the latter should be placed on the same footing as the former for the purpose of such exchanges of notes.

22. With regard to signature, he pointed out that those concerned with drawing up the texts surely had general responsibility for satisfying themselves, before the texts were presented for signature, that those wishing to sign were authorized to sign.

23. Some reference should be made in the commentary to the language in which an instrument of full-powers was drawn up, because complaints had arisen in the past even when one of the official United Nations languages had been used. As a matter of principle, the language could be that of the state issuing the instrument of full-powers, but when that language was not widely known a translation was sometimes required.

24. Mr. VERDROSS said that the stipulation in sub-paragraph 2 (b) that full-powers should be in the form

prescribed by the law and practice of the state concerned was dangerous, if it meant that the other state or states could inquire whether the instrument of full-powers fulfilled that condition. If that were not the sense, the stipulation was useless and should be deleted. Furthermore, the stipulation that full-powers should be in the form prescribed by both the law *and* the practice of the state concerned offered no solution to the case where the practice was not in conformity with the law of the state concerned. That was another reason for deleting it.

25. The distinction drawn in sub-paragraph 3 (a) between authority to negotiate and authority to sign or ratify was most important and should be retained. It was entirely consistent with the provisions of the Vienna Convention on Diplomatic Relations, 1961, which authorized diplomats accredited to a state to negotiate and sign a treaty subject to ratification, but not to conclude a treaty definitively unless they held full-powers for the purpose.

26. Mr. de LUNA said he associated himself with the observations by Mr. Lachs concerning sub-paragraph 2 (a) and the exchange of notes.

27. Mr. BARTOŠ said he was in agreement with most of the comments made by previous speakers, and his own were more or less of a supplementary and technical character. With respect to sub-paragraph 2 (b), he was of the same opinion as Mr. Verdross, that the other negotiating state or states had to accept an instrument of full-powers as a matter of good faith and could not enter into the question whether it complied with the municipal law and practice of the issuing state. On the contrary, the form of such an instrument had to be checked to see that it complied with accepted international form and practice, the traditional wording used in that regard being "found in good and due form".

28. The situation was analogous in regard to the question whether or not such an instrument emanated from the competent authority in municipal law, though admittedly there might be cases where the requirements of prior parliamentary approval or consultation with other internal bodies had not been complied with and the instrument of full-powers had been issued *ultra vires*. A negotiating state was not obliged to examine the legal provisions of other states in that respect. It was sufficient if the full-powers were issued by one of the usual competent authorities—the Head of State, the Head of the Government, or the Minister for Foreign Affairs.

29. The provision in sub-paragraph 3 (b) took account of the practice of the General Assembly and the Security Council whereby Heads of State, Heads of Government and Foreign Ministers were not required to produce full-powers. He would have thought that, as a matter of practical convenience, it would suffice if other persons produced, as evidence of authority to negotiate, a letter from the Head of State, Head of Government or Foreign Minister, which would be regarded as equivalent to a valid instrument of full-powers. Such a person would be accepted in good faith by the other state as a duly



authorized plenipotentiary. In that case, the question whether the instrument had been issued by the competent authorities would be regarded as a domestic matter.

30. He believed that the heads of diplomatic missions and permanent representatives to an international organization should be on an equal footing as far as authority to negotiate was concerned.

31. The drafting committee would have to consider whether the authority of heads of diplomatic missions in respect of an exchange of notes could also be exercised by a *chargé d'affaires ad interim*, a point on which the Vienna Convention on Diplomatic Relations was not altogether clear. If it were found that the provisions of that Convention were not entirely satisfactory, some mention of the point would need to be made, at least in the commentary.

32. Mr. LIU, referring to sub-paragraph 2 (c), said that in practice a letter from the head of a diplomatic mission or from a permanent representative to an international organization was usually merely informative, stating that the full-powers would be forthcoming. He did not know of any instance in which such a letter had been accepted as full-powers, despite the statement in paragraph 29 of the "Summary of the Practice of the Secretary-General" (ST/LEG/7), cited by the special rapporteur in paragraph 5 of his commentary. The special rapporteur had rightly made it clear that such a letter might be employed only provisionally as a substitute for full-powers; that provision reflected a more general practice than the statement in the Summary that such a letter was accepted as having the same validity as full-powers.

33. Mr. AGO said that he was not entirely convinced that the structure which the special rapporteur had chosen for the article was the best possible one. To concentrate in a single article the question of full-powers in general and that of full-powers used particularly for negotiation was rather confusing. In the 1959 draft there had been a sequence of stages from the negotiation of a treaty to its ratification, and at each stage it had been specified what were the requirements of the powers of the representative of a state. The special rapporteur had now included all those stages in a single article, and at the same time all description of the negotiation of a treaty had disappeared. No doubt the omission would be easy enough to remedy, but it was somewhat strange to start by talking about the adoption of a treaty without mentioning such matters as the negotiation and drafting of the text.

34. In the article as drafted, statements were made first about powers to negotiate, then about powers in connexion with signature; then the text reverted to negotiation—by the heads of diplomatic missions—and lastly spoke of ratification, accession and acceptance. The result was rather confusing. In particular, the use of the term "ratification" might be a source of misunderstanding. It was obvious that the term could not have the same meaning when used in connexion with an ambassador as when used in connexion with a Head of State. The head of a diplomatic mission could

never ratify a treaty, but could, at the most, deposit the instrument of ratification. Ratification in the true sense of the term might be performed by Heads of State, but Heads of Government did not have such powers. It would be much better to separate negotiation, signature and ratification, as there was no advantage to be gained by merging quite different matters in a single article.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that confusion would, of course, arise if ratification as a legislative process were put on a par with the execution of the international act of ratification. Legislative ratification was purely a question of domestic law, and was a problem which would have to be faced in the appropriate context.

36. He would have thought that the provisions concerning accession and acceptance could be drafted with reference to the provisions of draft article 4. If the system suggested by Mr. Ago were adopted, those provisions would have to be repeated every time. If an attempt was to be made to simplify the group of articles, a draft article on accession and acceptance might be inserted after the draft article dealing with ratification. In his opinion Mr. Ago's objection would not be well founded if draft article 4 were worded more clearly, and covered the additional points raised by Mr. Lachs. If the drafting committee could do that in a single article, that would save a great deal of trouble later.

37. Mr. ELIAS said that, in considering previous articles, the Commission had taken them paragraph by paragraph, a procedure which saved time and enabled the Commission to obtain a picture of the areas of agreement. If members criticized provisions at random, the discussion might go on indefinitely without members having any clear idea of where agreement lay. He thought the Commission should consider the relevant definitions in draft article 1, especially those in sub-paragraphs (e), (i), (j), and (k). The Commission had not yet decided whether it accepted those definitions.

38. Draft article 4 as it stood should be generally accepted, since it brought together almost all the points relating to formal negotiation, signature, ratification, accession and acceptance. He had, however, some reservations about sub-paragraph 2 (c); the second sentence should be drafted in more explicit language.

39. With regard to the suggested elimination of the implicit reference to constitutional law in sub-paragraph 2 (b), the Commission might follow the precedent of its own revision of article 3, in which the reference had been restricted to general international law.

40. The CHAIRMAN said that it was rather difficult to adopt Mr. Elias' suggestion on procedure, as the article covered a number of problems which were not exactly on the same footing, and the special rapporteur's grouping of them either found support or gave rise to objections which related to the article as a whole. It was customary in the Commission, in a first general discussion, to obtain the views of members both on an article as a whole and also on certain points of detail.

41. Mr. TUNKIN said he agreed with the Chairman's remarks about the procedure to be followed. Mr. Elias had rightly observed that it had been the Commission's custom, in principle, to deal with lengthy articles paragraph by paragraph, but in the case in point, especially at that stage of the discussion, such a procedure was hardly necessary.

42. He could not agree with Mr. Ago. The special rapporteur had rightly placed all the provisions regarding authorization to perform acts on behalf of a state in a single article. The provisions on full-powers covered at least negotiation and signature; no principle was involved and, from the point of view of practice, the article was better as it stood.

43. The main objection was to the term "ratify". That term might not be ambiguous in English, but in Russian ratification meant first of all ratification by the Head of State. An easy way out would be to use the term "international act", meaning the deposit or exchange of instruments of ratification.

44. With regard to the question whether full-powers were required for the exchange or deposit of an instrument of ratification, the practice was that only in rare instances did states insist on the possession of full-powers for those purposes; the reason was probably that the exchange or deposit was performed by the official representatives of states, who might not be the heads of diplomatic missions. It might, therefore, be necessary to add a provision requiring the production of full-powers in cases where the act was not performed by the Foreign Minister, the head of a diplomatic mission or a permanent representative.

45. He thought that some misunderstanding must have crept into sub-paragraph 2(c); he had never heard of full-powers being issued by a state's permanent representative to an international organization, or by an ambassador. In practice, full-powers were issued by Heads of State, Heads of Government and Foreign Ministers. The phrase should preferably be deleted.

46. Mr. Lachs had raised some very important points. The article as drafted failed to cover many treaties which came within the definition in draft article 1; one example was that of an unsigned joint declaration by Heads of State or Heads of Governments.

47. Mr. Bartoš' criticism of the phrase in sub-paragraph 2(b), "emanate from the competent authority in that state", had weight. It was the state's own domestic affair to decide which organ was competent to issue full-powers. It was true that authority to negotiate could be presumed, but it was the general practice to recognize, without further inquiry, the competence of the Head of State, Head of Government or Foreign Minister to appoint plenipotentiaries. A reference to that practice might be included for the sake of completeness.

48. Mr. Castrén's question regarding other subjects of international law had already been settled. The Commission had decided to deal first with treaties between states and to leave all other treaties, and specifically treaties between states and international organizations, to a later stage. That had been the decision at the

outset of the current session and the Commission should adhere to it.

49. Mr. LIANG, Secretary to the Commission, said it was doubtful whether the special rapporteur's economy of draft article 4 was an improvement on that of the corresponding provisions in the 1959 draft. Paragraph 2 raised more than a question of drafting: it raised the question whether the act of signature was on a level with the acts of ratification, accession or acceptance. Signature was effected by a representative in the name of a state, having been so authorized by the state, whereas ratification, accession, or acceptance were acts of the state itself. It was not possible to assimilate one to the other and apply the same criteria. Mr. Lachs had rightly stated that signature might take place at accession, but accession was an act of a state and signature merely an authorized act by a representative. In practice, only diplomatic representatives did not present full-powers at ratification, accession or acceptance where the act consisted merely of the deposit of the instrument. The Commission should preferably revert to the 1959 economy in order to cover the various legal systems represented.

50. With regard to the question raised by Mr. Liu and Mr. Tunkin whether there were cases of full-powers having been issued by a permanent representative to the United Nations, the special rapporteur, in paragraph 5 of his commentary, had drawn attention to a statement in paragraph 29 of the "Summary of the Practice of the Secretary-General" (ST/LEG/7). The statement was somewhat elliptical, but what was probably meant was that a letter from the head of a diplomatic mission provisionally evidenced the grant of full-powers; that was his own understanding about permanent representatives who wrote to the Secretary-General informing him that a named person had been appointed to attend a conference or to sign an instrument and that the requisite full-powers would be forthcoming. In other words, it was merely a notification that full-powers would be presented in due course.

51. Mr. BRIGGS said he supported the special rapporteur's approach to the subject. Article 4 had a unity of its own: its provisions really dealt with the evidence of the competence of the agent to bind his state.

52. Obviously, that competence was conferred in the first instance by the agent's own state in accordance with its domestic law, but the draft articles were concerned with the evidence that was required, for the purposes of international law, to show the competence of the agent to negotiate, sign, ratify or accept a treaty. That evidence was to be found in the credentials or full-powers of a duly accredited agent.

53. Strictly speaking, the Commission was not dealing with the question of validity, a question which would have to be dealt with in later articles. As far as the evidence of competence was concerned, he proposed the following formulation for article 4, paragraphs 1 and 2:

"1. Evidence of the competence of an agent to negotiate a treaty on behalf of his state shall be

provided in the form of credentials issued by the competent authority in the state concerned.

"2. (a) Evidence of the competence of an agent to sign (whether finally or *ad referendum*), to ratify or to accede to or accept a treaty on behalf of his state shall be provided in the form of full-powers."

54. Paragraph 3 should state that it was for the purpose of international law that the competence envisaged in sub-paragraphs (a) and (b) was recognized. He accordingly proposed that the opening words of those two sub-paragraphs should be revised to read:

"3. (a) For the purposes of international law, the heads of a diplomatic mission are regarded as having competence [authority] *ex officio* to negotiate . . .

"(b) For the purposes of international law, Heads of State, Heads of Government and Foreign Ministers are regarded as having competence [authority] *ex officio* to negotiate and authenticate . . ."

55. The formulation which he proposed would make it clear that the article dealt not with the source of the competence but with the evidence of that competence.

56. Mr. TSURUOKA pointed out that, until the Commission had fully considered the various stages in the conclusion of a treaty, it could not deal adequately with the question of the evidence of the competence to perform the various operations of negotiation, signature, ratification and accession or acceptance.

57. There might perhaps be some advantage in dealing with the question of full-powers in relation to all the stages, which had some points in common. The element of authorization was present in all of them and the question of the evidence to be produced also arose for all of them.

58. However, for the reasons which he had indicated, he suggested that the Commission should adopt article 4 provisionally and reconsider it at a later stage, when it came to deal with the various stages of the conclusion of a treaty.

59. Mr. PESSOU said that, in article 4 more than in any other provision, the various terms used denoted concepts each of which had its specific legal function. But if several concepts were mentioned together, in order to cover the various stages of a legal operation, the result could well be juridically incongruous.

60. The problem was one of method and he wholeheartedly supported Mr. Ago's plea for a systematic approach to the issues under discussion.

61. Mr. AGO said that, while he was prepared to bow to the will of the majority, none of the arguments put forward had entirely convinced him that the special rapporteur's approach was the best.

62. Article 4 grouped together the four stages of the conclusion of a treaty simply because reference was made in its provisions to the question of full-powers. In fact, the terms "signature", "ratification", "accession" and "acceptance" used in article 4 were explained in articles subsequent to article 4. Of course, the Commission would have avoided many difficulties

if it had endeavoured to reach agreement first on the definition of those various terms.

63. He would not, however, object to the provisional adoption of article 4, though the proposal by Mr. Briggs should be accepted in respect of paragraph 1.

64. His consent to the provisional adoption of the article was subject to two observations. First, a decision on the place of the article should be deferred; in his view, it should come after the provisions on the various stages of the conclusion of a treaty.

65. Secondly, while he fully agreed that the reference to ratification concerned ratification in the international sense and not ratification under internal law, he pointed out that article 4 dealt with two different things, one, the powers of the Head of State to ratify the treaty, and the other, the powers of the Minister for Foreign Affairs, or of the head of a diplomatic mission, or of some other authority, to deposit the instrument of ratification, a ratification which in any case emanated from the Head of State. A possible solution would be to eliminate the reference to ratification. The question of full-powers in connexion with ratification could be dealt with in article 11, which covered fully the procedure of ratification and the acts subsequent to ratification.

66. Mr. EL-ERIAN said that he was inclined to agree with the special rapporteur's method of dealing comprehensively in article 4 with the different categories of authorization relating to the exercise of the treaty-making power of the state.

67. He was glad to note that signature *ad referendum*, a question on which the Commission had been unable to agree in 1959,<sup>2</sup> had been dealt with by the special rapporteur in relation to full-powers in sub-paragraph 2(a), and in relation to the legal effects in article 8, paragraph 2. In his commentaries on the two articles, the special rapporteur had supplied much valuable material and thrown fresh light on a difficult question.

68. He agreed with Mr. Tunkin that questions relating to international organizations should be deferred. The Commission had been invited by General Assembly resolution 1289 (XIII) of 5 December 1958 to give further consideration to the question of relations between states and intergovernmental international organizations after other studies had been completed.

69. On the other point raised by Mr. Tunkin, he did not believe that article 4 should deal with the question of full-powers for depositing or exchanging instruments of ratification. The proper place for a provision on that point was article 11, on the procedure of ratification.

70. The CHAIRMAN said that, in the light of the discussion, it would seem appropriate to refer article 4, with the observations made in the discussion, to the drafting committee for the formulation of a provisional

<sup>2</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No. : 59.V.1, Vol. II), p. 106.

text which the Commission could then discuss afresh. The question of the structure of article 4, which was a technical question, and that of its place in the draft, might also be considered by the drafting committee.

71. Mr. ROSENNE said that, if the drafting committee was to consider the text proposed by Mr. Briggs, he would suggest that, in sub-paragraphs 3(a) and 3(b), the expression "For the purposes of international law" should be replaced by "For the purposes of the present articles". Unless that change were made, the scope of the provision would be far too wide.

72. With reference to the remarks of Mr. Tunkin, he thought that, strictly *de lege lata*, for the purpose of the deposit or exchange of instruments of ratification, the other party or depositor could require the production of full-powers. But that rule should not be perpetuated and he suggested that there was an instance where the Commission might usefully develop the law by recognizing the considerable simplifications which had been introduced by current practice.

73. Mr. BARTOŠ said that, although as regards substance, he did not disagree with the views put forward by Mr. Ago and the Secretary to the Commission, he agreed with the special rapporteur, who had taken into account a practice that had become current in recent years, particularly in the United Kingdom, whereby, at the time of the exchange of instruments of ratification, it was no longer necessary to produce the formal instrument of ratification itself; it was sufficient for the ambassador of the ratifying state to make a notification that ratification had been executed.

74. With reference to the remarks of Mr. El-Erian, he said that the question of signature subject to subsequent production of full-powers was quite distinct from that of signature *ad referendum*. It was quite possible for a representative having full-powers to sign *ad referendum*.

75. There appeared to have been a misunderstanding with regard to the second sentence of sub-paragraph 2(c). That sentence was not meant to say that a state's permanent representative to an international organization could issue full-powers; the permanent representative merely certified that full-powers existed and were awaited. A provision along the lines proposed by the special rapporteur was necessary in order to cover a well-established United Nations practice, which had been brought to the attention of both the Sixth Committee and the Credentials Committee of the General Assembly.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the remarks made during the discussion had not convinced him that he should change the method he had used in drafting article 4.

77. He pointed out that, in the definitions in article 1, a very clear distinction was drawn between, on the one hand, the signature of a treaty, which was an act performed by a duly authorized representative on behalf of his state, and, on the other hand, ratification and accession, which were international acts of the state itself. Article 4 should be read in the light of those definitions.

78. Any confusion that might have arisen from the manner in which the terms "ratify" and "accede" had been used in his draft could be cleared up by the drafting committee.

79. To cover the question of the deposit or exchange of instruments of ratification or accession, he suggested that sub-paragraph 2(a) should be divided into two parts; the first would deal with the authority to sign a treaty and the second with the deposit or exchange of instruments of ratification, accession or acceptance.

80. He drew attention to the saving clause in sub-paragraph 3(b), which recognized that the instruments relating to a treaty were nearly always executed by the Head of State, Head of Government or Foreign Minister. In that respect, the drafting could be improved, because sub-paragraph 3(b) as it stood set forth as an exception what in fact constituted a rule.

81. Furthermore, sub-paragraphs 2(b) and (c) could be made into a separate paragraph. Such a drafting change, coupled with the other adjustments he had indicated, might meet some of the objections put forward by Mr. Ago.

82. He supported the Chairman's suggestion that the drafting committee should be asked to prepare a provisional text. Although he had not changed his views as to the place of the article, he would not object to postponement of a decision on the point.

83. Mr. TUNKIN, replying to Mr. Rosenne, said that he did not favour the practice of requiring full-powers for the act of depositing or exchanging instruments of ratification, a practice which was followed by a few states. In the USSR the production of full-powers was not required in such instances, although cases had occurred where the instruments in question had been submitted by a subordinate official of a diplomatic mission and not by the head of the mission itself. As far as the draft articles were concerned, he suggested that full-powers should not be required in that connexion.

84. Mr. LACHS said he supported the special rapporteur's views as to the structure of article 4.

85. It was desirable that authority to negotiate, sign, ratify, accede to or accept a treaty should be dealt with in a single provision, as was done in the draft of article 4. Each of those operations was a separate operation. There were, however, cases where a treaty was not subject to ratification; signature then had the same effect as signature and ratification; there were also cases where accession alone was required. Consequently, the full-powers of the agent concerned should cover not only signature but also ratification or accession.

86. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no intention to introduce into the draft articles the requirement of full-powers for the mere purpose of depositing or exchanging instruments of ratification. There were cases, however, to which attention had been drawn in the "Summary of the Practice of the Secretary-General" (ST/LEG/7), when a representative himself actually executed the ratification. In such cases, full-powers would be needed.

87. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 4, with the observations made during the discussion, to the drafting committee on the terms indicated by the special rapporteur and himself; the drafting committee would formulate a text of a provisional character for the Commission's consideration at a later stage.

*It was so agreed.*

The meeting rose at 12.45 p.m.

## 642nd MEETING

Monday, 14 May 1962, at 3 p.m.

Chairman: Mr. Radhabinod PAL

### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

1. The CHAIRMAN invited the special rapporteur to introduce article 5 of his draft.

#### ARTICLE 5. ADOPTION OF THE TEXT OF A TREATY

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 5 was the first of the substantive provisions of the draft to raise the question of the distinction between plurilateral treaties and multilateral treaties, as defined in article 1 (*d*). In article 6, paragraph 4, of its 1959 draft, the Commission itself had drawn a distinction between multilateral treaties and "treaties negotiated between a restricted group of states".<sup>1</sup> The somewhat novel term "plurilateral" seemed convenient to describe the latter type of treaties, but it was possible to conceive of a different terminology.

3. Regardless of the terminology used, however, the fundamental question for the Commission was whether such a distinction should be introduced into the draft articles. He considered the distinction justified, because some of the rules did not apply in the same manner to plurilateral and to multilateral treaties.

4. As far as article 5, paragraph 1, was concerned, the distinction applied only to sub-paragraphs (*b*) and (*c*). Under article 6 of the Commission's 1959 draft, adoption of the text of what he called "plurilateral" treaties was by unanimity unless the negotiating states decided otherwise; in the case of multilateral treaties, it was by such voting rule as the conference decided. The Commission would be out of touch with current practice if some form of majority rule were not applied in that respect.

5. Since the distinction did not really apply to sub-paragraphs (*d*) and (*e*), he proposed the addition in each of them, after the opening words "In the case of a multilateral treaty", of the words "or a plurilateral treaty".

6. With regard to article 1 (*d*), he proposed that in the definition of "plurilateral treaty" the phrase "number of parties" should be changed to "group of parties" and the final words "such parties" to "such group", while in the definition of "multilateral treaty", the words "not confined to a particular group" should be added after the words "by a considerable number of parties".

7. It was not an easy matter to define the terms "plurilateral" and "multilateral" since in the case of a large regional organization like the Organization of American States, for example, it might be that for the purposes of the member states a treaty concluded among them was a multilateral treaty, although from the point of view of general international law it would be regarded as a plurilateral treaty.

8. Mr. TABIBI said he questioned the advisability of including references to voting procedure in the article; that matter should be dealt with in the commentary. The authors of the United Nations Charter had, except in a very few instances, wisely refrained from legislating on procedure, and the experience of the United Nations had shown how procedure was apt to change from time to time.

9. He accordingly suggested that paragraph 1 should be redrafted to read simply:

"The adoption of the text or texts, setting out the provisions of a proposed treaty, takes place, in the case of bilateral, plurilateral and multilateral treaties, by the procedures which the parties may agree."

10. That formulation would also cover the case where the procedure was prescribed in the constitution of an international organization or in a decision of the organ competent to determine the voting rule.

11. He thought that the provisions of paragraphs 2 and 3 concerned the participation of a state in treaty negotiations rather than the adoption of the text; the place for those provisions was elsewhere than in article 5.

12. Mr. LACHS said the special rapporteur had been right to omit from article 5 the contents of article 7 (Elements of the text) of the 1959 draft.

13. He was also glad to note that the special rapporteur had dealt with the important question of the distinction between plurilateral and multilateral treaties. In that distinction, there were both objective and subjective elements. As far as the objective element was concerned, plurilateral treaties purported to deal only with matters of concern to the parties; multilateral treaties purported to lay down general norms of international law or to deal with matters of general concern. From the subjective point of view, plurilateral treaties were open only to a restricted group of participants, whereas multilateral treaties were open to participation by all states, or at any rate by a considerable number of states.

14. Unfortunately, the line of demarcation between the two classes of treaty was hard to draw and a large number of treaties were difficult to classify.

<sup>1</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No. 59.V.I, Vol. II), p. 98.

15. There was first the case of a treaty which, although signed by a limited number of states, concerned a state which was not a party to the treaty. For example, the Treaty of Paris of 1856 concerned the integrity of Turkey, which had not been a party to it and had actually been refused accession to the treaty.

16. Another example was the Treaty of Berlin of 1878 which, although signed by only seven European states, had been claimed by its signatories to have been entered into in a European spirit. The parties to the treaty had thus claimed to be acting in a sense in the interests of all the European states.

17. A vast number of treaties contained stipulations in favour of third states and while it was true that some legal authorities questioned the validity in theory of such stipulations, the important fact was that they existed in practice.

18. There was the case of the peace treaties, many of which could be called law-making treaties. Some of those treaties, such as the Treaties of Paris of 1947, contained provisions in favour of third states.

19. Again, some of the modern military alliances presented very complicated issues.

20. For those reasons, he was inclined to share some of the opinions expressed by Mr. Tabibi. In view of the complexities of the subject, it would be wiser not to lay down hard and fast rules on the subject of voting procedure.

21. Mr. PAREDES said that the distinction between plurilateral and multilateral treaties was perhaps not essential to the draft articles. Instead of improving the text, it might create difficulties over the interpretation of the two terms "multilateral" and "plurilateral". In fact, the two terms were practically synonymous.

22. Certainly, the attempted distinction between treaties open to all, or a considerable number of, states and treaties open to only a limited group of states, was an extremely difficult one to make.

23. Multilateral treaties signed under the auspices of the Organization of American States could, and in fact on occasion were, open to accession by other states as well.

24. A regional organization such as the Organization of American States very often dealt with world-wide problems. If it were to deal, for example, with the law of the sea and arrived at an agreement on that question, that agreement would be open to accession or adoption by other states as well.

25. A distinction could be made between multilateral treaties, which were signed by individual states each acting in its own interest, and plurilateral treaties, entered into between two groups of states such as, for example, the two European economic groupings.

26. Mr. BRIGGS said that the definition of "multilateral treaties" in article 1 (d) contained no fewer than six criteria, to which the special rapporteur had just added a seventh. He did not believe that the contents of a treaty, or the fact that it was open or closed, had any

relevance to the definition of a multilateral treaty or to the majority required for the adoption of its text.

27. A multilateral treaty was simply a treaty to which more than two states were parties. The problem which arose in connexion with article 5 was simply that of the distinction between a general multilateral treaty and a multilateral treaty participation in which was restricted. That problem was best dealt with not by creating a separate category of so-called "plurilateral treaties" but simply by using where necessary in the draft articles some such expression as "bilateral treaties and multilateral treaties restricted to certain parties".

28. Two extreme examples would show the weakness of the criteria offered for the proposed distinction between plurilateral and multilateral treaties. Under those criteria, the North Atlantic Treaty of 1949 would be classed as a multilateral treaty, because it dealt with matters of general concern; the United Nations Charter, on the other hand, would be classed as plurilateral, because by virtue of its article 4, it was not open to accession by all states indiscriminately; in fact, admission was by the vote of the Members of the United Nations.

29. Although he rejected the proposed terminology, he did not wish to abandon the distinction altogether, for it had some value; the substance of the article should be retained.

30. Mr. JIMÉNEZ de ARÉCHAGA said that, in strict logic, every treaty, even a bilateral one, was "plurilateral".

31. Whatever might be the convenience of a distinction between "plurilateral" and "multilateral" treaties in other parts of the draft articles, such as those dealing with reservations or accession, such a distinction was not appropriate in the article concerning the adoption of the text of a treaty.

32. In that article, the only material question to be dealt with was the procedure for the adoption of the text of a treaty; the article was not concerned with the number of parties to the treaty. If a treaty were adopted after *ad hoc* negotiations, the adoption procedure would be that agreed upon by the parties to the negotiation. Where a conference was convened for the purpose of drafting a treaty, the adoption procedure would be that agreed upon by the participants in the conference, either beforehand or at the time of the adoption of the rules of procedure of the conference. In the case of a treaty drawn up by an international organization, whether regional or universal, the voting procedure would be that laid down by the organization. The important point was that, in the absence of a rule concerning the procedure of adoption, the only residual rule was that the consent of all the parties was required.

33. For those reasons, he urged that the question of the distinction between plurilateral and multilateral treaties should be left for decision at a later stage.

34. Mr. CASTRÉN said that on the whole the special rapporteur's article 5 was an improvement on the corresponding 1959 text.

35. From the point of view of form, however, he noted that sub-paragraph 1 (a) referred to "the parties", while sub-paragraph 1 (b) referred to "the states concerned"; the Commission should decide which of those two formulations it wished to adopt. The Commission had already decided that the draft articles would deal in the first place with treaties entered into by states, but in articles 1 (a), 1 (c), 1 (h) and 2, references had been introduced to treaties signed by subjects of international law other than states. He had no objection to the draft articles being considered as applying primarily to states, but the Commission should make its position clear on that preliminary point, after which the wording of the draft should be adjusted accordingly; in fact, the title of the whole draft might have to be changed.

36. As to the distinction between plurilateral and multilateral treaties, he said it was drawn in the 1959 draft, although the term "plurilateral" had not then been used, the 1959 text referring to "treaties negotiated by a restricted group of states". Sir Humphrey's formulation was more precise in that his definition in sub-paragraph 1 (d) made it clear that a plurilateral treaty dealt with matters of concern only to the parties to the treaty. Admittedly, the line of demarcation between the two classes of treaty was not clear, even in the special rapporteur's text, but it would be very difficult to formulate definitions which would not be open to criticism.

37. He approved the special rapporteur's differentiation between the two types of multilateral treaty referred to in sub-paragraphs (d) and (e) respectively.

38. He also approved the special rapporteur's formula in sub-paragraphs (c) and (d), to the effect that the voting rule in international conferences was decided by a simple majority. That system had been adopted by the Commission in 1959, for the reasons given in its commentary to article 6.

39. He preferred the special rapporteur's paragraph 2 to the corresponding provision in article 8, paragraph 1, of the 1959 text. The new text referred to participation in the adoption of the text of a treaty; the 1959 text had referred to participation in the negotiation of a treaty. The second sentence, beginning "*A fortiori...*", should, however, be deleted; it was obvious that participation in the adoption of the text of a treaty did not place a state under any obligation to carry out the provisions of the treaty.

40. Paragraph 3 was also to be preferred to the corresponding 1959 text in article 8, paragraph 2, because the special rapporteur did not go as far as the Commission had done in 1959 in attempting to derive legal consequences from the mere adoption of the text of a treaty.

41. It was unlikely, however, that even the special rapporteur's text would prove acceptable. It was doubtful whether positive international law imposed any specific or general obligations upon states which had participated in the negotiation or the adoption of the text of a treaty, but had not signed the treaty. Moreover,

he did not think it would be advisable to propose *de lege ferenda* any rules on the subject.

42. The views of some of the members of the Commission on the subject were set out in paragraphs 3 and 4 of the commentaries on article 8 of the 1959 text. The duration of the alleged obligations resting upon a state in such circumstances had given rise to much discussion, but the 1959 commentary did not throw much light on the subject, paragraph 6 of the commentary on article 8 merely indicating that "the obligation could clearly not last beyond such time as was reasonably necessary in order to enable the negotiating states to decide on their attitude in relation to the treaty".

43. Mr. AGO said that it would be desirable to include in the draft a provision on the lines of that contained in article 6, paragraph 1, of the 1959 text concerning the process of negotiation. He had mentioned the matter informally to the special rapporteur, who had indicated that he would have no objection.

44. With regard to article 5, he said that he largely shared the doubts expressed by Mr. Lachs concerning the definitions adopted by the special rapporteur, who had so frankly described some of the difficulties he had encountered. The task of defining different types of treaties imposed a grave responsibility on the Commission and it would have to give the matter very serious thought.

45. Mr. Lachs had pointed out the problems involved in classifying treaties according to subject matter or to the number of the parties and the difficulty of differentiating exactly between multilateral and plurilateral treaties.

46. It seemed to him that, for the purposes of that differentiation, if such were really needed, it was necessary to take into account the purpose of article 5, which was to indicate that, in some cases, the unanimity rule was the basic rule, in the absence of any express provision to the contrary, while in other cases the majority rule was the normal practice.

47. In his opinion, the essence of the distinction was that, in treaties called by the special rapporteur plurilateral, the parties were constituting, as the term correctly indicated, a plurality of sides, whereas in treaties called multilateral there was in reality not a plurality of different and mutually opposed sides, but only one side, as the parties were not regulating reciprocal relations of rights and duties, but collaborating for the adoption of common rules.

48. Some authors, in the past, had adopted for the purpose of a similar differentiation the distinction between the contractual treaty and the law-making treaty; the Treaty of Versailles and the Vienna Convention on Diplomatic Relations were respectively clear examples of the two categories.

49. The appellation "plurilateral" was entirely acceptable for treaties of the first category which might in fact resemble bilateral treaties because they regulated relations as between different sides, but some other term



should be substituted for the second category, which might be described as collective conventions, in accordance with a generally accepted usage.

50. Mr. LIANG, Secretary to the Commission, said that although a statement similar to that in sub-paragraph 1 (a) had been inserted in the 1959 draft, he wondered whether it served any practical purpose to speak of the adoption of the text of a bilateral treaty. Before the era of multilateral or plurilateral treaties there had never been any mention of the institution — the adoption of the text of a treaty — for in the case of a bilateral treaty such a stage simply did not exist. In the case of bilateral treaties, the nearest approach to the adoption of the text would seem to be the initialling of the text. The concept of the adoption of a text only had a meaning in the case of multilateral treaties negotiated at international conferences.

51. With regard to the statement in the sixth sentence of paragraph 8 of the commentary, concerning United Nations practice, he explained that he had had in mind, for instance, the first Conference on the Law of the Sea prior to which the Secretary-General had convened a group of experts, in accordance with a provision in the Assembly resolution convening the Conference. He had no wish to convey the impression that that represented a general practice.

52. With regard to sub-paragraph 1 (d), the more general practice was for conferences convened by international organizations to determine their own voting rules and, as he had stated at the eleventh session, at the 488th meeting, in practice United Nations organs had always refrained from making rules about voting procedure for international conferences convened by them; it was interesting to note that even the Council of the League of Nations had not attempted to do so for the Hague Conference for the Codification of International Law of 1930.

53. An additional reason for that practice was that such conferences were frequently attended by non-member states. Accordingly, he considered that sub-paragraph 1 (d) should first state, as a general rule, the prevailing practice of leaving the conferences convened by an international organization free to adopt their own rules of procedure, and that only by way of exception should it be stated that the constitutions of some international organizations contained provisions prescribing voting rules governing the adoption of conventions or vested in such international organizations the power to make decisions concerning voting rules for that purpose.

54. On a drafting point, he presumed that the words "or prescription" should be inserted after the words "failing any such decision" in sub-paragraph 1 (d), so as to cover both the eventualities contemplated.

55. In the matter of terminology, it would perhaps be wiser to follow the 1959 draft because the meaning of the term "plurilateral" was by no means immediately apparent.

56. Mr. VERDROSS, speaking on the problem of definition, said he favoured a classification distinguish-

ing between treaties which enunciated general rules of law, that was, law-making treaties, which Professor Triepel had called "Vereinbarungen", and those dealing with concrete matters, contractual treaties.

57. He proposed the deletion of the second sentence in paragraph 2, which was self-evident.

58. The provision contained in paragraph 3 was of fundamental importance; the corresponding provision in the 1959 draft had been discussed at great length at the eleventh session, when it had been correctly described as an innovation.

59. Mr. de LUNA said that the criteria characterizing a plurilateral or a multilateral treaty might not all be present in any given case, in which event the special rapporteur's proposed definitions would not fit. Similarly, the classification mentioned by Mr. Ago was already out of date. The Commission should endeavour to choose terms which corresponded with prevailing usage.

60. The CHAIRMAN announced that Mr. Jiménez de Aréchaga had submitted a redraft of paragraph 1, which read:

"1. The adoption of the text or texts setting out the provisions of a proposed treaty takes place:

"(a) By consent of all the parties, unless the states concerned shall decide by common consent to apply another voting rule;

"(b) In the case of a treaty drawn up at an international conference convened by the states concerned, by any voting rule that the conference shall, by a simple majority, decide to apply;

"(c) In the case of a treaty drawn up at an international conference convened by an international organization, by any voting rule that may be prescribed in the constitution of the organization, or in a decision of the organ competent to determine the voting rule, or failing any such prescription or decision, by the rule that the Conference shall by a simple majority decide to apply;

"(d) In the case of a treaty drawn up in an international organization, by any voting rule that may be prescribed in the constitution of the organization or, failing any such constitutional provision, in a decision of the organ competent to decide the voting rule."

61. Mr. AMADO said that he was most anxious that the Commission should succeed in drafting rules on the law of treaties, but he thought that the draft wasted too much time in the vestibules before getting on to the first important act in the conclusion of a treaty, namely, the act of signature. Article 5 was only one of those vestibules and, as such, was too detailed.

62. He agreed with other speakers that sub-paragraph 1 (a) stated something so evident that it did not need to be stated.



63. Normally voting rules were fixed at the preparatory stage of negotiations and by the participating states themselves.

64. He doubted whether the term "plurilateral" would convey the same meaning to everybody; perhaps the Commission should seek a more readily recognizable and current description for treaties to which the number of parties was limited.

65. The provisions contained in paragraphs 2 and 3 related to a later stage in the treaty-making process and should be placed after the provisions concerning signature.

66. Mr. AGO said that he wished to remove any mistaken impression he might have conveyed in his earlier remarks concerning the classification of treaties. He was not advocating the adoption of terms like "contractual" treaty and "law-making" treaty. He considered that the special rapporteur's term "plurilateral" could be retained, but that the expression "multilateral treaty" should preferably be replaced by "collective convention".

67. He agreed with Mr. Jiménez de Aréchaga that article 5 should be simplified, as it would be unwise for the Commission to engage in discussions on theoretical definitions, and that such definitions should be avoided whenever not absolutely necessary.

68. Mr. TSURUOKA said that Mr. Ago had covered much of what he had intended to say. For purely practical reasons it was not necessary to make a distinction in article 5 between multilateral and plurilateral treaties, although that might be necessary when the Commission came to discuss the question of signature, accession or reservations. In any case, the details of the prevailing practice could be explained in the commentary; the actual rules to be embodied in the draft convention should be very simple and drafted in terms acceptable by all states.

69. The object of the draft was to formulate certain rules to facilitate the work of international conferences convened for the purpose of making treaties; such conferences were always masters of their own procedure. That being so, sub-paragraph 1 (d) might not really be necessary, since, whether the conference was convened by the states themselves or under the auspices of an international organization, the conference itself would decide its own voting rules.

70. He agreed that the last sentence in paragraph 2 should be deleted.

71. The practical value of paragraph 3 was open to doubt, and the provision might actually introduce a danger in that it would make states hesitate to participate in a conference which was to prepare a treaty, when under the rule in paragraph 3 they would, by the mere act of participating in the conference, be accepting an advance commitment not to do anything that might "frustrate or prejudice the purposes" of the treaty.

72. Mr. PADILLA NERVO said that the draft should not make the voting procedure dependent on the type of treaty. What mattered in the treaty-making process,

at the stage covered by article 5, was the negotiation and the authentication of the text by a procedure agreed on during the negotiations, whatever the nature of the treaty.

73. In many cases, it was impossible to classify a treaty by reference to the number of parties. Some bilateral treaties were subsequently extended to become multilateral treaties. There were also cases, such as the draft treaties on general and complete disarmament and the discontinuance of nuclear tests, in the negotiation of which there had been an understanding that the treaty would be concluded, not by a vote, but consensually. A reference simply to agreement by the will of the parties would be sufficient and would not establish unduly rigid rules.

74. Paragraph 3 might not always correspond to what was politically possible. The negotiations for a treaty on the discontinuance of nuclear tests had been proceeding for three years, but some of the potential parties had carried out actions which were not consonant with the purposes of such a treaty. It would be most unwise for the Commission to lay down conditions that were politically unrealizable.

75. Mr. LACHS said that he had already expressed doubts about the excess of detail in draft article 5; the subsequent discussion had strengthened his doubts. He was now convinced that any rigid definition of a treaty concluded by more than two States would be undesirable.

76. He agreed with Mr. Ago's remarks concerning the classification of treaties, but would go much further and say, with Rapisardi-Mirabelli, "autant de classifications que d'auteurs". In drafting a convention the Commission should eliminate all dubious and controversial points. A treaty either confirmed the law, or created a new law, or applied the law *ad casum*, but all three processes were so closely interwoven and raised such complex problems that he agreed with Mr. Briggs and Mr. Ago that the distinctions should be dropped.

77. He could accept the provision on bilateral treaties in sub-paragraph 1 (a).

78. There were two types of multilateral treaty: first, those drawn up in an organ of an international organization which was governed by certain rules; presumably, if states agreed to negotiate within that organ of an international organization, they accepted its rules of procedure. Secondly, multilateral treaties drawn up outside an international organization at a conference, whether called by states or by an international organization; in such cases the participants would be free to settle the conference's rules of procedure whatever rule the Commission laid down. The procedure for the last-named type of treaty should therefore be left to the will of the parties.

79. Mr. ELIAS said that he agreed that sub-paragraphs 1 (a) and (b) should be merged as in the redraft proposed by Mr. Jiménez de Aréchaga. Sub-paragraphs 1 (b) and (c) of that redraft might also be merged for the purpose of simplification; in each case the word "may" should be substituted for the word "shall".

80. He agreed that the second sentence of paragraph 2 should be deleted.

81. Paragraph 3 might be retained, subject to the addition of the word "taking" before the words "any action", as in article 8, paragraph 2, of the 1959 draft, while the word "comes" should be substituted for the word "should come".

82. Mr. de LUNA said that even if the Commission reached unanimity on very clear and precise definitions, they would always be *ex post facto*, since they would refer to treaties already concluded, their subject matter and the number of participants; it would be impossible to define any treaty before its substance was known.

83. Mr. Padilla Nervo had made an excellent point in noting that some treaties might begin as bilateral treaties but later become multilateral.

84. Mr. BARTOŠ said there were three points he wished to make. First, with regard to the names to be used for the various groups of treaties, he agreed with Mr. Ago that an absolutely clear definition was needed. To take the case of plurilateral treaties, it was not the states concerned that decided anything but the states that took part in the drafting. The Treaty of Berlin of 1878, for example, had empowered certain newly created states to ratify certain parts of the instrument; those states had certainly been concerned with the effects of the treaty, but they had not influenced the adoption of the text. Even in modern times, states not concerned with the drafting of a treaty were affected by its accession clauses.

85. Secondly, with regard to the point raised by the Secretary of the Commission, it was true that treaty-making conferences convened by the states concerned applied a practice which differed from that applied at conferences convened by the United Nations. In the case of the latter, the rules of procedure remained provisional until formally adopted by the conference. Yet, treaties could be prepared otherwise than at one or other of those two kinds of conference. Many multilateral—or, as Mr. Ago called them, "collective"—treaties were drawn up by a few states and then presented to other states without an international conference and without the sponsorship of an international organization. What was dangerous in the context of article 5 was not the distinction between multilateral and plurilateral treaties, but the fact, pointed out by Mr. de Luna, that the definitions did not entirely correspond with current international practice and did not cover all forms of international transactions.

86. Thirdly, with regard to paragraph 3, he said it would be very dangerous to make a rule which might incite states which had participated in drawing up a treaty to nullify it before renouncing their right to sign, and so to prejudice the purpose of the treaty. Such conduct would be politically unethical and reprehensible, quite independently of any rule of international law. Naturally a state had a sovereign right to renounce its part in drawing up a treaty or to accept it or not, but he would regard it as absolute bad faith if a state, during the negotiations themselves, acted in a manner

which conflicted with the spirit in which the negotiators were drafting the treaty. For example, if a treaty on disarmament were concluded and a state did everything it could to elude the purpose of the treaty between the time of the authentication of the text and the time of entry into force, that would be bad faith. In strict law, perhaps such action was not forbidden, but he did not think that a commission of jurists representing the main forms of civilization and principal legal systems of the world should lay down that a state was not obliged to abide by its word. The special rapporteur had been very clear and it had been perfectly open to him to raise the question, but he himself was wholly on the other side. He agreed with Mr. Amado and Mr. Padilla Nervo and would go even further than Mr. Elias in demanding the amendment of paragraph 3.

87. Mr. EL-ERIAN said that he shared Mr. Tabibi's doubts about the advisability of specifying the voting procedure applicable to the adoption of different classes of treaty. The adoption procedure applicable to treaties drawn up at an international conference convened by an international organization and that applicable to those drawn up in an international organization had both been dealt with more conveniently in article 6, paragraph 4 (*d*), of the 1959 draft. The practice of international conferences convened under United Nations auspices was that provisional rules of procedure were prepared by the Secretariat, and the conference adopted them with what amendments it pleased. Thus, what were commonly called United Nations conferences were not conferences "in" an international organization and were not governed by the constitutional rules of the organization.

88. As a matter of principle, as Mr. Castrén had pointed out, the Commission had decided to deal only with treaties between states and not, for the time being, with treaties between states and international organizations or between international organizations.

89. He agreed with Mr. Amado that article 5 as it stood was unnecessarily complicated.

90. He shared Mr. Padilla Nervo's doubts about paragraph 3. The statement that nothing in paragraph 2 should affect any obligation that a state might have under the relevant general principles of international law could be made in the commentary, but was out of place in the body of a draft convention which stipulated precise legal provisions; besides, if such a proviso were written into article 5, many of the other draft articles would have to be similarly qualified.

91. Mr. AGO said that the drafting of paragraph 3 might be improved; in particular, the reference to "general principles of international law" might be omitted. But the substance of the paragraph should stand. The commentary on article 8 of the 1959 draft, in particular paragraph 2 of that commentary, showed how important such a provision would be. The overriding principle which should govern the negotiation of a treaty was that of good faith. If anything, therefore, the provision should be drafted in more rigid terms. He would propose a redraft in the drafting committee.

The meeting rose at 5.55 p.m.

**643rd MEETING***Tuesday, 15 May 1962, at 10 a.m.**Chairman: Mr. Radhabinod PAL***Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)**

1. The CHAIRMAN invited the Commission to continue its discussion of article 5 of the special rapporteur's draft.

**ARTICLE 5. ADOPTION OF THE TEXT OF A TREATY (continued)**

2. Mr. YASSEEN said that, like other members, he doubted the need for the classification of treaties into plurilateral and multilateral. The distinction might be useful in a few provisions, such as those relating to accession and reservations, but it would be hard to find criteria which would avoid all confusion, as the special rapporteur himself had admitted.

3. So far as the voting procedure for the adoption of the text of a treaty was concerned, he agreed that unanimity should remain the general principle, but, in view of recent developments in the law of treaties, a distinction should be drawn between multilateral treaties drawn up at international conferences convened by an international organization, and those drawn up in an international organization. A conference, whether convened by states or by an international organization, was master of its own procedure, whereas in the case of a treaty prepared by an international organization the rules governing adoption were laid down in or derived from the constitution of the organization concerned.

4. If paragraph 2 were retained, paragraph 3 would be needed. States should not be at liberty to rely on the terms of paragraph 2 if they committed any act which might prejudice the purposes of the treaty, or to claim that paragraph 2 relieved them of all international obligation arising out of their participation in the adoption of the text of a treaty. He therefore advocated the retention of paragraph 3. He was impressed by Mr. Ago's cogent defence of paragraph 3, but could go no further; the Commission could not take it upon itself to define the content of the obligation so incurred. Paragraph 3 was a saving clause and stressed that paragraph 2 did not release states from all obligations under other rules of international law.

5. The words "general principles of" could with advantage be deleted from paragraph 3, in order to make it quite clear that the reference was to any obligation arising from any rule of international law.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Amado had described article 5 as a "vestibule". It was rather an important vestibule, for it referred to the stage at which the content of the treaty was formulated; authentication was usually more or less automatic once the content had been accepted. Thus the voting rules governing the adoption of a treaty were very much a matter of substance.

7. His purpose in drawing the distinction between multilateral and plurilateral treaties in article 5 had been to emphasize the differing assumptions about voting rules in paragraph 1, sub-paragraphs (b) and (c), but he was fully prepared to drop the distinction if a suitable redraft could be found. The Commission would have some difficulty, however, in finding a formula that would cover both plurilateral and multilateral treaties, as it would need to do when it came to deal with signature, accession and reservations. He would be the first to welcome some method of evading the difficulty by making the distinction early in the draft. He entirely agreed that the attempted definitions did not cover every case. A change of appellation would not help, since the difficulty was substantive, nor was a solution easily found by drawing a distinction between law-making treaties and contractual treaties. As Rousseau had pointed out, treaties so often partook of the nature of both law-making treaty and contractual treaty.

8. He had divided multilateral treaties into three separate groups, dealt with in sub-paragraphs (c), (d) and (e), because article 8, paragraph 2, of the 1959 draft had seemed to him quite wrong in classifying treaties emerging from international conferences convened by international organizations with treaties drawn up in international organizations. The more usual practice seemed to be that the voting rule was decided by the conference itself. It had been suggested that sub-paragraph (d) was unnecessary and should be amalgamated with sub-paragraph (c). He could agree to that if the Commission was satisfied that there was no need to mention the special class of treaties dealt with in sub-paragraph (d).

9. In paragraph 8 of his commentary, he had referred to the special case of the International Labour Organisation, whose constitution prescribed in detail the method by which treaties concluded under its auspices should be drawn up. To cover cases of that kind, and a few similar ones where the organization itself provided the voting rule, a saving clause might be included if sub-paragraphs (c) and (d) were amalgamated, in order to avoid appearing to force a rule of international law on the constitution of an international organization. Whether in fact international organizations ever drew up a voting rule before a conference was convened he did not know. If they did not, sub-paragraphs (c) and (d) could safely be amalgamated, with the inclusion of the saving clause he had suggested.

10. With regard to the re-draft of paragraph 1 submitted by Mr. Jiménez de Aréchaga at the previous meeting, perhaps it would be simplest to mention, first, treaties drawn up at an international conference, then treaties drawn up in an international organization and then to state that in other cases the text would be adopted by the consent of all parties unless they decided to accept some other rule. Since, however, in some of his other draft articles he had mentioned bilateral treaties first, and had then gone on to refer to treaties drawn up in an international organization, it might be better, for the sake of symmetry, to maintain the sequence. The drafting committee could easily settle

that point, and Mr. Jiménez de Aréchaga's draft might be referred to it, with certain amendments which he, as special rapporteur, had prepared.

11. He could accept the deletion of the second sentence in paragraph 2 beginning "*A fortiori*", as urged by Mr. Castrén and Mr. Verdross; it had appeared in weaker form in article 8 of the 1959 draft, but was not necessary.

12. He agreed, however, with Mr. Yasseen that if paragraph 2 were retained, paragraph 3 should be retained also, because an isolated strong negative at the beginning of paragraph 2 might create an inference that states were bound by no obligations whatsoever during the drawing up of a treaty; a necessary safeguard of the rules of international law should therefore be stated in paragraph 3.

13. It seemed to him from the previous day's discussion that some members had not appreciated the very limited character of paragraph 3 and the purpose with which it had been formulated in 1959. That was partly his own fault for not having reproduced *in extenso* the commentary of 1959. If, as he hoped, the Commission decided to retain paragraphs 2 and 3, it would have to include in its final report a passage from the 1959 commentary, say paragraphs 4 and 5 of the commentary on article 8,<sup>1</sup> to explain that paragraph 3 was simply a saving paragraph to avoid excluding a rule which might or might not exist, and so was intended to leave the question entirely open.

14. He would be willing to omit the words "general principles of" if they created any misunderstanding as to the source of the obligation, but would urge the retention of paragraph 3, for use in cases where a court might have to determine a specific point.

15. Mr. AMADO, drawing attention to article 9 of the draft convention prepared by the Harvard Research,<sup>2</sup> said he had used the word "vestibule" because no one would deny that states which disagreed with the content of a treaty were free to retire from negotiations which were still fluid. The Commission would be assuming a heavy responsibility if it suggested that mere negotiations might give rise to any obligations over and above those imposed on every state by the requirements of good faith.

16. Sir Humphrey WALDOCK, Special Rapporteur, suggested that Mr. Amado's point might be met if, in paragraph 3, the phrase "in the adoption of the text of a treaty" were substituted for "in the drawing up of a treaty". Article 8, paragraph 2, of the 1959 draft referred to "the negotiation"; paragraph 3 of his draft referred to the "drawing up of a treaty", which was the next stage, but he would be perfectly willing to refer instead to the further stage, which was the adoption of the text.

17. Mr. AMADO suggested that paragraphs 2 and 3

should be merged so as to place less emphasis on paragraph 2 and stress the principle of good faith implicit in paragraph 3; the combined paragraph would then read more or less: "Although the participation of a state in the adoption of the text of a treaty, whether in negotiation or at an international conference, does not place it under any obligation whatsoever, nevertheless nothing contained in this article shall affect any obligation it may have, under general principles of international law, to refrain for the time being from any action that might frustrate or prejudice the purposes of the proposed treaty, if and when it should come into force."

18. Mr. LIANG, Secretary to the Commission, said that the special rapporteur's clarification of the purpose of paragraph 1, sub-paragraphs (d) and (e), should go a long way towards dispelling any misapprehensions. His draft was a great improvement on article 6, sub-paragraph 4 (d), of the 1959 draft. The special rapporteur had suggested that if the two situations contained similar elements, the two sub-paragraphs might be assimilated and a saving clause introduced, but there was nothing to warrant assimilation.

19. In actual fact, none of the existing international organizations had any constitutional provision that governed the voting procedure where a multilateral treaty was drawn up at a conference convened by an international organization. In paragraph 8 of his commentary, the special rapporteur had given the example of the International Labour Organisation as justifying the inclusion of sub-paragraph (d), but the International Labour Conference was a part of the International Labour Organisation, not a conference convened by it. He could not recall any example which fitted the situation described in sub-paragraph (d).

20. The outstanding example of a treaty concluded in an international organization was probably the Genocide Convention of 1948, which had been drawn up by the Sixth Committee of the General Assembly, and the Assembly had applied its own rules of procedure. Although those rules contained nothing about the adoption of conventions, article 18 of the Charter had been applied and all the articles of the Genocide Convention had been adopted by a two-thirds majority.

21. For an international conference convened by an international organization, the secretariat drew up provisional rules of procedure which the conference adopted with whatever amendments it considered necessary and desirable. He had not been able to find any example where an international organization had made any decision about the voting procedure for a conference convened by it. The nearest approach was the International Atomic Energy Conference, which had not been an organ of the United Nations but had been convened by it. The Conference had been preceded by a preparatory committee which had recommended that all decisions should be taken by a two-thirds majority vote. For the purpose of preparing the Conference, the preparatory committee had performed the same functions as the Secretariat in proposing the voting rules; the adoption of the voting rules had been a matter for the Conference itself.

<sup>1</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 102.

<sup>2</sup> *Supplement to the American Journal of International Law*, Vol. 29, No. 4, October 1935, p. 778.

22. Mr. GROS said that the Commission was discussing matters which should really be dealt with by the drafting committee. Article 5 could be referred to the drafting committee since, with one exception, which was a point of substance, the remaining points were purely drafting points. The adoption of the text of a treaty was obviously one of the essential steps in treaty making.

23. On the question of the voting procedure of an international conference being settled by the organ which convened the conference, there was one example which had not been quoted and that was the Paris Conference of 1946, where the Ministers for Foreign Affairs had settled that decisions of the Conference should be by a two-thirds majority. In organizing and preparing the general conference of states, the Council of Ministers for Foreign Affairs could be regarded as having acted as an organ of the community of states.

24. The point of substance which the Commission should discuss further before the whole draft article was referred to the drafting committee was that raised by Mr. Amado. Paragraph 2 admittedly stated the obvious, but that was sometimes inevitable in a draft convention like the one under discussion; paragraph 3 was more controversial. He would be inclined to accept what had been accepted by the Commission in its commentary on article 8, paragraph 2, of the 1959 draft. There might be some doubt as to the nature of the obligation involved, but not as to its existence. Mr. Amado had pinned his argument to the principle of good faith, but other explanations had been advanced in 1959, such as the doctrine of abuse of rights or a rule implied by the general international law of treaties. The Commission had left the question open in 1959, and was under no greater obligation to make a choice in 1962. He might prefer the suggestion of Mr. Ago and Mr. Bartoš that the Commission should merely allude to the existence of an obligation without going any further towards defining it than it had done in 1959.

25. The Commission was obviously contemplating the omission of the classification of treaties, although it would have to face that problem in connexion with subsequent articles, such as those dealing with accession and reservations. Even the classification into bilateral and plurilateral treaties was not entirely watertight, for it could not be said that the basic criteria for bilateral treaties were different from those which applied to plurilateral treaties. It would therefore be preferable to close the discussion and refer to the drafting committee the draft of paragraph 1 on the simplified lines suggested by Mr. Jiménez de Aréchaga, while retaining paragraph 2, as drafted by the special rapporteur, and paragraph 3, as simplified by Mr. Ago and Mr. Bartoš.

26. Mr. LIU said that it was not necessary to make too refined a classification of the different forms of multilateral treaties. The merit of article 5 was that it would provide definite guidance with regard to voting procedure.

27. He agreed with the views of the Secretary regarding the purpose of sub-paragraphs (d) and (e) of paragraph 1, but differed from him regarding the distinction

between the instances covered by those two sub-paragraphs.

28. The wording of sub-paragraph (d) would, in his opinion, also cover the cases mentioned in sub-paragraph (e). Whether a treaty was drawn up at an international conference convened by an international organization or actually in an international organization, there was no difference in substance. The drawing up of the treaty was in both cases an act of the participating states. Even in the instances described in sub-paragraph (e), the act of collective drafting and adoption was not an act done within an international organization as such.

29. Since both sub-paragraphs arrived in fact at the same result, the wording of sub-paragraph (d) would be sufficient to cover also the cases referred to in sub-paragraph (e). That wording safeguarded the constitutional provisions, if any, of the organization concerned and at the same time provided the necessary flexibility for the adoption of any rules of procedure which the participating states might decide upon.

30. It seemed to him that the distinction between the cases mentioned in sub-paragraphs (d) and (e) lay in the composition of the conference rather than in the manner of drawing up the text or of convening the conference.

31. The CHAIRMAN suggested that draft article 5, paragraph 1, be referred to the drafting committee with Mr. Jiménez de Aréchaga's revised draft and the further drafting points made by Mr. Elias.

*It was so agreed.*

32. The CHAIRMAN said that the Commission appeared to have agreed to delete the second sentence in paragraph 2, but had not yet agreed whether to delete paragraph 3 or to retain it with drafting changes. He suggested that the point should be discussed further before paragraphs 2 and 3 were referred to the drafting committee.

33. Mr. TSURUOKA said that if paragraphs 2 and 3 were to be retained, or combined in one paragraph as suggested by Mr. Amado, a problem would arise which he would like to have clarified. For instance, if a convention were adopted by the International Labour Organisation, but neither signed nor ratified, could paragraphs 2 and 3 be construed to mean that a member state of the International Labour Organisation would be debarred from enacting legislation at variance with the terms of the convention?

34. Mr. AMADO repeated his suggestion that paragraphs 2 and 3 should be merged; Mr. Gros' remarks had strengthened the case for that suggestion. The formulation which he had suggested would make it clear that the statement contained in the first sentence of paragraph 2 was the reaffirmation of a self-evident principle.

35. With regard to the classification of treaties, the most appropriate one was that based on their legal nature. Some treaties were of a normative character and laid down objective rules of international law; they were law-making treaties. Other treaties were subjective in

character and resembled contracts in that they related to the interests of the parties to the treaty. The essential difference between the two kinds was that only in the second kind was there any *do ut des*; in law-making treaties there was no question of any consideration given by one party to the other in return for the latter's corresponding undertaking.

36. Mr. AGO said that, in Mr. Tsuruoka's example, states remained completely free to enact legislation at variance with a convention adopted by an International Labour Conference, but not ratified by them. In doing so, they would not violate any international obligation, nor would they in any way frustrate or prejudice the purpose of the convention; and if the state concerned subsequently ratified the convention, it would be perfectly possible for it to amend its internal legislation accordingly.

37. The provisions under discussion were intended to cover a totally different situation. It was possible for a state to take measures relating to a property or a territory which would make it impossible to carry out the provisions of the treaty when it came into force, and that situation ought to be avoided.

38. He supported Mr. Amado's suggestion for the amalgamation of paragraphs 2 and 3.

39. He recalled the suggestion he had made at the close of the previous meeting that the drafting committee should be asked to formulate an article on the negotiation of treaties.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that he had omitted from his draft the 1959 provisions on the negotiation of treaties because those provisions seemed to him more a statement of fact than of law; they indicated merely how things were actually done.

41. If, however, a text were desired on the subject he did not think the drafting committee would have any difficulty in formulating one on the basis of the 1959 provisions.

42. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to Mr. Ago's suggestion.

*It was so agreed.*

43. Mr. VERDROSS, replying to Mr. Tsuruoka, pointed out that paragraph 3 did not establish any categorical rule. It did not purport to lay down what a state could or could not do, but merely indicated that, if in the circumstances any obligations existed under the general principles of international law, those obligations were not in any way affected by the draft articles.

44. Mr. TSURUOKA said that he was second to none in his devotion to the principle of good faith, but a provision such as paragraph 3 might lend itself to arbitrary interpretation. Its vague formulation could inhibit a scrupulous country from taking legitimate action.

45. The changes which the special rapporteur had agreed to introduce into the provisions under discussion

went a considerable way towards dispelling his doubts. He noted, however, that those provisions referred to "the purposes of the proposed treaty". That reference could give rise to controversy because a particular clause of a treaty might be regarded as essential by one country participating in the negotiations but not by another.

46. The CHAIRMAN said that the point raised by Mr. Tsuruoka had been the subject of considerable discussion in 1959 but that the Commission had then decided to retain a provision similar to article 5, paragraphs 2 and 3, of Sir Humphrey's draft.

47. In the circumstances, he suggested that the Commission should decide tentatively to retain paragraphs 2 and 3 and refer them to the drafting committee, together with the observations made during the discussion. The Commission could then pass on to the consideration of article 6.

*It was so agreed.*

#### ARTICLE 6. AUTHENTICATION OF THE TEXT AS DEFINITIVE

48. Sir Humphrey WALDOCK, Special Rapporteur, said that no introduction was necessary for article 6, which repeated with minor drafting changes the provisions of article 9 of the 1959 draft.

49. Mr. BRIGGS drew attention to the statement in paragraph 2 that a text might be authenticated with respect to a particular state. Surely, if a text were authenticated, it should be authenticated with respect to all states.

50. Sir Humphrey WALDOCK, Special Rapporteur, explained that what he had had in mind was the case of an exchange of notes or letters. The notes or letters would in many cases not be signed on the same date, with the result that the authentication would take place separately for each of the states concerned.

51. Mr. ELIAS suggested the deletion of the words "as definitive" from the title of article 6. In view of the definition in article 1 (g) of "authentication" as the act whereby the text of a treaty was "rendered definitive *ne varietur*", they were redundant.

52. He also suggested that in sub-paragraph 1 (c) the words "in any other manner prescribed" be replaced by the words "in the manner prescribed".

53. As he saw it, a resolution of one of the organs of an international organization was a resolution of the organization itself, since the organization would have to adopt formally the decision of its organ.

54. Mr. CASTRÉN said he supported the suggestion by Mr. Elias regarding sub-paragraph 1 (c), provided that it could be fitted into the language of the corresponding sub-paragraph 1 (c) of article 9 of the 1959 draft.

55. He preferred the 1959 formulation because it made clear that a resolution of an organ of an international organization was a resolution of the organization itself.

56. He noted that the second sentence of paragraph 3 was based on a passage in the commentary on article 9 of the 1959 draft. That sentence was not strictly neces-

sary but it would do no harm, so he would not oppose its retention.

57. Mr. LACHS said that the case of exchanges of notes or letters was a very important one. Recent statistics showed that some 40 per cent of all bilateral treaties concluded in the world now took the form of such exchanges. In addition, multilateral treaties sometimes also took the forms of exchanges of notes or letters and, although rare, examples of such a practice could be cited from the time of the League of Nations. It was therefore desirable that the Commission should consider the question of the authentication of treaties concluded by exchanges of notes or letters.

58. Another case which should be considered was that of agreements not expressed in the form of a signed document, but only in a communiqué issued at the end of the conference. Since there was neither signature nor initialling of a document, oral agreement to the publication of the communiqué would appear to amount to authentication of the text.

59. Lastly, the case should also be considered of agreements incorporated in the final act of a conference. The practice had recently developed, however, of drawing up two documents at the end of a conference: a final act, which was usually signed by all participants, and a separate treaty or convention, as with the 1959 Supplementary Convention on the Abolition of Slavery<sup>3</sup> and the 1958 Geneva Conference on the Law of the Sea.<sup>4</sup>

60. Mr. TSURUOKA said that he had the same difficulty as Mr. Briggs in relation to paragraph 2.

61. The paragraph might, however, be necessary to cover the case where one state initialled a treaty for purposes of authentication, while another actually signed it instead of initialling it. It would seem that for the latter state signature covered also authentication.

62. Sir Humphrey WALDOCK, Special Rapporteur, said that he was working on the assumption that some sort of authentication took place in every treaty. In the case of exchanges of notes or letters, to which reference had been made by Mr. Lachs, authentication took place with the attachment of signature. In the vast majority of cases, the signature of the letter or note was also the act which authenticated the text.

63. Very occasionally, however, exchanges of notes were made subject to ratification. In that case, the signature would be the authenticating act.

64. There was nothing in the provisions of article 6 which would conflict with existing practice in the matter of exchanges of notes or letters.

65. As for a treaty which took the form of a communiqué, he assumed that the communiqué would have to be adopted in some way. The Commission would encounter great difficulties if it endeavoured to cover every possible case.

66. The suggestion by Mr. Elias concerning the title of the article could be referred to the drafting committee.

67. As regards the other suggestion by Mr. Elias, relating to sub-paragraph 1 (c), he would be prepared to restore the 1959 text. It was sufficient to refer to a resolution of an organ of an international organization, since the organization would always have to act through one of its organs. But the reference to "any other manner prescribed by the constitution of the organization concerned" was necessary in order to cover certain special cases. For example, in the International Labour Organisation, it was the Director-General's signature which constituted the formal authentication, and not the resolution adopted by the Organization. The matter was explained in the 1959 commentary on article 9.

68. The CHAIRMAN said that if there were no objection, he would consider that the Commission approved article 6, subject to drafting changes, so that it could now be referred to the drafting committee, and the Commission could pass on to consider article 7.

*It was so agreed.*

#### ARTICLE 7. THE STATES ENTITLED TO SIGN THE TREATY

69. Sir Humphrey WALDOCK, Special Rapporteur, said that article 7 raised the general question whether the draft articles should contain some reference to the inherent right of states to sign a general multilateral treaty. The matter had been discussed by the Commission in 1959, and the 1959 commentary on the corresponding article 17 set forth the opinions then expressed by members of the Commission on that point.

70. In 1959 the Commission had arrived at the conclusion that the issue could not be divorced from the question of the procedure for the adoption of a treaty. Accordingly, it had decided to defer consideration of article 17 until it came to consider the provisions on accession. Unfortunately, the Commission had never reached the provisions on accession.

71. Perhaps the Commission should consider whether the article on the right to sign a treaty should be discussed at that stage or whether discussion should be postponed until the provisions on accession were debated.

72. Mr. BRIGGS suggested that consideration of article 7 be postponed until the Commission took up the articles concerning accession.

73. Mr. LACHS supported that suggestion.

74. Sir Humphrey WALDOCK, Special Rapporteur, said he saw no objection to that course; in the meantime the Commission could continue work on the provisions relating to the more formal clauses of a treaty.

*It was so agreed.*

#### ARTICLE 8. THE SIGNATURE OR INITIALLING OF THE TREATY

75. Sir Humphrey WALDOCK, Special Rapporteur, said that the article reproduced, with some modifications, the content of articles 10 and 16 in the 1959 draft. He considered that provisions concerning the time and place of signature should be linked with those

<sup>3</sup> *United Nations Treaty Series*, Vol. 266, p. 40.

<sup>4</sup> *United Nations Conference on the Law of the Sea*, Official Records, Vol. II (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 146.



concerning the signature or initialling of the treaty.

76. Mr. de LUNA suggested, as a drafting amendment, that the word "conditional" be substituted for the word "provisional" in sub-paragraph 2 (a).

77. Mr. GROS said that, although he was aware that sub-paragraph 3 (a) (i) was modelled on article 10, paragraph 2, of the 1959 draft, he felt bound to point out that it would not be easy to determine the intention referred to in the provision.

78. The remainder of the special rapporteur's text was acceptable and could be referred to the drafting committee.

79. Mr. BARTOŠ said that, in the past, the initialling of a treaty by a Head of State with the intention that it should be equivalent to a full signature would have been regarded as binding on the state, since a sovereign could not go back on his word. Under modern conditions, initialling might not always connote a final commitment.

80. Mr. PAREDES said that article 8 was of great importance, but should take into account those cases where, under constitutional law, the signature of a treaty needed parliamentary approval.

81. Mr. YASSEEN said he agreed with Mr. Bartoš's observation concerning the effect of initialling in modern times.

82. The CHAIRMAN suggested that, in the absence of further comment, article 8 be referred to the drafting committee.

*It was so agreed.*

#### ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE

83. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no comparable article in the 1959 draft and that the article had not been easy to formulate because it overlapped with other articles. He believed, however, that such an article was necessary.

84. Perhaps the Commission might find it convenient to consider the article paragraph by paragraph. The first question that would arise in connexion with paragraph 1 was whether, in fact, it was needed at all. He had inserted it for the sake of completeness.

85. Mr. BARTOŠ said that the article raised a problem of drafting, inasmuch as a state should be treated as one single entity and not as two different entities, one of which signed a treaty and then submitted it for ratification to the other.

86. He welcomed the "good faith" clause in sub-paragraph 2 (c), in view of the recent growth of a practice, particularly in the case of customs agreements, whereby they entered into force at once pending definitive ratification. The Commission had not discussed that practice to any great extent when preparing the 1959 draft.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that the practice mentioned by Mr. Bartoš was covered by article 20, paragraph 6, but that that provision might require amplification.

The meeting rose at 12.30 p.m.

#### 644th MEETING

*Wednesday, 16 May 1962, at 10 a.m.*

*Chairman: Mr. Radhabinod PAL*

#### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)

#### ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE (continued)

##### Paragraph 1

1. The CHAIRMAN, inviting the Commission to continue its consideration of article 9, suggested that it be discussed paragraph by paragraph; the substance of paragraph 1 had already been accepted with the approval of article 6, paragraph 2.

2. Mr. TABIBI said that the special rapporteur had prepared a useful article which, as he had himself admitted, had not been easy to draft satisfactorily. A signature, whether only for the purpose of authentication or whether constituting the signature of a treaty that did not require accession or ratification, clearly had some legal force and created certain obligations, for it was an act of the state, though in the exercise of its sovereign power the state was free to withdraw its signature. On that point he agreed with the opinion of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, quoted in the special rapporteur's commentary, that the signatory state entered into some intangible obligation, a view supported by the draft convention on the law of treaties prepared by the Harvard Research. The Permanent Court of International Justice had also recognized in the Polish Upper Silesia Case<sup>1</sup> that a signatory state's misuse of its rights in the interval before ratification might amount to a breach of the treaty.

3. On a point of drafting he observed that the language of paragraph 1 was not altogether clear. It did not indicate what happened in cases where signature did not amount to an act of authentication and where the text was authenticated in some other way agreed on by the parties or by persons other than those representing the parties; for example, the General Act for the Pacific Settlement of International Disputes of 1928 had been authenticated by the President of the League of Nations Assembly and the Secretary-General of the League.

4. Paragraph 1 was closely linked with paragraph 3 and so should be moved.

5. Mr. TSURUOKA suggested that the drafting committee should be asked to eliminate the overlap between article 6, paragraph 2, and article 9, paragraph 1.

6. Mr. CASTRÉN said it would suffice if article 6, paragraph 2, were simply referred to in article 9, paragraph 1.

<sup>1</sup> P.C.I.J., Series A, No. 7, 1926, p. 30.



7. Mr. AMADO said the drafting of paragraph 1 was unsatisfactory, particularly the phrase "automatically constitutes an act authenticating".

8. Mr. ELIAS said he was inclined to think that paragraph 1 could be dropped.

9. Mr. ROSENNE thought there was some value in retaining paragraph 1 but in a shorter form. It would be enough to state that, in addition to authenticating the text, full signature had the effects set forth in the succeeding paragraphs.

10. Sir Humphrey WALDOCK, Special Rapporteur, while agreeing that the wording of paragraph 1 could be improved, thought that for the sake of completeness it should be retained, if only in the form of a reference to article 6, paragraph 2.

11. The CHAIRMAN suggested that paragraph 1 be referred to the drafting committee.

*It was so agreed.*

#### Paragraph 2

12. Mr. CASTRÉN said that paragraph 2 was undoubtedly useful but there were certain gaps in it and some obscurities. One or two passages, such as sub-paragraph (a), the latter part of sub-paragraph (b) and sub-paragraphs (d) and (e), were too obvious to need stating.

13. He agreed with the special rapporteur that the obligation stated at the beginning of sub-paragraph (b) was vague, but it might serve a useful purpose to mention it.

14. The obligation dealt with in sub-paragraph (c) had been discussed earlier in connexion with article 5 and had given rise to a difference of opinions. It would seem necessary to define more exactly what was meant by "the other states concerned" and "a reasonable period". The point to be stressed was not so much that a state was under an obligation to indicate what its intentions were about ratification, as that it should not act in a way that might impair the performance of the treaty at any time before ratifying or accepting it. It was interesting to note that the Permanent Court, in its judgement in the Polish Upper Silesia case, had not mentioned the matter of notification concerning the decision about ratification or acceptance during a reasonable period, but had referred to the misuse of rights. Of course, a state was under no obligation if it was not going to become a party to a treaty, but the decision not to become a party was not usually notified; consequently, whether a state had fulfilled its obligations usually had to be judged *ex post facto*.

15. He proposed that sub-paragraph (c) should be redrafted to read:

"The signatory state, provided that it ratifies or accepts the treaty, shall be under an obligation from the time of signature to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance."

16. Mr. YASSEEN said that most careful thought would have to be given to the question whether the

notion of misuse of rights should be introduced into provisions of the kind under discussion.

17. A state should not sign lightly, for under international law signature had some significance, but he would not go so far as to say that it implied any obligation to ratify. He was troubled by the wording of the opening passage in sub-paragraph (b), because no obligation could derive from a treaty that had not yet entered into force.

18. The special rapporteur's proposal in sub-paragraph (c) seemed reasonable and practical.

19. Mr. JIMÉNEZ de ARÉCHAGA said that article 9 was acceptable as regards content, but was too long and too repetitious; the drafting committee should be requested to shorten and simplify it. Sub-paragraphs (a) and (e) might be deleted as self-evident and perhaps the latter part of sub-paragraph (b) could also be omitted.

20. Mr. VERDROSS said he could not agree to the proposition that a treaty subject to ratification imposed certain obligations. In so far as the obligations enumerated in sub-paragraphs (a) to (e) could be said to exist, they did not derive from the signature of a treaty but from general rules of international law. It should be enough to say in the introduction to paragraph 2 that signature subject to ratification did not make the state concerned a party.

21. Sub-paragraph (a) contained something that was self-evident: a state which had signed was entitled to proceed with ratification.

22. If sub-paragraph (b) was intended to express an obligation to submit a treaty for ratification, it should state that the obligation was owed by the government, rather than by the state as such. However, he very much doubted whether such an obligation on governments in fact existed, apart from special provisions such as those in the Constitution of the International Labour Organisation, according to which a convention adopted by a two-thirds majority of the International Labour Conference had to be submitted for ratification.

23. Sir Humphrey WALDOCK, Special Rapporteur, shared Mr. Verdross's doubt as to whether there was a rule of international law requiring a government to submit a treaty for ratification, but in fact the provision put forward in sub-paragraph (b) was very much weaker and only stipulated that the signatory state was under an obligation to examine in good faith the question of referring the treaty to the competent organs for ratification. Perhaps nevertheless there was some value in pointing out what was desirable conduct on the part of states.

24. He would be reluctant to try and draw a distinction between states and governments: the latter acted on behalf of the former.

25. The purpose of sub-paragraph (a) was to indicate that a state had no right to proceed to ratification unless it had gone to the length of signing; that might be obvious, but it needed saying.

26. Mr. TABIBI said he agreed with the remarks of

Mr. Verdross concerning paragraph 2; the phrase "whether actual or presumptive" might cast doubt on the subsequent sub-paragraphs. A provision stating that full signature would not constitute the state concerned a party would suffice, for the rest of the paragraph explained what effect signature had on the rights and obligations of signatories.

27. The meaning of the article would become clearer if paragraphs 1 and 3 were combined in a single clause describing the legal effect of full signature.

28. With regard to sub-paragraph (c), he said that signature should be regarded as having been done in good faith until the terms of the treaty were violated, which was the only way of determining whether the state had acted in good faith or not. There was, however, a danger in such a proviso, for it might be used by other states as a pretext for evading their obligations on the ground that other parties had not acted in good faith.

29. Mr. LACHS pointed out that, although signature did not mean that the state concerned had become a party, it nevertheless gave rise to certain rights and duties. The first was a perfect right to ratify, but the duty to comply with the provisions of the treaty was imperfect and passive, in fact it was a negative duty to refrain from certain acts. The Commission should consider whether it was desirable to encourage states to include in a treaty provisions relating to its substantive effects pending its entry into force; an example of such a provision was article 38 of the General Act of the Congo Conference of Berlin of 1885.<sup>2</sup>

30. The right expressed in sub-paragraph (d), if it existed at all, was certainly an imperfect right. If a state wished to become a party to a treaty it would presumably comply with its provisions, but he seriously questioned whether other signatories could insist upon its compliance. He was inclined to think that the sub-paragraph should be deleted.

31. Mr. de LUNA, commenting on the first part of sub-paragraph (b), said that it was unlikely that states would ever relinquish their power to keep matters of foreign policy outside parliamentary control in the sense of the distinction between the federative power and the legislative established by John Locke in his "Treatise of Civil Government".

32. He could not agree with Mr. Yasseen that an obligation could not be created by a treaty not yet in force. Although the legal significance of signature had gradually diminished, nevertheless, quite apart from the fact that it authenticated the text of the treaty, it gave rise to a precontract in regard to "service of the convention" which must be respected, as well as to an obligation in good faith to refrain from any act calculated to frustrate the purposes of the treaty before its entry into force, and to certain special obligations, as in the case of the ILO conventions.

33. Sub-paragraph (d) rightly emphasized that, although states were not obliged to ratify, if they did so they had to comply with the provisions of the treaty in that respect and could contest the action of a party which failed to comply.

34. Mr. AMADO said that, as was clearly indicated in article 8 of the Harvard draft, the right of a signatory to refuse to ratify a treaty was incontestable. Refusal could also be an act of the executive on parliamentary authority, which Mr. Scelle had described as discretionary power; other authors had similarly questioned the existence of an international obligation to submit a treaty for ratification.

35. The case was of course different if the treaty itself contained provisions expressly obliging the parties to submit it to ratification by the competent organs.

36. Pallieri, in his *Formation des traités dans la pratique internationale*<sup>3</sup> had described treaties as an expression of the concordant will of the contracting parties, even when subject to confirmation, and had added that, pending their expected ratification, states should not do anything that might make the execution of the treaty impossible or difficult. That notion had received practical expression in article 38 of the General Act of the Congo Conference of Berlin of 1885, to which Mr. Lachs has already referred, and more recently in article 24 of the Convention for European Economic Co-operation of 1948.<sup>4</sup>

37. The language of paragraph 2, particularly sub-paragraphs (a) and (c), was not appropriate in a legal instrument.

38. Mr. TSURUOKA said he agreed with those members who had expressed doubts regarding the usefulness of the first part of sub-paragraph (b). The obligation therein specified seemed to be partly moral and partly legal in character; while a reference to such an obligation might be appropriate in a code, it was not suited to a draft convention.

39. As to the second part of sub-paragraph (b), two situations were possible. The obligation therein set forth might result from an existing treaty, such as the Constitution of the ILO, or it might not; in regard to the latter case, it would be necessary to clarify the points mentioned by Mr. Yasseen.

40. The obligation set out in sub-paragraph (c) was similar to that specified in article 5, paragraph 3. The Commission might discuss the relative importance of the two types of obligation, during the period of negotiation and during the interval between signature and ratification, and then, when views had crystallized, draft a suitable commentary illustrated by examples.

41. He suggested that the somewhat unsatisfactory text of sub-paragraph (d) should be redrafted to read:

"The signatory state shall be under a duty to observe the provisions of the treaty regarding

<sup>2</sup> F. de Martens, *Traité de droit international*, Paris, 1887, Vol. III, p. 443.

<sup>3</sup> *Recueil des cours* 1949, Académie de droit international de la Haye, Paris, Vol. I, p. 469.

<sup>4</sup> *Treaty Series* No. 59 (1949), H.M.S.O., London, p. 18.

signature, ratification, acceptance, accession, reservations, deposit of instruments and any other such matters.”

42. He would illustrate his understanding of the purpose of sub-paragraph (d) by taking reservations as an example. Sub-paragraph (d) was not intended to give every signatory state the right to object to specific reservations by another signatory state; at most, the first state could demand the observance of the procedure specified in the treaty for the making of reservations. In the special rapporteur's text, that intention did not appear clearly.

43. Mr. ELIAS, expressing support for the three main ideas contained in paragraph 2, suggested that those ideas could be set out more concisely if, first, the opening clause and sub-paragraphs (a) and (b) were combined to read something like:

“(a) Where either the treaty or the signature to it is subject to ratification or acceptance, a signatory state shall be entitled to submit it to its competent organs for ratification or acceptance in accordance with the treaty itself or with the constitution of an international organization within which the treaty was adopted.”

44. Secondly, sub-paragraph (c) raised the difficulty of stating a negative obligation for the period when the decision to ratify had not yet been notified. He suggested that it be redrafted to read:

“(b) Before the expiration of the period stipulated in the treaty for ratification or acceptance, or, if no period is stipulated, within a reasonable period, the signatories shall refrain from any action calculated to frustrate the objects of the treaty.”

45. Thirdly, he suggested that sub-paragraphs (d) and (e) be merged in a single provision to read:

“(c) A signatory state shall have the right, as regards the other signatory states, to insist on the observance of the provisions of the treaty or of the present articles regulating signature, ratification, acceptance, accession, reservations, deposit of instruments and any other such matters.”

46. He submitted his redraft for the consideration of the drafting committee.

47. Mr. ROSENNE said he found himself in general agreement with the ideas contained in paragraph 2, subject to the following observations.

48. First, he suggested the deletion of all the references to “acceptance”. That term, as defined in article 1 (k), covered both the classical method of concluding treaties by means of signature followed by ratification and the modern method of acceptance, or accession, not preceded by signature. It was better for the Commission, in article 9, to confine itself to the classical process of concluding treaties by signature followed by ratification.

49. Secondly, he suggested the deletion of the words “whether actual or presumptive” in the fourth line of the introductory portion. The term “presumptive party” was defined in article 1 (c) as a state which had qualified

itself to become a party to a treaty, but he thought it should mean a state which was qualified to become a party to a treaty. The basic question was that of the provisional status conferred upon a state by signature subject to ratification, a question dealt with by the International Court in its reply to Question III in its Advisory Opinion on Reservations to the Genocide Convention.<sup>5</sup> to which reference was made by the special rapporteur in the appendix to his report. From the treatment of reservations by the International Court and by the General Assembly, he concluded that even in a treaty subject to ratification, a distinction should be made between the final clauses and the other provisions of the treaty. In practice, the final clauses entered into force, at least in an inchoate or imperfect manner, as soon as the treaty was authenticated.

50. Thirdly, in view of the contents of article 10, which covered not only treaties specifically subject to ratification, but also treaties which had been signed by a party subject to ratification, the words “or where the signature itself has been given subject to subsequent ratification or acceptance” were unnecessary in the introductory portion and he suggested their deletion.

51. Fourthly, he agreed with the explanation given by the special rapporteur regarding the intention of the provision contained in sub-paragraph (b) and hoped that the idea of that provision would be retained.

52. Fifthly, he also agreed with the idea contained in sub-paragraph (c), but thought that its provisions, by enunciating merely a negative duty, might not fully cover the legal situation. In the case concerning the Arbitral Award of 23 December, 1906,<sup>6</sup> between Honduras and Nicaragua, the parties had, before a treaty had entered into force, proceeded with the organization of a Mixed Boundary Commission. The International Court of Justice had drawn certain legal conclusions from that action, in the context of the facts of the case as a whole. In the light of that example, it was doubtful whether the negative form of sub-paragraph (c) was sufficient. The possibility should not be excluded of some positive conclusion being derived from action taken by the parties in implementation of the substantive provisions of a treaty which had not yet entered into force. He emphasized that he was referring to the substantive and not to the procedural provisions of a treaty.

53. Also with regard to sub-paragraph (c), he could not accept the new formulation proposed by Mr. Castrén. It was difficult to see how an obligation could arise from the time of the signature of a treaty, when the existence of that obligation was stated to be dependent upon an uncertain future event, namely, the subsequent ratification or acceptance of the treaty.

54. Lastly, he interpreted sub-paragraphs (d) and (e) as applying in effect to the final clauses of the treaty, and on that assumption could see little reason for those provisions.

<sup>5</sup> *I.C.J. Reports*, 1951, p. 15.

<sup>6</sup> *I.C.J. Reports*, 1960, p. 192.

55. Mr. AGO said he noted that most of the remarks made during the discussion related to questions of form which could be dealt with by the drafting committee.

56. With regard to substance, he was in broad agreement with the special rapporteur's proposals. However, it was advisable to simplify the text by eliminating certain superfluous provisions which were a survival from previous drafts. The presence of those provisions in the earlier drafts had been understandable because those drafts had been intended to serve as a basis for a code. Now that the Commission was drafting a convention, the questions covered by those provisions could safely be covered in the commentary.

57. In the introductory portion, the words "or where the signature itself has been given subject to subsequent ratification or acceptance" could be deleted. The purpose of that passage appeared to be already covered by the preceding words "subject to ratification or acceptance".

58. With regard to the essential problem of paragraph 2, which was the enumeration of the effects of signature, the special rapporteur's explanation of the purpose of sub-paragraph (a) was that it was to provide that signature was necessary to enable a state to proceed to the next stage and ratify the treaty. In that case the drafting committee would have to improve the wording so as to reflect that idea more adequately. As it stood, the provision seemed to suggest that the effect of signature was to grant to the signatory state a kind of right at international law to ratify the treaty.

59. Sub-paragraph (b) contained two different statements. The first related to the obligation to examine in good faith the question of ratification. That statement was vague; it was difficult to see what that obligation implied when a treaty had only been signed and the ratification still remained open; he therefore suggested that the first portion of sub-paragraph (b) should be deleted.

60. Sub-paragraph (b) contained, however, a second idea which it might be essential to retain in the text itself and not merely in a commentary. That idea related to a specific legal obligation which existed within the framework of certain organizations. In those organizations, states members had sometimes the obligation not only to submit the treaty to their competent organs for ratification, but also to report to the organization on the progress made, and, in the case of refusal by the competent organs to authorize ratification, to inform the organization of the reasons for that refusal. The drafting committee should examine the constitutions of those organizations and prepare a text broad enough to cover not only the provisions of those constitutions, but possible future developments in the same field.

61. The idea expressed in sub-paragraph (c), relating to the duties of a signatory state during the period between signature and ratification, was very similar to that in article 5, paragraph 3, which concerned the period of negotiation. He could accept the formulation proposed by the special rapporteur, but not that proposed by Mr. Castrén, which suggested that the

obligation would operate only retrospectively, in other words, where signature was followed by ratification.

62. He suggested that the drafting committee should consider whether two separate sets of provisions were necessary; it might be advisable to combine in a single clause the provisions relating to the obligations of states throughout the period from negotiation to ratification.

63. With regard to sub-paragraph (d), he noted that the special rapporteur himself did not object to amending or deleting the reference to the right "to insist upon the observance" of certain provisions. It was necessary to state in clearer language whether a right existed or not; if it was not intended to set forth an actual right at law, the matter should be relegated to the commentary.

64. Sub-paragraph (e) raised, among others, an important question relating to a modern practice of democratic states, which were often faced with the problem that the terms of a treaty needed to be carried out urgently, whereas it was known that it would take a long time to obtain the necessary authority of Parliament for ratification. The practice had, therefore, developed of including sometimes in that type of treaty a clause to the effect that the treaty was subject to ratification in accordance with the constitutional provisions of the parties thereto, but that its terms entered into force, in whole or in part, at the time of signature. The drafting committee should adjust the wording to sub-paragraph (e) so as to cover that practice.

65. Mr. YASSEEN, replying to Mr. de Luna, said that he had not denied that signature could produce legal effects in international law; he had only referred to the source of the obligation which might arise in such circumstances. He did not think that such an obligation could be derived from the treaty itself, where the treaty was subject to ratification. Such a treaty could not have any binding force before ratification because it did not enter into force until it was ratified.

66. By way of analogy, he quoted the example of donations or gifts, which under the law of France and a number of other countries had to be made by notarial deed. The courts had further ruled that, in order to be valid, the promise of a gift must also be made in notarial form.

67. Mr. VERDROSS said he questioned the validity of the idea expressed in the first part of sub-paragraph (b), since a government, after new elections or any other change in government, could hardly be expected to assume any obligation with regard to a treaty signed by a previous government, but not ratified. That part of the sub-paragraph should therefore be deleted.

68. A most important principle was embodied in the second part of sub-paragraph (b) regarding the obligations deriving from the constitution of an international organization. It was clear that member states should respect the obligations arising out of the constitution of the organization. The obligations did not derive from the treaty itself, whether ratified or not, but from the constitution of the international organization in which

it was concluded. It would therefore be wiser to delete from the introductory portion of the paragraph the phrase "with the following effects", and to specify in paragraph 3 what obligations flowed from general international law, because all the obligations set out in paragraph 2 flowed not from the treaty but from general principles of international law or from the constitution of the international organization concerned.

69. With regard to sub-paragraph (e), undoubtedly there were treaties which entered into force immediately on signature, but that case should be dealt with under article 10. Naturally, if the signatories had full powers to conclude a treaty definitively, the treaty would enter into force immediately, but if a treaty was signed subject to ratification and not ratified, no obligation would arise. That would not, of course, preclude the practice mentioned by Mr. Bartoš at the previous meeting, whereby a treaty, once signed, might be put into effect if given practical application even before ratification; it would then be ratified *de facto*. Sub-paragraph (e) should preferably be deleted.

70. Mr. BARTOŠ said that the debate on article 9 showed that many matters in the draft had either not been cleared up or were controversial in the theory of international law, though found in practice. The basic idea had been clearly explained by Mr. Verdross. Two subjects appeared to have become confused: the effect of a treaty signed but not yet ratified and the legal fact that a treaty had been signed. It was not the negotiations that counted, but the fact of signature or the constitution of international organizations or conferences which conferred certain legal effects on signature. The Commission had perhaps been wrong in dealing with the two concepts together and in drawing similar inferences. It would be the duty of the special rapporteur and the drafting committee to keep the two ideas apart.

71. Objection had already been raised to certain expressions in the introductory portion of the paragraph, particularly to the word "presumptive". It was a practical question. The draft did not refer to a treaty which had presumptively come into effect, but to the parties which might eventually be the parties bound by the treaty—in other words, the potential parties.

72. Another point was that raised by Mr. Rosenne. In the modern practice followed by governments and the United Nations Secretariat with regard to the right to sign, acceptance raised a difficult problem. A case had occurred where the full powers of the Yugoslav permanent representative had had to be changed because he had been authorized to sign and accept, whereas, in the view of the Secretariat, he was required merely to accept. A strict distinction should therefore be drawn between signature and acceptance. In United Nations practice, an agent could sign only if his country had participated *ab initio* and, once a certain period had elapsed, only if the treaty was still open for signature, whereas in practice acceptance was an act not much different in form from accession, though the two institutions might differ in substance. The Commission should decide whether to use the term "acceptance" or not. He did not oppose it, for he regarded acceptance

as equivalent in its effects to ratification; but from the point of view of technical terminology they were two different things.

73. With regard to sub-paragraph (b), he said that the special rapporteur's idea was sound. The practice of the International Labour Organisation had been cited, and Mr. Ago had shown that it involved not only the duty to submit the question of ratification for consideration by the competent organ of the signatory state, but also the duty of the government—government delegates participated as a separate group in the work of the ILO Assembly—to report on the decision of that competent organ and to explain the reasons if the organ refused to accept a recommendation or to ratify a convention adopted by the International Labour Conference.

74. The practice was even clearer in the World Health Organization. Any member state which refused to ratify a convention adopted by the World Health Assembly had to give the reason for its refusal. If the World Health Assembly accepted that reason, the matter rested there; if it did not do so, the state was given time until the next Assembly, and, if by then it still refused to ratify, the Assembly decided whether that state should be permitted to remain a member of the Organization or not. That was an entirely new practice, which pertained rather to international legislation than to contractual law. In any case, it was not provided for in the traditional law of treaties, and should be stated separately for its future implications.

75. He had been and remained in agreement with the idea contained in sub-paragraph (c), but the formulation was as repugnant to him as that of article 5, paragraph 3. There might be some question, as Mr. Ago had pointed out, whether the Commission should retain the duplication or combine the two statements in a single article, but the idea should be preserved.

76. It was to be presumed that the notification mentioned in sub-paragraph (c) meant notification of a decision to refrain from ratifying. If the decision was a positive one, the obligation would be that much stronger. Even though a state might eventually refuse to ratify, it had the moral obligation during the provisional stage to refrain from any action calculated to frustrate the objects of the treaty, because it was hoped that the state in question would become a party to the treaty.

77. Another question was raised by the phrase "during a reasonable period", in the same sub-paragraph. The special rapporteur, in paragraph 6 of his commentary, said he hesitated to suggest a specific period of years. The question of the length of the period was therefore not a question of law, but of fact. In international law many such questions had never been settled, a circumstance which made the Commission's task even harder and gave rise to uncertainties in practice.

78. He could not support the amendments proposed by Mr. Castrén and Mr. Elias. He agreed with previous speakers that Mr. Castrén's amendment would be retrospective. It could hardly be enforced; if a government which had signed a treaty was overthrown and succeeded by another government with a completely

different policy, the new government could hardly be bound by the signature of its predecessor. The new government might have an obligation of good faith to refrain from any action calculated to frustrate the objects of the treaty, but that obligation would not derive from the treaty itself, for in effect the treaty did not exist for the new government. The obligation derived really from general international law, which gave a certain legal effect to the act of signature considered as a legal fact, and to that extent would remain entirely valid, even if the new government refused to ratify the treaty. Indeed, a breach of that obligation might even attract sanctions if such could be imposed under the terms of the treaty. On the other hand, ratification in that case would not have retrospective effect, since the duty to refrain from frustrating the objects of the treaty continued to exist even in the interval.

79. The right referred to in sub-paragraph (d) was somewhat dubious. It might be tantamount to the protection of a legitimate position. He did not agree with the opinion of Mr. Lachs concerning that provision. The fact that a state had signed a treaty placed it in a position where the commission of certain acts in law by the other signatories might influence the validity of the treaty and affect the legal relations among the signatories. It was therefore authorized to defend itself against any abuse or any act by the other signatories liable to produce drawbacks or to aggravate its position as a potential signatory.

80. With regard to the right of a signatory state to insist on the observance by other states of the provisions of the treaty concerning reservations, he said the question was not so much whether the reservations had been made in the prescribed form as whether they existed at all within the meaning of the relevant provisions of the treaty. That was a substantive rather than a procedural question, but it was settled by a later provision, as would be seen from articles 17 to 19.

81. With regard to sub-paragraph (e), Mr. Verdross had rightly stated that the "other rights" were those specifically conferred by the treaty itself, or rather by the rules of international law concerning the consequences of the legal fact of signature of a treaty. That was the view that he (Mr. Bartoš) had maintained from the outset.

82. Mr. BRIGGS said that it was difficult to discuss article 9 paragraph by paragraph since the whole structure of the article needed revision. It had a certain architectural unity, but should preferably begin with paragraph 3, which dealt with the most important principle.

83. Paragraph 1 was unnecessary, for its substance was covered elsewhere.

84. With regard to sub-paragraph 2 (a), it had been said that the signatory state had undoubtedly the right to proceed to ratification, but that no corresponding obligation to ratify was stated. However, the corresponding obligation was that other states would have to permit the signatory state to ratify; he did not know of

any case in which a signatory state had been denied that right.

85. Two different ideas had been combined in sub-paragraph 2 (b). The first was too broad and too vague and the second did not properly belong in the article, as it dealt with the constitution of international organizations such as the International Labour Organisation. It might be preferable to delete that sub-paragraph.

86. Mr. Ago had noted that an idea comparable to that stated in sub-paragraph 2 (c) had already been stated in article 5, paragraph 3, and it was again stated in article 9, paragraph 3 (b) (i). The idea might be placed in a separate article dealing with the obligation to refrain from any action calculated to frustrate the objects of the treaty from the date of signature, but in article 5, paragraph 3, the implication was that the obligation might arise even before signature.

87. With regard to sub-paragraph 2 (d), he noted that certain provisions of certain treaties might enter into force on signature. An example was the treaty between the United States and the Philippines, signed on 4 July 1946, subject to ratification. The treaty as a whole had come into force in October 1946, but article 1, recognizing the independence of the Philippines, had been given application by Presidential Proclamation on 4 July 1946, and articles 2 and 3, providing that the United States would temporarily represent the Philippines diplomatically and would train Philippine diplomats, had entered into force on the date of signature by an express provision of the treaty. That example might be used by the Commission to explain that certain provisions of a treaty might come into force at the time of signature even though the remainder of the treaty was subject to ratification.

88. The problem arose when the treaty itself did not so specify, and that raised the question whether the Commission wished to establish obligations which would be binding upon signature, but prior to ratification, as was suggested in sub-paragraph 2 (d). His suggestion, however, went beyond what had been set down by the special rapporteur. He raised the question whether it might not be desirable to revert to sub-paragraph 2 (c) and write in a provision to the effect that, pending the entry into force of a treaty, the obligation not to frustrate the objects of the treaty would be not merely one of good faith but one which derived from a rule of general international law.

89. Mr. LIANG, Secretary to the Commission, said that, in his opinion, paragraph 2 (b) did not belong in draft article 9. The conventions of the International Labour Organisation, which had been given as an example, did not involve signature; they were adopted and authenticated under article 19 of the ILO Constitution and communicated to governments for ratification. Such treaties should therefore have been dealt with under article 10.

90. That raised a wider issue, which concerned, as Mr. Bartoš had cogently argued, the effort to improve international legislative technique in connexion with multilateral treaties. In 1947 the United Nations

General Assembly had appointed a Committee on the Development and Codification of International Law to study methods of encouraging the progressive development of international law and its eventual codification, and the Secretariat had undertaken to present certain suggestions for the encouragement of ratifications and accessions.<sup>7</sup> It had been felt at the time that many multilateral treaties signed by States were not being implemented by the States concerned, and especially in scientific circles it had been thought that certain measures might be devised to give an impetus to the process of ratification and accession. The Secretariat had therefore suggested that the Committee might consider continuing the practice of the League of Nations of publishing periodically information on the progress of ratifications of, and accessions to, conventions completed under the auspices of the League of Nations and procedures which the Secretary-General of the United Nations might take in order to encourage ratifications and accessions on the part of the States concerned. The Secretariat had had in mind especially the experience of the ILO, whose Member States were under an obligation to submit conventions and recommendations to their competent organs for ratification, and if no ratification ensued, to report the reasons for the delay. Some other specialized agencies had similar procedures. It was mainly a follow-up technique. In the state of international society in 1947, however, governments had not been ready to accept that novel technique and the Secretariat's suggestions had not met with an enthusiastic response. The Commission might wish to consider whether it was desirable to generalize the practice of the ILO.

91. If the second part of sub-paragraph 2(b) were retained, it should be placed in article 10, but it would be quite unnecessary to retain the first part of the sub-paragraph. When a state had signed a treaty, it would normally proceed to ratification if impelled by national interest, or if it wished to promote an international interest by becoming a party thereto. Doubts had been expressed as to whether it was appropriate for an international organization to follow the practice of the League of Nations of publishing a list of states which did not ratify the treaties signed by them.

92. Mr. CASTRÉN said that Mr. Rosenne and other members had criticized his proposal; nevertheless, he thought it presented no great difficulty, for it hinged on the attitude of the state concerned. Under his proposed provision, a state which did not ratify a treaty signed by it would be under no obligation whatsoever, which was surely a reasonable proposition; conversely, under that provision, a state which ratified would not be entitled to take any action calculated to frustrate the objects of the treaty. Consequently a signatory state would have to be careful to refrain from such action before it had decided its eventual attitude. If a change of government occurred, the new government would, of course, be entitled to decide its attitude freely, but the state as

such naturally remained responsible for obligations incurred by the previous government. The advantage of the proposal was that it would avoid all difficulties arising from provisions about ratification and the reasonable period for notification.

93. Mr. ROSENNE replied that Mr. Castrén's idea was perhaps too subtle; his text seemed open to various interpretations.

94. The question raised by Mr. Ago, Mr. Verdross and the Secretary assessing the specialized treaty-making techniques of certain international organizations was extremely complex. It might be preferable to draft a separate article containing a provision somewhat similar to that in article 25 of the 1958 Convention on the Territorial Sea and the Contiguous Zone<sup>8</sup> and article 30 of the Convention on the High Seas,<sup>9</sup> to the effect that the provisions of the Convention should not affect conventions or other international agreements already in force as between states parties to them. At the least, some such statement might be made in the commentary. That would draw attention to the cogent points made by previous speakers.

95. Mr. de LUNA said that he apologized to Mr. Yasseen if he had misunderstood him. He realized, in the light of Mr. Verdross' explanation, that Mr. Yasseen had been correct.

96. Mr. EL-ERIAN said that, like Mr. Briggs, he was not aware of any case in which any state had denied to another state the right to ratify a treaty.

97. The special rapporteur's views concerning the nature of the obligation of a state to proceed with ratification were not so far-reaching as those of Sir Hersch Lauterpacht, quoted in the special rapporteur in his commentary, that signature implied "an obligation to be fulfilled in good faith to submit the instrument to the proper constitutional authorities with a view to ratification or rejection." He was still not sure that such an obligation really existed. Although, as the special rapporteur had argued, imperfect obligations existed in international law, it might not be desirable to mention such obligations in a draft convention. He suggested that sub-paragraph (b) might begin: "The signatory state shall examine..."

98. He could accept the provision in sub-paragraph (c) that a signatory state was under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty.

99. The provision in sub-paragraph (d), however, was not clear, for it would mean that a treaty would be in a provisional status pending an inquiry into the compatibility of reservations with the terms of the treaty. The problem might be further considered when the Commission came to deal with the articles concerning ratification and reservations.

<sup>7</sup> Supplement to *American Journal of International Law*, Vol. 41, No. 4, October 1947, p. 113.

<sup>8</sup> United Nations Conference on the Law of the Sea, *Official Records*, Vol. II (United Nations publication, Sales No. : 58.V.4, Vol. II), p. 132.

<sup>9</sup> *ibid.*, p. 135.



100. He interpreted sub-paragraph (e) as implying that a signatory to a treaty might dispense with ratification with regard to certain parts of it, if it was expressly stated in the treaty itself that those parts did not require ratification. If that was the correct interpretation, he would have no difficulty in accepting the provision.

The meeting rose at 1.5 p.m.

## 645th MEETING

Thursday, 17 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

#### ARTICLE 9. LEGAL EFFECTS OF A FULL SIGNATURE (*continued*)

##### Paragraph 2 (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of paragraph 2 of article 9.
2. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not himself share the view of some of the speakers in the discussion, that in his draft he had been unduly faithful to the texts prepared by previous special rapporteurs. In fact, the Commission had not previously considered the questions covered by article 9, and the fruitful discussion which had taken place had shown that it had been useful to set out the detailed proposals of his predecessors for the Commission's consideration. The discussion now enabled him to outline a new formulation for article 9.
3. Paragraph 1 could easily be redrafted, in accordance with the Commission's decision at the previous meeting, so as to take into account the various observations during the discussion, which had all related to drafting points.
4. The position was, on the whole, similar in regard to the introductory portion of paragraph 2, which could be re-worded so as to refer to article 10 and article 16.
5. The fact that the term "acceptance", like many others used in international practice, had two meanings should not deter the Commission from using it throughout paragraph 2, for it was clear that in the context it could only mean acceptance equivalent to ratification.
6. The right set out in sub-paragraph (a) was undisputed and that was a good reason for including it in the draft; he saw no merit in the suggestion that because a point of law was undisputed it should be omitted from the draft.
7. Emphasizing the importance of the right of a state to participate in a treaty, he said the aspect of that right mentioned in sub-paragraph (a), the right to proceed to ratification after signature, was perhaps sufficiently

obvious as not to be essential to the draft, but other aspects of that right, such as the right to sign or to accede to a treaty, were of greater significance.

8. A matter of importance had arisen in regard to sub-paragraph (b). He had at first hesitated to include the provisions of that sub-paragraph, which related to an obligation of good faith of a very tenuous kind, but had finally decided to follow the example of his predecessors and retain it; a provision on the subject was desirable in order to encourage states to ratify treaties which they had signed. Such an encouragement was necessary in view of the disappointingly large number of cases in which treaties were signed by states but not ratified. That experience went back to the time of the League of Nations and the situation had unfortunately not improved since the establishment of the United Nations.

9. The Commission should decide whether it wished to retain a provision on the subject of that obligation of good faith. If it decided to retain it, the provision should set out the obligation not of the signatory state itself but, as Mr. Bartoš had suggested, of its authorities — not necessarily its government — to examine in good faith the question whether to follow up signature with ratification or not.

10. The discussion had emphasized the differences between the two portions of sub-paragraph (b). The first portion set out the obligation of good faith in general terms; the second set out an obligation which had its source not in the law of treaties but in the constitutional law of the international organization concerned. If the first portion were retained, it would be possible to keep the second in an amended form. He could not, however, accept the suggestion that the first should be deleted and the second retained, since the latter did not properly belong to the law of treaties. The only justification for including the second sentence was that it reserved the position of the ILO conventions if the rule set out in the first sentence were maintained.

11. Sub-paragraph (c) also set out an obligation of good faith and he saw much force in the suggestion that a separate article should be formulated to include all the provisions of the draft on the subject of the rights and obligations of states prior to the entry into force of a treaty. That new article could be placed at the end of the chapter on the conclusion of treaties, so as to precede the chapter on entry into force. It would cover three types of rights and obligations: first, the obligations, if any, of states which adopted the text of a treaty, obligations dealt with in article 5, paragraph 3; secondly, the rights and obligations of signatory states during the period between signature and ratification, dealt with in article 9, paragraph 2; and thirdly, the rights and obligations of a state which was a full party to a treaty, pending the entry into force of that treaty. There were cases, in modern practice, where a state could accept a treaty, or even accede to it, before the treaty came into force. A state which thus committed itself to a treaty which was not yet in force was entitled to expect that its objects would not be frustrated. The matter was dealt with in article 9, paragraph 3.

12. He drew attention, however, to the different formulations of the obligations of a state during negotiations, in article 5, paragraph 3, and after signature, in article 9. In the first case, the Commission had adopted a negative formulation; it had not taken any decision on the question of substance whether any obligation existed; it had merely agreed on a saving clause concerning a possible obligation which might exist at international law. For the purpose of article 9, however, the Commission was considering a positive formulation which would set out the obligation of good faith incumbent upon a state which had actually signed a treaty.

13. He could not accept the redraft proposed by Mr. Castrén for sub-paragraph (c) which would take the heart out of the obligation of good faith. The obligation not to frustrate the objects of a treaty, if it was to have any meaning, should exist before the treaty actually came into force.

14. Sub-paragraph (d) should, he thought, be redrafted so as to cover not only the rights, but also the obligations of a signatory state. He also agreed that it was desirable to find a better expression than "the right to insist upon the observance" of the clauses of the treaty in question.

15. The provisions of sub-paragraph (d) were of real significance, but did not properly belong to article 9 as it was now conceived. The purpose of the sub-paragraph was to emphasize that the clauses of a treaty which regulated such matters as signature, ratification, acceptance, accession and reservations should be observed even before the treaty came into force as a treaty. In particular, the whole authority of the depositary state depended on those clauses, which were usually final clauses of a mainly procedural character, although Mr. Bartoš had correctly pointed out that those relating to reservations could also affect matters of substance.

16. As he saw it, the real legal basis of such final clauses was the consent of the participating states at the time of adoption of the text of the treaty. That consent created rules of objective law governing participation in the treaty; it was only on the basis of those rules that states could sign, accept, accede to, or make reservations to the treaty. The contents of sub-paragraph (d) came within the scope of treaty law and not of general international law, and should therefore appear in the draft articles.

17. Signature was not, however, the only act which might give rise to rights and obligations pending the entry into force of the treaty; acceptance and accession might also do so. There was, therefore, a strong case for placing the contents of sub-paragraph (d) in the separate article on the rights and obligations of states pending the entry into force of a treaty in the preparation of which they had participated.

18. He had included sub-paragraph (e) largely because of the provisions of sub-paragraph (d). During the discussion, some members had suggested that the provisions of sub-paragraph (e) could be useful to cover the question of provisional entry into force. He agreed

that that was so, but pointed out that provisional entry into force was dealt with in article 20, paragraph 6, and article 21, paragraph 2.

19. In fact, the question of provisional entry into force could be said to belong to that of the rights and obligations of states prior to the entry into force of a treaty. From the drafting point of view, however, it was convenient to deal with "provisional entry into force" immediately after "entry into force" itself.

20. If all the questions relating to rights and duties prior to entry into force were to be transferred to the suggested new article on the subject, the residual paragraph 3 would be very brief: it would, in fact, resemble article 14 of the 1959 draft,<sup>1</sup> the language of which, moreover, needed improvement. He could not accept the formulation: "signature operates as a provisional consent to the text, as constituting an international agreement"; it could easily lead to misunderstanding.

21. Mr. de LUNA repeated his suggestion for the deletion of sub-paragraph (b).

22. An additional reason for deletion, apart from those mentioned earlier in the discussion, was that the contents of the sub-paragraph were a historical reminiscence from the time when an agent's signature was always subject to ratification by the sovereign whom he represented, because the sovereign had to satisfy himself that his agent had not acted *ultra vires*. In the days when rulers had had absolute powers the signature affixed to a treaty had had the effect of creating rights. Ratification had had merely a declaratory effect: it was evidence that the agent had not acted *ultra vires*. The state on behalf of which a treaty had been signed had then been under an obligation to ratify it if its agent had acted within his powers. But with the spread of democratic institutions, and constitutional government, parliamentary control over treaty-making by the Executive had become general. Ratification was no longer a declaratory act; it was, in fact, the act which bound the state. Any suggestion that a state could have obligations apart from "service of the convention", prior to ratification, would represent a return to ideas belonging to the era of the absolute power of Heads of State. Those remarks applied to the first sentence of sub-paragraph (b).

23. The second sentence referred to obligations arising from the constitutional law of international organizations; but the Secretary had pointed out that the conventions of the International Labour Organisation, the example given, did not involve signature. It was difficult, therefore, to see how a provision relating to "the signatory state" could apply in the circumstances.

24. Mr. LIU said that it would be regrettable if the contents of paragraph 2 were not retained in the draft. It was true that most of the obligations set out in that paragraph were imperfect obligations, but many examples could be cited of imperfect obligations in international law.

<sup>1</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 105.

25. The paragraph contained two important ideas: first, an obligation on the signatory state to submit the treaty to its competent organs for ratification or rejection; secondly, an obligation on the signatory state to refrain from acts calculated to frustrate the objects of the treaty or to impair its implementation.

26. It was very important to retain some provision along those lines in order to give meaning to the act of signature. In modern times, ease of communications enabled a representative to keep the authorities of his state fully informed of all the stages of negotiations. If those authorities allowed him to sign the treaty, they obviously undertook to proceed to the next stage, and to take steps to submit the treaty to the competent organs for ratification.

27. Mr. TSURUOKA said that, if the Commission decided to include in a single article all the imperfect obligations which states might have prior to the entry into force of a treaty in the preparation of which they had participated, emphasis should be placed on the degree of consent to the treaty by the state concerned.

28. The suggested article would have to cover three different situations: first, the obligations, if any, on a signatory state which had participated in the negotiation of a treaty at which a text to which it was opposed had been adopted; secondly, the obligations of a signatory state prior to ratification; and thirdly, the obligations of a signatory state which had ratified a treaty which had not yet entered into force.

29. An example that had been cited by way of illustration was that of a text adopted at a disarmament conference. In such a case, although in theory the consent of the government would be required, in practice the negotiators would be in such close touch with the highest authorities in their home countries that there could never be any doubt as to the intention of a participating state to accept any given proposal.

30. The problem in the case of technical conferences, which often adopted by a simple majority rules of procedure whereby a simple majority sufficed for the adoption of a substantive text, was rather different. If the rules of procedure were adopted by 51 votes to 49 and then a text were adopted by the same narrow majority, it could hardly be said that a country belonging to the minority was acting in bad faith if it took any action likely to hamper the implementation of a text which it had strenuously opposed and which had been adopted under a rule of procedure which it had also strenuously opposed.

31. The CHAIRMAN said there appeared to be general agreement to accept the proposal, originally made by Mr. Briggs, for a separate article combining the provisions of article 5, paragraph 3, and those of article 9 on the rights and obligations of a state participating in the preparation of a treaty pending the entry into force of the treaty. If there were no objection, he would take it that the Commission agreed to invite the Drafting Committee to formulate such an article and to include in it the provisions of article 5, paragraph 3,

and those of article 9, paragraph 2, sub-paragraphs (c) and (d), as suggested by the special rapporteur.

*It was so agreed.*

32. The CHAIRMAN said that, since all the comments on the introductory portion of paragraph 2 and sub-paragraph (a) related to drafting points, if there were no objection, he would consider that the Commission agreed to refer that part of paragraph 2 to the Drafting Committee.

*It was so agreed.*

33. The CHAIRMAN invited the Commission to consider sub-paragraph (b). There had been a division of opinion on the question whether the incomplete obligations stated in that sub-paragraph should be mentioned in the article.

34. He therefore called for a vote on the question whether the first sentence of sub-paragraph (b), commencing with the words "The signatory state" and ending with the words "for ratification or acceptance;" should be retained.

*The first sentence of sub-paragraph (b) was rejected by 8 votes in favour to 8 against, with 3 abstentions.*

35. Mr. YASSEEN urged the Commission, in view of the closeness of the vote, to ask the Drafting Committee to consider all the comments of members on the rejected passage and to try to formulate a text acceptable to the Commission.

36. Mr. AMADO proposed that the whole of article 9 should be referred to the Drafting Committee, with instructions to prepare a simplified and more precise text. The article was of great importance, for the legal effects of a full signature was one of the essential questions of the law of treaties. A state which signed a treaty was under no obligation whatsoever to submit that treaty to its competent organs with a view to ratification.

37. In thus reconsidering the whole text of article 9, the Drafting Committee would examine the question of the suitable placing of the various provisions included in the special rapporteur's draft of the article, particularly sub-paragraph (e), which was stated in the commentary to relate to reservations and which would therefore be more appropriately placed in the provision on reservations.

38. Mr. AGO, supporting Mr. Amado's proposal, said there had not been a majority in the Commission in favour of sub-paragraph (b) in the form in which it had been submitted, but the Drafting Committee should be able to formulate a text acceptable to the Commission.

39. He hoped the Drafting Committee would be allowed sufficient latitude in its consideration of article 9, as proposed by Mr. Amado. It should be empowered not only to amend the text of the various provisions contained in the article, but also to delete some of them and to decide which would be included in the article and which would be removed from it; with regard to the latter type of provision, it would also consider the question of their proper place in the draft.

40. Mr. TABIBI said that, if the Commission intended to reverse its decision to reject the first portion of sub-paragraph (b), it should observe its rules of procedure.

41. Mr. AGO pointed out that no such reversal was intended. The Commission had rejected the first portion of sub-paragraph (b) in the proposed formulation, but that did not prevent it from inviting the Drafting Committee to prepare a new text on the subject for possible inclusion either in the draft articles or in the commentary.

42. Mr. TSURUOKA said he would have no objection if the Commission instructed the Drafting Committee to prepare a more suitable text. The draft articles which the Commission adopted on first reading would be submitted to governments for their comments and one possible course of action would be to include a text in the commentary, so as to obtain government comments upon it.

43. The CHAIRMAN said that, since the Commission was formulating a draft only on first reading, it would be unfortunate not to make a further attempt to cover the subject-matter of sub-paragraph (b) by asking the Drafting Committee to prepare a more acceptable text.

44. The Commission had rejected only the first sentence of sub-paragraph (b); it had taken no decision regarding the second. If there were no objection, he would consider that the Commission agreed to refer sub-paragraph (b) as a whole to the Drafting Committee, with the comments made during the discussion, so that the Commission could reconsider the whole matter when the Drafting Committee formulated a text.

*It was so agreed.*

45. Sir Humphrey WALDOCK, Special Rapporteur, said he strongly supported Mr. Amado's proposal that the whole of article 9 should be referred to the Drafting Committee. The Commission's decision to remove the contents of sub-paragraphs (c) and (d) from paragraph 2 and place them in the new article on obligations prior to entry into force was bound to affect the terms of paragraph 3. If the provisions concerning the obligations of a signatory state pending a treaty's entry into force were removed from paragraph 3, that paragraph would be considerably shortened, and the Drafting Committee should have no difficulty in formulating it.

46. Mr. BARTOŠ said he had invariably opposed any suggestion to entrust the Drafting Committee with decisions on questions of substance. Questions of substance, important legal points, should always be settled by the Commission itself. He maintained that position, but would not object, in the present instance, to certain questions of substance being referred to that committee, but only for preliminary or supplementary study, along with matters of drafting relating to article 9. Once the Drafting Committee began to deal with questions of substance, it would no longer be a drafting committee properly so-called. In the present instance it would be an *ad hoc* committee with the same membership and it could be required merely to suggest a solution, not to decide a question of substance.

47. Mr. VERDROSS joined the special rapporteur in supporting the proposal that article 9 as a whole should be referred to the Drafting Committee. Since the special rapporteur was a member of that committee, there would be no procedural difficulty; the text prepared by the Drafting Committee would in fact be, as far as the Commission was concerned, a revised draft submitted by the special rapporteur.

48. The CHAIRMAN said that the Commission would take a decision on paragraph 3 later.

49. As far as paragraph 2 was concerned, the Commission had decided to remove sub-paragraphs (c) and (d) and to place them in a new article concerning the obligations of states pending the entry into force of treaties.

50. He invited the Commission to consider Mr. Amado's proposal that article 9 as a whole should be referred to the Drafting Committee, in so far as that proposal affected paragraph 1 and 2 of the article.

*Mr. Amado's proposal was adopted unanimously.*

### *Paragraph 3*

51. The CHAIRMAN invited the Commission to discuss paragraph 3.

52. Mr. BRIGGS submitted a redraft of paragraph 3 in the following terms:

"Except where signed *ad referendum*, the signature of an instrument by a duly authorized representative of a state binds that state [or: constitutes an acceptance by that state of the provisions of the treaty] upon the entry into force of the treaty:

"(1) where the instrument provides that it shall enter into force upon signature; or

"(2) where the instrument provides that it is not subject to ratification or subsequent acceptance as a condition precedent to its entry into force; or

"(3) where the form or nature of the instrument or the attendant circumstances indicate an intention to dispense with the necessity for ratification as a condition precedent to its entry into force."

53. In view of the special rapporteur's suggestion for the transfer of the provisions contained in paragraphs 2(c), 2(d) and 3(b) from article 9 to a separate article, he would like his own text to be considered by the Drafting Committee as an alternative to article 9 as a whole.

54. Mr. LACHS said he had no objection to paragraph 3 being referred to the Drafting Committee, but pointed out that sub-paragraph (b)(i) concerned the important question of principle, whether a state could consider itself no longer bound by the obligation in question if, after the lapse of a reasonable time from the date of signature, the treaty had not yet come into force.

55. Sir Humphrey WALDOCK, Special Rapporteur, said that the question mentioned by Mr. Lachs might be discussed in connexion with the new article to be prepared by the Drafting Committee.

56. Mr. CASTRÉN said that the obligation stated in sub-paragraph 3 (b) (i) was analogous to that stated in sub-paragraph 2 (c). What would be the position of a state which, under sub-paragraph 3 (b) (i), notified the other signatory states that it no longer considered itself bound in good faith to refrain from any action calculated to frustrate the objects of the treaty? Clearly it was not free to take any action it wished while remaining a party if, contrary to all expectations, the treaty eventually came into force. The only possible way of regulating the matter was to stipulate that states had the right to withdraw their signature before the treaty entered into force and that they would then be exonerated from any obligation regarding the objects of the treaty. He accordingly proposed that the words "it withdraws its signature" be substituted for the words "it no longer considers itself bound by such obligation", in sub-paragraph (b) (i).

57. He realized that the amendment was a radical one, but it offered the only means of retaining the special rapporteur's useful proposal.

58. It would remain for the Commission to define what was meant by "the lapse of a reasonable time".

59. Mr. BARTOŠ said that it would be wrong and at variance with the Commission's practice to refer paragraph 3 to the Drafting Committee without full discussion. He protested at such a course.

60. The CHAIRMAN pointed out that there was no question of depriving members of the opportunity to express their views on the whole of article 9. What had happened was that the special rapporteur had withdrawn his draft, which would be replaced by a new text for consideration by the Commission.

61. Mr. BARTOŠ said the Commission ought to keep to its traditional practice of debating issues of substance in plenary meeting before referring texts to the Drafting Committee.

62. Mr. AGO said that the position was not quite as described by Mr. Bartoš; had it been so, his protest would have been well founded. The special rapporteur had already mentioned that the discussion on paragraph 2 had provoked doubts in his mind about paragraph 3. Once the Drafting Committee had prepared a new text for paragraph 2, the special rapporteur would be in a position to submit a new text for paragraph 3.

63. Sir Humphrey WALDOCK, Special Rapporteur, said he could assure Mr. Bartoš that there was no question of trying to short-circuit the Commission's normal procedure. Paragraphs 2 and 3 evidently needed thorough redrafting, and although he could redraft them on his own, his task would be easier if he worked in concert with the Drafting Committee.

64. The CHAIRMAN said that the new draft for paragraph 3 would be debated by the Commission in due course; in the meantime he suggested that article 9 as a whole be referred to the Drafting Committee and that the Commission pass to article 10.

*It was so agreed.*

#### ARTICLE 10. TREATIES SUBJECT TO RATIFICATION

65. Sir Humphrey WALDOCK, Special Rapporteur, said that he had explained in the commentary why he had drafted article 10 in detailed form.

66. There were two different currents which crossed each other. The first, which had its sources in the past but had survived as convenient for ensuring democratic processes of treaty making, was that in principle treaties were subject to ratification unless they provided otherwise, or unless some special circumstances surrounding their adoption made ratification unnecessary. The second was one which had appeared during the past fifty years with the development of the practice of concluding less formal agreements, for which the presumption was that there was no obligation to ratify unless the treaty itself required it or the circumstances indicated that ratification had been contemplated. Those two currents of practice had given rise to controversy as to the correct residuary rule when the treaty itself did not indicate whether or not it was subject to ratification. Sir Hersch Lauterpacht had taken the line that, having regard to the need to safeguard constitutional requirements in some states, the residuary rule should be in favour of the need for ratification; Sir Gerald Fitzmaurice had taken the opposite view. He himself had suggested that probably the truth was that there were two different presumptions according as the treaty was formal or informal; but he felt that the Commission had to take account of the constitutional position in many states and start from the same general position as Sir Hersch Lauterpacht.

67. Mr. JIMÉNEZ de ARÉCHAGA, referring to paragraph 1, said that in international practice, there were cases, such as the International Labour Conventions, where ratification took place although the treaty had not been signed.

68. He did not greatly favour the view that there should be one residual rule for formal treaties *stricto sensu* and another for treaties in simplified form. It would be preferable to establish a single rule for all, based on the view, upheld by Sir Hersch Lauterpacht, that if there was silence on the matter and no intention was expressed to dispense with it, ratification was required. The opposite view, that in principle treaties did not require ratification, seemed to him heterodox.

69. Most Latin American countries were required by their constitutions to obtain parliamentary approval for treaties on important matters and so would find it difficult to accept the residuary rule proposed for the less formal type of treaty, because it would debar them from that useful practice of an exchange of notes.

70. Mr. VERDROSS said he welcomed the distinction drawn by the special rapporteur between formal treaties and those of the types listed in sub-paragraph 2 (a) (iv). The fundamental difference between them was procedural. The first category normally involved three stages: negotiation and signature, submission to the competent organs for approval, and ratification by the Head of State, and in his opinion, all treaties which, under the constitution of the state concerned, could only be

concluded by the Head of State required ratification. With that first category of treaty, the organ which negotiated and signed the treaty and the organ which ratified it were always separate; with the second category, however, the same organ both negotiated and concluded the treaty.

71. As was indicated in the commentary, the informal type of treaty was very much on the increase and the constitutions of certain states had taken account of that new development of international law. For example, the Austrian Constitution authorized the President of the Republic to delegate power to conclude treaties to the Council of Ministers or to an individual minister.

72. Paragraph 1 was entirely consistent with international practice and was wholly acceptable, but he had some doubts about paragraph 2. In particular, he was unable to accept the proposition in sub-paragraph 2 (a) (i), which belonged to the era of absolute monarchies when the Head of State had possessed *jus representationis omnimodae*; that theory no longer corresponded to modern practice.

73. Mr. BARTOŠ said he agreed with the comment of Mr. Verdross on sub-paragraph 2 (a) (i); such signature had perhaps been traditional in the era of absolute monarchies but had since become obsolete in most countries.

74. With regard to sub-paragraph 2 (a) (iii), he doubted whether ratification could always be dispensed in the case of a treaty amending an earlier treaty which had not itself been subject to ratification, though in the case of treaties with certain kinds of content that rule might apply. It was quite possible that the original treaty fell in the category of treaties not subject to ratification, whereas the amendments took it outside that category. He would therefore express a reservation on that provision and simply state that it was the content, not the historic procedure, which should be decisive in such cases.

75. With regard to sub-paragraph 2 (a) (iv), he agreed with Mr. Jiménez de Aréchaga that it depended on the substance, not on the form, whether ratification was necessary or not. If it framed a different rule, the Commission might be in danger of causing considerable international perturbation. It was hardly the Commission's business to intervene in the everlasting struggle between bureaucracy and parliamentarianism or to take up the position adopted by certain diplomatists who wished to rid themselves of parliamentary control. He would therefore also make a reservation on sub-paragraph 2 (a) (iv), which required more thorough consideration and possibly redrafting.

76. Mr. AGO said that article 10 was one of the most important in the draft and would require very careful thought.

77. He agreed with previous speakers that paragraph 1 clearly stated the existing rule, subject to some drafting amendments.

78. Some drafting rearrangement might also prove advisable for sub-paragraphs 2 (a) and 3 (a); they

should be combined so that the general rule that ratification was required was stated first, followed by provisions indicating the cases where it was not required, which were more in the nature of exceptions.

79. He agreed with the exception stated in sub-paragraph 2 (a) (i), but had doubts about that in sub-paragraph 2 (a) (ii). There was a growing practice of including in treaties which were subject to ratification an article stating that the treaty was subject to ratification in accordance with the constitutional procedures of the states concerned, but entered into force on signature. It would be dangerous to state, even as a simple presumption, that with all such treaties there was no need for ratification.

80. The second possibility envisaged in sub-paragraph 2 (a) (ii), that of treaties coming into force upon a particular date or event, posed even more delicate problems. Though the entry into force of such a treaty would be contingent on the occurrence of the event, it might nevertheless need ratification. The provision needed further study.

81. In general, he agreed with the exception contained in sub-paragraph 2 (a) (iii), but there might be certain other cases that would have to be covered.

82. Perhaps the term "intergovernmental agreement" used in paragraph 2 (a) (iv) should be avoided because some treaties using such a term, for example, the constitution of the Intergovernmental Committee for European Migration, had been subject to ratification.

83. Sub-paragraph 2 (b) was acceptable.

84. If his suggestion for the amalgamation of sub-paragraph 3 (a) with sub-paragraph 2 (a) were adopted, the exception stated in sub-paragraph 3 (b) should be added to those in the previous paragraph.

85. Paragraph 4 was linked closely with the question, discussed in connexion with article 9, whether signature entailed an obligation to examine in good faith the question of ratification. The Drafting Committee could consider the two provisions together.

86. Mr. PAREDES said that he could not accept any general rule that a treaty did not require ratification except where the treaty itself expressly contemplated it. In most cases the rule should be precisely the opposite.

87. The rule stated in paragraph 1 would hold good in the case of treaties drawn up in international organizations, because a state in joining the organization accepted its constitution, the provisions of which would prevail over any conflicting provisions of municipal law. In other types of treaty, however, involving the basic interests of a state, ratification would be essential as an expression of the democratic principle of representation and of the position of the Head of State as vested with competence through that representation. In most democratic legal systems, ratification was regarded as an indispensable part of the treaty-making process because it expressed the will of the people. Thus, the rule should be understood that every treaty was subject to ratification, unless otherwise provided.

88. Every international agreement should be thoroughly considered by the representatives of the people; sub-paragraph 2 (a) (i) was therefore not acceptable. Heads of State, much less Ministers for Foreign Affairs, could not bind their states on basic matters. They might negotiate, but they could never sign a binding agreement without the consent of parliament.

89. Mr. TSURUOKA said that the exact meaning of the term "ratification" should be made clear in paragraph 1, as well as in article 1, paragraph (i); it should be explained that a Head of State not only ratified a treaty but also promulgated it.

90. Treaties drawn up in international organizations were subject to ratification; the term was used in article 19, sub-paragraph 5 (d), of the constitution of the International Labour Organisation. He was not sure, however, whether the word had the same connotation in that context as it was intended to have in the draft articles on the law of treaties.

91. With regard to sub-paragraph 2 (a) (iv), in Japanese practice the criterion for determining whether a less formal treaty did or did not require ratification was content rather than form. Some exchanges of notes were subject to ratification.

92. The expression "intergovernmental agreement" was not clear; if it meant treaties concluded in the name of governments, he must point out that many such agreements required ratification.

93. Sub-paragraph 2 (b) was open to the same objection as that he had raised against article 4, paragraph 2. The definition of the term "full-powers" should be coordinated in the two contexts in order to prevent any possibility of confusion. The same difficulty arose with the use of the term "full-powers" in sub-paragraph 3 (b). The Drafting Committee might usefully consider the definition of full-powers in article 1, paragraph (e), in the light of those provisions.

94. Sub-paragraph 3 (b) was the complement of sub-paragraph 2 (b). In some cases the full-powers or other instrument indicated clearly that the holder was authorized to ratify by signature, whereas in others no such indication was given. A clause was needed to cover the case where the full-powers did not vest such authority in the representative.

95. If sub-paragraph 4 (a) were amended in the same way as sub-paragraph 2 (a), the difficulties might be solved. It might even be possible to delete sub-paragraph 4 (a).

96. Mr. VERDROSS noted that Mr. Ago appeared to agree with the view of the special rapporteur that Heads of State could sign an agreement which would enter into force immediately on signature. But surely the position was somewhat different. For example, if the President of Austria visited the President of Italy and they agreed on the settlement of some legal dispute between their states, in his (Mr. Verdross') opinion they could not by their signatures alone conclude a treaty binding their states. For in all parliamentary systems, all acts of the Head of State needed the counter-

signature of the government or a minister. Therefore the signature of the Head of State alone could not create an obligation of the state.

97. An example of cases where the act of ratification could be unilateral was provided by article 43 of the United Nations Charter, paragraph 3 of which stipulated that agreements to make available to the Security Council armed forces, assistance and facilities were subject to ratification by the signatory states but not by the Security Council. Other examples could be cited.

98. He fully agreed with the rule laid down in paragraph 1 that treaties were subject to ratification by signatory states in cases where the treaty itself expressly so provided. He wondered whether the special rapporteur would be willing to go further and add a statement that the same was true of treaties which, under the constitution of the contracting states, could be concluded only by Heads of State. In his own opinion, ratification would always be necessary for formal treaties, even if the text was silent on the point; he accordingly suggested that a provision should be added to the draft to the effect that ratification would be necessary except in cases where the full-powers authorized the representative to conclude a treaty without the reservation "subject to ratification".

99. Mr. de LUNA said that he agreed with the special rapporteur's distinction between treaties *stricto sensu* and the less formal treaties referred to in sub-paragraph 2 (iv).

100. The point made by Mr. Jiménez de Aréchaga was well taken, but it would hardly be wise to establish an obligation to ratify in all cases where the treaty itself was silent. Such a rule would be quite contrary to international practice. The determining factor was not so much the form of the treaty, but the will of the parties. In the United States of America, Executive Agreements depended on the will of the United States Executive, which might not wish to submit certain matters to the two-thirds ratification rule of the Senate. The part of the draft article which covered such practices should be very carefully worded.

101. He entirely agreed with Mr. Ago's suggestions for the redrafting of paragraphs 2 and 3; the principle should be stated first and then the exceptions. One exception which had not been contemplated by the special rapporteur covered conventions of belligerency, such as armistices and truces, which were concluded without ratification.

102. He agreed with the observations of Mr. Verdross concerning agreements made by Heads of States. The Yalta agreements might not come precisely under that head, but agreements existed and were in fact operative, by which Heads of States bound themselves effectively, even if anti-constitutionally.

103. Mr. GROS said that the special rapporteur was right in dealing in his draft with both formal treaties and less formal treaties. Paragraph 1 was not only correct but indispensable; indeed, the title of the article should be simply "Ratification". The special rap-



porteur had first stated in what cases ratification was necessary, and his commentary on that point was sound and exhaustive. It was quite right, as explained in paragraph 5 of the commentary, that total silence on the subject was exceptional; in fact, in such cases it was due to oversight. Nearly all treaties which were subject to ratification contained a provision stating as much, but it was true that the Commission was not absolved from the obligation of formulating a rule for the small residuum of cases in which the parties had left the question open.

104. He had been attracted by the rule put forward by Sir Gerald Fitzmaurice, quoted in paragraph 6 of the commentary, and he had the impression that the special rapporteur had also leaned towards it, namely, that when a treaty expressly contemplated that it should be subject to ratification, there was no problem, but when it was silent, the question arose whether it was a formal treaty, in which case it was subject to ratification. In the case of less formal treaties, it could be argued that if the parties had used that form, they had usually done so because they had wished to avoid ratification, and if nothing was said in the agreement, that presumed wish should form the core of the rule. If in certain cases one of the parties was constitutionally bound to ratification or acceptance, it would have to state so even in the case of less formal treaties. The Commission was engaged on a somewhat hypothetical exercise, but he rather favoured the rule proposed by Sir Gerald Fitzmaurice, although he would accept the other solution if the majority so wished.

105. It was not easy to draw a distinction between formal treaties and less formal treaties merely on the basis of ratification, since a number of constitutions included a special definition of the latter type. One example was the "Executive Agreement" in the United States of America. On the other hand, some constitutions required parliamentary or government approval for less formal treaties in specific cases.

106. Finally, the term "parliamentary ratification", which was occasionally used, was erroneous. Parliament simply authorized the Head of State to ratify a treaty and ratification was always an act of the executive power.

The meeting rose at 1 p.m.

## 646th MEETING

Friday, 18 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

### ARTICLE 10. TREATIES SUBJECT TO RATIFICATION (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 10.

2. Mr. ROSENNE said the Commission should bear in mind that, in the draft articles, references to ratification were references to the international act of ratification within the meaning of the definition in article 1.

3. Ratification was necessary in three cases. First, where the treaty expressly provided for ratification; in such cases, as the International Court of Justice had said in its judgement in the *Ambatielos* case,<sup>1</sup> ratification was an indispensable condition for bringing it into operation, not a mere formal act. Secondly, where a treaty was made by virtue of another treaty which required treaties made under it to be ratified, for example, agreements under Article 43 of the United Nations Charter and International Labour Conventions. Thirdly, where the full-powers of the representative who signed the treaty themselves specified that the signature would be subject to ratification. The full-powers thus constituted the link between the international treaty-making process and the requirements of domestic law and constitutional practice. Much more attention might be paid, incidentally, to the drawing up and examination of full-powers, so that the negotiators would be able to satisfy themselves that what they were intending to do would have legal effect. The question how far one party could be presumed to have knowledge of the constitution of the other party had been well treated by Lord McNair.<sup>2</sup>

4. The next question was when was ratification not necessary. The answer was that it was not necessary if the text of the treaty, or the text of the full-powers, expressly stated that it was not necessary.

5. That left the residuary problems. The first of those concerned treaties for which no full-powers were required, as, for example, under the terms of article 4, paragraphs 3 (a) and (b). It had not been the Commission's intention—and that might be mentioned in the commentary—to imply that, because evidence of full-powers was not required in those cases where the signatories acted *ex officio*, the international treaty-making process could be concluded in disregard of the requirements of domestic law.

6. The second residual problem arose where the text of both the treaty and the full-powers was silent. It would be proper to state the presumption that in such cases ratification was required in principle, unless anything to the contrary had been said during the negotiations. The decisive factor should always be the intention of the parties. The Commission should, therefore, avoid undue rigidity on that point, since the question where, when and how a treaty was signed was purely a matter for the will of the parties.

7. An attempt should be made to transfer the emphasis from the text of the treaty—with all the attendant problems of interpretation—to the full-powers or their equivalent. If the Commission succeeded in introducing greater legal discipline so far as full-powers were concerned, it would have rendered a major service. International law could not be concerned with the many

<sup>1</sup> *I.C.J. Reports*, 1952, p. 43.

<sup>2</sup> *The Law of Treaties*, 1961, p. 61.

refinements of domestic constitutional law and the rules for the incorporation of treaties into domestic legal systems. In dealing with article 3, an attempt had been made to divorce international treaty-making from considerations of municipal law, and a similar approach was appropriate for article 10. The conclusion to be drawn was that the question of parliamentary approval did not really fall within the Commission's purview. Paragraph 7 of the special rapporteur's commentary was impressive, but the point raised there should be reflected in the full-powers and not incorporated in a draft convention on the law of treaties itself. The obligation was on the negotiators and their advisers to satisfy themselves that the signatories were duly and fully empowered to sign a treaty.

8. It would be impossible to legislate in general terms at the international level on the substance of treaties requiring ratification or on questions of form, and it would be desirable to avoid making any rule based merely on the form of the treaty or on the rank, personality or position of signatories, since those factors were frequently of political or diplomatic but not of legal relevance.

9. The key provisions of article 10 were therefore paragraph 1, sub-paragraph 2(a)(ii), and paragraph 3(b). If those could be combined as a point of departure, the solution would have been virtually reached.

10. Sub-paragraph 2(a)(i) did not quite tally with article 4, since frequently it was the Head of Government rather than the Head of State who signed treaties. Sub-paragraph 2(a)(iii) should be omitted, since the substance of the provision did not lend itself easily to generalization. Sub-paragraph 2(a)(iv) should be retained, as it took into account the greater flexibility needed in the case of exchanges of notes, but it should not give the impression that form was the determining factor.

11. He doubted whether paragraph 3(b) was entirely applicable to multilateral treaties, since, in principle, all signatories to such treaties should be placed under the same legal rule; it would be inconvenient if some parties had to ratify and some not. That question did not, of course, arise with regard to bilateral treaties, as Mr. Ago had pointed out.

12. Paragraph 4(b) could either be referred to the drafting committee, since it might conflict with the final phrase in paragraph 4(a), or preferably be relegated to the commentary.

13. Reference had been made in the discussion to the case of agreements signed by military commanders in time of war. The special rapporteur had rightly not attempted to deal with that very special case; at the first session, the majority of the Commission had declared itself opposed to the study of the laws of war at that stage.<sup>3</sup> A sentence might perhaps be added in the

commentary noting that case and dealing with some of the other special problems involved.

14. The beginnings of a United Nations practice with regard to the inclusion of express dispensation from the need for ratification might be noted in article XII of the Egyptian-Israeli General Armistice Agreement of 24 February 1949.<sup>4</sup> For that treaty, the powers of the negotiators had been verified by representatives of the United Nations, under whose auspices it had been drawn up.

15. Mr. LACHS congratulated the special rapporteur on his drafting of article 10 and especially on his commentary, in which he had steered a course between the theses of Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice, and arrived at a safe destination.

16. Paragraph 1 of the article called for no comment; where the treaty itself provided for ratification, the position was clear.

17. The position would also be clear if the treaty expressly said that it did not require ratification, but governments could hardly be expected to include an express clause to that effect in every treaty which did not need ratification. In order, therefore, to cover cases where the treaty was silent on that point, the Commission would have to make certain presumptions, as the special rapporteur had done in paragraph 2.

18. With regard to paragraph 2, he had a number of suggestions to make, both of substance and of drafting. Sub-paragraph 2(a)(ii), so far as it concerned entry into force upon signature, should be interchanged with sub-paragraph 2(a)(i), so as to establish as a principle in the first line that the treaty should not require ratification if it itself provided that it should come into force upon signature, because that was the most obvious case of presumption. So far as the remainder of sub-paragraph 2(a)(ii) was concerned, however, he shared Mr. Ago's doubts. The mere fact that a treaty provided that it would come into force when a particular event occurred did not necessarily mean that the treaty did not require ratification. The Hague conventions on the laws and customs of war had required ratification, while article 10 of the treaty concerning the Archipelago of Spitsbergen of 9 February 1920<sup>5</sup> had provided that article 8 should come into force on ratification and the remaining articles after certain legislative changes had been made by Norway. Those articles had not in fact come into force till five years later. The final phrase of sub-paragraph (a)(ii) should therefore be deleted.

19. Sub-paragraph 2(a)(i) was acceptable and should become sub-paragraph 2(a)(ii). He agreed with Mr. Verdross that it was doubtful from the point of view of domestic constitutional law whether a Head of State could always both sign and ratify a treaty, but there would be no harm in suggesting that if the Head of State signed the treaty, the conclusion might be drawn that he had been authorized to ratify, and that, consequently, ratification might be dispensed with.

<sup>3</sup> *Yearbook of the International Law Commission, 1949* (United Nations publication, Sales No. : 57.V.1), p. 281.

<sup>4</sup> *United Nations Treaty Series*, Vol. 42, p. 268.

<sup>5</sup> *League of Nations Treaty Series*, Vol. 2, p. 14.

20. Sub-paragraph 2 (a) (iv) should become sub-paragraph 2 (a) (iii) and the term "less formal treaty" should be replaced by the term used by the Drafting Committee, "treaty in simplified form". The question arose whether the fact that the simplified form had been used presupposed that ratification was dispensed with. That was obviously so when such treaties concerned minor issues only; but they frequently dealt with important issues, and there was usually a particular reason in each case why the simplified form had been used. One reason might be the time factor; the parties might wish to avoid the comparatively slow processes of ratification and to bring the agreement into force immediately, even though fully aware that under domestic law the ratification with which they had dispensed would be required. That was why the inclusion of sub-paragraph 2 (a) (iv) was fully justified.

21. Sub-paragraph 2 (a) (iii) should be placed last, because it dealt with all other cases. Some parts of it might be omitted, because they referred to a very special case, but he still had some doubts about the substance. To link two instruments by reason of their substantive relationship was not justified.

22. With regard to paragraph 2 (b), he would suggest that some place should be found for an indication of the frequent practice resulting from constitutional provisions for simplifying ratification, such as approval. In Polish practice treaties were divided into two classes, one requiring ratification, the other simply governmental approval. He would request the special rapporteur to decide how that was to be done.

23. Paragraphs 3 (a) and 4 (b) were redundant and should be deleted.

24. Mr. TABIBI said that at one time ratification had been a most important act as the final stage in the treaty-making process, but was now losing ground in the legal literature. The main reason was the development of intercourse between nations and the expansion of economic relations, with the concomitant need for speed and informality. Ratification should, however, be recognized as necessary in so far as it rendered a treaty binding. The figures given by the learned Mr. Blix, quoted by the special rapporteur in paragraph 5 of his excellent commentary, showed a tendency to dispense with ratification in the case of informal agreements, but the number of treaties subject to ratification registered with the United Nations proved that the importance of ratification had not entirely vanished. An article in line with that drafted by the special rapporteur was therefore necessary, but the draft should be considerably simplified. He fully agreed with Lord McNair that ratification provided the appropriate government department with an interval for reflection on the implications of the text of the treaty. If, after reflection, a state was convinced of the value of the treaty, it would be the more willing to support its enforcement.

25. While he had no objection to paragraph 1, he had some reservations with regard to sub-paragraph 2 (a) (i) because of the declining role of Heads of States, and to sub-paragraphs 2 (a) (ii), (iii), and (iv) similar to those expressed by other speakers.

26. Paragraph 3 did not seem to cover all types of treaty, whether subject to ratification or not.

27. He had already stated his views on paragraph 4 in connexion with article 9.

28. Mr. AGO, in reference to some remarks by Mr. Verdross at the previous meeting, said he agreed with Mr. Lachs that sub-paragraph 2 (a) (i) was acceptable, for, as other members had pointed out, the reference to ratification meant, in the context of the draft, solely ratification by the Head of State and never what was sometimes also improperly called "ratification", namely, the authorization to ratify given to the Head of State by another organ. In the exchange of instruments of ratification, it was the Head of State who took the responsibility of expressing the final consent of the state at the international level. If the Head of State signed a treaty, he normally engaged his responsibility at that time, and unless the treaty itself required otherwise, it would be otiose to require him to sign a second time by way of ratification. If in fact his signature was not authorized or not valid as ratification under domestic law, that was no concern either of the international legal order or of the Commission.

29. Mr. BRIGGS said that he doubted the correctness of the reference to the confirmation of consent in the definition of ratification in draft article 1 (i) as it stood. Article 11, paragraph 1 (a), stated that idea more baldly and it recurred in article 10, paragraph 1. The definition of ratification seemed to assume that consent had already been given by the act of signature. He would prefer a new definition on the following lines: "For the purpose of international law, ratification means the international act by which the provisions of an instrument are formally accepted (approved and confirmed) by a signatory State, so as to become binding when the treaty enters into force." The change in phraseology reflected his opinion that it was the provisions of the treaty which were ratified, not the previous signature.

30. He submitted the following simplified redraft of article 10:

"The ratification of an instrument is required before a state can become a party to a treaty:

- "(1) Where the instrument provides that it shall be ratified; or
- "(2) Where the instrument makes no provision for its entry into force prior to ratification; or
- "(3) When the form or nature of the instrument or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification."

31. That redraft paralleled the redraft of article 9, on the legal effects of signature, which he had submitted at the previous meeting. He believed that the two redrafts together covered all points of importance in articles 9 and 10 as prepared by the special rapporteur.

32. The special rapporteur's paragraph 1 of article 10 was covered by paragraph 1 of his redraft. The special rapporteur's sub-paragraph 2 (a) (ii) really belonged in article 9, and was covered by his redraft of that article. The remainder of paragraph 2 (a) and paragraph 3 were

covered by implication in his redraft of article 9, and paragraph 2 (b) was covered by the clause introducing his redraft of that article. The special rapporteur's paragraph 3 was covered by paragraphs 2 and 3 of his redraft of article 10. He had retained the presumption that the residual rule was that, where a treaty was silent, ratification was required. The special rapporteur's paragraph 4 should preferably be placed in the new article which would deal with the rights and obligations of states pending the entry into force of a treaty in the preparation of which they had participated.

33. He had used the term "instrument" because the conclusion to be drawn from the redraft of article 1 prepared by the Drafting Committee was that the phrase "which is concluded" meant "which had entered into force". Strictly speaking it was the draft treaty, not the treaty as such, which was ratified.

34. Though his redrafts covered most of the ground covered by draft articles 9 and 10, one question to be settled was whether the draft should contain a provision concerning full-powers, a subject touched on by Mr. Rosenne; a model for such a provision might be found in article 7 (c) of the Harvard draft.

35. Mr. PESSOU, on a question of procedure, said that a more convenient and methodical approach might be to revert to the suggestion, made earlier in the session, that bilateral and multilateral treaties and treaties in simplified form should be dealt with separately. In particular, treaties in simplified form differed considerably from formal treaties, in that the latter were made in solemn form, by a process which was necessarily longer and more complex. To deal with all three forms together seemed to have caused unnecessary confusion and to have laid an undue burden on the drafting committee. He believed that Mr. Ago and Mr. Lachs were also in favour of a simpler procedure for dealing with the draft articles.

36. Mr. CASTRÉN commended the special rapporteur for having, in his draft article 10, steered a middle course between the views of the two previous special rapporteurs in respect of certain important points.

37. Article 10 was formulated as a series of rules, to which a number of exceptions were set out. The draft was a very full one, although it could not cover all possible cases. For example, it did not cover the case of conventions entered into by a military commander in time of war, which, it had been claimed, were exempt from the requirement of ratification. In fact a convention such as an armistice could contain political as well as military provisions and might therefore be subject to ratification. That example showed that there were exceptions to every rule.

38. Only one member of the Commission, Mr. Jiménez de Aréchaga, had spoken in favour of rendering the ratification requirement more stringent. Mr. Gros, on the other hand, had urged a return to the proposal of the previous special rapporteur, Sir Gerald Fitzmaurice, that the absence of provisions regarding ratification meant that ratification was not necessary.

39. He was inclined to share the views of Mr. Gros, for the reasons given by Sir Gerald Fitzmaurice. The main reason was that if, because of constitutional requirements or for any other reason, ratification was necessary, the representative of the country concerned should either insist on the inclusion of an explicit provision in the treaty, or make a clear declaration to the effect that his signature was subject to ratification. State practice supported that view.

40. It had been suggested that the distinction between treaties subject to ratification and those not subject to ratification should depend on the importance of the contents of the treaty. That suggestion did not provide any objective criterion; provisions of constitutional law varied considerably from country to country as to what matters were considered important. A distinction based on the form of the treaty would be equally uncertain, because, as noted by Rousseau,<sup>6</sup> contemporary practice made no rigid distinction between formal treaties and informal agreements and the transition from one to the other was often imperceptible.

41. He suggested that article 10 should be redrafted to begin with a provision modelled on paragraph 1, followed by the other provisions which set out the other cases in which ratification was necessary, including the contents of paragraph 2 (b). The other provisions of paragraphs 2 and 3 would be dropped. If so desired, it could also be mentioned that ratification was necessary where the requirement was specified in another treaty, where the treaty had been drawn up as a formal instrument, or where the contents of the treaty or the circumstances attending its conclusion showed that the signature was subject to ratification; but the latter were not objective criteria.

42. With regard to the definition of "ratification" in article 1 (i), he proposed the deletion of the term "international" before the words "act whereby a state..." It did not appear either in article 6 of the Harvard draft, or in the corresponding provisions of Professor Brierly's second report, or in Sir Hersch Lauterpacht's two reports. Unless it were deleted, the definition in article 1 would conflict with article 10, which dealt with ratification as an act under domestic constitutional law. The international act of ratification, in other words the deposit or exchange of instruments of ratification, was dealt with in article 11.

43. If the Commission decided to retain the structure of the special rapporteur's draft, it would be better to retain also sub-paragraph 2 (a) (i), which specified that ratification was not required for a treaty signed by a Head of State. Cases of such treaties were not unknown in modern practice; to the examples already given, he would add the Potsdam Agreement of 1945. Any provision on the subject should, however, be qualified along the lines indicated in the relevant passage in Oppenheim, which read: "...treaties concluded by Heads of State in person do not require ratification, provided that they

<sup>6</sup> *Principes généraux du Droit international public*, p. 250.

do not concern matters in regard to which constitutional restrictions are imposed upon Heads of State.”<sup>7</sup>

44. Mr. Ago and Mr. Lachs would like to change sub-paragraph 2 (a) (ii) on the ground that the contracting parties might consider ratification necessary in that case also. That was possible, but why not then mention it in the treaty as had been done, for example, in the Moscow Treaty of Peace of 12 March 1940,<sup>8</sup> between Finland and the Soviet Union.

45. In sub-paragraph 2 (a) (iii), he found the reference to “other circumstances” unduly vague in the absence of any clarification as to what those circumstances might be.

46. With regard to sub-paragraph 2 (a) (iv), he shared the views of those members who had criticized the expression “intergovernmental agreement”; the agreements which it was intended to cover were in fact agreements between the administrations of the states concerned.

47. To sum up, if the special rapporteur’s structure for article 10 were retained, paragraphs 1 and 2 (b) should be combined while paragraph 3 (b) should be deleted because its contents were covered by the reference to “other circumstances” in sub-paragraph 2 (a) (iii).

48. Paragraph 4 served a useful purpose.

49. Mr. YASSEEN said he supported the special rapporteur’s general approach in article 10. The requirement of ratification remained the rule. Ratification in modern practice served to maintain and strengthen parliament’s control over the acts of the executive; it thus provided one more example of a legal institution surviving while changing its purpose.

50. Those who took a different view pointed to the increasing number of modern treaties concluded in simplified form. He did not believe that undue weight should be attached to mere numbers; the criterion should be the relative importance of treaties signed as formal instruments or in simplified form.

51. Under the constitutional law of many countries, ratification was required for all treaties dealing with certain important matters; as other members had mentioned, such treaties could be concluded in simplified form for practical reasons.

52. In view of those considerations, the principle of the requirement of ratification should be laid down in any general convention on the law of treaties. Opponents might object that their own approach would simplify the drafting of the articles, but the desire for simplification should not prevail where the essential interests of states had to be protected.

53. Mr. VERDROSS said that he had been impressed by Mr. Ago’s argument that a rule requiring ratification in the case of a treaty signed by a Head of State would mean that the Head of State would sign the treaty twice over. That argument was not, however, decisive.

President Wilson had signed the Treaty of Versailles, and if the United States Senate had given its consent to the ratification of that treaty, the President would have had to sign it a second time for purposes of ratification.

54. There was, however, a more important reason for his criticism of sub-paragraph 2 (a) (i). Some constitutions authorized a Head of State to bind the state by his signature, but those constitutions were the exception and not the rule. In all countries with a parliamentary system of government, all acts signed by a Head of State had first to be approved by the government, possibly also by Parliament, and then countersigned by a competent minister. Under that system, the Head of State alone could never sign the treaty.

55. As he saw it, Mr. Ago was defending the idea once put forward by Anzilotti that rules of constitutional law were irrelevant to international law.

56. His own view was that, in the matter of the ratification of treaties, international law referred to the provisions of constitutional law. That reference was illustrated by Article 110 (1) of the United Nations Charter:

“1. The present Charter shall be ratified by the Signatory States in accordance with their respective constitutional processes.”

57. Of course, the reference was to the rules of constitutional law actually applied by states, not to those merely existing on paper.

58. Mr. ELIAS suggested that article 10 be rearranged so that paragraph 1, which dealt with the case where there was an express provision for ratification, became paragraph 1 (a); paragraph 3 (a), which covered cases where no such provision existed, became paragraph 1 (b); while paragraph 2 (a), as suggested by Mr. Ago and Mr. Lachs, was redrafted so as to contain exclusively a list of exceptions. Its opening sentence would be re-worded to read: “In the following cases, a treaty shall not require ratification by the signatory States:” followed by the enumeration of the cases specified in sub-paragraphs 2 (a) (i) to (iv).

59. With regard to the existing sub-paragraph 2 (a) (i), he shared the doubts expressed by Mr. Verdross, although there was substance in the proposition that a Head of State might be authorized to bind his state by his signature. However, he strongly supported the suggestion of Mr. Castrén that, if the provision were retained, it should be qualified by a proviso along the lines indicated in the passage quoted from Oppenheim. Particularly from the point of view of the new nations, which would pay great attention to the International Law Commission’s draft, it was highly desirable that such a proviso should be included.

60. With regard to sub-paragraph 2 (a) (ii), he supported the suggestion of Mr. Lachs that the final phrase “or upon a particular date or event” should be deleted.

61. He also supported the suggestion of Mr. Lachs that in sub-paragraph 2 (a) (iii) the reference to a treaty

<sup>7</sup> *International Law*, eighth edition, 1955, Vol. 1, p. 906.

<sup>8</sup> *British and Foreign State Papers*, Vol. 144, p. 393.

which modified or annulled a prior treaty itself not subject to ratification should be deleted.

62. With regard to sub-paragraph 2 (a) (iv), there was some danger for the newly independent states of Africa in the suggestion that informal treaties should not require ratification. At a previous meeting, he had referred to treaties taken over by Nigeria at the time of independence. In the case both of his country and of Ghana, Tanganyika and Sierra Leone, rights and obligations arising from a number of such treaties had been taken over by exchanges of notes. Some heavy responsibilities had thus been accepted on the eve of independence in a somewhat casual manner and it had later been found that many of the treaty provisions in question would have required, under the constitutions of the newly independent states concerned, parliamentary approval for their ratification. The legislature had in many cases taken the government to task for having signed the treaties and had claimed the right to discuss the questions of substance involved in them. He accordingly supported the simplified text suggested by Mr. Lachs, with a proviso that in some cases informal treaties should be made subject to ratification. Otherwise, a situation could arise in which a state was held bound by a treaty, although the majority of its inhabitants were unwilling to accept the obligations arising from the treaty.

63. He agreed with Mr. Ago that the case mentioned in paragraph 3 (b) constituted an exception to the rule set out in paragraph 1. He therefore supported the proposal that paragraph 3 (b) should be placed in paragraph 2, immediately after sub-paragraph 2 (a) (iv).

64. Paragraph 4 (b) should be deleted as unnecessary.

65. Mr. AMADO said that ratification was always an act of the Head of State. The only modern constitution which provided an exception to that rule was that of Turkey, which specified that parliament ratified treaties.

66. There had been cases of so-called imperfect ratification, where a treaty had been ratified by the Head of State whose action had subsequently not been approved by the parliament of his country. In practice, ratification in all those cases had been recognized as having the same effect in international law as a perfect ratification.

67. In the practice of all civilized countries, if the president signed a treaty, he did so subject to approval by parliament. Alternatively, the president would obtain prior authority from parliament to sign the treaty; in that case, his signature would bind the state.

68. The final signature and ratification which made a treaty a reality was invariably an act of a Head of State.

69. Mr. de LUNA said he agreed both with the general tenor of article 10 and with the special rapporteur's commentary; he also agreed with the special rapporteur's approach to the problems of the relationship between ratification and signature.

70. However, the language used not only in article 10 but also in article 12, paragraph 4, and article 9, para-

graph 3, should be carefully reviewed. As they stood, those provisions could suggest that the Commission supported one or the other of two obsolete doctrines in regard to ratification.

71. The first of those doctrines was the historical one which treated ratification by a Head of State of the signature of his representative almost on a par with ratification by a principal of his attorney's act when executing a power-of-attorney in private law. Grotius and many other early writers had viewed ratification in that light. Under that ancient doctrine, subsequent ratification could be held to have a retroactive effect, because it confirmed and validated the signature given by the representative. The consent given to a treaty by the signature was deemed to be conditional upon ratification.

72. A more recent but also obsolete doctrine, held by only one contemporary writer, Pallieri, regarded signature and ratification as two stages of a single operation.

73. Modern doctrine regarded signature and ratification as two separate acts. Signature had the effect of giving final form to the text of the treaty; ratification was the act by which the state bound itself to observe the treaty.

74. Although, like Mr. Amado, he did not favour theoretical discussions, he thought that the Commission should do nothing that might suggest that it supported either of the two obsolete doctrines to which he had referred.

75. He accordingly urged that paragraph 1 of article 10 should be redrafted so as to eliminate the conditional element contained in the words "shall be subject to ratification".

76. In article 9, paragraph 3, a similar adjustment should be made in regard to such expressions as "subject to ratification" and "conditional upon subsequent ratification or acceptance".

77. For similar reasons, it would be necessary to examine carefully the provisions of article 12, paragraph 4, which referred to the possible "retroactive effects of ratification".

78. All the provisions to which he had referred should be reviewed for the purpose of eliminating any suggestion that consent to a treaty could be given in two stages, once at the time of signature and again at the time of ratification.

79. He believed that the adjustments of language he had suggested were in keeping with the intentions of the special rapporteur in article 10, so lucidly set out in his commentary, and with the views of the Commission as a whole.

80. Mr. AGO said that the Commission should not enter into theoretical controversies. The theory that in the matter of ratification of treaties there was a reference by international law to municipal law could have the most dangerous consequences, because it would mean that a treaty ratified by a Head of State who had not

obtained prior authority from the legislature, or a treaty which the legislature refused to approve, would be void, whereas all members agreed that in such instances a treaty existed and an international obligation had been validly assumed.

81. Mr. BARTOŠ said he agreed with Mr. Verdross that in the case of treaties signed by a Head of State a distinction should be drawn between the act of signature and the act of ratification. The Head of State could not finally bind his state until he exercised his right of ratification, but if he did ratify, it had to be presumed that he had acted in accordance with the constitutional requirements of his country. The other party must consider that the will of the ratifying state had been regularly and validly expressed by the Head of State. It was not open to the other party to question it.

82. He did not share Mr. Verdross' view on the question of the reference to constitutional law by the text of the convention, even although he based his argument on article 110 of the Charter. It was a general principle of international law that ratification was carried out in accordance with the requirements of the constitution, and the instrument of ratification emanating from the Head of State or the competent organ established an absolute presumption to that effect.

83. There was in fact no great difference between Yugoslav practice and the "internationalist" theory expounded by Mr. Gros at the previous meeting. In Yugoslavia, ratification was a parliamentary act, but the instrument certifying that ratification had taken place was issued by the President of the Republic who represented the state vis-à-vis other countries. That was the only sense in which it could be said that there was any reference to internal constitutional law, whereas the instrument of ratification was presumed sufficient to produce the effects in international law.

84. It would be dangerous to allow the possibility of other parties questioning whether ratification had complied with constitutional requirements, or claiming that their partner in good faith had committed some irregularity, or even nullified the act of ratification through some breach of constitutional law.

85. On the other hand it should be noted that there had been instances, during the second world war for example, of agreements which violated such requirements through being ratified under duress. In those cases the partners in bad faith were not protected against objections of irregularity of substance, even although the instruments of ratification were in good and due form.

86. Commenting on paragraph 3 of Mr. Briggs' redraft, he said that the text was too vague; it would be no contribution to international law to leave open the question what forms of instrument did not require ratification. What were the circumstances which "do not indicate an intention to dispense with ratification"? Such wording might open the door to conflicting interpretations and the kind of controversies that arose from the differing conceptions in Europe and the United

States of what was meant by an "executive agreement" and what by a treaty.

87. The special rapporteur had not dealt with the interesting legal question whether treaties existed which required ratification by one party and not by the others. There had been instances in which, although no provision concerning ratification appeared in the treaty, Yugoslavia had notified the other parties that it had ratified and was ready to proceed to an exchange of the instruments of ratification. The other parties, which had been the Benelux countries, had signified that no ratification by them was needed. He wondered whether that particular matter was ready for codification. In any event, it was a question which should at least be mentioned in the commentary.

88. Mr. CADIEUX said that, though impressed by the special rapporteur's commentary and some of the proposals he had put forward as a solution to a number of controversial and difficult problems, he believed the article could be simplified by the Drafting Committee, which would have a fairly clear idea of the Commission's views on matters of substance.

89. The essential principle was that stated in paragraph 3, which he fully endorsed, that in the absence of any express provision in the treaty, ratification was required.

90. The intention to dispense with ratification might be inferred from the form of treaty adopted, but the presumption could not be regarded as an absolute one.

91. The problems raised by sub-paragraph 2(a)(i) might be avoided by changing the wording or inserting an explanation in the commentary. Perhaps the question of the intention to dispense with ratification in the case of treaties signed by a Head of State might be treated as analogous to the case covered in sub-paragraph 2(a)(iii).

92. Mr. TSURUOKA said it seemed that the special rapporteur had taken a far firmer view than his predecessor on the questions dealt with in paragraph 2. That paragraph would require fundamental modification if Mr. Ago's suggestions were adopted.

93. Sir Humphrey WALDOCK, Special Rapporteur, replying first to observations on the structure of the article, said he was quite prepared to amalgamate paragraphs 2(a) and 3(a), as suggested by Mr. Ago; the provision would begin with a statement of the cases in which ratification was not required, followed by a list of exceptions.

94. That change would make it desirable to transfer paragraph 2(b) to a position immediately after paragraph 1, since it also dealt with instruments which provided express evidence of the intention to ratify on the part of one or both parties.

95. He found Mr. Lachs' suggestions about changes in the order of the various sub-paragraphs of paragraph 2 acceptable.

96. Replying to observations on the substance, he agreed with Mr. Briggs and Mr. de Luna that the definition of



ratification could be improved. The definition given was derived partly from that proposed by Sir Gerald Fitzmaurice and others. Since it was not easy to express the notion of confirmation without running into difficulties as to what exactly it was that was being confirmed, it would be best to abandon it and to define ratification as the expression of the consent of states to be bound by the treaty. Mr. Briggs' proposed redraft had certain advantages, but he thought it was over-simplified and that the Commission should try to preserve something of the structure of articles 9 and 10.

97. The Drafting Committee might be invited to consider whether or not cases in which "ratification" took place even though there had been no signature, as in the ILO Conventions, should be covered, or whether it would be enough to mention them in the commentary.

98. It should be kept clearly in mind that the purpose of paragraph 2 was neither to lay down rules obliging states to choose a particular form of treaty, nor to lay down rules on ratification, but to provide a residual rule for cases where no provision concerning ratification had been included in the treaty itself or in the full powers or in other instruments. Essentially, what had to be established was intention.

99. Although internal constitutional requirements might be present in the background, Mr. Ago and Mr. Amado were quite right in stressing that it was impossible to refer to the constitutional law of the parties. That was particularly undesirable when the constitutional requirements in regard to ratification were not fully stated in the constitution but depended on the nature or content of the treaty; for then the international rule in regard to ratification might depend on subjective judgements as to those questions and the security of treaties might be endangered. In effect, the Commission was engaged in trying to state what would be the position if states acted in their treaty-making in a particular manner, and it would be helpful, especially to new states without long experience, if the draft were as specific as possible.

100. With regard to the cases covered in sub-paragraph 2 (a) (ii), it seemed to be generally agreed that it was possible to presume that, if a treaty itself provided that it came into force upon signature but said nothing about ratification, ratification had not been contemplated. He himself thought that the same presumption could properly be made when the treaty was expressed to come into force upon a particular date without a word being said about ratification. But if other members of the Commission thought that the presumption was not strong enough, the paragraph would need to be reconsidered. Perhaps the reference to a provision stating that it would come into force upon the occurrence of an event was too broad in scope.

101. With regard to the controversial question of treaties signed by Heads of State, the Commission should refrain from laying down rules that sought to control matters which pertained to the domestic affairs of states. If there were any danger in Heads of State possessing treaty-making powers, it was for the states themselves to exercise such control as was necessary. The Commission should assume that such persons would

not act *ultra vires* and should not seek to anticipate irregularities on the domestic plane; otherwise it might nullify treaties made in that way by certain states, without being subject to ratification. In general, the technique of treaty-making between Heads of State was comparatively uncommon and when it occurred in democratic countries with a modern constitution, was so exceptional that it could be assumed that the Head of State would obtain any necessary authority for his acts from the legislature.

102. The first part of sub-paragraph 2 (a) (iii) dealt with the more delicate problem of inferring intention from circumstances. For example, intentions concerning ratification might be discussed during the negotiations but not expressly referred to in any instrument, either the treaty itself or full-powers; a reference to that problem should be retained, though perhaps in a modified form.

103. As for the latter part of sub-paragraph 2 (a) (iii), the presumption that, if a prior treaty was not subject to ratification, an amending treaty would also not be subject to ratification, was United Kingdom practice and the position was so stated by Lord McNair.<sup>9</sup> If, however, the Commission took the view that the presumption was not strong enough, the passage might have to be dropped.

104. The provision in sub-paragraph 2 (a) (iv) contained the strongest element of presumption. He had not stated that all that category of instruments did not require ratification—for sometimes the parties provided otherwise—but that resort to such an informal type of treaty was objective evidence of intention to dispense with ratification. In fact, more than ninety per cent of such treaties came into force without any reference to ratification, and he knew of no instance of the practice being contested by a legislative organ. Practice thus provided a sound basis for the presumption which, however, was in no sense an absolute rule.

105. There seemed to be general opposition to the inclusion of paragraph 4 (b) but some mention of the point dealt with there should be made at least in the commentary.

106. He agreed with Mr. Ago that paragraph 4 (a) was closely linked with the obligation to proceed in good faith to ratification; the provision should therefore be transferred to the new article which the Commission had in mind to cover the rights and obligations of states prior to the entry into force of a treaty.

107. The CHAIRMAN suggested that article 10 be referred to the Drafting Committee in the light of the discussion, it being understood that the position of all members was reserved on such matters of substance as had not been fully debated.

*It was so agreed.*

The meeting rose at 1 p.m.

<sup>9</sup> *The Law of Treaties*, 1961, p. 138.

**647th MEETING***Monday, 21 May 1962, at 3 p.m.**Chairman: Mr. Radhabinod PAL***Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)****ARTICLE 11. THE PROCEDURE OF RATIFICATION**

1. The CHAIRMAN invited the special rapporteur to introduce article 11.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that in order to take account of some of the points raised during the discussion on previous articles and some of the Commission's tentative conclusions, he had prepared the following redraft of article 11:

"1. Ratification shall be carried out by means of a written instrument containing an express declaration of the ratification of the treaty by the state in question.

"2. (a) Unless the treaty itself expressly contemplates that the participating states may elect to become bound by a part or parts only of the treaty, the instrument of ratification must apply to the whole treaty.

"(b) The instrument of ratification must be definitive and may not be made conditional upon the occurrence of a future event, such as the deposit of the ratifications of other states. Any conditions embodied in an instrument of ratification shall be considered as equivalent to reservations, and their validity and effect shall be determined by the principles governing the validity and effect of reservations.

"3. Instruments of ratification shall be communicated to the other signatory state or states. If the treaty itself lays down the procedure by which they are to be communicated, instruments of ratification become operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory states, instruments of ratification shall become operative—

"(a) In the case of a bilateral treaty, upon the formal communication of the instrument of ratification to the other party, and normally by means of an exchange of such instruments, duly certified by the representatives of the states carrying out the exchange;

"(b) In other cases, upon deposit of the instrument with the depositary of the treaty provided for in article 26 of the present articles.

"4. When an instrument of ratification is deposited with a depositary in accordance with sub-paragraph (b) of the preceding paragraph, the ratifying state shall have the right to an acknowledgment of the deposit of its instrument of ratification; and the other signatory states shall at the same time have the right to be notified promptly both of the fact of such deposit and of the terms of the instrument of ratification."

3. To meet the point made by Mr. Briggs at the previous meeting regarding confirmation of consent, he had dropped the reference to consent in paragraph 1. He had also dropped the references to the competent domestic authority and to internal laws and usages, because most members considered that matters of domestic law should not be mentioned.

4. The new paragraph 2 was substantially the same as in his original draft, but he had simplified the drafting.

5. In paragraph 3, which was concerned with the question of the communication of instruments of ratification to other signatories, he had dropped the distinction between plurilateral and multilateral treaties. Instead, the paragraph mentioned only bilateral and "other" treaties. In the case of treaties which were not bilateral, the communication of instruments of ratification would be a matter for the depositary, and hence a reference to article 26, which was to deal with depositaries, sufficed.

6. Paragraph 4 was in essence the same as that in the original text but was simpler in form and omitted the references to the depositary government and to the secretariat of an international organization.

7. The CHAIRMAN invited the Commission to discuss the redraft of article 11 paragraph by paragraph.

*Paragraph 1*

8. Mr. ROSENNE said that, while he appreciated the special rapporteur's reason for deleting the original subparagraph 1 (b), its content should appear in some form in the commentary.

9. Mr. AGO said that the new paragraph 1 was not free from tautology. Perhaps the latter part of the sentence might be remodelled on the lines of the original text and the sentence redrafted to read: "Ratification shall be carried out by means of a written instrument containing an express declaration of the consent of the state to be bound by the treaty to which its signature is already affixed."

10. Mr. CADIEUX said that the article should describe clearly the nature of ratification, which was a legal act, the conditions to be fulfilled and the way in which it became operative. Paragraph 1 should be amplified so as to indicate that an instrument of ratification confirmed that a state assumed the obligation to be bound by the treaty and that ratification could be neither conditional nor partial.

11. Paragraph 2 might also require amendment on similar lines.

12. Mr. YASSEEN said that article 11 dealt not only with the procedure but also with the substantive characteristics of ratification; to that extent the title and the content did not correspond. The provisions concerning the conditions to be fulfilled by an instrument of ratification should be transferred to a separate article.

13. He presumed that in paragraph 2 (b) the special rapporteur had really meant to say that ratification, as distinct from the instrument, could not be conditional.

14. Mr. PAREDES said he agreed with the views of

Mr. Yasseen; the various elements of article 11 should be dealt with separately and with greater precision.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that he was prepared to re-word paragraph 1 in the way suggested by Mr. Ago. He agreed that the title of the article was not exact. Discussion on the other paragraphs would show whether the title or the contents needed amendment.

#### *Paragraph 2*

16. Mr. ROSENNE suggested that the drafting committee might consider what was the most suitable wording to describe the "whole treaty", which was also referred to in article 14, paragraph 2 (a). In article 23, paragraph 1 (a), the phrase "a true and complete copy" was used to convey what he presumed to be essentially the same idea. A case had come up before the International Court of Justice in which the Court had had to examine the instrument of ratification in order to establish what was the "whole treaty". Difficulties might arise if the instruments of ratification conflicted on that point and did not coincide in reflecting the intention of the parties.

17. He had some doubts about the second sentence in paragraph 2 (b). The definition of "reservation" in article 1 (i) properly distinguished between a reservation in the commonly accepted sense and an explanatory statement or statement of intention or of understanding as to the meaning of the treaty. Such statements did not affect the legal effect of the treaty and were not true reservations. Statements of that kind were sometimes attached to an instrument of ratification, and consequently paragraph 2 (b) should allow for a considerable amount of flexibility on that point.

18. Mr. VERDROSS, with regard to the first sentence in paragraph 2 (b), pointed out that one instrument of ratification at least was always conditional upon the deposit of one other, for one instrument of ratification could not by itself create a common will. There was therefore no reason to forbid a state to make its ratification conditional on ratification by one or more other contracting states.

19. Mr. AMADO said that paragraph 1 was unnecessary and pleonastic. The article should be confined to matters pertaining to an instrument of ratification. The special rapporteur had allowed other issues to enter in.

20. Mr. AGO said that the statement at the beginning of paragraph 2 (b) presumably meant that the ratification, rather than the instrument of ratification, should be definitive. But was it absolutely true to hold that ratification could never be conditional upon the occurrence of a future event? A ratifying state could stipulate that its ratification would only become valid when followed by a certain number of others, or by the ratification of a specified state.

21. He was not convinced of the wisdom of equating conditions embodied in an instrument of ratification with a reservation.

22. Mr. LACHS said he agreed with Mr. Rosenne that, in order to avoid misunderstanding, it was desirable that

the Drafting Committee should discuss what was the best form of words to express the idea of a "whole treaty".

23. Paragraph 2 (a) should be amplified to cover the case where states could become parties to alternative or optional parts of a treaty, as provided for by International Labour Conventions, for example, No. 81 of 1947 and Nos. 96 and 97 of 1949.

24. With regard to the first sentence in paragraph 2 (b), which Mr. Verdross had criticized on the theoretical plane, he pointed out that in practice ratification was often made conditional on the occurrence of a future event, particularly on ratification by other states which were sometimes specifically named, as had been the case with the United Nations Charter and the Paris Treaties of Peace. Furthermore, the United Kingdom Government had expressly made its ratification of International Labour Convention No. 19 conditional on its being ratified by certain other states. The existence of that practice should be recognized and provided for.

25. He shared Mr. Rosenne's doubts about the second sentence in paragraph 2 (b), which treated conditions embodied in an instrument of ratification as equivalent to reservations. In practice, various kinds of declarations and general statements were often made at the time of ratification which did not qualify as reservations, for example, the declaration by the United States Senate concerning the status of NATO forces. He therefore suggested that the subject matter of the second sentence of paragraph 2 (b) should be discussed in connexion with the articles on reservations.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that some members in their comments had tended to blur the distinction between entry into force of the treaty and ratification by one state conditional upon ratification by others.

27. The provisions he had put forward in article 11 derived from the drafts of Sir Gerald Fitzmaurice, who evidently considered that if states were allowed to make an instrument of ratification conditional upon a future event, it would be a very undesirable practice. He could not accept the argument of Mr. Verdross, which related to the entry into force of the treaty. The act of ratification went beyond signature: it committed the state to consent to be bound by the treaty. His predecessor, in laying down that an instrument of ratification should be definitive, had certainly not intended to imply that a treaty could never contain provisions making its entry into force dependent upon the deposit of a certain number of ratifications.

28. The purpose of the second sentence in paragraph 2 (b) was to remove any impression that might be created by the first sentence, that conditions could never be attached to an instrument of ratification; what it said was that the validity of such conditions would be determined by the principles governing the validity and effect of reservations.

29. He would be prepared to cover in paragraph 2 (a) the possibility of states electing to become bound by an alternative part of a treaty, as suggested by Mr. Lachs, if a suitable wording could be devised.

30. Mr. AGO said he agreed with the special rapporteur that conditions determining entry into force should be kept separate, but believed it would be unwise to debar states from attaching conditions to an instrument of ratification.

31. Mr. AMADO said the essential feature of ratification was that it was definitive. He did not know of a single case in which ratification had been made subject to conditions.

32. He expressed the strongest doubts about the second sentence in paragraph 2(b), which was a provision *de lege ferenda*; neither jurisprudence nor practice gave any authority for such an innovation.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission was faced with an issue of substance in the first sentence of paragraph 2(b). Surely it would be a very undesirable practice of states to attach suspensive conditions to an instrument of ratification. One of the consequences would be that a depositary would not be able to judge whether the ratification was a valid one. A suspended ratification was a contradiction in terms.

34. The CHAIRMAN suggested that the special rapporteur might consider deleting the second sentence in paragraph 2(b) and dealing with its subject-matter under the heading of reservations.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that if the Commission decided to retain the first sentence in paragraph 2(b), some additional statement might be needed to the effect that the validity of conditions would be determined by the principles governing the validity of reservations.

36. Mr. LACHS said that the special rapporteur, in mentioning the difficulties that might face a depositary, had advanced into the domain of entry into force. A depositary supervised the collection of documents concerning the treaty, such as ratifications, and if one were received with conditions attached, would notify the other states which had ratified of that fact. States could not be debarred from attaching conditions to ratification, which in fact were often the subject of express provisions in the final clauses of treaties themselves.

37. Mr. GROS said he agreed with Mr. Lachs, but would like to comment briefly on the important issue under discussion. Quite often treaties provided that they would come into force on ratification by a specified number of states. Another situation to be taken into account was that where the treaty itself was silent on the subject but was of such importance to three or four states that, unless it was ratified by all of them, it would be pointless for the first to deposit its instrument of ratification so long as the position of the other states was not known. The first state had every right to make its own ratification conditional on that of the others, a condition which could in no way be regarded as a reservation since there was no unilateral proposal for modifying the regime resulting from the treaty. He saw no reason to disallow such a practice and that special case could perhaps be mentioned in the commentary.

38. If the second sentence in paragraph 2(b) were

transferred to the provisions dealing with reservations, the remaining paragraphs of article 11 would conform more closely to its title.

39. The CHAIRMAN, speaking as a member of the Commission, said that if the treaty itself included provisions making its entry into force conditional on a given number of ratifications, repetition of or reference to that stipulation in the instruments of ratification would not make them conditional. In the absence of any such provision in the treaty, if any instrument of ratification sought to impose such a condition for its entry into force, it would be conditional within the meaning of the draft article.

40. Mr. LIANG, Secretary of the Commission, drew attention to the passage on partial ratification, accession or acceptance in the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7, para. 42), which provided that a state could not become a party to an agreement on a provisional basis, or with respect to certain of its provisions only, unless such a possibility was provided for in the agreement. In the case of a conditional ratification by a state which wanted to become a party to a multilateral treaty, since a depositary had the obligation to count the number of states which had ratified for the purpose of ascertaining the date of entry into force of the treaty, he could not count the state in question because the ratification was conditional. That would not mean, however, that the ratification itself was invalid, or had to be rejected. What would take place was that, when the condition was fulfilled, the ratification would be counted and the state would become a party. No additional act on the part of the state would be necessary.

41. In the example given by Mr. Ago, when state A made its ratification conditional on the ratification by state B, state A would not become a party to the treaty before state B ratified. When the depositary received such a conditional ratification, he would probably wait until state B ratified and then he would count state A as having become a party to the treaty. Therefore, a conditional ratification was only suspensive as far as the question of the full effect of ratification was concerned.

42. Mr. VERDROSS said that the practical effect of the adoption of the first sentence of paragraph 2(b) would be to nullify a ratification made on the condition that certain other countries also ratified. A rule of that kind would oblige the other contracting parties to reject a ratification made conditionally on ratification by another state, and to consider it as void. The act of ratification, however, was similar to a unilateral declaration by a state, and could be regarded as comparable to a declaration under Article 36, paragraph 3, of the Statute of the International Court of Justice: there seemed to be no reason why ratification should not be made unconditionally or on condition of reciprocity, as were the declarations referred to in that article.

43. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with those members who had opposed the inclusion of the provision in that part of the draft. The rules

governing treaty-making should not be too rigid; Mr. Lachs had cited cases from practice in which conditions had been attached to ratification. The distinction drawn by Sir Gerald Fitzmaurice, to which the special rapporteur had referred, was too subtle; any state which wanted to do so could make a conditional, and not a definitive, ratification, which would make the entry into force of the treaty in question subject to the fulfilment of the conditions. On the other hand, that distinction had not been made in the original draft, which had provided that ratification could not be conditional and nowhere stated that conditions could be made in connexion with entry into force. It would be wiser to consider the whole question in connexion with the articles on entry into force and on the functions of the depositary, and to return to article 11 later if necessary.

44. Mr. AGO, referring to Mr. Verdross's basic question whether conditional ratification should or should not be regarded as valid, drew attention to the burden which would be placed on the depositary if he had to decide that certain conditional ratifications were not valid. For example, if twenty ratifications were needed to bring an agreement into force, and the nineteenth state declared that it was ratifying only on the condition that another specified state also ratified, the depositary would be placed in a very difficult position: if he regarded the nineteenth ratification notwithstanding its conditional character as valid, all would be well. As soon as the state indicated by the nineteenth state had also deposited its instrument of ratification, he would regard the condition to which the nineteenth ratification was subject as fulfilled, and would recognize that the agreement had come into force, twenty valid ratifications having been collected. If, on the other hand, he regarded the nineteenth ratification as not valid, because conditional, there would be only nineteen ratifications by the time the twentieth state deposited its instrument. He quite saw the disadvantages of conditional ratification as described by the special rapporteur and realized that it was possible to regard the issue of conditional ratification as a question *de lege ferenda*; but he also agreed with Mr. Gros that, in cases where a few key states, whose ratification was essential to the execution of the agreement, were involved, any state which wished to take positive steps in persuading the others to ratify should not be prevented from doing so by an unduly rigid rule, but should be allowed to ratify on the condition that the others also ratified.

45. Mr. ROSENNE said a distinction should be drawn between two entirely different types of conditions. The first type, being of a material character which derived from the actual text of the treaty, might be left aside, as it fell within the scope of reservations. If, despite a provision of the treaty stating that ratification by three states would suffice, a state submitted a ratification containing the condition that twenty other states should also ratify, such a condition would be of that type and would have to be dealt with as though it were a reservation. The second type, being of a personal character, related to the parties to the treaty; in his

opinion, in the case of important treaties at least, states should not be debarred from attaching to their ratification, otherwise fully valid, conditions which would suspend the entry into effect of that instrument of ratification pending ratification by other states.

46. Mr. CASTRÉN said he agreed with the special rapporteur and Mr. Amado that in principle the ratification of a treaty should never be conditional. He could not see the usefulness of a provision allowing such a loophole: surely state A could agree with states B and C to wait until they were able to ratify the agreement simultaneously? He would not, however, go so far as to say that a conditional ratification was invalid.

47. Mr. BARTOŠ endorsed the views expressed by Mr. Ago. Perhaps, as Mr. Castrén had said, there was no need always to be in such a hurry to ratify a treaty, but there was also no reason to delay too much. Any ratification, whether conditional or not, represented a step forward and had a certain legal efficacy, since if the event on the occurrence of which the ratification was contingent took place, the ratification, even though conditional, was binding. There were many cases in practice where ratifications were made conditional on reciprocity. In any case, ratification as an act had an intrinsic value in the relations between the states participating in the treaty if they were to grant an equivalent benefit; reciprocity meant the application of the rule *do ut des*.

48. He supported in principle the idea of the integrity of ratification, but wished to point out that the special rapporteur had in effect proposed an exception to that rule, to which no member had objected. Nor did he himself object to it. If a condition for ratification was accepted subsequently, the situation would be exactly the same as if the parties had agreed in advance to dispense with the integrity of ratification; the time when that took place was immaterial. He was in favour of a flexible formula for the paragraph which was both useful and even necessary.

49. Mr. CADIEUX thought that the difficulty might be due to terminology rather than to actual concepts; perhaps the adjective "definitive" could be replaced by "complete". The effect of a conditional ratification would be to delay the execution of the treaty, whereas definitive ratification carried the connotation of immediacy.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that he had hesitated considerably before drafting paragraph 2(b), for he realized that states occasionally resorted to conditional ratification. Although he believed that the practice was undesirable and could lead to absurd situations, he would not offer strong resistance if the majority thought it inadvisable to exclude the possibility of conditional ratification. If it were decided to delete the first sentence, the second should also be omitted, since it would give an erroneous impression if left by itself.

51. He explained that the word "definitive" was used to mean something which, by law, could not be withdrawn. If that interpretation were clearly stated in the

commentary, the uncertainty which seemed to prevail in the matter would probably be largely dispelled.

52. Mr. YASSEEN said that there seemed to be no serious objection in the Commission to a provision admitting conditional ratification. Such a provision would not offend any basic principle of law and, moreover, was defensible in logic, inasmuch as a state was free not to ratify at all, whether conditionally or otherwise. The practice of conditional ratification, though rare, existed and was sometimes useful; there was no plausible reason for condemning it in advance, so long as the condition was not incapable of fulfilment and was not unlawful.

53. Mr. AMADO said he could not agree with the thesis propounded by Mr. Ago, Mr. Gros, Mr. Bartoš and Mr. Lachs. In his experience, treaties were not in fact ratified conditionally. Mr. Cadieux had rightly stressed the time factor: ratification was an act which had an immediate effect. The special rapporteur should maintain his text, and the possibility of conditional ratification might be mentioned in the commentary.

54. Mr. BRIGGS said that if paragraph 2 had any place at all in the draft, it was not in article 11. The problem might arise in relation not only to ratification, but also to signature, accession and acceptance. In his opinion, the article should contain only three main elements: first, it should describe ratification as constituting the acceptance of the treaty as binding; secondly, it should mention the formal documentary evidence of ratification; thirdly, it should refer to the communication of the instruments.

55. He therefore suggested that the following text should be substituted for the special rapporteur's draft of article 11:

"The acceptance as binding of the provisions of an instrument which is subject to ratification is effected through the exchange or deposit of duly certified instruments of ratification."

56. Mr. BARTOŠ said that conditional ratification was sometimes resorted to in cases where several different treaties were interdependent. Certain treaties could not be applied equitably if the other partners were not bound by the other treaties, since those other treaties were really the condition of the application of the treaty in question. Thence arose the necessity for prior assurance that the other parties would apply the treaties whose operation was considered desirable if the treaty to be ratified was to be applied realistically. Since such cases existed in practice, the Commission was offered an opportunity to develop international law by drafting appropriate provisions which would have the character of *de lege ferenda*. The question was one not only of reciprocity, but also and especially of the equality of conditions of application.

57. Mr. EL-ERIAN observed that the simplified text suggested by Mr. Briggs considerably altered the picture, since the article would thus be confined strictly to the procedure of ratification indicated in its title. Nevertheless, irrespective of the Commission's choice between that simple text and the more complex one proposed by

the special rapporteur, the question of the integrity and finality of ratification as an act should be made absolutely clear. The discussion had been concerned mainly with conditional ratification in connexion with reciprocity, but further explanation seemed to be required of the relationship between such conditions and reservations and entry into force.

58. Mr. TSURUOKA said that, in pondering the question of conditional ratification on a basis of reciprocity, he had been struck by the absurdity of a hypothetical situation in which, for example, Italy might refuse to ratify an agreement until the United Kingdom had done so, while the United Kingdom might similarly make its ratification contingent on Italy's. It would seem that someone should have the last word in the matter.

59. Secondly, it would not always be easy to decide whether an event on the occurrence of which ratification was conditional had indeed occurred. It seemed that the country stipulating the condition would be the only one competent to take that decision, but if the special rapporteur's explanation of the meaning of the word "definitive" was accepted, the results would be most confusing.

60. In practice, cases such as that cited by Mr. Gros were settled in advance by specialized negotiators and diplomats. Of course, there were both advantages and disadvantages in a system of conditional ratification, but he was certain that explicit admission of the advantages would merely serve to encourage an undesirable trend.

61. Mr. AGO, replying to Mr. Tsuruoka, said that, in the example which he had given, Italy's ratification would have been definitive, that was, complete and irrevocable; its effects would merely have been suspended until the condition laid down by Italy was accomplished. Upon the United Kingdom ratifying the treaty, Italy's ratification would automatically take effect. There would be no question of playing shuttlecock with ratifications.

62. Mr. Tsuruoka had also referred to the difficulty of ascertaining that a condition had been fulfilled. Where the condition related to ratification by other states, it was easy to know when it was fulfilled. He admitted that in other cases difficulties might arise; such difficulties, however, were inherent in all conditional acts.

63. As to the inadvisability of encouraging the practice of making ratifications conditional, he fully agreed with Mr. Amado and Mr. Tsuruoka. Equally, however, it should not be suggested that a ratification was invalid because its operation had been made subject to a condition. Such a suggestion would create difficulties for the depositary state or the United Nations, as the case might be.

64. Mr. TSURUOKA thanked Mr. Ago for his explanation. As he had surmised, in the example he (Mr. Tsuruoka) had given, the condition specified by Italy would not have been fulfilled.

65. He suggested that the matter should be dealt with in the commentary, so as to avoid giving any encouragement to the practice of making the effects of ratification conditional.

66. Mr. ROSENNE proposed the following redraft for paragraph 2 (b):

"The instrument of ratification must be definitive, and may not be made conditional upon the occurrence of a future event, apart from the deposit of the ratifications of other named states."

67. That formulation would follow naturally from the terms of the definition of "ratification" contained in article 1(i); it would also serve as a basis for the discussion of the effects of ratification, described in article 12 and other articles of the draft.

68. He made his proposal subject to the reservation that a reference to accession might be introduced into his text, to cover the case of a treaty which provided for entry into force on ratification or accession.

69. He understood from the statement of the Secretary to the Commission that that formulation, which would clarify the type of condition allowed, would not present insuperable difficulties for the depositary.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that if the text put forward by Mr. Rosenne met with general approval, he, for his part, would have no objection to its being referred to the Drafting Committee.

71. Mr. YASSEEN said that the discussion had been focused on a certain type of condition relating to ratification by other states. Actually, that was not the only type of condition that could be specified by states.

72. There did not exist any rule of positive international law to prevent states from making ratification conditional. He saw no reason why that freedom should be limited in any way and he therefore urged the deletion of paragraph 2 (b). If the condition specified by the state concerned were lawful, there could be no grounds for disallowing it. There was no question of encouraging states to make ratification conditional.

73. Mr. LACHS said that the discussion had indicated that it might be advisable to transfer the contents of paragraph 2 to the commentary and to confine article 11 to the contents of paragraphs 1, 3 and 4.

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the rule set out in paragraph 2 (a) was good law and it was advisable to retain it in the draft. The legal advisers of the many newly independent states would find the provisions of paragraph 2 (a), which set out the principles governing ratification, useful in the process of treaty-making.

75. Paragraph 2 (b) raised a more difficult question. He would accept Mr. Rosenne's formulation, but the Commission as a whole might consider that certain conditions other than those specified in that proposal were equally unobjectionable. For example, a state might well wish to make its ratification effective only after a period of three months. In that situation the state was prepared to commit itself in advance on the condition that its undertaking was suspended until a given date; there seemed much value in retaining a provision covering ratification in that form.

76. In the light of the discussion, he was inclined to favour the suggestion that the contents of paragraph 2 (b) should be transferred to the commentary. However, he urged that the idea expressed by the term "definitive", as used in that paragraph, should be incorporated in paragraph 1.

77. Mr. LACHS pointed out that the subject of paragraph 2 (a) was also dealt with under reservations. It might therefore be easier to transfer the provision to the section on reservations.

78. Sir Humphrey WALDOCK, Special Rapporteur, said he could not accept the suggestion of Mr. Lachs. The case mentioned in paragraph 2 (a) was that of a choice laid down in the treaty itself; it was a situation created by the participating states themselves, which wished to allow states to accede to certain parts only of the treaty if they so desired. Although there was some similarity to the question of reservations, it would be arbitrary to transfer the contents of paragraph 2 (a) to the section on reservations.

79. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt paragraphs 1 and 2 (a) subject to drafting changes; those paragraphs would therefore be referred to the Drafting Committee. He would also consider that the Commission agreed to transfer the contents of paragraph 2 (b) to the commentary, subject to drafting improvements.

*It was so agreed.*

#### *Paragraphs 3 and 4*

80. Mr. BRIGGS said that implicit in his earlier proposal for the redrafting of the whole of article 11 was the deletion of paragraph 3 as it now stood. Most of the contents of that paragraph were self-evident and were sufficiently covered by the words in his proposal, "...effected through the exchange or deposit of duly certified instruments of ratification."

81. Mr. ROSENNE said that if Mr. Briggs' proposal were adopted, it would be necessary to retain the idea of the supremacy of the text of the treaty. The agreement of 10 September 1952 between Israel and the Federal Republic of Germany was a case where, for special reasons, the instruments of ratification of a bilateral treaty had been deposited with the Secretary-General of the United Nations in accordance with express provisions of the treaty itself.<sup>1</sup>

82. Mr. LIANG, Secretary to the Commission, pointed out that the opening sentence of paragraph 3 might not apply to cases where the depositary was called upon to notify the other signatory states. In that case, there would be no question of the communication of the instruments of ratification to the other signatory states, unless by "communication" it was merely intended to cover information. In the case to which he had referred, the instruments of ratification were deposited and, as specified in paragraph 4, the other parties were advised by the depositary.

<sup>1</sup> United Nations Treaty Series, Vol. 162, p. 205.



83. Sir Humphrey WALDOCK, Special Rapporteur, said that the term "communication" was used in a general sense. He assumed that a copy of the text of the instrument of ratification was communicated at the time of notification.

84. Mr. LIANG, Secretary to the Commission, said that it was not a copy of the instrument itself but merely the terms of the ratification that were communicated, when necessary.

85. The CHAIRMAN said that the matter was one of drafting and could be left to the Drafting Committee.

86. If there were no objection, he would consider that the Commission agreed to refer paragraph 3 to the Drafting Committee with the comments made during the discussion. Also, if there were no comment on paragraph 4, he would consider that the Commission agreed to adopt that paragraph subject to drafting changes.

*It was so agreed.*

#### ARTICLE 12. LEGAL EFFECTS OF RATIFICATION

87. Sir Humphrey WALDOCK, Special Rapporteur, said he had redrafted article 12 to read:

"1. Ratification of a treaty shall:

"(a) Constitute a definitive expression of the consent of the ratifying state to be bound by the treaty; and

"(b) If and so long as the treaty is not yet in force, shall bring into operation the applicable provisions of article 19 (bis).

"2. Unless the treaty itself provides otherwise, ratification shall not have any retroactive effects. In particular, the ratifying state's consent to be bound by the treaty shall operate only from the date of ratification and shall not operate from the date of its signature of the treaty."

88. Article 19 (bis), to which reference was made in paragraph 1 (b), was the article which, as the Commission had agreed, would include all the provisions relating to the rights and obligations of states pending the entry into force of the treaty. Of course, the Commission's discussion of article 12 would be subject to reservations regarding the contents of that article 19 (bis), the text of which was not yet known.

89. He had deleted the reference to "a presumptive party to the treaty", which appeared in his original draft, because when the Commission had discussed the question of signature, it had been found that a comparable provision properly belonged to the article on entry into force. There had also been some duplication between the deleted words in article 12 and the provisions on entry into force.

90. With regard to paragraph 1 (a), it was not easy to state the rule it contained without repeating what was already said in connexion with entry into force.

91. Paragraph 2 was the more important provision in that it denied any retroactive effect to ratification.

92. Mr. AGO said that the redraft of paragraph 1 was an improvement on the earlier draft. The drafting

committee, however, should be asked to find a more suitable expression than the term "definitive", which lent itself to the criticism put forward by Mr. de Luna at the previous meeting, that it might convey the impression that the Commission considered consent to a treaty as being given in two stages, at the time of signature and at the time of ratification. In fact, it was ratification alone which gave expression to the consent of a state.

93. With regard to paragraph 2, it was true that the instrument of ratification itself could only operate as from its date. That question, however, ought to be more clearly distinguished from the question of entry into force of the treaty. The treaty itself could enter into force on a date which might be earlier or later than the date of ratification; it could state that it would enter into force at a later date, or it could state that, after ratification, it would enter into force with effect from the day of its signature, for example.

94. Much of the contents of paragraph 2 could be transferred to the provisions on entry into force.

95. Mr. BARTOŠ pointed out, for the benefit of the Drafting Committee, that in paragraph 1 (a) of the redraft, the term "definitive" was used in the sense of "firm" or "irrevocable"; the French word "définitif" had a different meaning, so some other term would have to be found for the French translation.

96. With regard to paragraph 2, first, he must make an express reservation regarding the possible contents of article 19 (bis); he was never prepared to state his views on a text until he had seen it.

97. Secondly, he shared the concern just expressed by Mr. Ago. In fifteen years' practice, it has been his experience that in over one-third of the international agreements with which he had dealt it had been stipulated that the treaty should be applied from the day of signature, whereas the treaty's binding force was conditional on the exchange of the instruments of ratification. Ratification in those cases had the practical effect of validating a number of operations which had taken place since the signature of the agreement. From time to time it happened that the exchange of the instruments of ratification did not take place till some time after the provisions of the treaty, though up to that point only of provisional validity, had been applied in full. But it was a mistake to consider that in such a case ratification was only of historical interest because the treaty had already been consummated. On the contrary, ratification in such a case gave binding force to the effects of the treaty and to acts based on the treaty.

98. In recent years a number of important agreements had been signed between Italy and Yugoslavia relating to trade and payments between the two countries. Those agreements had provided for provisional application pending ratification and had remained unratified for some five years, but the governments of the two countries had instructed their appropriate authorities, the Exchange Office in Italy and the National Bank in Yugoslavia, for example, to do whatever was necessary, just as if the agreements had been in force. The

exchange of ratifications had taken place after five years and had then validated, or legitimated, all the operations in question.

99. The same situation had arisen in connexion with frontier traffic between Italy and Yugoslavia. For three or four years, thousands had crossed the frontier under an agreement between the two countries pending ratification of the agreement.

100. The validity of the arrangement to which he had referred had undoubtedly had its source in a contractual relationship between the two countries. The Ministries of Foreign Affairs of Italy and Yugoslavia had established a practice of including in treaties a provision that the treaty was applied from the date of its signature, but juridically entered into force only on the exchange of ratifications. In strict law, there was perhaps a contradiction between those two propositions, but it was necessary to accept them both for practical reasons. It was a reality in present day international law and should be given a place in any convention on the law of treaties.

101. Mr. TSURUOKA said he agreed with the first sentence in paragraph 2, which reflected the existing international practice.

102. He drew attention, however, to a possible situation which could arise from the discrepancies between the terms of paragraph 2, particularly its second sentence, and those of article 8, paragraph 2 (c), on the subject of signature *ad referendum*. Say, for example, a treaty was due to enter into force upon its being signed by twenty states, and was to remain open to signature until 31 December 1962. If the twentieth state to sign the treaty signed it *ad referendum* on 30 October 1962 but only confirmed its signature *ad referendum* on 1 February 1963, according to article 8, paragraph 2 (c), the effects of the confirmation of the signature *ad referendum* would be retroactive so that the treaty would apparently have come into force as from 30 October 1962. There would, however, be considerable doubt as to the validity of acts performed in relation to the treaty between 30 October 1962 and 1 February 1963. If, on the other hand, the same state, instead of signing *ad referendum*, were to sign subject to ratification on 30 October 1962, and then to ratify on 1 February 1963, then according to the terms of article 12, paragraph 2, the treaty could only come into force on 1 February 1963. Thus the discrepancy between the terms of the two articles would produce different legal effects from what in substance would serve the same purpose for a state, namely, signature *ad referendum* and signature subject to ratification.

103. The drafting committee should be invited to compare the two texts and bring them into line.

104. Sir Humphrey WALDOCK, Special Rapporteur, said that the practice in regard to signature *ad referendum* was stated in article 8, paragraph 2 (c).

105. The inclusion in the draft of paragraph 2 of article 12 was useful in order to dispose of a heresy. A contrary rule had been put forward in the past but was no longer accepted.

106. He suggested that many of the difficulties encountered by members would be avoided if the second sentence of paragraph 2 were deleted and the first and only remaining sentence redrafted to read:

"Unless the treaty itself provides otherwise, or unless the parties otherwise agree, ratification shall not have any retroactive effects."

107. Mr. LACHS, supporting the special rapporteur's new redraft, suggested that when the Drafting Committee had submitted the new text of article 12, the Commission should consider the suggestion by Mr. Briggs of combining accession and ratification because they had some effects in common.

108. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 12 to the Drafting Committee with the comments made during the discussion.

*It was so agreed.*

The meeting rose at 6 p.m.

### 648th MEETING

Tuesday, 22 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)

#### ARTICLE 13. PARTICIPATION IN A TREATY BY ACCESSION

1. The CHAIRMAN said it had been decided earlier in the session to postpone consideration of article 7 until the articles concerning accession came up for discussion. He suggested that article 7 might now be discussed in conjunction with article 13.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that in his view it was desirable that article 13 should be considered before article 7. The provisions in article 7 on the right to sign a treaty did not go as far as those in article 13 on participation by accession. It would therefore be easier for the Commission to consider article 7 if it first settled some of the problems raised by article 13.

*It was so agreed.*

3. Sir Humphrey WALDOCK, Special Rapporteur, said that when the Commission had discussed the previous special rapporteur's draft articles in 1959, many members had taken the view that the draft should contain an article stating the right of states to become parties to treaties of a general character. That view had encountered some opposition on the ground that it was difficult to divorce the right to participate in a treaty from the particular procedure involved such as signature, accession or acceptance. The Commission had finally decided to defer consideration of a general article on participation until after articles on the right to sign, accede, etc. had been drafted.<sup>1</sup>

<sup>1</sup> *Yearbook of the International Law Commission, 1959, Vol. II* (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 108.

4. Accession raised the question of the right to participate in a very distinct form: accession constituted the main method of participating in certain multilateral treaties after the expiry of a comparatively brief period. The question of the right to participate also arose in connexion with the signing and the acceptance of treaties; the right to ratify probably only arose in very few cases, such as the conventions adopted by the International Labour Conference, for which the process of participation was described as ratification.

5. Although in principle he favoured the inclusion of a general article on the right of participation, he thought that there were technical difficulties which might prevent it from being an effective means of opening treaties to the new states. For the convention on the law of treaties now under consideration might not be ratified, until a considerable time had elapsed, by states whose consent, as parties to old treaties, was necessary to open them to participation by additional states. There might in consequence be doubt as to the validity of admitting a new state to the treaty.

6. With regard to article 13, if it were desired to introduce the notion of the right of participation, a distinction should be drawn between two categories of treaties, for there was a very real difference in that respect between general multilateral treaties and treaties which were open to participation by a restricted group of states.

7. The provisions of article 13 dealt with the question which states would have a voice in decisions regarding participation in a treaty. Under existing law, practice seemed to allow in most cases the states which had negotiated a treaty some right to be consulted, and to express their view regarding participation by other states in the treaty. He did not think, however, that there was any justification for allowing a state which had shown no interest in a treaty a right indefinitely to exclude other states from participating in that treaty. The problem was a real one and he proposed that it should be dealt with in the manner set out in paragraph 2 (b) and (c). Under those clauses a negotiating state would cease to have the right to object to the participation of other states if it had not become a party to the treaty four years after the adoption of its text.

8. He had put forward paragraph 2 (d) with some hesitation. That clause treated in the same manner treaties drawn up in an international organization and those drawn up at an international conference convened by an international organization. It was convenient to lay down a simple procedure to cover both situations. In the case of a conference convened by an international organization, it was better to leave decisions on participation to the competent organ of the organization concerned rather than to require a two-thirds majority of the states which had participated in the conference. It would be a very laborious process to put such a majority rule into effect after the conference had broken up.

9. The provisions of article 13 were intended as a basis for discussion. He would welcome comments on his

proposals, with a view to the formulation of a generally acceptable text.

10. Mr. BRIGGS said it was clear from the special rapporteur's introduction that the provisions of article 13 constituted residual rules. Modern treaties usually contained accession clauses, and article 13, as proposed by the special rapporteur, particularly in its paragraphs 1 and 5, stated in effect that any provisions which a treaty might contain on the subject of accession would prevail. The article concerning accession should commence with the statement of that rule, in order to avoid a debate on the "right", "faculty" or "privilege" of accession.

11. He proposed the following redraft of article 13:

"1. Where a treaty provides that it is open to accession, either generally or by categories of states, a state may become a party to the treaty in conformity with those provisions.

"2. Where a treaty contains no provision relating to accession, a state may become a party to the treaty by accession in the following circumstances:

"(a) In the case of a bilateral treaty or a multilateral treaty concluded between a restricted number or group of states, with the consent of all the parties to the treaty;

"(b) In the case of a general multilateral treaty drawn up at an international conference convened by the states concerned, with the consent of two-thirds of the parties to the treaty;

"(c) In the case of a multilateral treaty either drawn up in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

"3. When the depositary of a treaty receives a formal request for accession, the depositary shall communicate the request to the states whose consent or objection is material, and, in the case covered by paragraph 2 (c) of this article, shall bring the request, as soon as possible, before the competent organ of the organization concerned.

"4. In the case of a general multilateral treaty referred to in paragraph 2 (b) of this article,

"(a) The consent of a state to which a request for accession has been communicated under paragraph 3 of this article shall be presumed after the expiry of twelve months from the date of the communication, if no objection to the request has been notified by it to the depositary during that period;

"(b) If a state to which a request for accession has been communicated notifies the depositary of its objection to the request before the expiry of twelve months from the date of the

communication, but the requesting state is nevertheless admitted, conformably to paragraph 2(b), to accede to the treaty, the treaty shall not apply in the relations between the objecting and the requesting states."

12. Paragraph 1 of his redraft stated the rule to which he had referred.

13. Paragraph 2 dealt with the situation where the treaty was silent on the subject of participation by means of accession. Its various provisions expressed broadly the same rules as the special rapporteur's draft. Paragraph 2(a) stated that accession required the consent of all the parties to the treaty in the case of a bilateral treaty or of a multilateral treaty concluded between a restricted number or a group of states.

14. He did not believe that under existing international law other states had a "right" of accession; but he would be prepared to consider a proposal opening general multilateral treaties to accession by less than unanimity. His paragraph 2(b) therefore stated that participation in a general multilateral treaty drawn up at an international conference was subject to the consent of two-thirds of the parties to the treaty.

15. The rule set out in paragraph 2(c) of his redraft was identical with that proposed in the special rapporteur's paragraph 2(d).

16. He had omitted the special rapporteur's provisions permitting accession to a treaty which had not yet entered into force. Where, by the terms of the treaty itself, accession was possible before its entry into force, the situation would be covered by the terms of his paragraph 1: "...a state may become a party to the treaty in conformity with those provisions." Where the treaty did not contain any provisions on accession, its entry into force would usually depend on its ratification by a number of states. In that case, there would appear to be no advantage to a state in acceding to the treaty before its entry into force, particularly if accession was irrelevant to entry into force.

17. He had also omitted from his redraft the provision proposed by the special rapporteur which would give to negotiating states, during a four-year period, the right to be consulted in regard to participation in the treaty by other states. He questioned whether negotiating states were entitled to be so consulted.

18. By way of analogy, he drew attention to the ruling of the International Court of Justice in its Advisory Opinion on Reservations to the Genocide Convention. The Court was then of the opinion, on question III, "that an objection to a reservation made by a signatory state which has not yet ratified the Convention can have legal effect... only upon ratification", and "that an objection to a reservation made by a state which is entitled to sign or accede but which has not yet done so, is without legal effect."<sup>2</sup> Admittedly, the Court was dealing with reservations, but the analogy was valid and the same rule should apply to objections to accession.

19. Paragraph 3 of his redraft differed from the corresponding clause in the special rapporteur's draft in that it broadened the obligation of the depositary to communicate requests for accession.

20. Paragraph 4(a) of his redraft embodied the same presumption as that in paragraph 4(a) of the special rapporteur's draft.

21. Paragraph 4(b) of his redraft differed from the special rapporteur's draft in that it would limit the legal effect of an objection to accession to the case of a multilateral treaty drawn up at an international conference convened by the states themselves. In the case of a treaty drawn up in an international organization, or in a conference convened by such an organization, the organization's decision regarding participation should be binding on all member states and the treaty should be applicable even between objecting and acceding states.

22. With regard to article 7, he questioned whether any pressing problem connected with the alleged right to sign treaties would remain, once adequate provision had been made for accession.

23. Mr. JIMÉNEZ de ARÉCHAGA said he was in substantial agreement with the main points of the special rapporteur's article 13, on the negative side in not accepting that a general right of participation in treaties really did exist in international law, and on the positive side, of progressive development, in providing for the more flexible rule of a two-thirds majority in order to allow states to accede to certain treaties. He had himself submitted a redraft of article 13, which read as follows:

"Paragraph 1(a) and (b) as proposed by the special rapporteur.

"2(a). Unless the treaty itself otherwise provides, a state not possessing the right to accede to the treaty under the provisions of the preceding paragraph may nevertheless acquire the right to accede to a treaty by the subsequent agreement of all the states concerned [as determined in subparagraph (b)],<sup>3</sup>

"(b) Where the treaty:

"(i) Is not yet in force, or where the treaty is already in force but four years have not yet elapsed since the adoption of its text, with the consent of all the negotiating states;

"(ii) Is already in force and four years have elapsed since the adoption of its text, with the consent of all the parties to the treaty;

"(c) In the case of a multilateral treaty [dealing with matters of general concern to all states or to a definite category or group of states];<sup>3</sup>

"(i) Where the treaty is not yet in force or where the treaty is already in force but four years have not yet elapsed since the adoption of its text, with the subsequent consent of two-thirds of the negotiating states, or

"(ii) Where the treaty is already in force and four

<sup>2</sup> *I.C.J. Reports*, 1951, p. 30.

<sup>3</sup> The words in brackets indicate additions to the special rapporteur's text.

years have elapsed since the adoption of its text, with the subsequent consent of two-thirds of the parties to the treaty;

“(d) In the case of a multilateral treaty either drawn up in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

“Paragraphs 3, 4 and 5 as proposed by the special rapporteur.”

24. The consideration which had inspired his suggested redraft of paragraphs 2 (a), (b) and (c), which would do away with the distinction between plurilateral and multilateral treaties, was that participation of new states in existing treaties of general concern, through accession, on the basis of a majority decision, was an important progressive development of international law proposed by the Commission in its 1959 draft, and it did not seem justifiable to subject new states to a sort of veto on their accession to treaties, which, though of regional scope, were of common concern to all states in the region in question.

25. A treaty could have a regional scope and yet at the same time be of concern to states other than the signatories. The fact that certain treaties were entered into by a restricted group of states was not therefore a valid reason for introducing the unanimity rule.

26. An example was the law-making treaties of the Organization of American States. Many of those treaties were not signed by all the American States but were none the less of concern to all the states in the region. A state which had not signed, possibly for political reasons, or a newly independent state in the region, would have an interest in the treaty. If such a state wished to accede, there appeared to be no reason why any of the original signatories should have the right to veto its accession.

27. During the 1959 discussions, it had been erroneously assumed that law-making treaties could only be world-wide and not regional. But while he would not suggest that there existed a distinct American international law, certain law-making treaties were of specific concern to all the nations of the American region, such as the conventions on diplomatic asylum and on the legal situation of exiles and political refugees.

28. It might be argued that, in certain regions of the world, there were states which did not have the same historical affinity with other states in the region as that existing among the American states. The elimination of the unanimity rule might be said to give such states a right of intrusion into a treaty signed by states of the same region which were linked by some affinity. Such was not of course the purpose of his proposal; under that proposal there were in fact three lines of defence against any such intrusion.

29. First, the treaty itself might restrict the right of accession. After all, the provisions of article 13 were intended to be residuary; they would apply only in the

absence of any express provisions on accession in the treaty itself.

30. Secondly, no abuse of the right of accession need be feared since accession would require the consent of a two-thirds majority of the parties to an existing treaty.

31. Thirdly, under the provisions of paragraph 4 (b), which would remain unchanged, if a state requesting accession were admitted notwithstanding objections by another state, the treaty would not apply in the relations between the objecting and the requesting states.

32. The progressive development proposed by the special rapporteur with his two-thirds majority rule should not be confined to general multilateral treaties, but extended to regional multilateral treaties as well. The governing criterion should be whether the treaty concerned states other than those which were parties to it, regardless of its universal or regional character.

#### POINT OF ORDER

33. Mr. BARTOŠ, on a point of order, said he must formally protest against the breach of the rules of procedure involved in the circulation of proposals in English only, instead of in all the working languages.

34. Mr. LIANG, Secretary to the Commission, said he agreed with Mr. Bartoš on the need for the translation of proposals. In a number of cases, however, the sponsors of amendments had specifically asked that their texts should be circulated informally; only amendments intended to be circulated as formal proposals were submitted to the language services for translation. The translation service was very busy, and he suggested that in future proposals by members should be submitted in good time to the Secretariat for translation and circulation in the three working languages.

35. Mr. BRIGGS said he had certainly expected his proposal to be translated and circulated in all the working languages.

36. Mr. PAREDES and Mr. PESSOU supported Mr. Bartoš.

37. Mr. CADIEUX also supported Mr. Bartoš and said that no one could dispute that important proposals should be circulated in all the working languages and that in the case of amendments suggested in the course of the discussion, an immediate translation, even if only of a provisional character, should be provided.

38. Sir Humphrey WALDOCK, Mr. AGO and Mr. GROS supported Mr. Bartoš and Mr. Cadieux.

39. Mr. PADILLA NERVO said that, while he agreed with the distinction made by Mr. Cadieux, he himself was also participating in the Eighteen-Nation Committee on Disarmament, and had noted that that committee received translations of its documents promptly. The International Law Commission should enjoy similar facilities.

40. The CHAIRMAN said that at a previous session the Commission had decided that every amendment should be submitted a week before the Commission was due to discuss the article to which it related; that did not, of course, apply to proposals like the present one.

41. Mr. LIANG, Secretary to the Commission, said that Mr. Veillet-Lavallée, Chief of the Languages Division of the European Office of the United Nations, was present to explain the situation.

42. Mr. VEILLET-LAVALLÉE (Secretariat) said that the situation was particularly difficult at the moment because the European Office had to provide special services for the Eighteen-Nation Committee on Disarmament, the Sub-Committee on a Treaty for the Discontinuance of Nuclear Weapon Tests, the Commission on Narcotic Drugs, and the Executive Committee of the High Commissioner's Programme, as well as routine services for the Economic Commission for Europe. The multiplicity of conferences, some of them unforeseen, involved serious staffing problems. The Secretary-General had directed that work for the Disarmament Committee should be given priority, but he could assure the Commission that the needs of other bodies were not neglected. He would do everything in his power to see to it that the Commission's requests for urgent translations received attention.

43. Mr. GROS said that immediate translations of amendments proposed by members could and should be provided in writing and he was unable to understand why such a service could not be provided forthwith, if necessary by the secretariat of the Commission.

44. The CHAIRMAN said that, although he realized that special circumstances had arisen in 1962, the Commission was not satisfied with the explanation offered by the Secretariat; he hoped that thenceforward adequate facilities, particularly on the translation side, would be provided to enable it to carry on its work.

45. He invited the Commission to continue its discussion of article 13.

#### ARTICLE 13 (*resumed from paragraph 32*)

46. Mr. LACHS said that article 13 was a very important one and would need the most careful consideration. He commended the special rapporteur for his lucid exposition in the commentary. One of the main problems was how to reconcile the sovereign rights of the parties with the principle of the widest possible participation in multilateral treaties. As the special rapporteur had suggested, the article called for a general discussion before the Commission took up points of detail.

47. In the history of the law of treaties it was possible to detect the interplay of two trends, which should be reflected in the article. The first was to encourage any state whose participation was important for the implementation of the treaty to become a party, and the second was to encourage any state interested in the subject-matter of the treaty to become a party. In the case of treaties concerned with communications, transport, cultural and scientific relations, the general tendency nowadays was to throw them open to as many states as possible. On the other hand, there had been a contrary tendency in recent years to restrict treaties of a political nature to states which constituted a group

with social, economic or political affinities. That he regarded as a retrograde development.

48. In keeping with the special rapporteur's approach, he considered that, in the absence of specific provisions concerning accession in the treaty itself, the presumption was permissible that, unless specifically debarred from so doing, states were free to accede. The view taken by the Permanent Court of International Justice in the Polish Upper Silesia case, in connexion with the Armistice Convention of 1918 and the Protocol of Spa, that because there was no provision for a right on the part of other states to accede to them it was impossible to presume the existence of such a right,<sup>4</sup> no longer corresponded with the requirements of international law or international relations.

49. The question then arose whether a right of accession in fact existed and was enforceable. If it existed, it was an inchoate right, since the only recourse available to a state wishing to accede to a treaty of an open character but prevented from doing so would be to proclaim *urbi et orbi* that the parties to it were practising discrimination and that the treaty had been wrongly designated. It was a right which could only be acquired by its consummation. In the circumstances it seemed wiser, as suggested by Mr. Briggs, not to refer to a right of accession.

50. Although, in principle, where a treaty was silent it should be presumed to be open to accession, there might be exceptions, for example, if the treaty dealt with a technical matter of a restricted character in which other states could have no possible interest, such as whaling.

51. Another question the Commission would have to consider was whether there was such a thing as a duty to accede, as laid down in certain peace treaties, such as the Treaty of St. Germain-en-Laye, the Treaty of Versailles and the Paris Treaties of Peace.

52. Those were the elements which should appear in paragraph 2. The special rapporteur had already indicated that, in the light of the previous discussion, he would abandon the distinction he had drawn in that paragraph between plurilateral and multilateral treaties.

53. Since any time-limit was bound to be artificial and arbitrary, and did not offer any great advantage either for the execution of the treaty or for the mechanism of accession, he doubted the advisability of references to time-limits.

54. On the question how a decision should be reached about accession, he favoured a majority rule because the unanimity rule was declining in international practice. The decision should be made by the parties, for it would not be desirable to allow signatories which had not displayed sufficient interest in the treaty to become parties themselves to debar others from acceding.

55. One further question which should be examined was whether special mention ought to be made of the case of treaties dealing with general principles of international law. There were strong arguments in favour of

<sup>4</sup> P.C.I.J., Series A, No. 7, *Case concerning certain German interests in Polish Upper Silesia (the merits)*, p. 28.

stipulating that any state had the right to accede to such treaties if they included no express provision on accession, since otherwise states debarred from acceding might use the absence of such a stipulation as a pretext for refusing to comply with the rules laid down. That would not be in the interests of the development of international law or of general compliance with its principles.

56. Sir Humphrey WALDOCK, Special Rapporteur, referring to Mr. Lachs' remarks about his intention of dropping the distinction between plurilateral and multilateral treaties in paragraph 2, said that he did not believe it would be possible to avoid making any such distinction, for the presumption that a treaty should be open to all for accession depended on the nature of the treaty.

57. He agreed that the four-year time-limit he had suggested was an arbitrary one but it was a matter of secondary importance. The first question to be settled was whether, in principle, states which had taken part in the negotiations should have a voice in the important decision about accessions and at what point in time, if they had not become parties themselves, they ceased to have the right to debar others from acceding. The practice was that negotiating states had a say in the matter.

58. Mr. AMADO said that the institution of accession had evolved during the 18th and 19th centuries as a means whereby a state could associate itself with a legal instrument created by others. Mr. Jiménez de Aréchaga had just described the rule proposed in the Commission's 1959 draft allowing for participation, by a majority decision, in existing treaties of general concern, as an important progressive development of international law.

59. The special rapporteur in his commentary also had shown himself to be notably progressive and a champion of the ideal of universality. In coming near to advocating an absolute right to accede to treaties, he differed from his predecessor, Sir Gerald Fitzmaurice, who had maintained that "accession implied, and should only be made to, a treaty already in force". Although Sir Gerald Fitzmaurice had recognized that exceptionally accessions prior to coming into force might be admitted, he had criticized the practice as "lax" and one "that ought not to be encouraged".<sup>5</sup>

60. Rousseau had defined accession as the juridical act by which a state which was not a party to an international treaty placed itself under the rule of the provisions of the treaty.<sup>6</sup>

61. One of the problems which the Commission would have to resolve was whether it should go beyond pure codification and admit the possibility of accession to treaties not yet in force.

62. Another problem was whether the right to accede in fact existed. Although it would be difficult in principle to argue that members of the international community were debarred from the right to accede to treaties, there could be no doubt that in certain cases, for instance, regional treaties concluded between Latin American States, that disqualification did exist.

63. In the matter of classifying treaties, he agreed with Mr. Jiménez de Aréchaga and was opposed to making a special category denominated plurilateral treaties; any treaty that was not bilateral was multilateral.

64. The decision on the request of a state to be admitted to accession could certainly not lie with one of the parties only; he favoured a two-thirds majority rule.

65. Mr. YASSEEN said that there was no difficulty when the treaty itself dealt with the question; the difficulties began when there was no provision in the treaty on the question. He was in general agreement with the rules set out in the special rapporteur's draft. With respect to the voting rule as regards accession, the article drew a clear line between, on the one hand, multilateral treaties drawn up at an international conference or in an international organization, and, on the other hand, all other treaties. In the case of treaties called in the article "plurilateral", accession was governed by the same unanimity rule as bilateral treaties; the majority rule applied only to accessions to multilateral treaties. The very fact that an international conference had prepared the text of the treaty justified the application of the majority rule which, however, remained an exception.

66. The draft also satisfied the requirements of sovereignty, while constituting an expression of the wish to enlarge the field covered by international treaties, particularly those which stated principles of international law. Nevertheless, the fact that the majority rule was admitted made it necessary to introduce the safety valve provided in paragraph 4 (b). That system for multilateral treaties should not seriously prejudice the principle of sovereignty; the Commission could not go so far as to impose on states, against their will, relations with other states.

67. On the question whether negotiating states which had not yet become parties to a treaty should be able to object to an accession, he believed that such states should have certain rights, since the fact that they had participated in the negotiations endowed them with a special status. It implied that they had definite views on the scope of the treaty, and they should therefore be free to express objections, but not for an indefinite period. The time-limit laid down in paragraph 2, therefore, seemed to be justified.

68. Mr. AGO said that article 13 was one of the most important articles in the draft, and that considerable time and care should therefore be devoted to it. In general, he was in agreement with the special rapporteur's reasons, explained in the commentary, for his choice between several possibilities. The special rapporteur's decision to proceed on the basis of certain

<sup>5</sup> *Yearbook of the International Law Commission, 1956, Vol. II* (United Nations publication, Sales No. : 56.V.3, Vol. II), p. 125.

<sup>6</sup> *Droit international public, 1953, p. 37.*



classes of treaties—although those classes were in fact hypothetical—had been a practical expedient.

69. He also agreed with the general considerations expressed by Mr. Lachs, Mr. Amado and Mr. Yasseen and believed that the three proposals before the Commission—those of the special rapporteur, Mr. Briggs and Mr. Jiménez de Aréchaga—had a number of points in common and might ultimately be amalgamated in a single article.

70. A number of speakers had referred to the so-called right of accession, but he agreed with Mr. Briggs that it would be wise to avoid adopting a definite position on that point in the text. Technically, it was open to dispute whether a real right of accession did exist. A treaty was always the result of a meeting of wills, but a state seeking to accede had not expressed its will in the course of the negotiations. An accession clause in a treaty constituted, in effect, an offer to the states which had not negotiated the treaty. Consequently, a state which had not participated in the negotiations had not itself a "right" of accession; it had merely the possibility of accepting an offer if and when an offer was made to it. As Mr. Briggs had rightly pointed out, the problem was more theoretical than substantive, and should not be dealt with in the draft itself.

71. Mr. Briggs' text was considerably simpler than that proposed by the special rapporteur, but in some respects the simplification had gone too far. For example, it omitted the very important point that a state which was invited to participate in the negotiation of a treaty but declined to avail itself of that possibility could nevertheless be regarded as having received the offer and should be able to accede to the treaty without further consultation. A clause along the lines of paragraph 1(b) of the special rapporteur's text should therefore be retained.

72. Difficulties would, however, arise in the case of states which had not participated in the negotiation and had not been invited to negotiate. In such cases, it was impossible to dispense with hypothetical classifications. In the case of bilateral treaties, the answer was simple, for accession required the consent of both parties. In the case of the plurilateral treaties mentioned by the special rapporteur, the situation was more complex, since such treaties had nearly all the characteristics of bilateral treaties, except that they were concluded between more than two parties. Presumably, the parties to those treaties wished them to be restrictive and would be reluctant to admit other parties; the majority rule could not be applied in such cases, and all the parties had to be consulted on a request for accession. Application of the unanimity rule, although not a perfect solution, was the one which would do the least harm and would cover most cases in practice.

73. An even more serious question, however, was whether negotiating states, or only states actually parties to the treaty, should be consulted on requests for accession. The theory that negotiating states should have no say in the matter seemed to provide an unduly facile solution. But it could not be said with any certainty

that a state which had taken part in negotiating the treaty would not become a party to it, especially when only a short time had elapsed since the conclusion of the negotiations, and if those who had already become parties were alone empowered to admit other states, their actions might conflict with the intentions of the treaty and even endanger its operation, since negotiating states might refuse to ratify the treaty in those conditions. In his opinion, the negotiating states should have a voice in decisions on accessions but, in that case, a time-limit, as proposed by the special rapporteur, should necessarily apply.

74. In the case of multilateral treaties, there was even less reason to leave the decision on accessions to the full parties alone. States often took a long time to become parties to such instruments, and it would be wrong if a small group of parties could take decisions on a matter which was of general interest. There again, a time-limit would be useful, and the period might be longer in the case of multilateral than in that of other treaties.

75. Moreover, unanimous consent could not be required; a certain majority, the size of which would of necessity be somewhat arbitrary, must suffice. There was a guiding principle in the matter: an international conference would have certain rules, which it had adopted itself or were contained in the statute of the convening international organization, providing that the participation of states in the negotiations was decided by a certain majority; that majority rule should also be applied throughout the life of the instrument arising from the conference. Application of that principle would introduce some unity and clarity into the accession procedure.

76. He had some doubts concerning the acceptability of the thesis that, if a state entitled to be consulted objected to the accession of another state which had been admitted by the requisite majority, then the treaty should be regarded as being in force between the acceding state and the other parties, but not in force between that state and the objecting state. For example, if the accession was assented to by a two-thirds majority of the parties to a treaty, it could hardly be considered desirable for a state to be bound by the treaty with respect to two-thirds of the parties, and not with respect to the remaining one-third. Moreover, there was a contradiction between that conclusion and the fact that it would not apply if the decision regarding the accession of the state concerned had taken place during the conference itself.

77. Finally, with regard to treaties which codified general principles of international law, he understood Mr. Lachs' apprehensions concerning the possibility that a state which was denied accession to such a treaty might claim that it was not bound by the rules laid down in the general treaty in question. While admittedly states which were prevented from acceding, because not invited to participate in the negotiation of the treaty, might not be bound by any new general rules arising from that instrument, they could certainly not claim not to be bound by existing rules of customary law. Never-

theless, he agreed with Mr. Lachs that, as far as possible, it should be open to all states to participate in such codifying conferences.

78. Mr. VERDROSS said he agreed in principle with the special rapporteur, but wished to ask him one question. It was understandable that, in the case of multilateral treaties, a certain time-limit should be fixed for accession, because in that category of instrument accession was admitted with the consent of a majority. What he could not understand was why the special rapporteur provided for a four-year limit in the case of plurilateral treaties, where accession was only possible if it was accepted by all the negotiating states; in a case of that kind, a time-limit was pointless.

79. Sir Humphrey WALDOCK, Special Rapporteur, replied that the time-limit was proposed only for the purpose of determining who had a right to a voice in the decision concerning a request for accession. The underlying idea of the time-limit was that the negotiating states should have a right to decide on any question of opening participation in the treaty to a wider circle of states, but that the time might come when that right would become an abuse. Thus, the parties to the treaty might be quite content to invite new states to accede, but some of the negotiating states who had delayed their ratifications or acceptances indefinitely might raise an objection, perhaps for political reasons. In such cases, the time would come when the negotiating states concerned must be regarded as having ceased to have a voice in the decision.

80. Mr. LACHS said he agreed with Mr. Ago that a state which had not participated in the negotiation of a treaty codifying existing rules of international law could not claim that it was not bound by those rules. If a state argued thus, it would open the existence of such rules to question. For example, the Nuremberg Military Tribunal, in confirming the Geneva Conventions of 1929, which in turn had confirmed existing rules of international law, had expressed the view that, although some of the belligerents had not signed the Geneva Conventions, Germany was bound by those rules. Most such cases would not be brought before the International Court of Justice and it seemed unnecessary to open the door to doubts concerning the existence of general rules of law. The text should therefore be so worded as to encourage the participation of all states in codifying conferences and to open the treaties in question to their accession.

81. Mr. Ago had argued with considerable force the case for enabling mere signatories to bar other states from accession. Nevertheless, he (Mr. Lachs) believed that, although it should naturally be presumed that states acted in good faith, allowance should be made for cases where states with no intention of ratifying treaties or acceding to them confined themselves to the negative function of preventing the accession of other states.

The meeting rose at 1 p.m.

## 649th MEETING

Wednesday, 23 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)

#### ARTICLE 13. PARTICIPATION IN A TREATY BY ACCESSION (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of article 13.
2. Mr. ROSENNE said that the dominant factor in regard to participation by accession was always the treaty itself. It would therefore be desirable to stress that principle in the Commission's draft and thus respond to the need for greater precision in the law of treaties, a need which was apparent in relation both to accession and to other questions.
3. The Commission was drafting a residual rule and was within the domain of progressive development rather than codification of international law. Consequently, the rules it formulated should be genuinely progressive and should take into account the changing needs of the international community.
4. As the point of departure, he accepted the following three propositions: first, that bilateral treaties were, in principle, closed to outside states; secondly, that general multilateral treaties were, in principle, open to all states willing to assume the obligations and the burdens involved; and, thirdly, that multilateral treaties concluded by a restricted number or group of states were in an intermediate position, but had more affinities with bilateral treaties than with general international treaties.
5. There was one broad general exception to the principles which he had mentioned. All treaties creating international organizations, large or small, were in principle closed. The question which arose in connexion with them was not really one of accession to a treaty but of admission to the organization. From the formal point of view, admission was effected by a document similar to an instrument of accession, but the whole process of admission was totally different in character from that of accession and in view of the doubts which had been expressed by certain members, it was desirable to clarify that case.
6. By a logical extension, participation by accession in treaties concluded under the auspices of an international organization should be in conformity with the principles and practices of the organization concerned.
7. With regard to the position of negotiating states, he pointed out that their position was already recognized by international law in regard to the process of the interpretation of treaties. In that process, one of the factors was the intention of the negotiators.

8. He therefore saw no reason for not recognizing the special position of negotiating states in connexion with accession for a specified period, although it might be shorter than the four-year period proposed by the special rapporteur. The Commission's 1951 report, cited by the special rapporteur in his report, stated "that a period of twelve months would be a reasonable time within which an objecting state could effect its ratification or acceptance of a convention".<sup>1</sup> Although that statement had been made in the context of reservations, analogous considerations applied to the special position of negotiating states recognized in paragraph 2 of the special rapporteur's article 13. He would be willing to consider any reasonable period up to four years. The period might in fact be longer because of the modern practice of keeping conventions open for signature for several months after the authentication of the text.

9. He accepted the presumption set out in sub-paragraph 4(a), which reflected the general practice in the matter.

10. The Commission was engaged in the progressive development of international law and should avoid creating anything in the nature of a right of veto by individual states on participation in a treaty by other states. There was a tendency in contemporary international law to avoid such a right of veto in relation to general international conventions. That tendency had been one of the points of departure of the International Court of Justice in its Advisory Opinion on Reservations to the Genocide Convention. The necessity for flexibility had been repeatedly stressed in relation to general international conventions; that necessity was implicit in the abandonment of the unanimity rule as a rule of voting in international organizations. For those reasons, he was prepared to accept the special rapporteur's text as a reasonable compromise between the various tendencies on the subject.

11. Since the provisions under discussion would constitute progressive development, they would apply to the future. The Commission would therefore have to consider the question of the time at which the new rule would come into force.

12. At that stage, however, there was a much more urgent problem, that of the opening up for accession by newly independent states of old general international conventions such as those concluded under the auspices of the League of Nations. Those conventions were technically closed and there was little possibility of opening them to accession by new states except by a political decision. The matter had been discussed in connexion with the conclusion in 1946 of the various arrangements by which the functions previously exercised by the League of Nations in regard to treaties were transferred to the United Nations. The purely depositary functions of the League, being of an administrative character, had then been simply transferred to the United Nations. Other functions, of a technical and non-political

character, had been taken over on the basis of some element of choice on the part of the United Nations.

13. Subsequent developments in the United Nations in that sphere had been less satisfactory. Except where the old treaty had been suitably amended, the consent of the parties remained necessary for the accession of new states. The paradoxical result was that a treaty which had been open to all Members of the League of Nations was not open to all Members of the United Nations. The absurdity of that situation had been emphasized in the discussions on the Slavery Convention of 1926 at the eighth session of the General Assembly.

14. The United Nations should adopt a bold approach similar to that taken by the Administrative Council of the Permanent Court of Arbitration, which had succeeded in cutting through the theoretical issues involved and re-opening to accession the first Hague Convention of 1907. The remarkable result had been that the number of parties to that convention had grown from 35 to 60 in two and half years. The principle should be recognized that a treaty which had originally been open to accession by all Members of the League of Nations should be open to accession by all Members of the United Nations without the formal consent of the original parties. Such a rule would be a corollary of article 4 of the Charter and of the universality of the United Nations.

15. He had been impressed by the considerations in paragraph 16 of the special rapporteur's commentary on article 13 and he urged the Commission to bring the problem of the accession of new states to the older multilateral treaties to the special attention of the General Assembly.

16. Mr. TABIBI said that accession was, with signature and ratification, one of the most important acts in the treaty-making process. In certain cases, it combined both signature and ratification in one act. Some countries made even accession subject to ratification, a practice which had been recognized as permissible by the Assembly of the League of Nations in 1927.

17. He agreed that the main element in the process of the negotiation and formulation of treaties was the participation of the states concerned, but the criteria for participation should be, first, the interest of a state and second, the usefulness of that state in the process of negotiation and in the operation of the treaty.

18. He supported an "open" policy for the participation of states in treaty making. Naturally, treaties which concerned only a group of countries could remain open only to that group, but as a rule the open character of treaties should be encouraged. In particular, treaties of a universal character should be open to participation by all states; new states should be enabled to participate in them by means of a simple procedure such as a resolution of the General Assembly.

19. He agreed that, in the case of a bilateral treaty or of a multilateral treaty concluded by a restricted number of states, the consent of all the parties was necessary for accession by an outside state. However, in the case of a multilateral treaty drawn up by an international

<sup>1</sup> *Yearbook of the International Law Commission, 1951, Vol. II* (United Nations publication, Sales No.: 1951.V.6, Vol. II), p. 130.

conference convened either by states or under the auspices of an international organization, it was advisable that the rule should not be a strict one; even a time-limit of four years after entry into force was not feasible.

20. Numerous conferences were now convened for the purpose of treaty-making and there were a large number of new states, many of which were either unfamiliar with treaty-making techniques, or did not have the means to follow the process of negotiation.

21. For those countries, mostly new Asian and African nations, the process of accession was a safety valve in cases in which they were unable to appear among the signatories to a treaty. For financial reasons, it was not uncommon for one of those states to be kept informed of developments at a treaty-making conference by the representative of another state of the same region. Cases had even occurred where, owing to unfamiliarity with the practical advance arrangements required, a country had not been represented at a conference.

22. In view of the difficulties facing those new nations, the rule concerning participation in a treaty by accession should be a flexible one. He had been surprised to hear an Asian member of the Commission defend the view that the parties to a treaty could refuse accession to new states. He supported the special rapporteur's suggestion in his commentary that the General Assembly should adopt a resolution for the purpose of opening to accession certain multilateral treaties of a universal character.

23. Mr. GROS said that the Commission's function was not to settle academic problems but to propose precise rules for states, practical and convenient rules intended to establish a uniform practice for the conclusion of treaties; the Commission had abandoned the scheme for a code or repertory of the theory and practice of the law of treaties.

24. The question of the "right" of accession, which had been raised in the discussion, was a typical academic problem. In practice, it did not often happen that a state approached the parties to a treaty and claimed as a general right to be allowed to join their circle, when the treaty was not open to accession.

25. The case he had in mind was where the treaty itself was silent on the question of participation by accession. Such silence might be due to the fact that the parties had considered the matter and decided not to include an accession clause in the treaty; in that event, it was clear that the intention of the parties was not to permit accession.

26. On the other hand, the fact that the treaty was silent on the subject of accession might also mean that its negotiators had felt certain that the problem would never arise. For instance, in the case of restricted economic communities such as those recently set up in Europe, no one imagined that a state which was not a signatory of one of the treaties in question would approach the parties with the claim that, because it was a European state, if there was no accession clause it was entitled, as a matter of right, to accede to the treaty. The best proof that such an attitude would be quite

abnormal was that when a state expressed the wish to join one of the European economic communities, it had to negotiate with all the member states of the community and could not put forward any pre-existing "right" of accession.

27. If, therefore, the Commission were to embark on a discussion of the right of accession, it would be complicating its work unnecessarily and running the risk of rendering its draft less acceptable to states. Any attempt to settle the theoretical aspect of the question should be avoided.

28. The Commission should make a recommendation to states on the question of accession; it should advise them to consider the question when negotiating treaties and direct their attention to the desirability of including an express provision on the subject.

29. He agreed with Mr. Rosenne that the contents of article 13 constituted a residual rule. The rule was that, for accession to be possible, there should be a provision to that effect in the treaty itself. That was what the Commission had decided in 1951 and that was the opinion of the International Court. In the absence of such a provision, in the case of bilateral or multilateral treaties the consent of all the states parties to the treaty was necessary in order to repair that grave omission.

30. The position was no different in the case of collective treaties concluded within, or under the auspices of, an international organization. It would be a serious mistake not to include a formal accession clause in such treaties. In fact, the problem of accession was invariably considered during the negotiations and if the parties did not agree to include an accession clause, he did not see how it was possible for the Commission to accept as a rule of law that accession could take place against the will of the parties.

31. Whether a treaty was concluded within an international organization or not, it was a treaty between states, and states were bound only by their consent. It was not possible to impose on the states parties to a treaty an accession which they did not wish to accept since, *ex hypothesi*, they had not agreed to include an accession clause in the treaty.

32. He failed to see by what means such participation by an outside state could be imposed on the parties to the treaty. It could not be done, for example, by a decision of an organ of the international organization concerned, unless, of course, the constitution of the organization contained a provision empowering it to do so. In the absence of a provision to that effect, such power could only be conferred by an express clause of the collective treaty. For those reasons he could not approve the suggestion that the Commission recommend that, by a specified majority, an organ of an international organization be empowered to admit another state to the relations between certain states.

33. He had been interested by Mr. Tabibi's remarks on the position of the newly independent states. If, however, as mentioned by Mr. Tabibi, a newly independent state was kept informed of developments at a treaty-making conference, it would be in a position either to sign the

treaty or to make a request, if necessary by cable, for the inclusion of an accession clause. Mr. Tabibi's remarks merely served to underline the need for an accession clause in multilateral treaties; if the parties to the treaty refused to include such a clause, how could it be argued that they should be compelled to accept accession?

34. He recognized that his presentation of the problem of the so-called right of accession might appear oversimplified; the special rapporteur's approach was perhaps intellectually more satisfying, but it was also unfortunately much too complicated. A community of over one hundred states needed extremely simple rules in order to avoid difficulties of interpretation.

35. With regard to the possibility of accession to a treaty before it entered into force, the excellent commentary on article 13 summarized the arguments for and against allowing accession in such circumstances. He favoured extremely simple and clear rules. Accession before entry into force should be permitted if allowed by a provision of the treaty itself; such a provision had meaning where accessions counted towards the number of consents necessary for the entry into force of the treaty and also because such accessions might encourage the negotiators of the treaty to ratify it themselves. On the other hand, in the absence of an express provision, the consent of the parties which had negotiated the treaty was necessary to permit accession by a new state before the treaty's entry into force.

36. In that connexion, the question arose which states had the right to be consulted, and it was appropriate that the Commission should make a recommendation in that respect. Should all the negotiating states have that right, or only those which had taken positive action to accept the treaty? Where the treaty itself was silent on the point, he favoured a system which would give the right to all negotiating states for a specified period of time.

37. Reference had been made by Mr. Rosenne to the need to re-open certain old multilateral treaties to accession by all states. That problem concerned the succession of states; it should be dealt with by the sub-committee on that topic.

38. The example of the Hague Convention of 1907 was not convincing. None of the states which had recently acceded to that Convention had actually had recourse to arbitration; it was the old parties to the Hague Convention which systematically submitted their disputes to arbitration. The number of accessions to an arbitration treaty was not in itself of any great importance; what was important was that the states should participate in the effective application of the treaty.

39. He had only wished at that stage to state a first opinion on article 13 as a whole and he looked forward to hearing the views of other members.

40. Mr. CASTRÉN said that the special rapporteur's draft of article 13 was progressive and generally satisfactory. He agreed that accession could take place before a treaty came into force, and also that the consent of all the parties should not be required, provided the

four-year time-limit and the two-thirds majority rule were observed. The accession of an outside state to a bilateral or plurilateral treaty was subject to the consent, express or tacit, of the negotiating states, as the special rapporteur had pointed out in his commentary.

41. Mr. Briggs' redraft was more explicit in that it did not start from a right of accession, but, on the other hand, it suffered from certain omissions. For example, it contained no provision along the lines of the special rapporteur's paragraph 1(b) and no reference to accession by a third state through an ancillary treaty.

42. He would submit that the classification of a treaty for accession purposes depended not only on the number of states concerned, but also on the nature of the treaty. General instruments which codified international law should be open to the entire international community, and there should be an assumption of free entry to such instruments; but surely such treaties were likely to contain express provisions on accession.

43. With regard to the classification of treaties, while he did not object to the three categories proposed by the special rapporteur, or, with a somewhat different nomenclature, by Mr. Briggs, the text proposed by Mr. Jiménez de Aréchaga had the advantage of simplicity in that respect, although it did not differ greatly in principle from the special rapporteur's text. The drafting committee should certainly be able to produce a satisfactory draft on the basis of the three texts before the Commission.

44. In the definition of accession in the special rapporteur's article 1(i), the word "definitively" should be deleted: in fact, the whole phrase "to 'accede' or 'adhere' to the treaty and thereby definitively gives its consent" seemed unnecessary. On the other hand, the words "or by the subsequent consent of the states concerned" should be inserted after the word "instrument".

45. Mr. YASSEEN said he agreed with Mr. Gros that states should be encouraged to formulate rules with regard to accession. It was precisely by establishing a rule which would apply where the treaty itself was silent on the matter that the Commission would be encouraging states to make rules on the subject of accession.

46. At the previous meeting, he had emphasized the classification of multilateral treaties into those drawn up at international conferences and those drawn up in international organizations. In paragraph 2(d) of article 13, the special rapporteur equated with the latter treaties drawn up at conferences convened by an international organization. He doubted whether the fact that a conference had been convened by an international organization affected the question of accession. The special rapporteur had produced the somewhat facile solution of saying that in such cases the competent organs of the organization concerned would decide on requests for accession in accordance with the voting rules applicable to that organization; he (Mr. Yasseen) did not consider, however, that that solution settled certain serious difficulties. A treaty drawn up by a

conference, even if that conference had been convened by an international organization, was still a treaty between the states which had negotiated, signed and ratified it; it was not a treaty of the organization. Moreover, while some member states of the organization might not have participated in the conference, the resulting treaty might have been signed by non-members; in such a case it would be wrong to deprive those non-members of a voice in a decision on accession.

47. Besides, the number of states attending a conference might be relatively small. For example, the United Nations Conference on Statelessness, held at Geneva in 1959, had been attended by some thirty or more states, not all of them Members of the United Nations; if such a treaty contained no express provision on accession, it would hardly be possible to bind the negotiating states by a General Assembly resolution. Even where it was possible to invite all member states, as in the case of the provision of the Statute of the International Court of Justice concerning the election of judges, it was not certain that the body thus convened was in fact an organ of the organization; it was an *ad hoc* body, convened to carry out a specific act. It had been asserted during the fifteenth session of the General Assembly that the body competent to elect the judges of the Court, which was the General Assembly, should be governed by the rules of procedure of the Assembly; after some discussion, however, it had been decided that in that case the rules of procedure of the General Assembly did not apply. It would therefore be more logical if multilateral treaties drawn up at conferences convened by international organizations were governed by the same rules as treaties drawn up at conferences not convened by international organizations.

48. Mr. EL-ERIAN said the special rapporteur's draft of article 13 was a workmanlike instrument, which showed an awareness of current practice in the matter. But on such an important subject as accession, it was desirable that the Commission should be agreed on three or four general principles and in that connexion, he wished to raise a question relating to the Commission's method of work. The special rapporteur had submitted some very lengthy articles, dealing with a number of separate problems together; it might be advisable to split those articles into several parts and to concentrate on one main problem at a time; such a procedure would be helpful to subsequent plenipotentiary conferences on the law of treaties. At the Commission's ninth and tenth sessions, preliminary general debates had been held on each article and decisions had even been taken on whether or not certain principles should be included; only afterwards had articles been considered paragraph by paragraph.

49. The first general principle which should guide the Commission's work was that of the widest possible participation in multilateral treaties. The modern trend was towards international legislation; a proof of that was that the Commission itself submitted its drafts to the General Assembly in the form of draft conventions. Sir Hersch Lauterpacht, as the special rapporteur had pointed out in paragraph 3 of his commentary on

article 13, had stated that the entire tendency in the field of the conclusion of treaties was in the direction of elasticity and elimination of restrictive rules; the Commission would undoubtedly endorse that view, particularly since it took into account the position of newly independent states.

50. He was glad to see that the special rapporteur had taken into account the modern tendency to regard the question of accession as independent of the entry into force of a treaty. Mr. Tabibi had pointed out the difficulties of new states in the matter of accession, since many of them had had no opportunity to participate in the negotiation of important treaties; the special rapporteur had rightly made invitation to participate, rather than actual participation in negotiations, the criterion for accession.

51. The question of accession to multilateral treaties drawn up at conferences convened by international organizations, or in international organizations, was controversial, and the special rapporteur had rightly stressed that the practice of international organizations in the matter was not uniform. That comment applied even to the United Nations family. For example, at the first Conference on the Law of the Sea in 1958, there had been controversy not only with regard to accession, but even as to whether the Conference was bound by the invitations of the United Nations, or whether, as a plenipotentiary Conference, it could invite other states.

52. It was the Commission's duty to recommend to the General Assembly the course it should take to enable newly independent states to accede to old multilateral law-making treaties.

53. Mr. ELIAS said that, although the special rapporteur's article was a useful basis for a final text, he had serious doubts concerning certain provisions. Paragraph 1(b) seemed to conflict with the principle of the widest possible participation in multilateral treaties and, moreover, was likely to give rise to three difficulties. First, if invitation was taken as the main ground for accession, it should be borne in mind that the invitation itself might be based on an error; a state invited by the negotiating parties might not be interested in the treaty itself. Secondly, the inviting states might change their minds, thus placing the state invited to accede in a difficult position. Thirdly, states which were invited as observers only, and consequently did not participate in the negotiations, might be prevented from acceding. It would therefore be wiser to omit paragraph 1(b) altogether.

54. Paragraph 2(c) should be amended. A three-year time limit seemed preferable and the two-thirds majority rule should be made more flexible by adding the words "at least" before "two-thirds". That would bring the provision into line with the statutes of certain regional organizations, such as the Inter-African and Malagasy Organization, the charter of which provided that the consent of four-fifths of the members was required.

55. It would be difficult to accept paragraph 3(a) unless the phrase "states whose consent or objection is material for determining the admission of additional states

to participation in the treaty" was more clearly defined. The treaty itself might not make it clear enough which those states were.

56. Finally, while paragraph 4 (b) covered such cases as that of the United Nations Charter, which allowed sovereign states to become members and allowed some of them to make reservations under the so-called optional clause of the Statute of the International Court, the position of regional organizations, such as the one he had mentioned, would be different. If accession to a treaty was allowed to create a situation in which objecting and acceding states would have no treaty relations, it was difficult to see how both of them could be members of the same organization, particularly if the treaty in question constituted the basis of membership of the organization.

57. Mr. BARTOŠ said he would confine his remarks to the main principles governing accession to multi-lateral treaties of general interest. The form of the relevant provision would be determined by the answer to the question whether, in principle, participating states should have a free choice of their partners in the treaty in cases where no express provision to that effect was stipulated in the treaty itself, or where the treaty was not governed by the rules of an international organization. The principle of free choice certainly existed as a general rule of international law, but there was also another principle in the modern international community, that of the duty of universal collaboration. In order to harmonize those new principles and develop international law, the Commission should recognize the right of states to be admitted to such collaboration on a basis of equal sovereignty. While he acknowledged that the right of accession *stricto sensu* did not exist, he maintained that every state had the right to participate actively in the life of the international community; it was to the advantage of all states to develop international law and to promote its universality. Consequently, a general rule providing that states could be excluded from participation in a treaty at the will of other states would tend to hamper international collaboration. And yet, sovereign states were free to exclude, by an expression of will, states with which they did not wish to have contractual relations, provided they did not abuse their right of exclusion by vexatious acts designed to exclude such states from international collaboration.

58. The special rapporteur and Mr. Briggs had rightly taken the view in their drafts that all general agreements were open to accession. The question was whether a state had a valid claim to accede or whether it could be debarred by a simple declaration of the will of the negotiating states. Both the drafts he had mentioned provided that, although the mediating states could exclude others from accession to a treaty by a declaration of that will, that will would be ineffective to prevent such accession as regards the other parties to the treaty, if more than one-third of the negotiating states took a different view. It seemed to be reasonable for the Commission to adopt that proposition for all multi-lateral treaties of a general character, including regional

treaties of general interest, which did not contain an explicit clause declaring the instrument restrictive.

59. In the case of treaties concluded within international organizations or under their auspices, the rules of those organizations were applicable, and it was for them to decide whether or not a treaty was open for accession, if it contained no express clause limiting accession. In accepting the constitution of an organization which conferred certain powers on various organs of that organization, a state also accepted the competence of those organs in that matter. Such treaties could not be regarded as something apart from the organization; rather, they were the instruments whereby the organization pursued its aims and carried out its functions.

60. As regards the contractual relationship in cases where certain states parties to a treaty repudiated accessions by other states, the solution proposed by the special rapporteur seemed to have been derived from a system, formerly known as restricted unions of collective treaties, which had been extensively used during the two world wars, when direct relations between the belligerent parties to certain treaties had been suspended, whereas the neutrals had always been in relations with all the participants. There would be four groups, the neutrals, the neutrals and one belligerent party, the neutrals and the other belligerent party, and the states belonging to one belligerent party. That practice had been known in the Berne Union for the Protection of Literary and Artistic Property and the Paris Union for the Protection of Industrial Property. A similar practice was followed in Latin America with regard to reservations and was known as the Pan-American system. Under the rules of that system, if there was opposition to a reservation, the reserving state remained in the contractual union, but no contractual relations existed between that state and the objecting states. Accordingly, two groups were formed, one consisting of states opposing the reservation and states which had not expressed any reservation, and the other of the states accepting the reservation and the state making it. Thus the rule proposed by the special rapporteur and also by Mr. Briggs on the comparable question of objections to an accession, was already known in international practice; it reconciled the principle of the broadest possible participation with that of the free choice of partners. Moreover, it was in conformity with the general principles of the United Nations Charter, which called for the widest possible collaboration among states, on the basis of justice, the rules of international law and the principles of the Charter.

61. Apart from that general rule he had spoken of, a rule should if possible be devised stating that in general there was a presumption that treaties originally restricted to a limited number of states and concluded before the recent emergence of new states, whether newly created or those which had gained independence before the principle of the equality of states had been enunciated, should be open to their accession. But that was a political matter and should be settled outside the Convention the Commission was preparing, perhaps by a resolution of the United Nations General Assembly.



62. But to revert to the special rapporteur's draft and the question which category of states could reject an application to accede, he favoured a broad solution, namely, that it should be all the interested states, which meant all the states entitled to participate in the treaty. Admittedly, some signatories might be slow in ratifying, but nonetheless they would be closely concerned to know with which others they might be entering into treaty relations, and should be free to choose not to enter into relations with certain states while at the same time proceeding with the execution of the treaty together with other parties.

63. Finally, the argument that general treaties codifying custom should by their very nature be open to accession by all states in order to ensure the observance of the custom was not decisive. If it was a universally recognized legal custom, whether codified or not, it was generally binding. The issue was not whether a treaty had consequences for states outside the parties, but which were to be the parties.

64. Mr. ROSENNE said that Mr. Gros' contention, that the question he had raised concerning general conventions drawn up under the auspices of the League of Nations came within the purview of the Sub-committee on State Succession, was mistaken. The question he had raised was that of a new state acceding to a general universal convention drawn up under the League's auspices, to which the metropolitan state either had not itself acceded at the time or had acceded after ceasing to be the metropolitan state, and was totally unconnected with the question of state succession.

65. In referring to the first Hague Convention of 1907, he had merely wished to point out that the recent invitation by the Administrative Council of the Permanent Court of Arbitration to accede to that Convention furnished a useful illustration of a practical solution that avoided difficult political and theoretical problems connected with state succession.

66. Mr. TABIBI, replying to Mr. Gros, said that he was certainly not opposed to the inclusion of accession clauses in future treaties. On the contrary, he had emphasized the importance of the institution of accession and of allowing a considerable measure of flexibility, and of not giving too much weight to the prerogatives of the parties. It would be particularly undesirable to refuse accession to states whose participation in a treaty would be specially useful.

67. Mr. VERDROSS said that at the previous meeting he had expressed support for the special rapporteur's proposal, or that of Mr. Briggs which was in a simpler form, because they propounded reasonable rules *de lege ferenda* in a manner consistent with the Commission's function of furthering the progressive development of international law. He would be all the more in favour of such rules if they were formulated as legal presumptions in the sense outlined by Mr. Bartoš.

68. From the standpoint of positive law, the principle stated by Mr. Gros was unassailable, namely, that accession was only possible if expressly provided for in the treaty or with the consent of all the parties; but it

would be contradictory not to allow all states to accede to treaties "declaratory of international law" which purported to enunciate general rules binding on all states.

69. Mr. TSURUOKA said that article 13 should be drafted in simpler form: complicated provisions were liable to provoke difficulties. The article should state clearly the general principle of contractual autonomy; the succeeding provisions would be more in the nature of exceptions to the general rule. The Commission would have to settle such questions as whether or not to insert a time-limit and what were the relations between the two groups of states described by Mr. Bartoš, before it could decide on the structure of the article.

70. He recognized the desirability of universality where appropriate, but believed that the effective execution of a treaty was equally important. Before making a bold excursion into the realm of the development of international law, the Commission should carefully examine the nature of treaty relationships between the parties.

71. One further question to be considered was what effect the present draft, if it took the form of a convention, would have on existing treaties.

72. Mr. CADIEUX said that the clarity of the special rapporteur's text and commentary had greatly facilitated the Commission's task. His proposals were admirably reasonable and moderate, steering a middle course between codification and progressive development and skilfully avoiding certain political shoals. The special rapporteur had wisely pointed the way to a system which would not be controversial, and he did not think that a majority of states would be prepared to go much beyond what the special rapporteur had proposed. The best known treaty "declaratory of international law" was the United Nations Charter and that by no means enunciated an absolute right of accession but hedged it about with a number of definite limitations such as the two-thirds majority rule. On the whole he favoured the provision contained in paragraph 2 (d), and hoped the Commission would be cautious in not framing rules that would raise difficult problems of recognition.

73. He agreed with Mr. Jiménez de Aréchaga that in the case of plurilateral treaties a right of veto would be most undesirable. The intention of the parties, particularly in regard to regional treaties, should be the touchstone, as also in the case of multilateral treaties. It had been argued that the negotiating states could always insert accession clauses in the treaty, but it should be recognized that they might not wish to include general machinery for accession open to all states, in which event the procedure for deciding on accession by specific states should be the same as that adopted for drawing up the text. In regard to accession to multilateral treaties, he favoured the rules put forward by the special rapporteur.

74. The CHAIRMAN invited the special rapporteur to comment on the more important issues raised during the general discussion.

75. Sir Humphrey WALDOCK, Special Rapporteur, said he entirely agreed that the text should not speak

of a right of participation in abstract terms. In paragraph 1 he had used the words "the right to become a party" to describe a concrete right deriving from a particular source, whether the treaty itself or the consent of the interested states. He had never intended to introduce any philosophical concept.

76. It would be helpful if the Drafting Committee could formulate the article in general terms covering all forms of participation, not only accession. There were treaties which only provided for participation through the procedure of signature, and it would therefore be preferable to deal with participation in a general way.

77. The points made by Mr. Jiménez de Aréchaga concerning regional law had been in his mind, particularly in connexion with plurilateral treaties, and should be taken into account by the Drafting Committee. The main object should be to formulate provisions relating to treaties of general application and to avoid the kind of language that would give rise to the difficulties Mr. Jiménez de Aréchaga had mentioned.

78. As to whether the decision on requests for accession lay with the negotiating states or with the parties, the same question arose in connexion with reservations and the functions of the depositary. In his view, the negotiating states should have a voice in the matter, at least for a reasonable period, a view supported by modern practice, for they had an important interest in the question of the future participants. If the decision were left to the parties alone, and they acted in a manner contrary to the views of the states which had participated in the negotiations, some of the latter might find themselves unwilling to proceed to ratify the treaty.

79. It was not easy to decide on the length of the period on the expiry of which the states originally entitled to be consulted on requests for accession should cease to have that right. In examining practice, he had noted that where a time-limit existed it was usually less than four years, but on the other hand it had to be recognized that many multilateral treaties were slow in coming into force.

The meeting rose at 1 p.m.

## 650th MEETING

Thursday, 24 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

### Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (*continued*)

#### ARTICLE 13. — PARTICIPATION IN A TREATY BY ACCESSION (*continued*)

1. The CHAIRMAN invited the special rapporteur to continue his reply to the points made during the discussion of article 13.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the scheme of article 13 seemed to be generally

acceptable. The language might be simplified but as far as substance was concerned, if the simpler redraft submitted by Mr. Briggs were amplified by the inclusion of the points which most members seemed to want included, the resulting text would not differ greatly from his original draft.

3. Mr. El-Erian's suggestion that the article should be divided into two parts might be referred to the Drafting Committee. Though it would be possible to detach paragraphs 3 and 4, he would have thought it more convenient to incorporate all the provisions concerning participation in a treaty by accession in a single article.

4. In general he found the simplified version of paragraph 1 as drafted by Mr. Briggs acceptable, but thought it should contain a reference to the presumption mentioned in paragraph 1(b) of his own text. That point could be referred to the Drafting Committee.

5. The presumption he had stated in paragraph 2, that unless the treaty itself otherwise provided, the negotiating states should be presumed not to have intended to rule out the possibility of accession by other states in the future, was broader, and he thought rightly so, than in Mr. Briggs' formulation.

6. In regard to the classification of different types of treaty, the Commission seemed inclined to accept a distinction, but appeared to prefer some such expression as "treaties concluded by a restricted group of states" to the term "plurilateral". Actually, almost all treaties were concluded between a restricted group of states, which was the very reason why article 13 was needed. The question was to determine in what cases the treaties were open or were restricted to a specified circle of states. Perhaps the Commission should wait until the Drafting Committee had submitted a new text before continuing to discuss the difficult problem of the treaties to which the article should apply.

7. On the question of the rule which should govern accession in cases where a multilateral treaty had been drawn up at an international conference convened by the states concerned, Mr. Ago's suggestion that the same rule should be applied as that applied to the adoption of the text itself was logical. He had stated the two-thirds rule in paragraph 2(c) because it was so frequently used in practice. In answer to Mr. Elias' point that a larger majority might at times be desirable, he could only observe that it was unlikely that something between a two-thirds rule and unanimity would be chosen; the former was already a quite stringent rule.

8. In answer to Mr. Yasseen's comment on paragraph 2(d), he recognized that the equation of treaties drawn up at conferences convened by international organizations with those drawn up within the organization itself might be regarded as an encroachment on the sovereignty of the participating states, for they normally had sovereign competence to determine all questions pertaining to participation in the proceedings. He had put forward the rule in paragraph 2(d) for the purely practical reason that once a conference had ended it was a very laborious matter to obtain a consensus of opinion on the participation of new states. Procedurally,

it would be much simpler if requests for accession could be referred to the competent organ of the organization. He doubted whether there was real substance in the objection to the residual rule he had stated in paragraph 2 (d), which was no invention of his own, but could be found in a number of recent treaties, including the Conventions adopted at the Geneva Conference on the Law of the Sea. That Conference had been attended by a number of states which were not members of the United Nations, but which appeared to have felt no qualms about leaving the matter of future accessions to the General Assembly in which they had no voting rights.

9. In connexion with paragraph 4(b), Mr. Ago had persuasively argued against a provision allowing a state which objected to an accession to maintain its objection and decline to enter into treaty relations with the requesting state. He had contended that if the objecting state could have been outvoted during the conference on the question of the accession clause, it should subsequently accept the majority decision. At first sight the argument had some weight, but on careful examination he doubted whether it could be sustained, for the position of the state in question after the conference was not the same as during the proceedings when it had not yet committed itself to participation in the treaty. The matter was not one on which he wished to take an extreme view. It was necessary to find some reasonable compromise between the principle of state sovereignty over treaty relations and the ideal of achieving the widest possible participation in treaties.

10. The objection put forward by Mr. Elias that the consequence of such a rule might be that two states would become members of the same organization after one had objected to the membership of the other did not seem to carry weight, because paragraph 2(d) was concerned with treaties drawn up at conferences convened by international organizations or in an international organization. It presupposed the existence of the organization and only dealt with subsequent treaty-making by the organization to carry out its purposes.

11. Attention should be drawn in a special paragraph of the report to the question raised by Mr. Rosenne concerning the extension of old treaties of general concern, whose circle of eligible parties was at the moment closed, to new states, a matter he had discussed in paragraph 16 of his commentary. It raised serious difficulties because, in principle, the consent of the contracting parties would have to be obtained and no one could foresee whether they would all ultimately become parties to the draft convention being prepared by the Commission which would lay down the necessary procedures. Perhaps a political approach would be the most effective, and a recommendation might be made to the General Assembly to take special action.

12. The Commission might forthwith refer the various points raised to the Drafting Committee and discuss any further matters of substance after the Committee had submitted a redraft of article 13.

13. Mr. JIMÉNEZ de ARÉCHAGA said that, since the special rapporteur had made it clear that he did not

intend to exclude special regional treaties from the application of the two-thirds rule governing accession and had agreed that a single state should not have the power to veto an accession to such treaties, there was no need for the Commission to take a separate decision on the amendment to paragraph 2 (c) that he (Mr. Jiménez de Aréchaga) had submitted. It could be referred to the Drafting Committee which, he felt sure, would find an appropriate wording to meet his point.

14. It seemed desirable to abandon the attempt to distinguish between plurilateral and multilateral treaties, but the Commission appeared to be agreed on the need to find an expression to describe the restrictive type of multilateral treaty, accession to which should not be subject to the rigorous unanimity rule but to the two-thirds rule. The expression should exclude constitutions of international organizations, for states which applied for participation in those cases were applying not so much for accession to the constitution as for membership of the organization; it should also exclude agreements analogous to those governing the European or South American Common Market, admission to which depended on the acceptance of the other members by a decision in accordance with a prescribed majority.

15. In his amendment he had suggested a special designation to cover those multilateral treaties "dealing with matters of general concern to all states or to a definite category or group of states", which called for a flexible rule. In those cases the crucial issue was not so much whether the treaty had been drafted in an international organization, under its auspices, or through the ordinary diplomatic channels, but whether it affected the interests of other states. The judges of whether it did so would be a two-thirds majority of the parties, or of the negotiating states, as the case might be.

16. He was certain that, if the Drafting Committee could reach agreement on an appropriate expression to describe those special categories of multilateral treaties, all members of the Commission would be satisfied, including Mr. Gros who thought that the proposed rules were too liberal. The implication of a rule making accession to multilateral treaties of general concern conditional on the consent of two-thirds of the parties, or negotiating states, would be that accession to other multilateral treaties not of "general concern" would be governed by the unanimity rule. Perhaps Mr. Gros would then be able to meet halfway those members of the Commission who had favoured the progressive proposal for a two-thirds rule put forward by the Commission in 1959.

17. In reply to the remarks of Mr. Gros, he said that if a group of states decided to conclude a treaty on matters of general concern limited only to themselves, they were legally entitled to refuse accession to an outside state, but at least they should be required to indicate their position clearly in the text of the treaty so as to apprise other members of the international community of their restrictive intention.

18. It was hardly arguable that to impose a two-thirds majority rule on a group of states which had not voted in favour of the inclusion of an accession clause in the

treaty prepared at a conference would frustrate the will of the parties. Under article 5 of the draft, treaties drawn up at an international conference were adopted in conformity with the voting rules, and the voting rules themselves were adopted by a simple majority. Consequently, during the conference no single state possessed a power of veto on the insertion of an accession clause; but Mr. Gros contended that, once the conference was over, any participating state acquired a right of veto to exclude accessions. If a conference decided to apply the two-thirds rule for the adoption of the treaty, as was standard practice, and a proposal that the treaty should be open for accession did not obtain the necessary two-thirds majority, then presumably a subsequent request for accession would also fail. Of course, if the participating states subsequently changed their views and decided that accessions should be permitted, they should not be prevented from doing so by the single dissentient voice of one state. At that stage, as Mr. Ago had suggested, the same voting rule as had been applied during the conference should be maintained.

19. There was no need to dwell on the political abuses to which a power of veto was liable to give rise, and it would be deplorable if, in the case of general law — making treaties concluded under the auspices of the League of Nations, one state were able to frustrate the wish of the majority to open them to the accession of new states. On that point the Commission's views would carry great weight with the General Assembly.

20. As Mr. Verdross had pointed out, the Commission was engaged in codifying what were mostly subsidiary rules, in other words, rules which would apply in cases where the text of the treaty itself was silent on the question of accession. Yet that was an important task. Such rules might in future encourage states not to leave treaties silent on the question of accession and should help them to reach agreement on the necessary provisions.

21. Mr. TSURUOKA said he feared that the proposed residuary rules *de lege ferenda* were going to cause so much uncertainty as to outweigh their advantages. The Commission should not generalise from exceptions. It would be preferable to deal with a number of the issues in the commentary and to await the observations of governments.

22. Mr. LACHS paid a tribute to the way in which the special rapporteur looked for compromise solutions, but before the text of article 13 was referred to the Drafting Committee he wished to revert to some essential problems of substance.

23. The Commission should certainly pay heed to Mr. Gros' warning to refrain from philosophical discussions, but questions that to him might appear theoretical were to others of practical importance. Mr. Gros was no doubt correct in arguing that a state should be free to choose its partners in a treaty or any other instrument, but on the other hand the Commission should not overlook the general trend to open treaties to all states, particularly to those that could contribute to their implementation or had an interest in participating in them. International law had progressed considerably from

the time when a special instrument had to be negotiated to enable Spain to accede to the Treaty of Aix-la-Chapelle of 1748. Accession was being increasingly simplified, and it was of interest to note that the 1923 Convention relating to the Regime of the Straits, for example, even contained an express provision — article 19 — under which the Parties undertook to "use every possible endeavour to induce non-signatory Powers to accede."<sup>1</sup>

24. Obviously, if a treaty was silent on the question of accession, the intention of the parties had to be interpreted by reference to the will they had manifested in the treaty itself, but it should not be forgotten that silence was sometimes the result of inadvertence. Certain treaties, such as the Pan-American Sanitary Code of 1924,<sup>2</sup> had omitted to include a clause about the date of entry into force. Silence did not necessarily mean that the treaty was intended to be closed, and sometimes, as in the General Agreement on Tariffs and Trade of 1947, Article XXXIII, the parties had decided to leave the terms of accession to be agreed between the requesting government and the contracting parties.

25. The Commission was not concerned with trying to impose upon states a certain course of action, but to point out what presumptions were permissible in the light of the apparent intention of the parties, if no express provision had been included in the treaty. Such presumptions were rebuttable.

26. The problems could be handled in a way that was not at variance with the principle of the sovereign will of the parties and allowed fully for the general trend of development which he had mentioned. Treaties such as the Hague Conventions on Private International Law of 1902 and 1905 had formed the subject of special protocols in 1923 and 1924<sup>3</sup> to enable new states that had emerged after the First World War to accede, since the original text did not provide for that possibility. Limiting clauses such as those contained in those conventions were not favourable to the development of the rules the conventions were intended to promote.

27. He recognized that by their very nature some treaties, such as special regional agreements, required a special approach.

28. The special rapporteur had been wise in suggesting a two-thirds majority rule in certain cases where the treaty itself made no provision for accession. Such a rule was becoming frequent in practice and was found in the constitutions of a number of international organizations.

29. The Drafting Committee would have to discuss five essential questions in connexion with article 13. First, whether or not treaties should be classified into categories and, if so, how. Secondly, whether a distinction should be drawn between treaties in force and those not yet in force, when no provision on accession had been inserted in the text. Thirdly, whether the decision concerning

<sup>1</sup> League of Nations Treaty Series, Vol. 28, p. 135.

<sup>2</sup> League of Nations Treaty Series, Vol. 86, p. 44.

<sup>3</sup> *Conférence de la Haye de Droit international privé, Documents relatifs à la sixième session, 1928.*

accession should lie with the parties, with the parties and the signatories or with the parties, the signatories and the members of an international organization in which the treaty had been drafted. Fourthly, whether a two-thirds majority rule for accession should be laid down. Fifthly, what should be the effect of one state's objection to another's accession if the process of accession had been completed.

30. Mr. PAREDES said that he had been impressed by Mr. Bartoš' view that article 13 should reconcile two opposing principles, namely, freedom of choice of partners and the duty of universal collaboration. He also endorsed Mr. Lachs' view that a clear distinction should be made between two types of treaties, those which introduced new principles of international law binding on all the countries of the world, and others which covered less universal laws and principles. In the case of the former, it seemed contradictory to ask all states to accept certain principles and yet to refuse them the possibility of acceding to such universal instruments as, for example, the covenants on human rights. The Drafting Committee should therefore bear in mind the difference between universal treaties and treaties of limited interest.

31. Mr. AGO said he was not sure that the time had yet come to refer the article, together with members' observations, to the Drafting Committee. Perhaps the Commission could quickly consider the draft paragraph by paragraph, or the special rapporteur might put a number of questions on which the Commission could express its views, in order to give the Drafting Committee some definite guidance in its work.

32. Mr. de LUNA said that, although Mr. Gros' theory of *jus cogens* was correct, he was more inclined to endorse Mr. Jiménez de Aréchaga's view that the Commission should lay down a rule of *jus dispositivum* concerning accession which would supplement the will of individual states. A provision designed to encourage the widest possible international collaboration, without the power of veto, and particularly one supported by a rule for so large a majority as two-thirds, was wise and progressive and fully compatible with the current trend of international law. States wishing to take different action in the matter could always insert provisions for limited accession in the treaty itself. He was convinced of the wisdom of such a rule, which would soon be accepted as one which promoted the well-being of the international community.

33. Mr. ROSENNE said he thought that the article could now be referred to the Drafting Committee, though he was somewhat disturbed at the emphasis laid in the draft on the text of the treaty itself. Elucidation of the intentions of the parties might be a much more sophisticated process than the mere reading of the text of the treaty. That was a lesson to be drawn from the whole problem of reservations as it had been dealt with, for example, in connexion with the Convention on Genocide. A great deal could be inferred from the silence of a treaty; the Drafting Committee should therefore try to find a form of words which would make it clear that the mere presence or absence of a certain clause in a

treaty was not the only relevant factor. The wording "Except to the extent that the particular context may otherwise require" at the beginning of article 2, paragraph 1, of the special rapporteur's draft, seemed generally to be a more suitable formulation than, "Unless the treaty itself otherwise provides", the wording employed in article 13, paragraph 2, and, with slight variations, in paragraph 1 (b).

34. Mr. TSURUOKA said that he had no wish to deny that international collaboration should be encouraged and the development of international law promoted; that was obviously the Commission's objective in preparing the draft of article 13. But there were different methods of attaining that objective. Some believed that it could be attained by indicating in the treaty itself that it should be open to all countries in a given category, but he would hesitate to support a rule *de lege ferenda* which was obviously not quite perfect. Emphasis should be placed on the possibility of attaining the Commission's objective by simpler means, with due respect for the contractual sovereignty of states.

35. Mr. LIU said that he did not see in paragraph 4 (b) the right of veto referred to by some members. In his opinion, the special rapporteur's draft was quite reasonable, in that it did not prejudice accession if approved by two-thirds of the parties, and did not bind the objecting state *vis-à-vis* the requesting state. However universal a treaty might be, it usually had a specific purpose, and the parties should be able to determine whether accession by a given state would further the purposes of the treaty. He hoped that the Drafting Committee would agree that paragraph 4 (b) was satisfactory.

36. Mr. GROS, speaking as Chairman of the Drafting Committee, said that there were two courses open to the Committee. Either it could give the Drafting Committee more specific directions after further debate on the article, or it could instruct the Drafting Committee to consider the article, with the comments made in the discussion, and prepare a simplified text, which would then be discussed in the Commission. In his opinion, the latter procedure was the more practicable.

37. Speaking as a member of the Commission, he said that he was as anxious as any other member to extend the circle of states participating in treaties; nevertheless, he was convinced that the overwhelming majority of the new treaties concluded after the Commission's articles had been adopted would contain provisions on accession.

38. He agreed with Mr. Rosenne that, if an accession clause had been discussed at a treaty-making conference and rejected, there was no rule of international law which permitted states to act subsequently as though such a clause had been included.

39. The accession of new states to older treaties admittedly gave rise to a problem, but the point had perhaps less legal importance than some members had suggested and he believed that the special rapporteur and the Drafting Committee could find a solution.

40. It had been rightly pointed out by Mr. Lachs that a distinction should be drawn between general law-making and regional treaties; in addition, however, it

would be necessary to determine in any particular case whether the state applying to accede was objectively qualified to accede, and Mr. Lachs had admitted, if only implicitly, that the problem was not entirely a legal one.

41. Mr. BRIGGS said he supported the second course indicated by the Chairman of the Drafting Committee. The Commission was not yet in a position to settle the questions raised by the special rapporteur and Mr. Lachs, and it seemed desirable to postpone further discussion until the Drafting Committee had prepared a simplified text.

42. He had been impressed by Mr. Rosenne's suggestion at the previous meeting that the Commission should bring the problem of the accession of new states to the older multilateral treaties to the special attention of the General Assembly. A paragraph in the Commission's report might not suffice for that and it would be better for the Secretariat to prepare a separate report on the problem, perhaps listing the categories of League of Nations and other old treaties which were not open to accession by new states and analysing the possible ways of opening them to accession by General Assembly action or recommendation.

43. Mr. AMADO said that Mr. Tsuruoka had voiced a legitimate doubt: should the silence of a treaty on the matter of accession be construed as permitting accession? Although he (Mr. Amado) supported the thesis expounded by Mr. Bartoš and Mr. de Luna, he quite saw that the problem of principle remained and that the Drafting Committee would have a difficult task in reconciling the opinions expressed by members.

44. The CHAIRMAN observed that it would probably be best to follow the second course indicated by the Chairman of the Drafting Committee, although an analysis of the debate showed that, while a number of guiding philosophical views had been presented, few specific suggestions had been put forward for the assistance of the Drafting Committee. Of course the guiding value of those philosophical utterances must not be underestimated. They were an expression of the will to measure even the subtlest oscillations of the period especially those characteristic trends of group behaviour with regard to the matter under consideration. Yet they might not assist formulation of what was needed since they were more concerned with the phenomena than with their underlying cause. The only point made in the discussion on which a decision might have to be taken was that dealt with in paragraph 4 (b), which also had a bearing on paragraph 2 (c), since the determining character of the two-thirds majority rule laid down in paragraph 2 (c) might be laid open to question if the objecting states were not affected by the accession.

45. With regard to the distinction between plurilateral and multilateral treaties, the Drafting Committee might be able to find more suitable expressions for them, but it was unquestionable that the two classes existed.

46. Mr. AGO said he agreed that the article could be referred to the Drafting Committee on a provisional basis, but two points should be taken into account in connexion with paragraph 4 (b). First, certain types of

treaty should, if possible, be differentiated; it seemed hardly acceptable, for example, in the case of treaties such as the one the Commission was drafting, which would in fact define international law, to allow the objecting state not to regard itself as automatically bound by the treaty to the requesting state. Secondly, the rule might, so to speak, be reversed, and made non-automatic. If a state, on being asked whether it agreed to an accession, replied in the negative, the treaty should not automatically be held not to be in force between that state and the acceding state, but the objecting state should be granted the faculty of requesting that the treaty should not be regarded as being in force between it and the acceding state. That would probably reduce the number of the situations covered by paragraph 4 (b).

47. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's second suggestion was quite acceptable, but his first point raised a more delicate matter. Paragraph 8 of his commentary on article 13 showed that there might be jurisdictional clauses, either in the treaty or in other instruments, which were brought into play by the linking together of the two mutual treaty relations.

48. The CHAIRMAN suggested that article 13 be referred to the Drafting Committee, on the understanding that the resulting text would be reconsidered in the Commission; the special rapporteur could then introduce article 14.

*It was so agreed.*

#### ARTICLE 14. — THE INSTRUMENT OF ACCESSION

49. Sir Humphrey WALDOCK, Special Rapporteur, said that the content of article 14 was similar to that of article 11 (The procedure of ratification); all the points, except that dealt with in paragraph 3, had already been discussed in connexion with ratification. Article 14, article 16 (Participation in a treaty by acceptance) and article 11, might ultimately be amalgamated into a single article on instruments of ratification, accession, acceptance and approval.

50. The point raised in paragraph 3 arose also in connexion with article 15 (Legal effects of accession) and might belong in that article. The Commission would have to decide whether it should take account of the occasional practice of accession subject to ratification, which was practically a contradiction in terms, for the notion of accession was that of a commitment on the part of the state. His only reason for mentioning the practice had been to emphasize that accession subject to ratification did not really constitute accession. It was the practice of the Secretary-General of the United Nations when, as depositary of multilateral treaties, he received an instrument of accession subject to ratification, to inform the state concerned that that act was regarded merely as a notification of intention. In any case, the point was covered in article 15 and could be dealt with in that article.

51. Mr. VERDROSS, with regard to the expression "an authority competent under the laws of the acceding state," used in paragraph 1 (a), said that in many countries, constitutional law gave the Head of State the power

to conclude treaties; in practice, however, treaties were concluded by the government or even by a minister. For example, under the United States Constitution, the President had the power to enter into treaties, subject to Senate approval; the practice, however, had grown of concluding "executive agreements" without Senate approval. It was rare for a constitution to specify, as was the case in Austria, that the government, as distinct from the President, was authorized to enter into treaties which did not require approval by Parliament. It would have been more appropriate, therefore, in paragraph 1 (a), to refer not to "the laws" but only to "the usages" of the acceding state.

52. Paragraph 1 (b) stated that the form of instruments of accession was governed "by the internal laws and usages" of the acceding state. It would be more correct to refer to "laws or usages", since it was not uncommon for usages at variance with the letter of the law to become current practice.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that when article 16 was brought into line with the amended text of the corresponding provisions on ratification, both expressions criticised by Mr. Verdross would be eliminated.

54. Mr. BRIGGS suggested that the contents of article 14, paragraph 3, and of article 15 should be transferred to the commentary; they had no place in the articles.

55. Mr. AGO said he favoured the elimination of paragraph 3 in order to avoid misunderstandings. An instrument of accession expressly declared to be subject to subsequent ratification constituted a mere promise of accession.

56. The CHAIRMAN stated that, if there were no objection, he would consider that the Commission agreed that the provisions of paragraph 3 should be transferred to article 15 and the remainder of article 14 referred to the Drafting Committee, with the comments made during the discussion; the special rapporteur could then introduce article 15.

*It was so agreed.*

#### ARTICLE 15.—LEGAL EFFECTS OF ACCESSION

57. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2 consisted of a mere reference to the legal effects stated in article 12; that paragraph would not be necessary if the provisions relating to the legal effects of ratification, accession and acceptance were included in a single article.

58. The only point which arose in connexion with article 15 was whether paragraph 1 was necessary, or whether its contents could be transferred to the commentary. The previous special rapporteur had appeared to take the view that the practice of making accession subject to ratification or approval was dying out. In fact, however, the Secretariat document, "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7), indicated that it was not uncommon for states to deposit instruments of accession which were expressed to be subject to ratification. In such cases, the Secretary-General would inform the

state concerned that its instrument of accession did not have the effects of an accession but operated only as an expression of the intention to accede to the treaty.

59. Mr. ROSENNE said he did not agree that the contents of paragraph 1 should be transferred to the commentary, since the commentary would disappear after the convention had been drawn up. Paragraph 1 dealt with an important practical point and should be retained in the draft articles.

60. Mr. JIMÉNEZ de ARÉCHAGA said that he would not object to the contents of paragraph 1 being transferred to the commentary. In that event, the wording should be toned down so as not to appear to criticize the state practice referred to. Since the constitutional provisions of certain states required prior approval by Parliament to enable the Executive to sign a treaty, those states could not do otherwise than make their accession subject to ratification. It would therefore be going too far to suggest that such an accession was invalid.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that there was no such suggestion; paragraph 1 merely stated that the act would not have the positive legal effects of an accession. If parliamentary authorization was required, the government concerned should obtain it before depositing its instrument of accession.

62. The main value of paragraph 1 was that it would guide a depositary state which might not be as familiar as the Secretary-General of the United Nations with the problem dealt with in that paragraph. The Secretary-General had an enormous practice as a depositary of treaties.

63. Mr. JIMÉNEZ de ARÉCHAGA pointed out that in many countries it was not possible to take any constitutional action regarding a treaty until it had been signed by the Executive. In the case of those countries, it was not possible to obtain prior authorization for the purpose of acceding to a treaty; the only form of accession possible was accession subject to ratification. He therefore urged that the practice under discussion should not be condemned.

64. The CHAIRMAN said that there was no question of condemning the practice.

65. If there were no objection, he would consider that the Commission agreed to refer article 15, with the comments made during the discussion, to the Drafting Committee; the special rapporteur could then introduce article 16.

*It was so agreed.*

#### ARTICLE 16.—PARTICIPATION IN A TREATY BY ACCEPTANCE

66. Sir Humphrey WALDOCK, Special Rapporteur, said that he had considered acceptance in each of the two meanings in which the term was used; the first, where it was almost equivalent to ratification, as in the cases falling under paragraph 1 (a), and the second, where acceptance was an original act, as in the cases falling under paragraph 1 (b).

67. Paragraph 2 stated that the principles governing ratification applied in the first category of cases, and



paragraph 3 stated that the principles governing accession applied in the second category of cases. If the Commission agreed on that proposition as to substance, there would be no serious drafting problems.

68. The previous special rapporteur had not dealt with the question of "approval", which was covered in paragraph 4. An examination of the final clauses of treaties showed that the term was becoming quite common. He was not altogether certain as to its correct use, but it appeared to be almost synonymous with "acceptance".

69. Mr. BRIGGS said that an article written by Mr. Liang a few years ago on the subject of acceptance seemed to suggest that the method was no longer used. He asked whether acceptance and approval were still as current in international practice as they had been in the period immediately after 1946.

70. Sir Humphrey WALDOCK, Special Rapporteur, replied that acceptance was a continuing practice; approval was a growing practice, particularly in the case of treaties entered into by international organizations with governments.

71. Mr. LACHS said he approved the special rapporteur's decision to deal with acceptance, which was becoming more frequent in international practice. At the fourth session of the General Assembly in 1949, the Sixth Committee had rejected the term "acceptance" and urged the retention of the institutions of signature and ratification or accession, as appropriate. Unfortunately, that advice had not been heeded and many international instruments continued to use the term "acceptance". The Commission should therefore take the practice into account.

72. The term "approval" had a special meaning in the practice of certain countries. In Poland, for example, some treaties were subject to ratification by parliament whereas others were subject to approval by the government. In paragraph 4, the reference was clearly to an international act and not to approval in constitutional law.

73. Mr. LIANG, Secretary to the Commission, said that he did not recall having expressed the view which Mr. Briggs had referred to, but remembered the criticism in the Sixth Committee of the term "acceptance". The Sixth Committee had, in the light of that criticism, decided not to use the term in a particular convention, but he did not think it had gone so far as to reject the use of the term altogether.

74. With regard to paragraph 4, "approval" was a general term and had not yet become a legal institution. Logically, it could include such processes as ratification, accession and acceptance. It did not therefore have the same significance as acceptance, which had, in a sense, become a legal institution.

75. Mr. ROSENNE agreed that approval was sufficiently established in international practice to require separate treatment. From the international point of view, it could be equivalent to either ratification or accession. The Commission could either include in its draft a separate article on approval, or insert a definition of "approval" in article 1.

76. Mr. LIU said that acceptance had been introduced as a device to avoid the delays involved in complying with the constitutional requirement of authorization for ratification. From the international point of view, acceptance without prior signature was analogous to accession.

77. Paragraph 2 stated that the procedure and legal effects of acceptance in cases falling under paragraph 1(a) would be determined by reference to the provisions of articles 11 and 12 on ratification. Paragraph 3, however, in stating that in cases falling under paragraph 1(b) the provisions of articles 14 and 15 governing accession would apply *mutatis mutandis*, omitted all reference to article 13, even though that article also related to accession. He asked whether the omission was intentional.

78. Mr. AGO, criticizing the use of the term "approval" in paragraph 4, said that a state might approve of the conclusion of a treaty between two other states, but such approval would not necessarily make it a party to the treaty. The term "approval" could also be used to describe the authorization given to the Head of State by the competent bodies under constitutional law for the ratification or acceptance of a treaty; however, it was the act which followed that approval which constituted the acceptance of the treaty, and not the "approval" which preceded it.

79. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that "approval" was commonly used as a substitute for "ratification". That use was particularly frequent in treaties concluded between a government and an international organization, where it was stated that the treaty would come into force upon its approval by the organization and by the government concerned.

80. He agreed that the international practice in the matter stood in need of improvement, but he doubted whether the Commission could exert much influence in that respect.

81. Mr. GROS said that the special rapporteur had indicated, in paragraph 4 of his commentary to article 16, that he did not favour the modern use of the inadequate term "approval", which led to confusion in practice. If the Commission shared that view, it would be doing a service if it helped to introduce more order in the matter.

82. "Approval" was not a legal term; it was an ordinary word which could cover the implementation of a treaty by any of the processes of ratification, accession or acceptance. Its use should not be encouraged in legal documents of international scope. It could, on the other hand, be used to describe a situation such as that to which Mr. Lachs had referred in municipal constitutional law.

83. The CHAIRMAN said that the Commission appeared to be in agreement that the contents of paragraph 4 on "approval" should be placed elsewhere in the draft; "approval" should not be mentioned in article 16 as being equivalent to "acceptance".

84. Mr. AGO urged that the Drafting Committee should be free to rearrange the provisions of paragraph 4 and

to transfer part of them to the provisions on ratification and part to those on accession.

85. The CHAIRMAN said that the Drafting Committee always had authority to take such action. If there were no objection, he would consider that the Commission agreed to refer article 16 to the Drafting Committee, with the comments made during the discussion.

*It was so agreed.*

The meeting rose at 12.45 p.m.

### 651st MEETING

*Friday, 25 May 1962, at 10 a.m.*

*Chairman: Mr. Radhabinod PAL*

#### Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (*continued*)

##### ARTICLE 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS

##### ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS

##### ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS

1. The CHAIRMAN invited the Commission to consider articles 17, 18 and 19, on reservations.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the three articles would be amended in respect of certain points of detail on which the Commission had already expressed its views. For example, the references to the "competent authority" of the reserving state would be deleted, in keeping with the decisions concerning earlier articles relating to ratification and accession.

3. For the moment, he wished to discuss only certain questions of principle which affected the ultimate shape of the draft articles. The first concerned the freedom to formulate reservations. His approach was not based on the notion of absolute sovereignty; he considered that there existed a presumption that states were free to formulate reservations unless the treaty, either expressly or by implication, clearly excluded that right, or unless the reservation in question was contrary to the established usage of an international organization.

4. In article 17, paragraph 2(a), he had attempted to give expression to the principle stated by the International Court of Justice on question I in its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>1</sup> The principle was a sound one, although it did not provide any objective test of the legitimacy of a reservation, other than the opinion of each state as to whether the reservation was compatible with the object and purpose of the treaty.

5. Admittedly, the statement of the principle in article 17, paragraph 2(a), was imperfect; no sanction was

laid down and no effects were indicated in articles 18 and 19. He had had considerable hesitation on that point because he had been anxious to confine the draft articles to the statement of effective principles and to avoid mere exhortations. However, the ruling of the International Court had great value as a statement of principle and the debates in the General Assembly had shown that it enjoyed a measure of support from states.

6. For the purpose of determining the effective law in the matter, the objective tests remained consent, dealt with in article 18, and objection, dealt with in article 19. A subjective criterion such as that laid down in article 17, paragraph 2(a), could only be applied if an independent authority could decide on the question of the compatibility of reservations; that would be possible if, as a general rule, treaties contained an arbitration clause for judicial settlement.

7. Articles 18 and 19 raised again the problem of the distinction between multilateral and plurilateral treaties which the Commission had already discussed at length in connexion with article 13. They also raised the question which states would have a voice in the matter of consenting or objecting to reservations, as well as the more complicated question of the time-limit after which objections were to be considered as having ceased to have effect.

8. His attention had been drawn to the 1959 debates in the Sixth Committee and in the plenary General Assembly on the item entitled "Reservations to Multilateral Conventions; the Convention on the Inter-Governmental Maritime Consultative Organization". The debate had resulted from the objections by France, and in a somewhat modified form by the Federal Republic of Germany, to a reservation made by India in its instrument of acceptance of that Convention, and had led to the adoption of General Assembly resolution 1452 (XIV) of 7 December 1959.

9. By operative paragraph 1 of part B of that resolution, the General Assembly had amended paragraph 3(b) of its resolution 598 (VI) of 12 January 1952. The amendment had had the effect of broadening the instructions given in 1952 to the Secretary-General to communicate to all states concerned the text of reservations or objections made to conventions concluded under the auspices of the United Nations, of which he was the depositary. Whereas the 1952 instructions had referred only to conventions that might be concluded in the future under United Nations auspices, the 1959 resolution requested the Secretary-General, in his capacity as depositary, to apply paragraph 3(b) to his practice "in respect of all conventions concluded under the auspices of the United Nations which do not contain provisions to the contrary", and not only to those concluded after 1952. The debate in the General Assembly which preceded its 1959 decision had indicated a tendency on the part of the Assembly to assert authority in regard to conventions concluded under United Nations auspices.

10. Mr. AMADO noted that the special rapporteur had cited in paragraph 2 of the appendix to his report a memorandum which he (Mr. Amado) had submitted to

<sup>1</sup> I.C.J. Reports, 1951, p. 29.

the Commission in 1951<sup>2</sup> and in which he had taken a very radical stand. He had since modified his views, having re-examined the question in the light of the advisory opinion of the International Court of Justice to which the special rapporteur had just referred.

11. The ten years which had elapsed since he had submitted his memorandum had brought much closer the proponents of different theories regarding reservations to multilateral conventions. Opinions had inevitably been influenced by the new forces at work in the international community; for example, the principle of universality, which had once been a mere rhetorical formula, had since asserted itself as a very real fact.

12. The progressive approach adopted by the special rapporteur took those new developments into account and he found himself in broad agreement with what the special rapporteur had to say in his commentary on the subject of the compatibility of reservations.

13. He urged the Commission to avoid a general discussion on matters of principle concerning reservations, a discussion which could become unduly prolonged. It would be better to concentrate on the text of the draft articles, so well elucidated by the special rapporteur's excellent commentary.

14. The CHAIRMAN said that, since no one was asking to speak, he would take the initiative of calling on members to speak, starting with Mr. Verdross, Mr. Tunkin and Mr. Briggs.

15. Mr. VERDROSS said he agreed with Mr. Amado that the Commission should analyse the draft provisions, article by article. He commended the special rapporteur for his proposals, which broadly reflected developments in international law over the past decade.

16. Mr. TUNKIN said that articles 17, 18 and 19, although generally acceptable, were too detailed for the purposes of a draft convention.

17. The provisions on reservations should first of all specify the right or faculty of a state to formulate reservations. They should then envisage two possibilities: when the treaty contained a provision on reservations, and when the treaty was silent.

18. The provisions of article 17, paragraph 1 (a), could be condensed more or less along the following lines: "A state is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation, as defined in article 1, unless the making of reservations is prohibited or restricted by the terms of the treaty".

19. The contents of sub-paragraphs 1 (a) (ii) and (iii) could then be dropped. He also doubted the advisability of including the provisions contained in paragraph 1 (b) and paragraph 2.

20. After the Commission had completed its general discussion on articles 17, 18 and 19, the special rapporteur should submit a simplified redraft of those

articles. That procedure would expedite the work of the Commission.

21. Mr. BRIGGS said he agreed with Mr. Tunkin that article 17 could be drastically simplified. Paragraphs 1 (a) and 1 (b) could be combined into a single paragraph, consisting of the opening sentence of paragraph 1 (a) followed by the proviso: "Unless the treaty prohibits or restricts the making of reservations . . ."

22. At the same time, the opening words of paragraph 1 (a), "A state is free", should be replaced by the words "a state is legally entitled", since the provision dealt with the "formulation" rather than the "making" of reservations.

23. The principle enunciated in paragraph 2 (a) was sound but not easy to apply. He suggested that the contents of that paragraph should be retained as guidance for states which had to make a decision whether to consent or object to particular reservations.

24. He did not know whether paragraph 3 (b) reflected existing custom, but he would have no objection to the inclusion of that provision.

25. With regard to article 18, he accepted as a sound basis for discussion the principle stated in paragraph 1. There had been some objection to the presumption of consent expressed in paragraph 3, but he thought it would be desirable to retain that presumption.

26. With regard to paragraph 4 (a), he accepted the proposition that in the case of a bilateral treaty the consent of both parties was necessary for the acceptance of a reservation. He also accepted the proposition that the unanimous consent of states was necessary in the case of reservations to a multilateral treaty restricted to a group of states.

27. He was not at all certain, however, that the two provisos laid down in sub-paragraph (b) (i) were necessary.

28. The essential provision of paragraph 4 was that contained in sub-paragraph (b) (ii). That sub-paragraph went too far, however. He had already drawn attention during the general discussion<sup>3</sup> to the three propositions put forward by the late Sir Hersch Lauterpacht and quoted by the special rapporteur in the appendix to his report. In line with those propositions he favoured a system under which a State could not append reservations to a multilateral treaty and become a party to it unless those reservations were approved by two-thirds of the states parties to the treaty.

29. With regard to article 19, paragraph 4 (c) was unduly broad. There were serious grounds for doubting the wisdom of allowing states to formulate any reservation they desired. For example, in a disarmament treaty, the system of paragraph 4 (c) could well result in two completely different systems, inspection and control for some parties, and absence of inspection or control for others, existing for different states under one and the same treaty.

<sup>2</sup> *Yearbook of the International Law Commission 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), pp. 17-23.

<sup>3</sup> 637th meeting, para. 21.

30. Mr. AGO said that the special rapporteur had had the choice between two approaches to the problem of reservations to multilateral conventions. He could either have considered the admissibility of reservations as the rule, and laid down the exceptions to that rule; or he could have considered as the rule that reservations were admissible only in specified cases. Before the Commission went on to examine the procedure, the effects and the admissibility of reservations, it should reach agreement on the fundamental question of the choice between those two approaches.

31. He commended the special rapporteur for taking account of the current situation in international practice and adopting the first approach. Multilateral conventions had grown in number and the process of accession had become more and more general. An unduly rigid rule in regard to reservations would hamper international legislation. He therefore proposed that the Commission should adopt the same approach as the special rapporteur and consider reservations as admissible in principle, provided it was clearly stated when they were not admissible.

32. When signatory states prepared a multilateral convention and opened it for signature or accession by other states, they were in fact making an offer to other states. The question then arose whether the signatory states had meant that offer to be indivisible, so that other states would have only the choice between accepting the whole treaty and deciding not to join it. If the offer was indivisible, no reservations were possible. If however, the signatory states had left the door open to partial acceptance of their offer, it would be possible for other states to make reservations.

33. The special rapporteur had proceeded on the assumption that the most frequent case was that of an offer which admitted of partial acceptance. The problem was an easy one if the treaty contained express provisions on the subject. Those provisions could contain one of three types of statement: either, that reservations were possible to any of the clauses of the treaty; or, that reservations were possible to all the clauses, except a few specified ones; or, that reservations were possible only to certain specified clauses. The question of reservations would in all those cases be governed by the actual terms of the treaty; the detailed formulation contained in paragraph 1 (a) of article 17 did not appear necessary, except perhaps in so far as sub-paragraph (iii) referred to a comparatively easy problem of interpretation.

34. The real problem arose when the treaty was silent on the subject of reservations. The omission of a reservations clause could give rise to considerable difficulties. Heated debates had taken place at the Geneva Conference on the Law of the Sea in 1958 between those who had advocated freedom of reservation in respect of certain articles of the Second Geneva Convention and others who had proposed that that freedom should be restricted.<sup>4</sup> In the event, no provision

on reservations had been included in the Convention, with the result that widely different interpretations had been given. Some had maintained that reservations were not admissible to any of the articles of the Geneva Convention. Others had claimed that reservations were possible to all the articles.

35. He did not believe that, as a general rule, either of those extreme views was correct. The question of the admissibility of reservations could only be determined by reference to the terms of the treaty as a whole. As a rule it was possible to draw a distinction between the essential clauses of a treaty, which normally did not admit of reservations, and the less important clauses, for which reservations were possible.

36. There were cases, particularly where the text of the treaty was short, where the various parties to the treaty made mutual concessions, each accepting one of the clauses of the treaty in return for the other's acceptance of another clause. In such cases, if reservations to an isolated clause were permitted, the result might well be that each state would select that part of the compromise which suited it and reject the counterpart, thus vitiating the compromise. The basic purpose of a compromise solution was not to work out an agreed text, but to formulate an effective universal rule which would be binding on all parties.

37. The problem was how to interpret the intention of the parties as expressed at the time of the preparation of the treaty, in order to determine the contents of the offer made by the signatory states to other states.

38. In view of the serious difficulties which had arisen in practice at the time of acceptance of, or accession to, multilateral treaties, he urged the Commission to recommend that states should not fail to include a reservations clause in multilateral treaties, specifying the articles to which reservations were admissible or, alternatively, those to which reservations were not admissible. Certainty was one of the foundations of law, and the Commission would be rendering a great service to states by helping to dispel uncertainties in the legal relationships between them.

39. Mr. BARTOŠ said that, like Mr. Amado, he had changed his views over the past ten years. In the past, he had opposed the Latin-American doctrine favourable to reservations and had been a determined advocate of the doctrine of the integrity of treaties then generally held on the continent of Europe. That doctrine maintained that there should be a strict balance of obligations in a treaty. Reservations were only admissible in two cases: first, where the signatory states had included an express provision to that effect in the treaty; and, second, where all the states participating in the treaty accepted the reservations.

40. A new trend had become apparent in international law in consequence of the opinion given in 1951 by the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, and of the General Assembly debates on the subject of reservations to multilateral conventions which had led to the adoption of resolu-

<sup>4</sup> *United Nations Conference on the Law of the Sea, Official Records, Vol. II* (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 71.

tions 598 (VI) of 12 January 1952 and 1452 (XIV) of 7 December 1959. The tendency was now to examine whether reservations were compatible with the general tenor of a multilateral treaty and whether they did not conflict with the aims of the treaty.

41. He had arrived at the conclusion that in certain cases reservations could serve to facilitate the application of rules of international law laid down in multilateral treaties. He agreed with Mr. Ago that the question of the admissibility of reservations could only be answered by interpretation of the intention of the signatory states to the treaty; the question to be determined was whether the offer made by the signatory states to other states was an indivisible one or not.

42. It was possible in multilateral conventions to draw a distinction between those clauses which admitted reservations and those to which reservations were clearly impossible. On the analogy of private law, the latter could be considered as in the nature of *jus cogens* and the former as in the nature of *jus dispositivum*.

43. The General Assembly at its sixth session had not been particularly favourable to reservations but had accepted their admissibility in principle; it had then adopted its resolution 598 (VI) recommending to states that they should consider, in preparing multilateral conventions, the insertion of provisions relating to the admissibility or non-admissibility of reservations and to the effects to be attributed to them. In adopting that resolution, the General Assembly had moved away from the rigid doctrine of the integrity of treaties.

44. The Commission should steer a middle course between two extremes: rejection of reservations unless accepted by all the signatory states, and absolute freedom to make reservations. The former doctrine would hamper the development of international relations, while the latter would lead to innumerable conflicts on the compatibility of reservations with the essential purpose of a treaty.

45. The special rapporteur had acted wisely in adopting an intermediate position between those extreme views; the articles he proposed provided for freedom to make reservations, but restricted it within reasonable limits; they also provided for freedom to object to reservations, again within reasonable limits. He supported generally the special rapporteur's approach which safeguarded the principle that reservations had to be compatible with the object and purpose of a multilateral treaty.

46. Mr. LACHS said that, on the whole, the special rapporteur's draft articles and commentary represented an important advance in the matter of reservations; the draft would tend to encourage the widest possible participation in treaties. The special rapporteur had been largely successful in drawing the proper conclusions from the various elements of the question discussed in the commentary.

47. He disagreed with Mr. Ago and Mr. Bartoš that any treaty open to accession constituted an offer, for a state whose application to accede was refused had no redress. The analogy with private law was therefore a false one, because in private law if an offer had been

accepted and the offerer declined to carry out his share of the bargain, a claim could lie.

48. Mr. Ago's thesis, if accepted, would imply that the increasing trend towards accessions to multilateral treaties would take the form of a series of bilateral agreements.

49. On the whole the definition of reservations proposed by the special rapporteur in article 1 (I) was a sound one and should help to prevent the misuse of the term to describe conditions which were not reservations. He agreed that an essential feature of a reservation was its unilateral character. On the other hand he doubted whether the use in the definition of the word "condition" was appropriate; surely what was meant was more in the nature of a proviso. The second sentence in the definition was correct, and he particularly congratulated the special rapporteur on the felicitous precision of the phrase "which will vary the legal effect of the treaty". That sentence also covered the cases, which were not unknown, where a reservation, instead of restricting, extended the obligations assumed by the party in question, as had happened with one of the reservations to the General Agreement on Tariffs and Trade.

50. Perhaps the definition would need to be amplified by explicit reference to the kind of reservations that had to be made by federal states and similar entities in accordance with their constitutional requirements.

51. With regard to article 17, he agreed with Mr. Tunkin that no problem arose if the treaty itself made provision for reservations. What the Commission was concerned with was the presumptions to be made if the text of the treaty was silent.

52. The phrase the "nature of the treaty" in article 17, sub-paragraph 1 (a) (i), might need to be interpreted. On that point the special rapporteur had correctly relied on the advisory opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.

53. However, he had some doubts about the reference in the same clause to the "established usage of an international organization", for the problem of reservations could arise at the outset of its existence when no usage had yet grown up.

54. As to the limits to be set on reservations, he believed that the special rapporteur had rightly linked the two criteria, that they must be compatible with the object and purpose of the treaty and must be accepted by other states, while admitting that the two might give inconsistent results.

55. He had some doubts as to the wisdom of the view taken by Sir Hersch Lauterpacht in the fourth of his alternative drafts for an article on reservations, that the question whether a reservation was compatible with the objects of the treaty should be determined by the International Court of Justice<sup>5</sup> or, as suggested some time

<sup>5</sup> *Yearbook of the International Law Commission, 1953, Vol. II* (United Nations publication, Sales No.: 59.V.4, Vol. II), p. 134.

ago by Fenwick, by the Legal Committee of the General Assembly. The decision should be made by the parties, for they were the masters of the treaty.

56. Though he agreed with other speakers that the drafting of article 17 could be made more concise and that some of the points could be transferred to the commentary, that in no way detracted from the value of the special rapporteur's work.

57. Mr. AGO, in reply to Mr. Lachs, said that in speaking of offer and acceptance he had not drawn an analogy with private law but had drawn attention to the nature of consent. If a treaty was not open to accession, or if a state's request for accession was refused, there had been no offer and could be no acceptance. The Commission should not overlook the essential element of consent.

58. However, he had been reassured to hear Mr. Lachs' conclusion that, because of the difficulty of applying the criterion of compatibility with the object of a treaty, the consent of the parties would be decisive.

59. A whole series of questions would have to be considered, particularly those connected with reservations to constituent instruments of international organizations or conventions concluded within the framework of international organizations, and the Commission would have to differentiate clearly between those questions.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that what he had had in mind in drafting the second proviso in article 17, sub-paragraph 1 (a) (i), was the Charter of the United Nations which, by its nature, was not open to reservations, and in the third, treaties such as those concluded within the International Labour Organisation.

61. He had sought to cover existing practice. Of course, article 17 could be simplified but the Commission should first be absolutely clear as to the consequence of any suggested omission and take some general decision on the principle, which he did not think could be separated from the machinery of making reservations. Some objective criterion should be laid down, since otherwise the admissibility of reservations would be left to be determined by the parties. Admirable as were Sir Hersch Lauterpacht's ideas, they were inapplicable: the Commission had to face the realities of international life, one of which was that it was often not possible to include in treaties a jurisdictional clause for the handling of disputes, including disputes as to reservations.

62. Mr. LACHS, in reply to Mr. Ago, said that his argument could not be so lightly dismissed. It was extremely dangerous to transpose institutions of domestic law to the plane of international law.

63. Mr. YASSEEN said that the principles governing the question of reservations should derive from the treaties themselves, and he had in mind not only express provisions but also the tacit intention of the parties, as well as the nature and purpose of the treaty.

64. The faculty of making reservations should be accepted as the general principle, particularly where

open treaties were concerned; it was similar to the right to accede. In his opinion, a state which had the right to accede could also formulate reservations, unless reservations were barred by the terms of the treaty itself. The special rapporteur seemed to be more or less of that view and the Commission should be able to achieve an acceptable result on the basis of the three articles he had prepared, which, though detailed, provided a better foundation for discussion than something in more summary form. Once agreement had been reached on the questions of principle, the texts could be simplified.

65. Mr. CADIEUX said that, in drafting the provisions on reservations, the Commission would have to choose between stating the rule that, in general, reservations were admissible except in certain instances, and stating the contrary rule that they were only allowed exceptionally. The former had greater regard for the will of the parties, and since treaties were often the outcome of a delicate process of negotiation and compromise, the possibility of making reservations might be considered necessary. It was, however, no easy matter to determine whether a treaty could be regarded as divisible and which elements could be open to reservations.

66. The contrary rule could prove arbitrary. He therefore found the special rapporteur's solution acceptable.

67. Mr. CASTRÉN said that he had not yet made up his mind about the three articles and reserved the right to comment further at a later stage in the discussion. The four alternatives proposed by Sir Hersch Lauterpacht in 1953 were not acceptable. At first sight the articles proposed by the special rapporteur appeared to be satisfactory and took account of new developments in the practice of states and of the United Nations. The special rapporteur had borne in mind the Court's advisory opinion and also various systems of making reservations but had arrived at a set of rules independently.

68. Article 17 could be shortened. He agreed with Mr. Tunkin's suggestion for paragraph 1; paragraph 1 (b) was redundant and could be omitted.

69. Mr. TSURUOKA said that, in its draft provisions concerning reservations, the Commission's task was to reconcile the principle of the integrity of treaties with the ideal of the universality of treaties, especially of general multilateral instruments. As it would not be easy to reconcile the two, the Commission should seek the golden mean and establish a rule which would satisfy the greatest possible number of states. That course was particularly desirable because the basis of successful drafting was respect for the will of states.

70. The whole question of reservations had given rise to vigorous discussion and had become serious as a result of a recent tendency to make reservations with a view to deriving certain advantages therefrom. Broadly, the practice in the past had been to make and admit reservations only if states were obliged to take that course to protect their vital interests. The new psychological shift was regrettable, and in remedying the situation, the Commission would be rendering a

service to the international community. It should not give the impression that it was in any way encouraging reservations, but on the other hand, the rule it laid down should be flexible enough to take modern developments into account.

71. Mr. TABIBI said that the question of reservations had acquired greater importance in the past fifty years, as a result of the increase in the number of treaties concluded, in the number of the parties to treaties, and of the number of topics covered by treaties. Landmarks in the history of reservations had been the treatment of the reservation of China to the Treaty of Versailles in 1919, the rejection of the Austrian reservation to the 1925 Opium Convention and the manner in which the International Court of Justice had dealt with reservations to the Genocide Convention in 1951. The special rapporteur's draft took those developments into account.

72. It also reflected the principle of the consent of states, which was supreme in the modern development of international law on the matter. Indeed, among all the important cases which the special rapporteur had studied, no case could be found where the consent of the other parties to a reservation had not been given, either expressly or implicitly. On the other hand, no case could be quoted as a precedent for the theory that any state could make any reservation it wished. Nevertheless, the attitude of the law to treaty-making gave the parties wide discretion in the practice of concluding treaties; subject to the maintenance of the principle of consent, the parties were free to adopt the machinery most acceptable to them. There was nothing to prevent the parties from stipulating that reservations would not be permitted to a particular treaty, as had been done in the case of Article 1 of the covenant of the League of Nations. He agreed with Mr. Ago that, even if a treaty was silent on the subject, reservations could be made on the basis of the interpretation of the treaty itself. In short, he supported the theory of the supremacy of consent, and the right of every state to make reservations.

73. Although there was no denying the right of states parties to a treaty to object to a reservation, a difficult question arose if a minor reservation made for purely constitutional reasons was rejected for political or other reasons, in order to prevent the reserving state from becoming a party to the instrument. That point should be referred to in the draft, and machinery should be devised to obviate such abuses.

74. Mr. ROSENNE, expressing general agreement with the approach of the special rapporteur, said he thought that, since the phenomenon of an organized international society had now become a reality, the scope of the general debate on the subject of reservations should be limited to the major preoccupation of international law, of international organizations and, indeed, of international relations, namely, the problem of reservations to multilateral general treaties. The question of reservations to bilateral or plurilateral treaties should therefore be set aside, since the considerations which applied to them were quite different. Moreover, it was mainly in connexion with reservations to universal multilateral

conventions that the General Assembly had asked the Commission for guidance.

75. The general multilateral convention was a special and unique instrument of public international law, and its use and significance were bound to develop with the expansion of the international community and as the needs of that community became increasingly varied; no one could prophesy an end to the development of that institution. As a result of that expanded use, the problem of reservations had long ceased to have a merely juridical or doctrinal significance, but had also acquired political importance.

76. The multilateral convention was essentially an institution of public international law, and he agreed with Mr. Lachs and other members as to the decreasing value of concepts derived from any system of civil law, since civil law systems had no comparable institution performing simultaneously both legislative and contractual functions and which was in principle based on the consent of the states.

77. He also agreed with Mr. Lachs that the Commission was drafting a residual rule, and that it would be wise to base it on a series of presumptions. However, those presumptions should be flexible; Mr. Tabibi had rightly pointed out that the draft should not encourage reservations, but it would be unrealistic, and probably contrary to the functions of multilateral conventions, to exclude reservations altogether.

78. Furthermore—and that was another consideration which should limit the discussion—reservations to general multilateral conventions were entirely distinct from so-called reservations sometimes encountered in connection with the admission of states to international organizations. The unilateral character of reservations had been rightly stressed, whereas the applications for admission to which he had referred were essentially contractual; that type of problem therefore did not fall within the scope of the debate, although it might be dealt with at a later stage. In that connexion, he did not consider that the term “the established usage of an international organization” used in article 17, subparagraph 1 (a) (i), applied to the constitution of the organization concerned, but only to treaties concluded under its auspices, where the constitution of the organization contained treaty-making provisions.

79. Despite the widespread criticism levelled against the advisory opinion of the International Court in 1951 in the case of Reservations to the Genocide Convention, the special rapporteur had boldly incorporated the compatibility test as a general guide to the making of reservations in article 17, paragraph 2. In his (Mr. Rosenne's) opinion, that provision represented a considerable step forward in clarifying the international law on the subject, especially when accompanied by the more objective tests of articles 18 and 19. Admittedly, some extremely delicate problems of application might arise, but the system was essentially workable. Some differentiation should, however, be made between the application of the test by states and its application by the depositary, whether the secretariat of the organization concerned or a state designated for that purpose.



Where the Secretariat was the depositary, the principle laid down by the General Assembly in its resolution 598(VI) was that the depositary should adopt a neutral position, and should not pronounce on the legal effects of the reservation or of objections to it. The Commission would have to consider whether the same principle should not also apply where the depositary functions were entrusted to one of the Contracting Parties. The principle proposed by the special rapporteur for determining the compatibility of a reservation with the object of a treaty seemed to be reasonable, but it might be wise to extend it to all the three articles. Its application to article 19, in particular, would correspond to the opinion of the International Court in 1951 on Question II in the Genocide Convention case, when it had applied the compatibility test to objections as well as to the reservations themselves.<sup>6</sup>

80. The general principle laid down in General Assembly resolution 598(VI), operative paragraph 1, which recommended that organs of the United Nations, specialized agencies and states should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them, should receive special mention in the Commission's report to the Assembly. And yet the text of that recommendation carried some inherent difficulties: thus, experience at the First Conference on the Law of the Sea had shown that the question of an article on reservations might raise political difficulties in a plenipotentiary conference and that the silence of a treaty on the matter might in itself give rise to difficult problems of interpretation. In that connexion, he wished to repeat the view he had expressed at the previous meeting, namely, that reference to the text of a treaty as such frequently involved a far more sophisticated interpretation than a mere reading of the treaty itself; it involved consideration of the text of a treaty against the whole background of diplomatic acts, and the Drafting Committee would help to clarify all the articles on the law of treaties if it could find a formula to cover that more complex mode of interpretation.

81. Those considerations had once led him, in his capacity as his country's representative to the General Assembly, to introduce an element of criticism of the Commission's earlier work. The Assembly's recommendation which he had mentioned related to all organs of the United Nations and, consequently, to the Commission itself. In the examination of the Commission's drafts on the law of the sea and on arbitral procedure, for example, the task of the representatives of the different governments might have been facilitated if at least some of the final clauses had been included, in particular reservations clauses, which could be regarded as partially substantive. It would, moreover, be particularly incongruous if no final clauses, and particularly no article or articles on reservations, were to be included in the Commission's draft on the law of treaties.

82. Reverting to the question of the compatibility test, he said that, although it was true that, in the absence of a universal system of compulsory jurisdiction, it might be difficult to settle disputes concerning the application of the test, there was considerable danger in exaggerating those difficulties. Since the test had first been introduced in 1951, the number of serious disputes on its application had been small. Moreover, although the judicial settlement of disputes was often advocated, exclusive preference for that method was not always compatible with Article 33 of the Charter, which enumerated a number of other possible methods of pacific settlement. The experience of the so-called Indian reservation to the constitution of the International Maritime Consultative Organization showed that other modes of settlement could be found. Accordingly, it seemed inadvisable to lay stress on the absence of a universal system of compulsory jurisdiction.

83. Mr. Briggs had referred to the possibility of making the admissibility of reservations in residual cases subject to approval by a predetermined majority of states. He (Mr. Rosenne) did not favour that approach, for it carried too far the analogy between the treatment of reservations to multilateral conventions and the system of admission to international organizations, and also the notional authority of the majority over the accession of states which were *prima facie* not qualified to accede. That very difficult problem might perhaps be settled on a bilateral basis between the consenting and objecting states; it was not suitable for solution by majority rule. In that connexion, a clear distinction should be drawn between the problems of reservations and accession. A state acceded to a treaty in its existing form; what would be the position of a state which applied for accession, was admitted, and then purported to formulate a reservation in circumstances which brought the residual rule into play?

84. He thought that the time had come to ask the special rapporteur to draft a simpler or fragmented text of the articles, taking into account the changes agreed to in the debates on earlier articles.

85. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Briggs and Mr. Rosenne, said that he had inserted the provision concerning the test of compatibility with the object and purpose of the treaty in article 17 only, and not in articles 18 and 19, because to extend the test to the latter articles might result in altering the position of states with regard to reservations rather drastically. The general law as he saw it was that if a state objected to a reservation, it would not be a party to the treaty *vis-à-vis* the state making the reservation, and he had thought it right to keep that point independent of the question of compatibility with the object and purpose of the treaty. If a state, for its own reasons, considered that the reservation related to an important matter and was consequently not prepared to have relations under the treaty with the reserving state, it could make an objection by virtue of its sovereignty and so prevent the treaty from operating between the two states. Only if that interpretation of the general law was incorrect could compatibility with the object and

<sup>6</sup> *Reservation to the Convention in Genocide, Advisory Opinion*: I.C.J. Report 1951, p. 18.

purpose of the treaty be made decisive in the application of articles 18 and 19.

86. Mr. Rosenne had suggested that the article should now be redrafted, but he still felt that he needed more guidance from the Commission on various points of substance. He had already made the articles more detailed than was perhaps necessary, with a view to eliciting the Commission's views on the points it wished to retain.

87. Mr. PAREDES, drawing attention to the definition of the word "reservation" in article 1 (1), said that he did not quite agree that a reservation was "a unilateral statement". Perhaps a different adjective could be used, to cover cases where more than one state made identical reservations, jointly or separately.

88. He asked whether the phrase "a certain term which will vary the legal effect of the treaty", in the same definition, meant that reservations which completely denatured the treaty were admissible. Articles 17, 18 and 19 suggested that such reservations would not be admissible.

89. The Ministries of Foreign Affairs of a number of American States had discussed at length the important question whether an acceding state could make reservations to an existing treaty. In view of the conclusions reached by those Ministries, he was glad to see that the special rapporteur was in favour of allowing not only signatories, but acceding states also, to make reservations. He also agreed that, since the signatory states in opening a treaty for accession were in effect offering it for either total or partial acceptance, it was only fair, in the case of partial acceptance, to allow the original parties to reconsider the whole matter before accepting the accession of a state whose reservation might alter the entire purpose of the treaty.

90. It was obviously essential to interpret the intention of the parties. If a reservation was capable of disturbing the normal operation of the treaty, it should not be accepted, but if the essence of the treaty was maintained, and the reservation related to detail only, the parties should give their consent. In any case, the express or implied will of the parties prevailed.

91. It was most desirable that all treaties should contain an express indication of the provisions to which reservations were admissible. For that purpose, a treaty could either enumerate the clauses to which reservations were admitted, or else enumerate those to which reservations were not admitted. Personally, he preferred the negative formula, because it laid greater emphasis on what the signatories regarded as the essence of the treaty.

The meeting rose at 1 p.m.

## 652nd MEETING

Monday, 28 May 1962, at 3 p.m.

Chairman: Mr. Radhabinod PAL

### Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (*continued*)

#### ARTICLE 17.—POWER TO FORMULATE AND WITHDRAW RESERVATIONS (*continued*)

#### ARTICLE 18.—CONSENT TO RESERVATIONS AND ITS EFFECTS (*continued*)

#### ARTICLE 19.—OBJECTION TO RESERVATIONS AND ITS EFFECTS (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of the three articles on reservations.

2. Mr. JIMÉNEZ de ARÉCHAGA said that he was in substantial agreement with the special rapporteur's approach to the subject of reservations and, with one exception, was prepared to accept his proposals. He commended his progressive draft rules, particularly in connexion with the most controversial question, that of the effect of objections to reservations.

3. On that question, the special rapporteur proposed as the residuary rule what had been called the Pan-American system, which appeared to have obtained the support of a majority of the members, including those who, like Mr. Amado and Mr. Bartoš, had formerly held a different opinion. He was gratified to see so distinguished an English jurist as the special rapporteur show that changed attitude towards the Pan-American system which, on past occasions, he recalled, had been disapproved of by the special rapporteur's countrymen as a legal heresy.

4. However, the Pan-American system would lose much of its original force and vitality if adopted in the manner proposed by the special rapporteur. The residuary rule proposed by the special rapporteur would apply the system of multilateral treaties, but would cease to apply it precisely in the region where it had originated. In effect, the special rapporteur proposed that reservations to plurilateral treaties should be subject to the unanimity rule, with the result that the objection of a single party would veto the participation of the reserving state. Actually, if the Pan-American system was so convenient and flexible as to be adopted as the world-wide residuary rule for reservations to multilateral treaties, there was no reason why it should cease to be the residuary rule in the regional sphere where it was born and where it still applied. There again, the distinction between multilateral and plurilateral treaties was unnecessarily complicating an already complicated matter.

5. The question of the effect of objections to reservations on the reserving state's ability to become a party to the treaty had arisen in connexion with all multilateral treaties, whether of world-wide or only regional scope. The only distinction suggested by some had been that between multilateral conventions capable of being split up into a series of bilateral agreements, and multilateral conventions where integral agreement by all the parties was required. He did not recall that it had even been suggested that the limited scope or the restricted number

of parties required the unanimous acceptance of reservations. The system which rejected unanimity had originated in the regional sphere and in 1951 the Commission had declared that such a system, the Pan-American system, was particularly appropriate for regional conventions.

6. The distinction between plurilateral and multilateral treaties should be eliminated as irrelevant to the question of reservations and the same residuary rule proposed by the special rapporteur should apply to all multilateral conventions, whatever their scope.

7. Earlier in the session, the Commission had decided to eliminate the same distinction in connexion with the voting rules for the adoption of a treaty. There was an evident and close connexion between the voting on the text of a treaty and the capacity to make reservations and to become a party to the treaty despite such reservations. More and more multilateral conventions, whether world-wide or regional, were being adopted by the majority rule, and therefore a safety valve should be provided for those states which had been out-voted on particular articles, if they were ever to become parties to a treaty thus negotiated.

8. He therefore suggested the deletion of article 18, subparagraph 4(b)(i), and article 19, paragraphs 1(b), 3(b) and 4(b). Those deletions, along with certain drafting changes, would greatly simplify the text.

9. He was in entire agreement with the proposed rule in article 17, paragraph 5, that the decision on the admissibility of a reservation to a treaty which was the constituent instrument of an international organization should be made by the competent organ. However, decisions by competent organs could be made in the case of certain other types of treaties. For instance, the Protocol to the Convention relating to the Simplification of Customs Formalities, 1923<sup>1</sup> gave competence to the Council of the League of Nations to decide as to the admissibility of a reservation, and the organs of the World Health Organization and the Universal Postal Union had that same prerogative with regard to sanitary and postal conventions. The saving clause "unless the treaty otherwise provides" should therefore be employed, to make it clear that in all the three articles the Commission was merely codifying rules which would be applicable if the treaty itself did not provide for a different procedure.

10. Mr. de LUNA commended the special rapporteur for his realistic proposals, for his clear and convincing commentary to the articles, and for the historical summary contained in the appendix to his report.

11. The Commission could not disregard the fact that the majority of states had declared themselves in favour of freedom of reservations. The practice of entering reservations undoubtedly conflicted with the traditional law of treaties, but it had been rendered necessary by developments in international relations. In the past, when international law had been the law of the Great

Powers of Europe, at that time governed by absolute sovereigns, even a multilateral treaty had normally been adopted by unanimity at an international conference, but the number of signatories had always been comparatively small.

12. Absolute rule had given way to constitutional rule, and modern international conferences were attended by a large number of states; international law was tending to become truly universal. More and more frequently, the text of a treaty was being adopted by a majority instead of by unanimity and it had become necessary to admit reservations.

13. Reservations should be permissible in order to enable a legislature to protect itself from certain legal consequences of a treaty submitted to it by the Executive, instead of having to face the choice between accepting or rejecting the treaty in its entirety.

14. An additional reason for the proposed rule was, as had been argued by Mr. Lachs in the Sixth Committee of the General Assembly, that the majority rule for the adoption of the final text of a treaty logically implied the same rule for the approval of the conditions subject to which the minority could join the treaty.<sup>2</sup>

15. The United States of America, in its written statement to the International Court of Justice in the case of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, had pointed out that, apart from a rule that a state had the right to make reservations which it deemed desirable and the rule that any other state had a co-equal right to determine for itself whether or not it should be bound by such reservations, there were no settled rules respecting the juridical status of reservations to multilateral treaties.<sup>3</sup> The Commission should, therefore, advance prudently, though without undue timidity, along the path of progressive development of international law in the matter, for the rules which it was formulating were in the nature of *jus dispositivum* and so would come into operation only where the treaty itself was silent on the subject of reservations.

16. For those reasons, he approved the special rapporteur's proposals, which were in line with the Pan-American system, although the formulation of the articles could be simplified as suggested by Mr. Tunkin at the previous meeting. The distinction between plurilateral and multilateral treaties should be dropped, so that the Pan-American formula would apply to all treaties except bilateral treaties.

17. As the special rapporteur said in his report, "the effect of the reservation on the *general* integrity of the treaty is minimal"; moreover, its effect was generally compensated by the fact that the admission of reservations enabled a larger number of states to participate in the treaty.

<sup>2</sup> *Yearbook of the International Law Commission 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 5.

<sup>3</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, Oral Arguments, Documents*, p. 30.

<sup>1</sup> *League of Nations Treaty Series*, Vol. XXX, p. 409.

18. He did not approve of the provision in article 17, paragraph 2 (a), which was based on the principle of "the compatibility of the reservation with the object and purpose of the treaty"; although quite exact, that criterion was unfortunately dependent on the subjective appreciation of states and therefore impossible to apply with any certainty in practice.

19. Mr. CASTRÉN said he found the special rapporteur's proposals generally satisfactory.

20. It was often of great importance that the number of parties to a treaty should be as large as possible. Where it was desired to conclude a universal convention, in an international community of more than 100 members, that result could not be achieved without recourse to the institution of reservations. Some treaties were of course indivisible, while others contained certain provisions which every party must accept as they stood; the special rapporteur had taken those possibilities into consideration. Moreover, if a signatory state considered that a reservation was incompatible with the purpose of the treaty or in any way contrary to its own interests, it could object to the reservation and prevent the entry into force of the treaty between itself and the reserving state.

21. But recourse to reservations should not be encouraged. For that reason, he fully agreed with the provision in article 17, paragraph 3 (b), that a reservation formulated at the time of a signature, which was subject to ratification or acceptance, should continue to have effect only if repeated in the instrument of ratification or acceptance.

22. He did not believe that the admissibility of reservations within reasonable limits, as proposed by the special rapporteur, would give states any undue latitude. If reservations went too far, they would generally be rejected and, under the reciprocity rule of article 18, sub-paragraph 5 (a) (ii), the other parties to the treaty could avoid the application of the provisions in question in their relations with the reserving state.

23. The admissibility of reservations could, of course, lead to unexpected results. For example, a multilateral convention between five states might become in effect ten bilateral treaties different in content, or even a single bilateral treaty; even that result, however, was better than complete failure.

24. In contrast to the case of accession, there was a presumption in favour of the admissibility of reservations if the treaty was silent on the subject. The difference between the two cases arose from the fact that the acceptance of a new state as a party to the treaty was generally more important than the exclusion from some of its provisions of a state which was qualified to become a party to the treaty.

25. With regard to the criteria for the admissibility of reservations, only objective criteria should be laid down, based on the reactions of the other states concerned to the reservations formulated. At the same time, there was no reason why the draft should not contain a provision, on the lines of article 17, paragraph 2 (a), requesting states not to make reservations to certain articles.

26. He noted with interest that no sanction was laid down in the provision in article 17, paragraph 2 (a).

27. With regard to the definition of "reservation" in article 1 (1), he doubted the wisdom of retaining the second sentence; the explanatory and other statements referred to were rare in practice; moreover, if they occurred, it was difficult to see which authority was to decide the nature of the statement.

28. Some of the language used in articles 17, 18 and 19 was rather vague, for example, the expressions "the nature of the treaty" and "the established usage of an international organization" in article 17, paragraph 1 (a). In paragraph 1 (b) of the same article, reference was made to "interested states" without any precise indication as to which states were meant.

29. He agreed with other members that the drafting of articles 17, 18 and 19 should be simplified. In particular, the distinction between plurilateral and multilateral treaties should be dropped, so that the same rule would apply to both, as indicated by Mr. Jiménez de Aréchaga.

30. He had already suggested the deletion of article 17, paragraph 1 (b). He now wished to suggest the deletion of article 18, sub-paragraph 2 (a) (iii), because the case there envisaged was very rare in practice; of article 18, paragraph 2 (b), because it added nothing to sub-paragraph 2 (a) (i) of the same article; and of the last portion of article 18, paragraph 3 (b), commencing with the words "provided that, in the case of a multilateral treaty...", since a state which was not yet a party to the treaty but which had been notified of the reservation could submit its objections within the normal time-limit, though its objections would naturally be without legal effect if it did not become a party to the treaty.

31. In article 19 also there were certain provisions which could be deleted or shortened in the light of the amendments to article 18, but he did not wish to enter into such detail.

32. Mr. VERDROSS, expressing his general agreement with the provisions in articles 17, 18 and 19, said they reflected international practice in the matter of reservations. The drafting, however, might be clearer. Three different situations should be considered successively. The first was that of a treaty which contained specific provisions on the subject of reservations; in that case, those provisions would apply. In that connexion, he agreed with the view expressed by Mr. Yasseen at the previous meeting that the nature and purpose of the treaty had to be taken into consideration, since they were of the essence of the treaty.

33. The second case was that of a treaty which specifically prohibited reservations; that case did not present any difficulties.

34. The third and difficult case was that of a treaty which did not contain any provisions on the subject of reservations. There were then three possibilities. The first was that a state might make reservations which all the contracting parties accepted. The second was that a state might make a reservation which the contracting parties did not actually reject but to which they failed to take any attitude; to meet that case, some presump-

tion should be laid down in the draft articles. The third was that the reservation might be accepted by some contracting parties but not by others: in that event it would be a complicated problem to determine whether the treaty was in force between the reserving state and the states which had accepted its reservation and not between the reserving state and the states which had not accepted its reservation.

35. He could not accept article 17, sub-paragraph 1 (a) (i). Even if the making of reservations were excluded by the nature of the treaty, the admissibility of reservations would depend on the content of the treaty and on the agreement of the parties.

36. Mr. GROS commended the special rapporteur for the lucid manner in which he had presented the subject in his commentary and for the valuable historical summary given by him as an appendix to his report, a summary which would remain invaluable to all students of the subject of reservations to multilateral conventions.

37. A treaty was an instrument for establishing a legal regime. It was not an instrument for establishing a number of different legal regimes, since then it would no longer be a treaty but a series of international agreements at different levels. It was the notion of the integrity of the treaty to which that of flexibility had been opposed.

38. In its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice had stated that the concept of the integrity of the treaty was of "undisputed value as a principle" in international law.<sup>4</sup> The integrity of a treaty was an indispensable principle of international law, for it followed directly from the fundamental rule *pacta sunt servanda*. That principle and that rule meant that a treaty must be respected as formulated by the parties to it; the legal regime prescribed by the treaty could not therefore be altered by a state which had remained outside the treaty but wished to impose its own conditions for joining it.

39. As had been pointed out by Mr. Ago, a state which wished to participate in a treaty with a reservation was in effect proposing the unilateral amendment of the treaty. A treaty concluded for the purpose of establishing certain legal relations could not be amended by a prospective party to it; a prospective party could only ask the contracting parties whether they agreed to the amendments it was proposing.

40. In his remarkable commentary, the special rapporteur had been very lenient to the flexible system and he (Mr. Gros) could not agree with his remarks in the concluding sentences of paragraph 5. He was not at all convinced by the arguments put forward and considered that they provided no justification for the rules of law proposed for the interpretation of a treaty which contained no clause on reservations.

41. He would illustrate his point by three practical — and topical — examples. First, in 1954, a number of

interested states had concluded an international Convention for the Prevention of Pollution of the Sea by Oil,<sup>5</sup> the essence of which was an obligation on the parties to install at their main ports facilities for the disposal of oily residues from ships' tanks. But two states had made a reservation in respect of that very obligation. Could the special rapporteur still contend, as in paragraph 5 of his commentary, that when a reserving state refused to carry out one of the most important provisions of a Convention, "the position of the non-reserving state is not made more onerous if the reserving state becomes a party to the treaty on a limited basis"?

42. His second example was provided by the Convention on Fishing and Conservation of the Living Resources of the High Seas, signed at Geneva on 29 April 1958.<sup>6</sup> The essential feature of the system of fisheries protection instituted by the Convention was the provisions for technical control and arbitration. Was it conceivable that a state should accede to such a Convention, subject to a reservation in respect of those very provisions?

43. The international discussions on the subject of outer space provided his third example. Efforts were being made to draft an international convention on the subject of outer space. That convention would doubtless provide: first, for the exchange of information relating to space vehicles; secondly, for state liability for damage caused by space vehicles. If a convention of that sort were formulated and a state signed it but made reservations in respect of its international liability for damage, would not the other signatory states be entitled to refuse to give the reserving state the information provided for in the treaty?

44. Those three examples clearly showed that reservations, where they affected such issues, caused grave prejudice to the signatory states, quite apart from the fact that apparent acceptance of a treaty when in fact the effect of acceptance was destroyed by reservations, was not an international phenomenon to be encouraged.

45. The support given in some quarters to the so-called flexible system was merely the result of an obsession with statistics; it reflected the desire for universality at any price. But fifty signatures which established a collective regime of general scope were preferable to 105 signatures when fifty-five of them were subject to a variety of reservations which impaired the unity of the legal regime established by the treaty.

46. For those reasons he agreed with Mr. Briggs in his criticism of the provision contained in article 8, sub-paragraph 4 (b) (ii). Instead of paying lip-service to the idea of universal collective treaties, the Commission should try to ensure respect for the rule of law established by agreement between states. A collective treaty ought not to be split up into a series of bilateral agreements.

<sup>5</sup> United Nations Treaty Series, Vol. 327, p. 4.

<sup>4</sup> Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 21.

<sup>6</sup> United Nations Conference on the Law of the Sea, Official Records, Vol. II (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 139.

47. His provisional conclusion was that there was no place for any reservations other than those provided for in the treaty itself. A reservations clause was therefore an essential feature of multilateral treaties. Where such a clause was included in the treaty, there was no problem. If, however, the negotiating parties had discussed the question of reservations but had not been able, through lack of a majority, which nowadays was often two-thirds, to arrive at an agreement, the only valid inference from that situation was that the treaty admitted of no reservations at all. In the extremely unlikely and rare event of the negotiating parties not having even discussed the question of reservations, their admissibility could only be decided in the light of the intention of the parties in each case, bearing in mind the nature of the treaty.

48. The special rapporteur had clearly shown that there was no objective criterion for determining whether, as a general rule, a reservation was or was not admissible. Also, in the existing state of international law and international relations, there was no judicial authority to rule on the question of compatibility; there were, of course, exceptions, such as the WHO and UPU Conventions which provided for the necessary machinery.

49. He entirely accepted the special rapporteur's analysis of the ruling given by the International Court of Justice in its advisory opinion on the subject of reservations. He must point out, however, that the Court's opinion had only been adopted by a very narrow majority and that one of the leading authorities on the law of treaties had been among the dissenting minority. In addition, the Court had been careful to point out that its opinion was limited to the particular case before it, a case where control was possible and the treaty was of a special character. How could that system be generalized if there were no judicial control?

50. In the circumstances, it could not be claimed that that ruling was anything more than a mere guide, a recommendation to states as to the attitude they should take up towards reservations.

51. The only genuine rule in the matter was that, in the residual case where the treaty was silent on the subject of reservations, the consent of the parties was necessary for the reservation to have any effect. A state did not have a right to make reservations, only a right to request reservations, and he did not believe that a general rule could be laid down that such a right could be acknowledged after the event by a two-thirds majority of the negotiating or participating states. The only proper approach was to enquire into the intention of the parties in each particular case. The two-thirds majority rule could only lead to the admission of reservations; the desire to achieve unanimity was so keen that more often than not it would lead to the mustering of the necessary two-thirds majority.

52. If, on the other hand, the requirement of the consent of the parties were maintained, the reserving state would have to negotiate with the signatory states and by such negotiation might be led either to withdraw its reservation or to modify it in a manner acceptable to the parties.

53. Having thus expressed his general views on articles 17, 18 and 19, he was prepared to discuss the provisions, paragraph by paragraph.

54. Mr. LIANG, Secretary to the Commission, said that he was in full agreement with Mr. Gros. He was not familiar with the 1954 Convention for the Prevention of Pollution, but with regard to the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Mr. Gros had been right in pointing out that if there had been many reservations to the provisions on technical control and arbitration, the Convention would have lost all meaning. The situation was, however, covered by article 19 of the Convention itself, the first paragraph of which read:

"1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 6, 7, 9, 10, 11 and 12."<sup>7</sup>

55. The articles to which no reservation was possible included those which contained the elaborate provisions on technical arbitration.

56. The 1958 Geneva Convention on the Continental Shelf contained a similar provision in article 12, paragraph 1:<sup>8</sup>

"1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."

57. Article 1 was the article which defined the term "continental shelf". Article 2 set out the rights enjoyed by the coastal state over the continental shelf. Article 3 stated that the rights of the coastal state over the continental shelf did not affect the legal status of the superjacent waters as high seas or that of the air space above those waters.

58. The system adopted in those conventions was to allow reservations to all the articles, except those in respect of which reservations were expressly prohibited. That system arrived at the same result as that of prohibiting reservations except in respect of certain specified articles.

59. Those two Geneva conventions seemed to constitute an object lesson in the prevention or, at any rate, diminution of the possibilities of occurrence, of so-called residuary situations.

60. Mr. AMADO said that in his 1951 memorandum, to which he had referred at the previous meeting, he had expressed the view that "generally speaking the collective treaty possessed a systematic unity which should be safeguarded as far as possible. That was one of the reasons why he had disagreed with his Latin American colleagues in the discussions in the Sixth Committee on the procedure adopted by the Pan-American Union."<sup>9</sup> From the

<sup>7</sup> *United Nations Conference on the Law of the Sea, Official Records, Vol. II* (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 141.

<sup>8</sup> *ibid.*, p. 143.

<sup>9</sup> *Yearbook of the International Law Commission, 1951, Vol. II* (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 21.

practical point of view he would like to ask Mr. Gros whether it was not likely that states would take defensive measures against the threat created by the right of unlimited reservations and prohibit certain types of reservations. With a two-thirds majority rule, the international community could express its opposition to such a right.

61. Mr. GROS said that he had taken the 1958 Convention on Fishing as an example, although it contained a formal reservations clause, of the case where, if a state were free to make any reservation it wished, an international legal system would be undermined and rendered meaningless. The 1954 Convention on the Prevention of Pollution had not admitted reservations to articles, and yet two states had made such reservations. Thus Mr. de Luna's argument was not watertight; numerous examples could be quoted to prove that a state which made reservations might prejudice the interests of states which did not.

62. Nowadays, in a large international conference, there was an urge to try to secure as many signatures as possible in the cause of universality, to the detriment of another legal desideratum, the integrity of the collective treaty. Experience showed that it was unwise to trust in the wisdom of the majority which tended to work for compromises and to accept reservations. The danger was that if, after discussion, no provisions concerning reservations were adopted for lack of the necessary majority, and the treaty was consequently silent on the matter, states would conclude that any reservation was possible. The starting point should therefore be a clear statement by the Commission that, if reservations were admissible, the treaty must say so expressly.

63. Mr. TSURUOKA said that he would like to know whether a reservation that failed to comply with the rules laid down in article 17 should *ipso facto* be regarded as invalid.

64. The Commission should make a distinction between a declaration concerning the interpretation of the treaty and a reservation. It was conceivable that a reservation might be received without comment by the other parties because they thought it a declaration, and at a later stage the state in question would declare itself not bound by certain provisions of a treaty on the grounds that its reservation had not provoked any objection.

65. As regards the conflicting claims of universality and the integrity of the treaty, he agreed with the special rapporteur that for the purpose of the former some flexibility should be allowed, but he also agreed with Mr. Gros that universality would become an empty principle if in its name a whole series of regimes — instead of a single regime — were established under the treaty. Obviously, to prevent that from happening, states should be prepared to make sacrifices and the Commission should say something to that effect in the commentary.

66. The need to safeguard the principle of the integrity of treaties was the greater in modern times because with

the increasing number of new states, there was a greater danger of more reservations being made.

67. Under the system adopted in the draft, the interests of states which did not make reservations did not receive the same measure of protection as those of states which did make them, and some inequality resulted, since the only recourse open to the former was to object to a reservation and to refrain from entering into treaty relations with the reserving state. But that did not provide sufficient protection for the objecting state in the case of a normative treaty. For instance, an objecting state could be placed in a disadvantageous position *vis-à-vis* the reserving state in the case of an international labour convention, because it would still be bound by all the provisions of the convention, while the latter would be bound only by some of them, so that the objecting state's competitive position in relation to the reserving state would be weakened.

68. Again, what was the position if a proposal that certain articles should not admit of reservations were rejected by a narrow majority at the negotiating conference, and the resulting treaty contained no provision concerning reservations? If the presumption were made that the treaty's silence implied that reservations were admissible, some time later a reservation might be made and communicated to the states concerned. By then, however, the situation could have changed and with the lapse of time chanceries have become less vigilant so that some would forget to oppose the reservation within the prescribed time-limit of twelve months, with the result that the reservation might be accepted by a single vote, thus producing the reverse effect to that desired at the conference itself. Perhaps the special rapporteur's draft made too strong a presumption in favour of allowing reservations, to the detriment of the interests of states which did not make them. He (Mr. Tsuruoka) suggested that, as a counterpoise to that tendency, the rule might be stated in contrary terms, so that if the other parties failed to make any reply to a notification of a reservation, their silence should be interpreted as an objection.

69. Mr. BRIGGS said that, after moving away from the unanimity rule, the Commission should not swing too far in the direction of the Pan-American system, even in a modified form. If too many reservations were allowed, universality would become fictitious.

70. He was concerned to find an answer to two questions raised by articles 17, 18 and 19. First, could a state which formulated a reservation not authorized by the treaty become a party to it in the face of the objection of a substantial number of the other parties? Secondly, what was the legal effect of a reservation established as admissible by a majority of the parties?

71. Taking the first question, it would appear from article 18, paragraph 1, in the special rapporteur's draft that if the reservation was admissible and 99 out of the 100 parties objected to it but one party accepted it, the state making the reservation would in effect become a party to a bilateral treaty with the latter.

72. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the case would fall within the terms of



article 17, paragraph 1(b): the reservation would be inadmissible because the consent of all the other interested states had not been obtained.

73. Mr. BRIGGS replied that he was not discussing a reservation which was prohibited. He believed it might be possible to arrive at a different formulation on the lines of his own redraft of article 13. It might be provided that if a state formulated a reservation not authorized but also not forbidden by the treaty, its admissibility would be determined, in the case of a bilateral treaty or a multilateral treaty concluded by a restricted number or group of states, by the consent of all the parties, and in the case of a general multilateral treaty, by the consent of two-thirds of the parties.

74. He noted that in article 18 the special rapporteur had abandoned the distinction between a general multilateral treaty negotiated at an international conference convened by the states concerned, and one drawn up in an international organization. Perhaps in both cases the voting rule for determining the admissibility of a reservation should be the same as that applied for the adoption of the text of the treaty itself.

75. With regard to his second question, there were two possible solutions. One was that put forward in the special rapporteur's text of article 19, paragraph 4(c), and the other was a bolder provision stating that a reservation accepted by a majority vote of the parties would be binding on all in their relations with the reserving state.

76. Mr. de LUNA said that Mr. Gros had over-emphasized part of his argument and in doing so had attributed to him something that was illogical. He (Mr. de Luna) had pointed out that, even if the principle of reciprocity in regard to the rights of the parties were upheld, the principle of the integrity of obligations in law-making treaties might result in a reserving state's enjoying a privileged position *vis-à-vis* a non-reserving state. That result might have varying degrees of seriousness according to the nature of the treaty. But the situation would certainly be no better if, in the example given by Mr. Gros, a state which could not make reservations could not be a party to the 1954 Convention and could consequently be at liberty to pollute the waters of the sea to its heart's content.

77. The principle *pacta sunt servanda* was certainly a cornerstone of the law of treaties and would not necessarily be undermined if, for example, all parties except one accepted a reservation and the obligations assumed by the parties were not uniform. There was an advantage in allowing reservations because the general regime established by the treaty, and not the reservations, would in the long run, gain recognition as establishing certain rules. A draft convention was being negotiated at the moment in Paris concerning the property of aliens, and one country, because of its economic position and balance of payments problems, was unable to subscribe to the provisions concerning freedom of transfer. It would be most undesirable, in the circumstances, to debar that country from making a reservation, possibly purely temporary, to the provisions in question and so to deny it the possibility of accepting all the other provisions of

the treaty, including those concerning arbitration. His two proposals were inter-related and respected the principle *pacta sunt servanda*.

78. Mr. AGO said that the discussion, which at the previous meeting had centred on questions of law, had veered round to certain practical considerations as to whether reservations should be encouraged or not. The Commission should strive to frame precise, universal rules generally applicable and consider the question within that framework. As a realist he was aware that the possibility of making reservations had to be admitted, but he must draw attention to the dangers of abuse which might frustrate the aim all had in view.

79. The principle of universality had been defended with varying degrees of conviction by different members and there was no doubt that the practice of reservations helped to encourage more states to sign treaties. But if the reservations were so numerous as to create in effect a series of different regimes, universality would become a mirage.

80. The two-thirds majority rule for the adoption of treaties was regarded as marking a great advance in the conclusion of general international treaties but if, by means of reservations, the will of a majority could be overturned by a minority, the result would be illusory. Another possibility that had to be borne in mind was that many states, perhaps even the majority, at a codification conference, while fully prepared to accept a convention concluded without reservations, might hesitate to ratify because a few states had already made reservations to what they, the many, regarded as essential clauses.

81. It was true that even a majority of states at a treaty-making conference might adopt too liberal a view as to which provisions of a treaty could be open to reservations. But the other possibility mentioned during the discussion, that an international conference might actually overlook the problem of reservations, was almost inconceivable. The real danger arose when, being unable to reach agreement on which articles should be open to reservations, an international conference failed to include any provision at all about reservations, as had been the case with the 1958 Convention on the High Seas. He hoped such a practice would be emphatically discouraged. To prevent its recurrence, the Commission should suggest a way in which the problems involved might be settled *ex post facto*.

82. The Commission should come down on the side of a certain stringency in order to discourage excessive recourse to reservations.

83. Mr. EL-ERIAN, commenting upon the practical rather than the theoretical aspects of the problem, said that the special rapporteur had succeeded in reconciling two major considerations—that of ensuring the widest possible acceptance of treaties and that of preserving their integrity and the uniformity of obligations.

84. Nearly eleven years had elapsed since the Commission had submitted to the General Assembly its views concerning reservations to multilateral conven-

tions<sup>10</sup> and since the International Court had delivered its Advisory Opinion on reservations to the Convention on Genocide. The time had now come when it could make a signal contribution towards the settlement of a controversial problem.

85. Rather than discuss whether a unanimity rule existed and what should be regarded as a restriction on the sovereignty of states, the Commission should be guided by the clear endorsement by recent practice of the right to make reservations to multilateral treaties. The special rapporteur had rightly sought to endorse that right so long as the reservation was compatible with the nature and main purpose of the treaty. That criterion had been criticized as being subjective, but subjective criteria were by no means unknown in international law; an example was article 28 (*rebus sic stantibus*) in the Harvard draft.<sup>11</sup> He saw no danger in such a criterion and did not believe it would undermine the principle of the integrity of treaties.

86. The CHAIRMAN said that, after the conclusion of the general discussion, he would request the special rapporteur to indicate which issues of substance would need a decision by the Commission before the article could be referred to the Drafting Committee.

The meeting rose at 5.55 p.m.

### 653rd MEETING

Tuesday, 29 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

#### Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (*continued*)

##### ARTICLE 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS (*continued*)

##### ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS (*continued*)

##### ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of the three articles on reservations.

2. Speaking as a member of the Commission, he said that the main points on which the opinions of members differed related to the so-called principle of the integrity of the treaty and to the advisability of reverting to the traditional doctrine which seemed to have been generally accepted at least until 1951. Thus in 1938 Lord McNair could state that the analogy between international

treaties and the contracts of private law was frequently pressed too far, but that in solving the problems to which the practice of attaching reservations to the signature or ratification of treaties gave rise, the analogy had been found useful.<sup>1</sup> He had gone on to compare reservations to counter-offers in domestic systems of law: the terms of the treaty were an offer to the parties for acceptance; the reserving state did not accept them, but instead made a fresh offer in a modified form to the participants for their acceptance. The fate of the reservation thus depended on the manner in which the counter-offer was received by the parties. That seemed to have been the general view at the time and a similar opinion had prevailed in the Commission in 1951, as was shown by the memorandum then submitted by Mr. Amado.<sup>2</sup>

3. However, as the special rapporteur's commentary showed, the General Assembly, on the Commission's recommendation, had not accepted that principle, and the International Court of Justice, in the case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, had also refused to accept the so-called traditional doctrine as having been transformed into a rule of law. In view of that opinion, of the practice of states and of the debates in the General Assembly on the Commission's recommendation of 1951, he did not believe that it would be in keeping with the progressive development of international law to think of returning to the unanimity rule.

4. He was in substantial agreement with the special rapporteur's formulation of the underlying principles of the three articles. Their actual wording could be left to the Drafting Committee; the Commission should concern itself solely with the question of improving the statement of the basic principles.

5. He agreed with the special rapporteur and other members that the criterion of the compatibility of the reservation with the object and purpose of the treaty, taken from the opinion of the International Court, should be accepted, although it constituted no real guiding principle. Mr. Rosenne had suggested that the compatibility test should also be adapted to articles 18 and 19. That would limit objections, which would then be allowable only on the ground that the reservation was incompatible with the object and purpose of the treaty; if Mr. Rosenne's view was accepted, the question of consent would lose in importance. Nevertheless, even in that event, article 18 would still be necessary. If objections to a reservation could be made only on the ground of its incompatibility with the object of the treaty, they would remain without any immediate legal consequences and the matter would be left to the risk of the parties, as the special rapporteur had pointed out in paragraph 4 of the commentary. The question of consent in that case might seem irrelevant, but the principle laid down in article 17, paragraph 1 (b), still remained; under that provision, a reservation could still

<sup>10</sup> *Yearbook of the International Law Commission, 1951, Vol. II* (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 125.

<sup>11</sup> Supplement to the *American Journal of International Law*, Vol. 29, No. 4, p. 662.

<sup>1</sup> *The Law of Treaties*, 1938 Edition, p. 105.

<sup>2</sup> *Yearbook of the International Law Commission 1951, Vol. II* (United Nations publication, Sales No.: 1957.V.6, Vol. II), p. 17.

be admitted even if expressly or implicitly excluded under paragraph 1 (a), provided it received the consent of the parties. Article 18 therefore remained necessary, even if Mr. Rosenne's suggestion concerning the applicability of the compatibility test to objections were accepted.

6. A number of speakers had urged that reservations should not be encouraged. While he recognized that there was much force and wisdom in their views, he would submit that in the present international state of affairs, the balance of wisdom would incline towards not closing the door to reservations.

7. In view of the rapid development of regionalism, and because that development was not altogether without its mischief when the world's efforts should be directed to finding a new unity on a universal basis, it was essential to keep the door open to greater participation in measures designed to secure effective international action in a world-wide organization, rather than to force states to seek solutions in regional groups. He was, of course, not unmindful of the basic reasons for the establishment of regional groups and of their importance; the states of a particular region might have common problems and interests which were not shared by the rest of the world, and consequently the members of those groups might have an incentive to work together, especially if they had a common historical and traditional background which made it easier for them to reach joint solutions in such an organization than in a more heterogeneous group. But in view of the vast number and complexity of the problems which could be solved only by international action, the obligation to build and to perfect community life on a world-wide basis was forced on the peoples of the world by the necessity of coming to terms with changed circumstances. Even in the traditional field of state responsibility, all states had to realize that the effective discharge of their responsibilities depended upon events beyond their frontiers. In the modern world, states had become unprecedentedly inter-dependent, and instances of national insufficiency were occurring with increasing frequency. In the light of that development, the United Nations Charter itself constituted an attempt to solve international problems on a world-wide basis. It was with that background in mind that the Commission should take its decisions.

8. The two basic questions remaining to be settled were, first, whether the criterion of compatibility with the object and purpose of the treaty should be adapted to objections to reservations and, secondly, whether and to what extent the inter-American system which the special rapporteur had incorporated in his draft should be accepted.

9. Mr. PESSOU said that the draft articles should contain a provision which departed from the principle of the integrity of the treaty, although that principle had been defended by a number of speakers. It was obvious that the admission of reservations to certain provisions of a treaty could frustrate the very purpose of the treaty; to consent to a treaty and then withdraw that consent by artificial means was comparable to the

practice censured in the old maxim of French domestic law, *donner et retenir ne vaut*. But it could not be denied that the practice of making reservations was admissible so long as the reservations were compatible with the object and purpose of the treaty.

10. Reservations were admissible only to multilateral, plurilateral and collective treaties, where the majority could mitigate the effect of the reservation. In the case of bilateral treaties, where the obligations undertaken by one party were counterbalanced by those assumed by the other, a reservation would obviously amount to refusal to ratify.

11. At the previous meeting, Mr. Gros had stressed the difficulties which would arise from a diversity of legal regimes in a treaty, and had expressed the view that such diversity was incompatible with the unifying functions of law-making treaties. He (Mr. Pessou) would suggest that, if agreement could not be reached on that question, articles 17 and 18 could be differentiated by first stating the general rule of the integrity of the treaty, and then formulating the exception constituted by reservations.

12. Mr. LACHS said that Mr. Ago and Mr. Briggs, in particular, had raised some serious questions, which went to the very heart of the problem before the Commission. Since the battle had been joined on the subject of reservations over ten years previously, a host of arguments had been put forward, both for and against the institution. Apart from the question of the integrity of the treaty, which Mr. Gros had raised, there were a number of other arguments against reservations; it was argued that, since a treaty was an agreement, the duties and rights it involved should be carefully weighed, so as not to lay a heavier burden on one state than on another; it was also argued that a reservation represented a further step in the negotiation of a treaty and that all parties should therefore be consulted; and Mr. Ago had argued that reservations were liable to lead to abuses and to unjustified privileges for some states.

13. In his (Mr. Lachs') opinion, however, examination of the arguments showed that they were not valid; the institution of reservations had become a part of contemporary international law. Among the features of the modern world were the great variety of states and of their interests in treaty making and the extension of international law to many new fields. Consequently, whenever more than two parties were involved in treaty making, their interests might not be identical. Moreover, in a number of cases accession without reservation might be of less value than accession with reservation; everything depended on an individual state's contribution to the treaty, since some states which acceded to a treaty without reservations merely regarded that step as a formal act. An unduly rigid rule might prevent a state whose participation was vital from becoming a party to the treaty and thus frustrate its very purpose. From the purely theoretical standpoint, moreover, the so-called unanimity rule was not part of international law; the International Court had rightly pointed out that the procedure endorsed in the report adopted by the Council

of the League of Nations in 1927 upholding the rule of the integrity of the treaty, constituted "at best the point of departure of an administrative practice".<sup>3</sup>

14. In view of the wide variety of their interests, it seemed advisable as far as possible to leave states free to decide the extent to which they should be bound by a treaty. Admittedly, there was a risk that reservations might become instruments of abuse, but the same argument could be applied to every legal institution; at the other end of the scale, there was the counter-risk of inaction and mere lip-service to a treaty. The historical process of the *rapprochement* of nations could not be completely disregarded out of fear of abuse.

15. The Commission should adopt a balanced approach to the problem. The divergent interests of states which concluded treaties could not be reconciled automatically by the application of a quantitative majority rule, for minority was not only a quantitative but also a qualitative notion. On the whole, the special rapporteur had submitted a sound solution and provided a number of safeguards against abuse.

16. He could not agree with those members who, at the previous meeting, had suggested that acceptance of the special rapporteur's proposals might jeopardize the whole treaty relationship. He could not follow Mr. Ago in that respect: reservations should be regarded as an outcome of the natural development of international law and as a means of evolving new treaty relations. As to Mr. Briggs' fear that the method advocated in the special rapporteur's report might create unduly complex relations within the treaty, that argument had been advanced by the United Kingdom Government in the International Court of Justice in connexion with the case of reservations to the Genocide Convention.<sup>4</sup> But in the practical operation of a treaty, those consequences might arise even without reservations; the inter-relationship between rights and obligations was brought into play by the contact of a treaty with life itself. Some clauses might become a dead letter, while others became increasingly substantive, as the result of individual States' interest in specific provisions. The nuances of those complex relationships could hardly be reduced to mere formulae.

17. If the practical application of the institution of reservations was taken into account, the inescapable solution was one which leaned towards a more liberal approach. For at least twenty-five years, the weight of many theorists had been against the institution and in favour of the principle of unanimity, and yet hundreds of reservations had been made to treaties concluded under the auspices of the League of Nations. Accordingly, reservations had acquired a definite and lawful place in international relations, and in the past decade many theorists had changed their views on the matter.

<sup>3</sup> *Reservations to the Convention on Genocide, Advisory Opinion*: I.C.J. Reports 1951, p. 25.

<sup>4</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide: Pleadings, Oral Arguments, Documents*, p. 62.

Practice had thus prevailed over theory, as the special rapporteur had so rightly indicated in his report.

18. Mr. TUNKIN, replying to the arguments advanced by members against the institution of reservations, said that Mr. Gros had claimed that reservations destroyed the integrity of the legal regime established by the treaty by rendering it inapplicable to all parties, while Mr. Ago had contended that reservations would make universality illusory and had suggested that the attention of states should be drawn to the danger they represented. Admittedly, the practice of making reservations to treaties was not without danger, but that applied to almost everything in the world. Theoretically, some reservations might depart from the purpose of the treaty itself; but it would be wrong to draw attention to the danger of reservations without at the same time drawing attention to their advantages. The best course, in his opinion, would be to allow states to decide for themselves, particularly since the other states concerned in a treaty were free either to accept reservations or to object to them if they were not compatible with the object and purpose of the treaty.

19. If there were a unified regime of treaties, if the primary goal of the Commission were *elegantia juris*, and if it wished to adhere to the principle *vivat justitia pereat mundus*, then admittedly reservations could not be fitted into so rigid a system. But the Commission's approach should not be unduly abstract; it should always bear in mind the relationship of law to the realities of life and regard the effects of law only in the context of those realities.

20. The opinion had also been expressed that the articles should not encourage reservations. While he agreed with that view in theory, he would advocate a more radical approach. A reservation was the reaction of a state which considered itself unable to participate in a treaty without the reservation. Ideally, of course, there should be no reservations to a treaty, but the means of achieving that ideal was to make every effort during the negotiations to reach agreement on a text acceptable to all the states concerned: it was by encouraging conferences to settle treaties in universally acceptable terms that reservations would be discouraged.

21. There seemed to be a confusion in the minds of some members between the problem of specific reservations and that of reservations as an institution of international law. Specific reservations might be either innocuous or harmful; for example, the United Kingdom postulate in its note of 19 May 1928, relating to article I of the General Treaty for the Renunciation of War as an Instrument of National Policy, the Briand-Kellogg Pact,<sup>5</sup> had restricted the impact of the provisions of that very important international treaty, and had consequently been harmful.

22. It had already been pointed out that the institution of reservations opened up an opportunity for the participation of a greater number of states in a treaty—and that, as Mr. Lachs had said, was an outcome of

<sup>5</sup> *League of Nations Treaty Series*, Vol. XCIV, p. 57.

modern developments in treaty practice. The experience of plenipotentiary conferences had shown that, even with the complete goodwill of all the parties, the time-limits imposed often prevented the participants from attaining results acceptable without reservation to all the states concerned. That being the case, it was hardly advisable to accept a system which would automatically exclude what might be a considerable number of states from participation in a treaty. Moreover, deliberately to debar certain states from participation in treaties which were of interest to the entire international community would hardly be in keeping with the spirit of modern international law, which encouraged collaboration between states.

23. It might therefore be concluded that the institution of reservations served a useful purpose as a practical means of promoting international co-operation. Indeed, it was indispensable in modern practice, for reservations usually related to relatively unimportant provisions of the treaty; if they were incompatible with the object and purpose of the treaty, the other parties were free to reject them.

24. Mr. Briggs had suggested that the two-thirds or other majority rule applied in the adoption of the text of the treaty should apply to the procedure of accepting or rejecting reservations and that, if the specified majority accepted the reservation, the treaty would become binding on all the parties. In that connexion, he wished to raise a theoretical point. The conclusion of treaties was a consecutive process, but reservations appeared after the process of forming an agreement had been completed, in other words, when the text had become final and could not be altered by the ordinary procedure of negotiation. Accordingly, reservations represented a kind of deviation from the straight line of treaty making, and yet in a sense also represented a co-ordination of the will of states, because a reservation could not be imposed on any party to the treaty.

25. He agreed with the view that a reservation was a kind of offer by the reserving state, which the other Parties, in the exercise of their sovereignty, were free to accept or to reject. Thus, Mr. Briggs' suggestion that the majority rule should govern the admissibility of reservations would certainly not be workable and would destroy the very substance of reservations, for their special characteristic was that they constituted a deviation from the continuous process of treaty making.

26. He was in general agreement with the provisions proposed by the special rapporteur, which seemed to constitute the only basis on which states could agree for the time being; provisions excluding reservations altogether would be unacceptable to a great many states. In his opinion, three principles should be laid down in the draft articles. First, that states were free to make reservations, unless the treaty specifically prohibited or restricted reservations. Secondly, with regard to the compatibility test, and there he agreed with Mr. Rosenne, that if the test was to apply to reservations, it should also apply to consents and objections to reservations. Thirdly, that if a reservation was accepted, the treaty was in force between the reserving state and

all the consenting parties, with the exception of the article or articles to which the reservation was made. On the other hand, if a state objected to a reservation, it seemed premature to conclude that it would automatically not be bound by the treaty *vis-à-vis* the reserving state. It should be left to draw its own conclusions; the purpose of its objection might merely be to affirm its position, and not to sever treaty relations with the reserving state. Objecting states should therefore be left free to decide for themselves whether their objections should or should not carry those extreme consequences.

27. Mr. ROSENNE said that he wished to clarify further his views on the place which the compatibility test occupied in the institution of reservations and on the residuary rule which the Commission was drafting. He had been surprised to hear the Chairman imply that there was perhaps a serious division in the Commission on that issue. If he had correctly understood the special rapporteur's intention in the text of article 17, paragraph 2 (a), as explained in the commentary and his introductory statement on the reservations articles, the compatibility test contained in that provision was a kind of general guide, though not sufficient in itself, and for the purpose of determining the effective law in the matter the objective tests remained consent and objection.

28. The combination of the general principle with such objective tests seemed to him the correct approach and to provide a key to the proper solution of the problem, but that was precisely why he thought it would be right to lay down the same test explicitly in article 19, and not to leave it merely as a matter of implication, as it appeared to be in the special rapporteur's draft. As the Court had declared in its Advisory Opinion on reservations to the Genocide Convention in answer to question II, in dealing with objections to reservations, the contracting states had a common duty to be guided in their judgement by the compatibility or incompatibility of the reservation with the object and purpose of the Convention.

29. Reference had been made during the discussion to a philosophical problem, whether the juridical regime resulting from a multilateral convention was in effect a series of bilateral relations or something more complex. Neither the Commission with its twenty-five members nor any other group of lawyers would ever reach agreement on that issue, and he doubted whether it was relevant to the task of elaborating a residual rule for cases when the treaty and any accompanying documents were silent on the subject of the admissibility of reservations. From a practical standpoint, what was important was for each state to know what its treaty relations were with other states so that the treaty was not deprived of material effectiveness. The United Nations publication "Status of Multilateral Conventions in respect of which the Secretary-General acts as Depositary" (ST/LEG/3/Rev.1), clearly showed the position where that category of treaties were concerned.

30. In regard to the theory of integrity, which he found somewhat difficult to understand, the special rapporteur had rightly argued in paragraph 7 of the commentary

that the detrimental effect of reservations upon the integrity of the treaty could easily be exaggerated. A problem existed but it should not inhibit the Commission from elaborating a workable rule to fit modern needs. As Mr. Tunkin had argued, perhaps there was a real danger in trying to be too specific about the ultimate consequences of an objection. Practice since 1951 indicated that states objecting to a reservation often refrained from drawing the conclusion that their objection meant refusal to enter into treaty relations with the reserving state. On that point he was willing to accept the general tenor of the special rapporteur's draft and he believed that it would not stand in the way of states which did not wish to draw all the conclusions from a formal objection to a reservation made by another state.

31. Mr. AGO said that, although in general the Commission appeared ready to accept the special rapporteur's proposals and subscribe to his conclusions, an element of controversy had entered into the discussion which might give the impression that serious doubts as to the substance still remained. In some instances, part of an argument had been taken out of its context in an effort to refute something that had never been said. For example, he had never contended that reservations to treaties should be prohibited. Practice showed clearly that they were necessary, and nothing would be gained by ignoring the realities of international life; what he had said was that if reservations were allowed without restriction they could entirely nullify the effects of a treaty and the progress of codification of international law. Some speakers had eloquently described the advantages of reservations, but he preferred to approach the matter from the standpoint that the effective purpose of treaties must be safeguarded.

32. The institution of reservations undoubtedly existed. The real question to be answered by the Commission's drafts was in what circumstances they might be admissible. Moreover, while he could agree that reservations were indispensable because it was impossible to obtain universal acceptance of general rules quickly, he could certainly not agree that reservations *per se* represented an advance in the development of international law.

33. Though it was true, as Mr. Tunkin had said, that the possibility of making reservations might attract more parties to a treaty, that advantage would be entirely destroyed if the reservations nullified the essence of the treaty itself. The proposition was therefore true only up to a certain point, because unless the essential character of the treaty were preserved, wide participation would prove an empty achievement.

34. The special rapporteur's criterion that reservations should be compatible with the object and purpose of the treaty might give rise to practical difficulties of interpretation. As Mr. Tunkin had pointed out, the situation was clear if the treaty itself, as it should, indicated which provisions were essential to the extent that they did not admit a reservation, and which were not of that character, but doubts were likely to arise if the treaty was silent either because the question of reservations had not been discussed during the negotia-

tions or because the states concerned had failed to reach agreement on a reservations clause.

35. In regard to the effect of reservations, Mr. Tunkin had reached the same conclusion as his own, that the treaty was in force as between the state making the reservation and that accepting the reservation, except that the provisions to which the reservation related were not operative between them.

36. He thought, however, that if the treaty was silent the criterion by which the admissibility of reservations could be judged was the collective, as distinct from the individual, intention of the parties at the time when it had been drawn up and he could not accept Mr. Tunkin's conclusion that the final decision on the admissibility of a reservation should be left to each individual state. Nor could he share the view that there was no need for an objecting state to specify whether or not its objection entailed refusal to enter into treaty relations with the state making the reservation. Such an element of uncertainty was undesirable and although it was not the Commission's task to give paternal advice to states, where possible it must frame clear and precise rules. A system whereby any state could make any reservation to any clause of a treaty, and any party was free either to accept or to object without indicating the consequences of its objection, would lead to a situation where *fiat apparentia juris pereant jus et mundus*.

37. Mr. VERDROSS said that, although there appeared to be a considerable difference of opinion between Mr. Tunkin and Mr. Ago, they both agreed that everything depended on the common will of the parties. At a time when there was no supra-national authority, the decision as to whether a reservation was compatible with the object of the treaty had to be left to the parties, for it was hardly likely that such a decision could be entrusted to the Secretary-General of the United Nations.

38. Mr. TUNKIN, in answer to Mr. Ago, said that, while reservations could not be considered as an advance *per se*, they could not be separated from the context of the treaty relations. Within that framework they were recognized as a useful institution.

39. He agreed with Mr. Ago that the core of the problem lay in the requirement that the reservation should be compatible with the object and purpose of the treaty; the Commission might either try to frame a rule to determine that issue or leave it to the states concerned.

40. Mr. Ago had suggested that if the treaty was silent, it could be assumed that the parties were opposed to reservations or at least would not regard them as admissible to all the articles. Personally, he would have thought that if the treaty was silent, it was difficult to draw any inference regarding the intention of the parties and that it was preferable to leave the decision to them by their acceptance or rejection of the specific reservation.

41. In practice, there were few cases where reservations were of such a nature or so numerous as to impair the universal character of a multilateral treaty. A rule could not be constructed out of rare exceptions.

42. The CHAIRMAN, speaking as a member of the Commission, said that as the provision in question related only to cases where the treaty was silent on the point, future treaty makers would have ample warning to take special care in that respect after accepting the Convention. The only difficulty might arise in relation to treaties already concluded, if the provisions were to be retroactive to any extent; otherwise the question as it affected such treaties would have to be resolved by making presumptions in the light of the law at the time of the conclusion of the particular treaty. If it could be presumed that the parties had intended to allow only reservations expressly provided for, silence should be interpreted to mean that none were admissible. If the Commission succeeded in drafting a precise rule concerning reservations and its articles were finally accepted by States, presumably the kind of difficulties that arose when no provision concerning reservations was included in a treaty would no longer occur. In the Genocide case the question of presumption from silence had also been dealt with and the Court had expressed the opinion that the absence of a specific reservation clause did not necessarily preclude the possibility of reservations.<sup>6</sup>

43. Mr. JIMÉNEZ de ARÉCHAGA said that the discussion on articles 17, 18 and 19 had been concerned largely with the case where a state made a reservation which might defeat the object and purpose of the treaty. Attention should preferably be focused on the situation where a state made a reservation and another state, or other states, accepted it. Obviously a reservation must be accepted by other states, in order to have any legal effects. The *pacta sunt servanda* rule had been invoked; but that rule surely meant that what states agreed to constituted the law. If a state made a reservation and another state accepted it, the rule meant precisely that those two states had entered into a treaty relationship.

44. The two states could just as well have formulated their agreement as a bilateral treaty. He could not see on what grounds a third state could claim to prevent the two states concerned from entering into that same legal relationship within the framework of a multilateral treaty. Freedom should constitute the residuary rule in the matter. Such a rule would be in keeping with the practice followed since 1952 by the Secretary-General in accordance with the decision of the General Assembly.

45. It had been suggested that the proposed system would result in complications in legal relationships, but those complications would be no greater than those which would arise if a series of bilateral treaties were entered into by the states concerned, a thing which those states were perfectly entitled to do. In any event, fear of administrative complications should not prevent the Commission from abiding by the *pacta sunt servanda* rule.

46. Only in very exceptional cases would the interests of third parties be in any way affected by a state's

acceptance of another state's reservations. In fact, in the case of the Geneva Convention on Fishing of 1958, mentioned by Mr. Gros at the previous meeting, specific provisions had been inserted stating which reservations were not permissible. The residuary rule to be formulated by the Commission would not prevent that type of clause being inserted in a treaty in similar cases in the future.

47. It had been suggested by Mr. Briggs that the acceptance of reservations should be decided by a majority vote of the parties. Such a system was open to the objection that a particular reservation was often of interest to two states only and a matter of indifference to all the rest. For example, in the case of any world-wide treaty in which it participated, Argentina always made a reservation concerning the Falkland Islands. The majority of states had no objection to that reservation, since it did not concern them. It was manifestly not a tenable proposition to say that a two-thirds majority of the states concerned could compel the United Kingdom to accept that reservation. The matter should be left to be decided by the objecting and reserving states. The Commission had already decided, in accepting article 13, paragraph 4(b), on provisions according to which the objecting state should not have treaty relations with the acceding state to whose accession it was opposed, and had agreed to a proposal by Mr. Ago that the rule should be optional for the objecting State.<sup>7</sup>

48. The situation in regard to reservations was similar to that in regard to accession, and he favoured Mr. Tunkin's suggestion that the objecting and reserving states should have the option of having treaty relations despite the reservations made by the latter state and objected to by the former.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that he would reply to the remarks of members, not only in his capacity as special rapporteur but also as a member of the Commission.

50. Several members had commended his progressive approach to the subject of reservations. In fact, his intention had been simply to reflect the existing practice and to put forward, in regard to the problem of reservations, proposals which would prove acceptable to states.

51. Some members had indicated that their views had changed since 1951. If he had been a member of the Commission in 1951, his views would have been very close to those which Mr. Amado had then expressed. It was necessary, however, to take into account developments since then, which tended to qualify the traditional principles of the integrity of the treaty and the unity of its legal regime.

52. State practice in regard to multilateral conventions had evolved since 1951 in the direction of a system approaching the Latin American system. The General Assembly, however, had not yet committed itself: it had merely instructed the Secretary-General, by resolutions 598 (VI) and 1452 (XIV) B, to circulate reserva-

<sup>6</sup> *Reservations to the Convention on Genocide, Advisory Opinion*: I.C.J. Reports 1951, p. 22.

<sup>7</sup> 650th meeting, para. 46.



tions and objections to reservations "without passing upon the legal effect of such documents". That practice had been followed consistently since 1952, but the Secretariat document, "Summary of the Practice of the Secretary-General" (ST/LEG/7) showed that when the Secretary-General communicated the text of documents relating to reservations, an accession or ratification to which a reservation had been made was marked down for purposes of counting the number of accessions or ratifications necessary to bring the treaty into force. There was thus an indication that something resembling the Latin American system was growing up in the practice of the General Assembly. The debates in the General Assembly in 1951 and 1959 also showed a tendency in the same direction.

53. He had formulated his proposals in a realistic spirit. The subject was an extremely important one; the Commission had once before tried to codify the relevant rules but its proposals had not been accepted. It would cause considerable damage if the Commission's draft articles being prepared in 1962 were rejected because the articles on reservations proved unacceptable to states. The situation created would mean the continuation of the existing practice of freedom of reservations. If, on the other hand, the Commission were to clarify the situation in regard to the formulation of reservations, it would be making a positive contribution to the improvement of the existing state of affairs.

54. His proposals did not necessarily represent his own ideas as to what was theoretically best in the matter of reservations; they were an attempt to formulate a set of provisions which would have a chance of being accepted by states.

55. Notwithstanding suggestions to the contrary, he believed there was a definite division in the Commission with regard to his proposals. Some members had expressed approval of the general concept contained in those proposals; Mr. Tsuruoka, Mr. Ago, Mr. Briggs and Mr. Gros, on the other hand, had expressed uneasiness, regarding the system as unduly loose and as likely to encourage reservations and to sacrifice the unity of the legal regime of the treaty to the interests of universality.

56. In view of that cleavage of opinion, it could be expected that a divergence of views would become apparent in the General Assembly on the articles on reservations, and the Commission should seriously consider the need to avoid the possible consequent rejection of its draft articles. Apart from accession, reservations was the main subject on which the Commission could make a real contribution to the law of treaties, if its draft articles were accepted.

57. The main question to be decided by the Commission was whether it should put forward, in its provisions concerning reservations to general multilateral treaties, a modified Latin American system. The system had to be taken as a whole. In that respect, the provisions of article 17, paragraph 1, were very important. If the Commission accepted considerable freedom of reservations, it should also accept the principle that, if a reservation was expressly prohibited or impliedly

excluded by the treaty itself, that prohibition or exclusion held. That proposition had been accepted by all members of the Commission and constituted an important point of departure: the freedom to make reservations applied only outside the terms of article 17, paragraph 1.

58. Another point had been raised by Mr. Ago, who admitted the usefulness of the compatibility test laid down in article 17, paragraph 2 (a), but attached more importance to the intention of the original negotiating states. That intention was partly taken into account in the formula "a state shall have regard to the compatibility of the reservation with the object and purpose of the treaty"; the object of the treaty and the compatibility of the reservation with the object were largely determined by reference to the intention of the negotiating states.

59. Mr. Ago, however, wished to go further and investigate the intention of the original negotiating states in regard to the making of reservations. Where the negotiators had agreed on express provisions on reservations their intentions were manifest; but where the negotiations had not resulted in such express provisions, it was difficult to deduce the common intention of the parties on the subject of reservations. An example of the difficulties that could ensue was provided by the Antarctic Treaty signed at Washington on 1 December 1959. That Treaty was open to the accession of a large number of states; it included an article XII on the modification and amendment of the Treaty but nothing on reservations. It was doubtful whether the inference could be drawn that no reservations were possible to that treaty.

60. Mr. Rosenne had suggested that the compatibility test should be introduced into articles 18 and 19, and it would seem logical, if the test were accepted for reservations, to extend it to consents and objections to reservations as well. He had hesitated to propose that extension because a state was always free to accept or reject a reservation without applying the criterion of compatibility. The matter was not of great practical importance, for a state wishing to object to a reservation would invariably say that the reservation was incompatible with the essence of the treaty.

61. The real problem for the Commission was to decide whether to put forward provisions modelled on the Latin American practice in the matter of reservations, which left the decision to individual states, or whether to put forward a system involving some sort of collegiate decision on the acceptability of reservations.

62. He had considered the possibility of a system under which consent to reservations would be left, in the case of a convention formulated by an international conference, to the decision of a two-thirds majority of the states concerned, or where the treaty had been formulated by an international organization, to the decision of the competent organ of the international organization; in the latter case, the rule would be subject to the proviso indicated by Mr. Yasseen. The Commission could of course put forward some such proposal

*de lege ferenda*, but he did not suggest that. His reason for not doing so was that, while it was modern practice to follow the procedure of a collegiate decision in regard to accession, there was little evidence of such practice in regard to the acceptance of reservations. Most of the examples which could be cited were the constituent instruments of international organizations, which formed a special class; very few multilateral conventions, however, incorporated the system of collegiate decisions in respect of the acceptance of reservations.

63. Mr. AMADO did not believe that any great harm would be done if a number of bilateral agreements were entered into within the framework of a multilateral treaty: he would be glad to have the opinion of Mr. Ago and Mr. Gros on the subject.

64. He agreed that it was theoretically desirable to have uniform rules which were universally accepted. However, states would not be prepared to renounce their freedom to make reservations, a right derived from their sovereignty, merely in the interests of uniformity.

65. As had been pointed out by the special rapporteur, the Commission was faced with the choice between acknowledging the realities of the contemporary situation and retiring into its ivory tower. It would not command the respect of the General Assembly if it did not submit proposals calculated to gain the acceptance of states.

66. Mr. de LUNA, with regard to article 19, paragraph 4(c), said that he took the same view as Mr. Tunkin and Mr. Rosenne that nothing prevented the objecting state from agreeing to the partial entry into force of the treaty in its relations with the reserving state. He therefore suggested, as a compromise solution, that after the words "as between the objecting and the reserving states" the words "unless the objecting state makes an explicit statement to the contrary" should be inserted.

67. The compatibility test laid down in article 17, paragraph 2(a), was reasonable in principle; unfortunately, it was impracticable in the absence of any authority to decide the question of compatibility. He therefore suggested that the contents of paragraph 2(a) should be transferred to the commentary.

68. If, however, they were retained in article 17, then Mr. Rosenne had made a convincing case in favour of including a similar provision in articles 18 and 19. Personally, he agreed with Mr. Tunkin that states should be left to decide for themselves whether a particular reservation was compatible with the object and purpose of the treaty, and to accept or reject it accordingly.

69. Mr. CADIEUX said he favoured a flexible system in the matter of reservations. Such a system was particularly useful to federal countries like Canada. Because it had to take into account the rights of the component units of the federation, the Federal Government was often obliged to append reservations when signing a treaty. Unless a flexible system were adopted, countries like Canada would find themselves in the position where they could not join many multilateral treaties which it was desirable that they should.

70. The interests of the newly-independent states also weighed in favour of a flexible system. Those states were not as yet certain what either their future social evolution or their future economic interests would be. Reservations offered them a means of safeguarding their future position and a flexible system would be of great assistance to them.

71. The special rapporteur had just indicated that the Commission had a choice between the so-called Latin American system and a system embodying some form of collegiate decision. It was interesting to note that the special rapporteur had excluded the possibility of adopting the unanimity rule. He was prepared to accept the special rapporteur's proposals.

72. Mr. AGO said that there would be no harm in the conclusion of a series of bilateral agreements in the circumstances indicated by Mr. Amado, if the points to which they related were secondary ones; great harm would, however, be done if the points at issue were essential features of the multilateral treaty.

73. It would be dangerous to leave to individual states the decision as to the acceptance of reservations. At a time when general rules of international law were being increasingly codified by means of multilateral conventions, such a system would leave it to each individual state to decide whether a rule was essential or not in connexion with the international law governing a particular subject.

74. It had been rightly indicated by the special rapporteur that his proposals were in line with what had been agreed by the Commission for accession, namely, that the question of the admissibility of an accession would be decided at the later stage by the same authority as was competent to admit accessions at the earlier stage. Personally, he did not think—and that was his reply to Mr. Amado—that the Commission would fail to command the respect of the General Assembly if it suggested that the Assembly should be competent to decide on the interpretation of the essential purpose of a multilateral treaty concluded under the auspices of the Assembly itself. It was, of course, essential that the parties to such a treaty should express their intentions clearly by including in it a specific provision stating which clauses admitted reservations.

75. But where the treaty was silent, it was possible to adopt a system which would leave it to the General Assembly to decide whether the clause of the treaty to which a reservation related was an essential clause or not. The states invited to codification conferences were very largely the same as the membership of the United Nations. It was therefore possible to have the question of the acceptance of reservations decided by a body very similar to that which had adopted the treaty itself.

76. The Chairman had suggested that the problem was unlikely to arise in the future because future treaties would contain clauses on the subject of reservations. The experience of the 1958 Geneva Conference on the Law of the Sea had shown the difficulty of agreeing on what clauses of a treaty should admit of no reservations. It was therefore very undesirable to leave complete

freedom of reservation to states in the event of a treaty's silence on the subject of reservations; such a system would impair the chances of an agreement on a reservations clause. Negotiators would not make a sufficient effort to reach agreement during the negotiations, knowing that failure in that respect would leave states free to make reservations at will.

77. Mr. VERDROSS said he favoured the system proposed by the special rapporteur. He also agreed with the special rapporteur that the main question to be decided by the Commission was whether the acceptance of reservations should be left to the individual decision of states, or be the subject of some sort of collegiate decision.

78. Since the draft articles were being adopted by the Commission only on first reading, perhaps the Commission might wish to consider submitting alternative texts, as it had done on previous occasions. States would thus be offered a choice between the Latin American system and the system proposed by Mr. Ago. In the light of their reactions and of the preferences expressed by them for one or the other system, the Commission could then come to a decision on second reading.

The meeting rose at 1.5 p.m.

#### 654th MEETING

Wednesday, 30 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

#### Law of treaties (A/CN.4/144 and Add.1) (Item 1 of the agenda) (*continued*)

##### ARTICLE 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS (*continued*)

##### ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS (*continued*)

##### ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of the three articles on reservations.
2. Mr. YASSEEN said that the discussion on the draft articles concerning reservations showed that there was a good deal of common ground on many essential points.
3. On the question of freedom to make reservations, there was agreement on the necessity to examine first and comply with the provisions of the treaty itself. Some controversy had arisen, however, over the case where the treaty contained no provisions on the subject of reservations.
4. Some members interpreted the silence of the treaty as meaning that reservations were admissible; that might be correct in some cases, but not in all. The answer hinged on the interpretation of the intention of the parties and that involved an examination not only

of the text of the treaty, but also of the will of those who had formulated the text.

5. On the question of the effects of the acceptance of a reservation, there was agreement on the essential point that acceptance brought into force between the reserving state and the accepting state all the provisions of the treaty except those to which the reservation related.

6. On the question of objections to reservations, it was agreed that the objecting state was entitled not to consider the reserving state as a party to the treaty. That was not, however, the result in all cases. It could happen that the objecting state did not intend to debar the reserving state from becoming a party to the treaty. It was necessary to examine the document containing the objection for the purpose of determining the objecting state's intentions in that respect. If, however, an objection was categorical without any suggestion that the objecting state did not wish to debar the reserving state from becoming a party, then the reserving state could not be considered a party to the treaty.

7. The one important question on which there was a division of opinion was that of the system to be recommended for the acceptance of reservations to a general multilateral treaty. Some members favoured a system based on the Latin American practice, according to which an objection to a reservation did not debar the reserving state from becoming a party to the treaty with respect to those states which accepted the reservation. Other members thought that admission of the reserving state as a party to the treaty should be subject to the unanimous consent of the parties, or to the consent of a specified majority of the parties. In view of that division of opinion, it would be advisable for the Commission to adopt the suggestion of Mr. Verdross, and leave it to the states themselves to decide that question.

8. Mr. TUNKIN said he agreed with Mr. Yasseen that there was no great difference of views in the Commission on the main points of articles 17, 18 and 19, and consequently those articles could soon be referred to the Drafting Committee.

9. The Commission might adopt the principle of article 17, that states were free to formulate reservations unless the making of reservations was implicitly excluded by the treaty itself. The article itself could be shortened by the Drafting Committee; in particular he saw no need to refer to the usage of international organizations, which might vary from one organization to another.

10. He said the Commission might also adopt the leading principle which ran through all the paragraphs of article 18, except paragraph 4 which conflicted with that principle. He saw no reason for drawing any distinction between treaties formulated within or under the auspices of international organizations and other treaties. The Drafting Committee should therefore consider omitting paragraph 4.

11. There appeared also to be general agreement in regard to the basic principles laid down in article 19. With reference to paragraph 4(c), he recalled the suggestion he had made at the previous meeting,<sup>1</sup> a

<sup>1</sup> 653rd meeting, para. 26.

suggestion which had since received some support, that the Commission should not try to impose the consequences of an objection. The objecting state should be free to decide for itself what consequences it attached to its action; it might wish merely to state its position in regard to the reservation, without going so far as to preclude the entry into force of the treaty as between itself and the reserving state. It would be both correct in theory and advisable in practice to leave it to the objecting state to declare whether it wished to preclude the entry into force of the treaty as between itself and the reserving state.

12. He saw no need to request the opinion of states on the suggested system of collegiate decisions for the admission of reservations. He found the system proposed by the special rapporteur in his formulation of article 19 generally acceptable.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that a number of points still required clarification by the Commission before the Drafting Committee could know how far it could go in the simplification of articles 17, 18 and 19. The main point was what recommendation the Commission was to make in respect of reservations to general multilateral treaties, leaving aside for a moment the question of plurilateral treaties. Three courses were open to the Commission. The first was to make a recommendation along the lines of his proposals, which considered acceptance and objection as a matter for each individual state, so that the treaty relations would depend upon the action taken by individual pairs of states; those proposals could be said to embody the Latin-American system with certain modifications; the second was for the Commission to propose a scheme for reservations similar to that adopted in respect of accession; the third was that suggested by Mr. Verdross, namely, that the Commission should submit to states the two alternatives, and leave the states to choose between them.

14. He would confine himself to one point, the central issue, but in formulating that issue he was obliged to set it in the framework of his main proposals. It seemed to him that the central issue presented itself as follows.

15. There appeared to be agreement in the Commission that, where a general multilateral treaty contained no express or implied indication as to the admissibility of reservations, states were free to formulate reservations compatible with the object and purposes of the treaty. On the other side, other states participating in the treaty might object to a reservation which they did not consider to be compatible with the object and purpose of the treaty.

16. In that framework there were two alternative solutions which had been discussed. The first was that which was in his report and which he would call Alternative A; the second was that which had been indicated by various speakers at the previous meeting and which he would call Alternative B. Those two alternatives could be formulated more or less as follows:

*Alternative A:*

"The consent of any other state to the reservation shall establish its admissibility as between that state and the reserving state, and, subject to the provisions of the treaty on entry into force, the reserving state shall become a party to the treaty with respect to that state."

*Alternative B:*

"In the event of an objection, the admissibility of the reservation shall be determined:

"(a) in the case of a treaty drawn up at a conference convened by the states concerned, by the consent of the same number of such states as would have been necessary to adopt the text of the treaty at the conference in question;

"(b) in the case of a treaty drawn up either in an international organization, or at a conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with its applicable voting rule."

The essential difference between those two alternatives was that in Alternative A the reaction was entirely dependent on the attitude of the individual state, whereas in Alternative B it was dependent on a collegiate decision by the majority rule followed at the conference or by the majority applicable in the international organization in question.

17. To conclude the picture, the rest of the framework would be as follows:

"The state which has objected to the admissibility of a reservation may, if it thinks fit, notify the reserving state that the treaty shall not come into force in the relations between the two states in question."

18. With regard to a minor issue that had been raised, the Commission appeared to be of the opinion that it would be wrong to impose the rule that an objecting state was automatically not in treaty relations with the reserving state.

19. The CHAIRMAN recalled that, towards the close of the discussion on article 13, Mr. Ago had made two suggestions, the second of which, relating to the non-automatic effect of a negative answer, the special rapporteur had accepted.<sup>2</sup> Perhaps, therefore, article 19, sub-paragraph 4 (e), could be recast on those lines.

20. Sir Humphrey WALDOCK, Special Rapporteur, confirmed that he had agreed that article 13, paragraph 4 (b), should be amended so as to render the rule stated therein non-automatic. As far as reservations were concerned, he proposed that both in Alternative A and in Alternative B, an objection should not have an automatic effect. The Commission should confine itself for the moment to the main issue of the choice between Alternative A, Alternative B and the suggestion of Mr. Verdross that both alternatives should be submitted to governments.

21. Mr. LACHS said he must reserve the right to express his views in regard to the consequences of an objection on the bilateral relationships between the

<sup>2</sup> 650th meeting, paras. 46 and 47.

objecting and reserving states. It was his understanding that the Commission would not prejudge the question, but would deal with it later.

22. Mr. TSURUOKA said he had some misgivings in regard to the precise content of the term "admissibility". On a previous occasion he had asked for clarification of the legal nature of the rule expressed in article 17, sub-paragraph 1 (a) (i) and paragraph 3. The question was whether a state's reservation in contravention of those provisions was unlawful and consequently invalid. In other words, would an objection to such a reservation merely preclude the entry into force of the treaty between the objecting and reserving states, while theoretically a state maintaining the invalid reservation could not be a party to the treaty?

23. Sir Humphrey WALDOCK, Special Rapporteur, said that if article 17, paragraph 1, were considered in the light of the views expressed in the Commission, the conclusion was that members had agreed on the following proposition: that, where a general multilateral treaty contained no express provision or implied rule on the admissibility of reservations, a state was free to formulate reservations compatible with the object and purpose of the treaty. Both Alternative A and Alternative B dealt with the objection by a state which regarded a reservation as incompatible with the object and purpose of the treaty. The difference between the two alternatives was that in one case, the view taken by the objecting state decided the relationship between that state and the reserving state, and that in Alternative B, compatibility was a matter for a collegiate decision.

24. In his original proposal, he had not introduced the compatibility test into article 18 and article 19. The Commission, however, had favoured making consent and objection to reservations subject to the compatibility test.

25. Mr. AGO thanked the special rapporteur for his clear formulation of the two alternatives and said that he preferred Alternative B, particularly since its provisions were limited to the case where the reservation affected the very purpose of the treaty.

26. He was not satisfied with a system such as that set out in Alternative A, which left the decision entirely to the objecting state, without taking into account either the interests of other states or the general interest. However, he would be prepared to accept the suggestion of Mr. Verdross that both alternatives should be submitted to states so that they could choose between the existing practice, reflected in Alternative A, which took into account the individual interest of states and which could be said to be in line with the traditional rules in the matter, and Alternative B, which was more progressive and took into account the general interest.

27. The opinion of the states themselves should be asked before making a choice between the two systems. Since the Commission was examining the text only on first reading, a vote to decide its choice was undesirable at that stage.

28. Mr. BARTOŠ said that he also was much concerned with the question raised by Mr. Tsuruoka. An illustration

of his point was provided by the Convention on the Political Rights of Women, which had been concluded under United Nations auspices; it had been adopted by General Assembly Resolution 640(VII) and had entered into force on 7 July 1954. A number of states had made reservations which conflicted directly with the very purpose of that Convention. Some of those reservations stated that, in the reserving country, certain provisions were not applicable to women and certain posts were not open to women; some South American countries had indicated that they would apply the Convention only subject to their constitutional provisions, which limited the enjoyment of specific political rights by women and the access of women to certain offices; a number of African countries had made a reservation to the effect that they would only introduce measures gradually, where they conflicted with their customary law.

29. In the case of that Convention, a situation had been created in which reservations had thus been made to what might be termed a fundamental rule of United Nations constitutional law: the rule that there should be no discrimination between the sexes, in law at least. Since very few objections had been made to the reservations in question, and since time limits had been set by the Convention both for the making of reservations and for objections, it could be claimed on formal grounds that the Convention was in force between a reserving state and the states which had not objected to its reservation. He doubted, however, whether the operation of such time limits could mean that a flagrant violation of essential rules of modern international law could no longer be challenged. The question was an extremely difficult one and he urged that, at any rate in the commentary to the articles and in the Commission's report, it should receive some attention.

30. Mr. TUNKIN, with regard to Mr. Verdross's suggestion that two alternatives should be submitted to governments, said that, although that had been done before by the Commission, it was not a regular practice and its advisability was debatable. In the case in point, the Commission should recommend the alternative for which there was a considerable majority.

31. The second alternative, first advocated by Mr. Briggs and then supported by some other members, would mean that a reservation would be treated as admissible if accepted by the same majority as that which had adopted the final text of the treaty at the plenipotentiary conference. It should not be submitted to governments as an opinion of the Commission, since it cast doubt on the very possibility of making reservations. The procedure it suggested was tantamount to prolonging the conference, and would be meaningless, since the reserving state would in most cases have already made a similar proposal during the conference. The purpose of the institution of reservations was to promote international co-operation, and the proposal that the majority rule should apply denatured the very essence of that institution. The same argument applied to treaties concluded in international organizations; a reservation could not properly be called a reservation if its admissibility was

decided by a fixed majority under the rules of the organization concerned. He was therefore opposed to the submission of that alternative to governments.

32. Mr. AMADO said that, during his years of service on the Commission, he had acquired a reputation for advocating the traditional procedures of codifying the practice of states, and also for promoting the establishment of rules *de lege ferenda*. In the case at issue, he had no hesitation as to the position he should adopt.

33. The Commission had before it the special rapporteur's draft, which corresponded to the current practice of states submitting reservations to multilateral treaties; indeed, Mr. Ago had referred to that practice as "classical". Some members had compared it to the so-called inter-American system of reservations and had asserted that a similar patchwork of bilateral relationships between states would be the result. He did not deny that the proliferation of such relationships was deplorable in theory, but would submit that, in the fraternal community of the Latin American countries, with their similarity of interests, the system was workable and presented no serious dangers. In the universal framework of important multilateral treaties, however, the participating states would be fully aware of the far-reaching and vital interests at stake, and would refrain from making reservations which threatened the entire structure of the treaty; they were as anxious as any member of the Commission to maintain the principles of international law.

34. On the one hand, therefore, the Commission had before it the current practice of states, and on the other the proposed alternative, a creation *ex nihilo*, which had no foundation whatsoever in practice. The government representatives to the General Assembly, who all had the very precise interests of their countries in mind, were bound to regard the submission of such an academic and theoretical rule with faint derision. He therefore opposed the suggestion that the two alternatives should be submitted to the General Assembly and considered that the special rapporteur's original draft should be retained.

35. Mr. VERDROSS said he had suggested that two alternatives should be submitted to the General Assembly not only in a conciliatory spirit, but also because, although the first alternative alone corresponded to current practice of positive international law, some members had pointed out that it was a practice that could lead to very dangerous results. Since the second alternative represented a considerable innovation in international law, the Commission could not opt for it or recommend it without first receiving the comments of governments. Where there were two contrary opinions, one of which, upheld by the majority, represented current practice, while the other, advocated by the minority, would lead to a rule *de lege ferenda*, it was obvious that the Commission's work could only be facilitated by government comments.

36. Mr. JIMÉNEZ de ARÉCHAGA said he would confine his remarks to the second alternative and to Mr. Verdross's proposal that both alternatives should be submitted to the General Assembly.

37. With regard to the second alternative, the application of the voting rule seemed to be contrary to the purpose of reservations in modern international practice. There was a close connexion between voting rules and reservations, since multilateral conventions were more and more often adopted by a fixed majority; consequently, it was becoming increasingly necessary to provide a safety valve for states which were outvoted at the conference on specific clauses, but which nevertheless wished to become parties to the treaty. The second alternative would have the effect of giving a reservation the same status as a substantive proposal. But that was not the purpose of a reservation; its purpose was to cover the position of a state which regarded as essential a point on which a two-thirds majority had not been obtained. The second alternative thus represented a negative position towards the most important function of the institution of reservations.

38. With regard to Mr. Verdross's suggestion, it was true that the Commission had submitted alternative proposals to the General Assembly in the past, but that procedure had been employed when two essential conditions had been present. The first was that opinion on the issue had been equally divided, and the second, that there had been an element of the unknown in one of the alternatives. In the case in point, however, the majority of the Commission was clearly in favour of the special rapporteur's solution, and the second alternative was already well known to governments and their legal advisers. The only result of submitting the second alternative would be to reopen the discussion on an already much-debated question in the Sixth Committee of the General Assembly, which, moreover, had already requested the Commission to provide it with guidance in the matter. He therefore thought it would be sufficient to draw attention in the commentary to the fact that the second alternative had been supported by some members.

39. Mr. GROS said he could assure Mr. Amado that the defenders of traditional international law were not necessarily unaware of what was happening around them. On the contrary, those of them who were legal advisers to their governments were in daily contact with the realities of international life. He had examined and explained the question of reservations objectively and considered that, after a three-day discussion, the Commission should decide whether to abandon the search for agreement on that capital issue, or whether there was any basis for agreement and if so, what that basis was.

40. There were different ways of stating the fundamental rule. Mr. Tunkin had taken one of the possible courses by emphasizing the freedom of all states to propose reservations; he (Mr. Gros) could accept that proposition, provided there was no mention of a "right" to make reservations, for no such right existed, only a faculty to propose.

41. Personally he would state the rule differently. He would say that if a treaty laid down the conditions on which reservations were admitted, those conditions must be applied, and that no reservation which failed to fulfil the conditions could be regarded as valid. Actually, there

was little difference over that starting point in the reasoning, so long as it kept to the question of the formulation of reservations; the real difference began with the question of their validity.

42. It could be regarded as a rule of law that a multi-lateral treaty was one in which the system of reservations was regulated. The first difficulty that arose was that certain treaties were silent on the subject of reservations and Mr. Ago had rightly pointed out that in most cases the silence of the treaty was due to the fact that no agreement had been reached on the clause concerning the faculty of making reservations. For example, if a clause admitting reservations to all the provisions with the exception of three articles were submitted to a conference of ninety-nine states, and sixty-five states voted in favour, there would be no two-thirds majority and consequently no reservations clause. If, in such a case, certain states, under the proposed system of complete freedom to make reservations, submitted reservations to the three articles which the majority of sixty-five states regarded as essential, would it have to be admitted that a minority of the parties, as a result of the silence of the treaty, could make reservations which were unacceptable to the majority? He did not think that he could be labelled as reactionary in expressing the view that the fundamental factor of such a case was equality before the law for all the states which had concluded a treaty. The supremacy of international law must be recognized; it should, therefore, be clearly recognized that some reservations were acceptable and others were not. When it was through the accident of a vote, the lack of a majority, that a treaty contained no clause on reservations, then reservations were only possible with the consent of the parties.

43. The special rapporteur had rightly provided in his draft articles that reservations incompatible with the object and purpose of the treaty were inadmissible. But it was at that point that opinions began to differ. In the absence of a specific reservations clause, who was to decide whether a reservation was admissible or not? In view of the difficulty of deciding that point, he was in favour of the second alternative suggested by the special rapporteur, which consisted in concerted examination of the reservation by the states concerned. The uniformity of international law did not permit the fragmentation of a collective treaty into a series of bilateral relationships; to those who asserted that the adoption of such a system would represent progress in international law, he would reply that the adoption of such a system, the triumph of bilateralism, would set international law back three hundred years to the age of individual relationships between one state and another, one city and another. Collective treaties must not be destroyed; if states accepted a legal regime, it was dangerous deliberately to fragment the agreement by allowing all or a large number of states to go back on the agreement by making reservations to those articles which did not square with their own views.

44. He believed that all members were prepared to accept the principle that, if a treaty contained formal clauses, those clauses should be applied. If a reservations

clause had been discussed and not adopted, the Commission might consider some special provision to cover that situation and that provision should refer to the agreement of all the parties to the treaty. If the negotiators had not considered the question, a solution should be adopted which took account of the realities of life. For example, in a case like that of the 1960 Convention on the Safety of Life at Sea, which laid down certain measures for protecting the health of the population of ports visited by certain kinds of ships, would those members who claimed that they were in favour of progress really be satisfied if their states accepted a reservation by another state which would have the effect that ships of those kinds could enter its ports without observing the precautions laid down by the Convention and without inspection? Could bilateral acceptance of such a reservation, which was incompatible with the object and purpose of the treaty, and entailed danger to the health of the population, be regarded as progressive? The answer was obviously in the negative. Not all reservations were acceptable. The Commission must have the courage to recognize that and to provide that the question of their acceptability should be decided by objective examination. Individual decision by each state could be no guarantee of objectivity.

45. Mr. LACHS said that he had originally wished to speak only on the procedural point raised by Mr. Verdross, but since Mr. Gros had referred to substance, he felt obliged to make some reply. Mr. Gros and some other members had gone so far as to assert that the admissibility of reservations carried with it the danger of destroying international law. No member of the Commission was interested in the destruction of international law; their presence in the Commission served as a proof that they were interested not only in maintaining international law, but in promoting its progressive development.

46. The interpretations of the word "progress" during the debate had admittedly been contradictory. Mr. Ago had said that he could not rejoice at the existence of reservations; but he (Mr. Lachs) would submit that there was no question of rejoicing at or deploring the existence of certain institutions of international law. It was essential to bear in mind the facts which were the outcome of a historical process; a broad view of the issue of reservations showed that they were a phenomenon of a changing age, and had reached the cross-roads between the majority rule and the unanimity principle. Some members wished to press the majority principle as the acme of wisdom and law; but he would recall the fifty-year-old dictum of an eminent French jurist, "*la majorité ne fait pas loi en matière internationale*", which still held good. The institution of reservations had grown out of the tripartite relations between the phenomenal extension of the majority principle, the recession of the unanimity rule and the principle of the equality of states. References to progress and to the defence of international law could hardly be reconciled with advocacy of what would in fact become closed treaties, open only to some states. On the



contrary, it was by opening the way to increasingly wide participation, compatible with the vital interests of states, that a contribution could be made to the progress of international law. Closed treaties had represented an unfavourable tradition of international law, irrespective of where and when they were concluded.

47. The Commission should assume a certain wisdom on the part of states, and leave it to them to ponder and decide in each case whether it was more important to extend participation as widely as possible or to establish certain bilateral relationships within the treaty. States did not take such decisions lightly, especially in the case of treaties in which they were vitally interested. Naturally, the ideal situation was one where states subscribed to the whole treaty and where they all took an equal interest in the instrument; but it was essential to take into account the variety of interests involved in modern treaty-making. The solution offered by the special rapporteur allowed for reliance on the wisdom of states and for the compatibility of the treaty provisions with state interests; accordingly, that was the solution which should be adopted.

48. While accepting certain general principles, Mr. Gros had implicitly advocated reintroducing the majority principle by the back door, which would fundamentally alter the position.

49. The Commission should proceed with circumspection so as not to take any step that might be at variance with practice and what was an established institution of international law. Since the General Act of Brussels of 1890 many thousands of reservations had been made.

50. While appreciating the reason behind Mr. Verdross's procedural suggestion, he greatly doubted whether it should be followed. Such states as would reply, and they might be few, would only indicate what was their own practice and that was already known to the Commission. Furthermore, states had already expressed their views concerning reservations on numerous occasions in the General Assembly. If those which replied were fairly evenly divided, the situation would in no way be changed. His final objection was that, by asking states for guidance the Commission would seem to be anticipating the issue and binding itself to follow the majority view. Such an outcome would be extremely prejudicial to the Commission's prestige, and any hesitancy on its part would diminish its standing in the eyes of the world. The Commission should be in a position to come to a decision in the light of practice during the past fifty years and more particularly the past decade.

51. Mr. TSURUOKA asked whether the Commission had reached any decision on the suggestion by Mr. Rosenne that the compatibility test should also be applied to consent or objection to a reservation.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had not yet taken any decision, but he had suggested, as part of the general framework of the articles, that states making a reservation and those consenting or objecting to it, should have regard to the compatibility principle.

53. Mr. BARTOŠ said that although, as he had already indicated, his own views had changed during the past ten years and he had come round to accepting reservations as a necessary institution, he nevertheless considered that regulatory provisions should be laid down to check the possibility of abuse.

54. He also considered that reservations should be part of the contractual system, and he could not subscribe to the theory that, since states in the exercise of their sovereign rights could make reservations, others were bound to accept them. To his mind, that reasoning meant an expansion of the sovereignty of the reserving state at the expense of the sovereignty of those states which had accepted the treaty in complete good faith and without reservations. Some means should be found of reconciling the freedom to make reservations with respect for the will of the parties in the sense suggested by Mr. Tunkin, if he had understood him correctly.

55. With regard to Mr. Verdross's suggestion, he was not in principle opposed to the idea of the Commission submitting alternatives to states in its draft but considered that such a course should only be adopted when the Commission was very divided or very hesitant and needed guidance from governments to help it form an opinion. In the present instance, although there was some difference of opinion, there appeared to be sufficient support for the special rapporteur's approach. He favoured the idea of Mr. Jiménez de Aréchaga that the difference of opinion should be reported in the commentary and that the special rapporteur's proposals should be accepted, subject to possible amendments by the Drafting Committee.

56. With regard to the rule for the acceptance or rejection of reservations, if the treaty was silent on the subject of reservations, the presumption was that states which did not object accepted the reservation and there the two-thirds majority rule, which was that commonly adopted in United Nations conferences for the adoption of texts, should be applied. If a treaty specifically stipulated a two-thirds majority rule and states neglected to register their objection to reservations, then, if one-third expressly opposed them, the reservations should be regarded as rejected absolutely *erga omnes*. In other cases the inter-American system, as proposed by the special rapporteur, should be followed.

57. Mr. LIU said that an excessively flexible rule concerning reservations might have an adverse effect on the conclusion of multilateral treaties by diminishing the inducement to states to compromise and subordinate their individual views to that of the majority at the negotiating stage; it could thus have certain consequences even before the treaty was drawn up.

58. The inter-American system worked admirably for a closely-knit group of states with a great deal in common, and the stage at which the Secretary-General of the Organization of American States notified parties of a reservation and, where necessary, sought to persuade the reserving state to bring the reservation more into line with the object and purpose of the treaty, was almost tantamount to resumption of negotiations. United

Nations practice did not go so far and its Secretary-General was only required to transmit reservations to the other contracting states, a process which committed no one to any appraisal of the validity of the reservation itself. The procedure envisaged in the special rapporteur's draft seemed to go somewhat further and he doubted if states would be prepared to accept it.

59. He was not denying the utility of reservations or arguing in favour of the unanimity rule for their acceptance; even with a strict rule there was nothing to prevent states from making reservations.

60. Mr. EL-ERIAN said that he had already explained his general attitude to the question of reservations but wished to make some further comments in the light of the subsequent discussion. Little purpose would be served by the Commission adopting a rigid attitude in such a controversial and delicate matter: it should frame a flexible, acceptable and constructive rule appropriate to the needs of the international community.

61. The principle of the integrity of treaties had perhaps been overstressed. Although as far as possible obligations under a treaty should be uniform, he doubted whether reservations to any of the provisions would in fact seriously impair the integrity of a treaty. If there were such a danger, presumably the negotiating states would insert an express prohibition against reservations to specific provisions which they regarded as essential, as had been done in the case of the Geneva Conventions on Fishing and Conservation of the Living Resources of the High Seas and on the Continental Shelf of 1958 and the Convention on the Liability of Operators of Nuclear Ships signed in Brussels only five days previously. He appealed to Mr. Gros and Mr. Ago not to carry to extreme lengths their defence of the principle of integrity.

62. It was, in his opinion, equally important to secure the widest possible participation in general treaties, particularly in order to obviate the possibility, implicit in the comments of the United States Government in connexion with the choice between the Commission's draft on diplomatic privileges and immunities being embodied in a draft convention or in a code, that a convention codifying customary law which failed to secure a large number of ratifications would weaken that law.

63. The argument that rules restricting the effects of objections to reservations impaired the sovereignty of states could be advanced against any rule which in some way or another limited the absolute freedom of states. The Commission should be guided by what was necessary and useful. The issues under discussion were important and called for clear-cut decisions.

64. On the procedural question, in general he favoured the special rapporteur's approach and agreed that the points on which views had diverged could be stated in the commentary. The Commission was, after all, engaged on the first reading, and there would be ample opportunity to reconsider both the texts of the articles and the commentary.

65. Mr. AGO said that, to state the problem in its simplest terms, there was no dispute over the need for

reservations, which all members recognized; the only question was how reservations could be prevented from nullifying the object and purpose of the treaty. Admittedly the remedy of giving the General Assembly power to decide by a majority, where the treaty was silent because no decision had been possible as to which articles were essential, whether or not a reservation was compatible with the objects and purpose of a treaty, was a makeshift, but he could not agree that it would destroy the very essence of the institution of reservations. There was no reason why failure to reach agreement on the inclusion in the treaty itself of a clause indicating to which articles no reservations could be accepted should prevent the negotiating states from reaching agreement on that point at a later stage, and particularly as to the itself into believing that any progress had been made.

66. Admittedly questions of interpretation might arise as to whether a particular article of a treaty was essential and not open to reservations, and the objections to submitting such a question for decision to a body like the General Assembly rather than, as he would prefer, a judge, were only too obvious. But the decision of a collegiate body was always to be preferred to a series of contradictory decisions taken individually by the different states. Since, however, the majority of members did not favour such a system, they should at least be clear as to the implications of that choice and recognize that, because an objective rule could not be devised, the logical consequence was that the matter had to be left for decision by each state, with the serious drawback that one state's decision as to the essential character of an article might conflict with that of another state. That was the so-called "classical" rule of which he had spoken earlier. If the Commission could not do better than bow to practice, at least it should not deceive itself into believing that any progress had been made.

67. In any case, the Commission should at all costs avoid admitting tacitly that, where the treaty was silent, any provision could be subject to reservations and any reservations could be accepted. In every treaty there were some articles to which reservations could not be accepted if the object of the treaty was to be safeguarded. Even if the Commission could do no more, it should at least urge states to be sure to include reservations clauses in treaties specifying which articles were essential, and to take seriously their responsibilities towards other parties when they accepted reservations to what might be essential provisions. A statement on those lines should be inserted either in the draft articles to be prepared by the Commission or at any rate in the commentary.

68. Mr. de LUNA said that reservations were necessary in modern treaty-making because of the evolution from the absolute to the democratic form of government with parliamentary control over international relations, the trend towards the universality of international law, and the substitution of the majority rule for the unanimity rule in the adoption of treaties.

69. Obviously, reservations affected the integrity of treaties and, even if the principle of reciprocity were applied, could produce inequality as between the reserving and the objecting state, because the latter,

though not bound by the treaty *vis-à-vis* the former, was bound with regard to the other parties which had made no objection by virtue of the principle of the indivisibility of rights and obligations. In the circumstances, the reserving state might obtain certain advantages. Nevertheless such drawbacks were outweighed by the value of reservations which enabled a minority to undertake to be bound by part of a treaty, a solution which was preferable to their remaining outside altogether.

70. Incompatibility with the object and purpose of a treaty was unfortunately an objective criterion which could only be applied subjectively. In the absence of any other solution, each state should be free to judge for itself.

71. The Commission should take account of practice and respect the express will of the parties. For that reason, he thought that the articles under discussion should be based on the inter-American system.

72. He had no firm opinion about the procedural suggestion put forward by Mr. Verdross and agreed with the view expressed by Mr. Jiménez de Aréchaga.

The meeting rose at 1 p.m.

### 655th MEETING

Friday, 1 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (Item 1 of the agenda) (*continued*)

#### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to discuss the texts submitted by the Drafting Committee.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that before the Commission took up the Drafting Committee's texts he would like to have guidance about how it wished him to modify the commentary, which had been prepared primarily for the Commission's own use and contained numerous references to views expressed at the eleventh session.

3. Mr. BRIGGS suggested that the special rapporteur should be requested to redraft the commentary so as to give less prominence to what the Commission had thought in 1959 and more space to explaining the reasons for the decisions reached in 1962.

*It was so agreed.*

#### ARTICLE 1. — DEFINITIONS

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared the following new text for a paragraph 1(a) and paragraph 2 of Article 1:

"1(a). Treaty means any international agreement in written form, whether embodied in a single instru-

ment or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), which is governed by international law and is concluded between two or more states or other subjects of international law.

"....."

"2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any state."

5. The Commission would note that, in accordance with its wishes, the Committee had amalgamated the definitions of treaty and international agreement in a single clause and had dropped the reference to the possession of international personality as well as the reference to intention in the statement that the agreement was one governed by international law. The Drafting Committee had been hesitant about whether or not to retain the list of appellations attached to treaties, which was not exhaustive, but had decided to retain it so that that point might be considered by the Commission. As special rapporteur, he believed the list to be useful for illustrative purposes, because of the considerable uncertainty as to what was covered by the term "treaty".

6. Mr. TSURUOKA suggested that the whole definition should be qualified by the proviso "for the purposes of the present articles".

7. Mr. CASTRÉN said the new draft of paragraph 1 was a great improvement on the original definition but it failed to make clear whether or not contractual international relations between states and individuals were covered by the draft. Some explanation on that point was certainly necessary in the commentary.

8. He agreed with Mr. Tsuruoka that the article should be prefaced by the proviso he had stated.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the whole series of definitions would certainly be prefaced by the words mentioned by Mr. Tsuruoka. The draft they were discussing related only to one definition.

10. Mr. ROSENNE said he hoped that the list of instruments placed in parentheses was not intended to imply any legal hierarchy among those mentioned. The order was somewhat puzzling; perhaps the most satisfactory solution would be to make it alphabetical and make it clear that the list was merely illustrative by inserting the words "such as" at the beginning.

11. It might be necessary to include in article 1 a separate definition of a treaty in simplified form.

12. Mr. PAREDES pointed out that the element of consent had been altogether overlooked in the definition, which should be amplified by a reference to the fact that international agreements were instruments freely and spontaneously concluded by the parties.

13. Mr. de LUNA said that the Commission would have to give some thought to the fact that individuals and bodies corporate could be subjects of international

law and in the conclusion of treaties could enjoy a special position, whose curious juridical nature he would not discuss. Three examples were the 1937 Convention modifying the International Convention signed at Paris on 21 June 1920 for the creation of an International Institute of Refrigeration,<sup>1</sup> the Agreement with a view to the administrative and technical re-organization of the Southern Railway Companies system together with a Protocol of signature and a provisional Protocol of 1923 between Austria, Hungary, Italy, the Kingdom of the Serbs, Croats, Slovenes and the Südbahn,<sup>2</sup> and the Protocol between the Federal Republic of Germany and the Conference on Jewish Material Claims against Germany.<sup>3</sup> He was not proposing any change in article 1 to take account of that fact; it should be made clear in the commentary, however, that in no case could the phrase "other subjects of international law" cover individuals.

14. Mr. CADIEUX said that, although there was some advantage in adopting an alphabetical order for the list in brackets, such a rearrangement would give rise to difficulties in translation. It should be indicated, however, that the list was not in order of importance.

15. He agreed with Mr. Rosenne that a definition of a treaty in simplified form was necessary, since it occurred often in practice.

16. He suggested that the words "two or more" could be deleted as redundant.

17. Mr. TUNKIN said that the Commission had agreed at its eleventh session, and seemed still to agree, that the definition should cover treaties between states, treaties between states and international organizations and treaties between international organizations, whereas it had decided that the articles themselves should be concerned with treaties between states. The word "or other subjects of international law" might not express that intention clearly and were open to misconstruction owing to the controversy as to whether individuals could be subjects of international law.

18. Mr. BRIGGS said the definition in paragraph 1 (a) was acceptable, but unwieldy because of the inclusion of the passage in parentheses. The point should be dealt with in a separate paragraph, as had been done in article 4 of the Harvard draft.

19. It was undesirable that paragraph 2 should be separated from paragraph 1 (a) by a whole series of other definitions; the latter could be embodied in the next article.

20. He suggested, as a drafting improvement, that the words "the present articles" in paragraph 2 should be changed to "these articles".

21. Mr. AMADO said that, although he was not opposed to the Drafting Committee's text, he was troubled by a seeming tautology. It was hardly conceiv-

able that an international agreement could not be governed by international law.

22. He was somewhat concerned also at the juxtaposition, in the list within parentheses, of important formal instruments and informal ones.

23. Some explanation, if only in the commentary, should be given of what was meant by "other subjects of international law". Presumably the Drafting Committee had had good reason for using that term, which raised the difficult question whether individuals could be subjects of international law, a question which had been discussed at length in the Commission in connexion with the formulation of the Nuremberg principles.

24. Mr. GROS, speaking both as Chairman of the Drafting Committee and as a member of the Commission, suggested that the answer to the question raised by Mr. de Luna and Mr. Amado could be found in the special rapporteur's commentary, where the concept of subjects of international law was linked with that of capacity to conclude treaties.

25. He believed the Commission's view was that the cases mentioned by Mr. de Luna should be excluded from the scope of the draft because federations of associations, for example, had no capacity to conclude a treaty. In the case of Mr. de Luna's third example, the possibility of such a body entering into a contractual type of relationship had been recognized by the other partner, but the resultant instrument was not a treaty within the meaning of the Commission's draft. Mr. Tunkin had rightly pointed out that the intention was to deal only with treaties, whatever their designation, concluded between states, between states and international organizations, or between international organizations.

26. Mr. BARTOŠ said that Mr. Amado's first criticism of the text would be justified if the Commission failed to define which international law—public or private—governed treaties. There could be international agreements governed by private international law, an example of which was that concluded between Yugoslavia and Switzerland concerning the insurance of ships leased to the latter at a time when Yugoslavia had still been neutral during the Second World War. At the end of the war, seeing that a ship had been seriously damaged while in Swiss service and Switzerland had been obliged to insure the ship on Lloyds policy terms, a dispute had arisen. To settle it, a *compromis* had been drawn up for submission of the agreement to arbitration under private international law. The Drafting Committee and the special rapporteur should consider inserting the appropriate qualification either in the text of the definition or in the commentary.

27. On the question of the reference to "other subjects of international law", he recalled the ruling of the International Court in the Anglo-Iranian Oil Company case and that one of the grounds on which the Iranian Government had contested the Court's jurisdiction had been that the dispute was between a private company and Iran, and not between the United Kingdom and Iran. Yet in the Commission it had been claimed that

<sup>1</sup> League of Nations *Treaty Series*, Vol. CLXXXIX, p. 361.

<sup>2</sup> *ibid.*, Vol. XXIII, p. 255.

<sup>3</sup> United Nations *Treaty Series*, Vol. 162, p. 270.

"international" companies should have international legal personality and be the subject of *compromis* for international arbitration in disputes with states.

28. Even before the Anglo-Iranian Oil Company case, the United States Government had perceived the problem and initiated the practice of concluding, simultaneously with the signature of the contract between the foreign state and an American company, a treaty with the state in question. By those treaties, known as guaranty agreements, it espoused in advance the claims of private United States companies which had concluded concessionary or financial agreements with another state. That method enabled the United States Government, if necessary, to protect United States' interests by direct intervention, in accordance with international law, by virtue of the guaranty agreement and not of a substitution; in other words, to support a claim at private international law by diplomatic action. In his opinion, in such cases, it was only the guaranty agreement that was governed by public international law. Thus the articles being prepared by the Commission did not affect agreements with companies, but only treaties between states and other true subjects of international law.

29. In his opinion the examples mentioned by Mr. de Luna showed what kind of international agreements were a mixture of public international law treaties and contracts under private international law. They should be mentioned in the commentary but, at least as far as the first reading was concerned, should be excluded from the scope of the draft articles.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that if the Commission so wished, the possibility of individuals being parties to a treaty could be more expressly excluded, but the Drafting Committee had thought that if the definition were read as a whole no misunderstanding on that point could arise. The difficulty in following the course suggested by Mr. Tunkin was that the rest of the draft dealt almost exclusively with treaties concluded between states, and no decision had yet been taken as to whether a separate chapter was to be prepared on treaties between international organizations.

31. The phrase "or other subjects of international law" had been used advisedly so as not to exclude certain entities such as the Holy See, and belligerents which had received *de facto* recognition. Originally, he had excluded individuals by inserting the qualification of treaty-making capacity, but the Drafting Committee had thought that unnecessary.

32. Though there was a certain tautology in the language, the emphasis on the international character of the treaty was necessary to keep the definition on the proper plane.

33. The answer to Mr. Amado's question why it was necessary to describe the instrument as governed by international law had been given by Mr. Bartoš, who had made a strong case for its retention. In addition to his excellent examples, there were treaties of a tripartite character such as those concluded between the International Bank, a private corporation and a government.

34. He saw no serious objection to the somewhat rough and ready order of the list contained in brackets. It was certainly not intended to indicate an order of importance.

35. He assured Mr. Rosenne that a definition of a treaty in simplified form was to be included. Such a definition was important for the interpretation of certain articles, but the Commission had not yet formulated the definition.

36. The drafting suggestions put forward by Mr. Briggs were radical and in his opinion would not make for elegance. He still continued to believe that it would be neater to start with an article on definitions and to deal subsequently with the scope of the articles in article 2; he saw no great drawback in paragraph 2 being separated from paragraph 1 (a) by the other definitions.

37. Mr. de LUNA said that, in the interests of clarity and in order to exclude from the application of the draft all concessionary or guaranty agreements, the word "public" should be inserted after the words "which is governed by". He made that suggestion although aware that the remainder of the draft was concerned with public international law.

38. Mr. VERDROSS proposed that the words "which is concluded between two or more states..." should be placed before "and is governed by international law". The existing order of the two provisos in question was not logical: the more important one, which related to the fact that an agreement, in order to be a treaty, had to be concluded between two or more states or other subjects of international law, should be placed first.

39. In order to avoid giving the impression that individuals were included in the expression "other subjects of international law", it would perhaps be advisable to specify that the subjects in question were communities.

40. The term "international" before "agreement" was redundant in view of the subsequent qualification that the agreement must be "governed by international law". The repetition did no harm, however, and he would not press the point.

41. Mr. TUNKIN said that, in the light of the explanations given by the special rapporteur, he accepted the retention of the phrase "or other subjects of international law". The phrase could cover, in addition to the examples already given, a nation which was fighting for its independence but which did not yet constitute a state. The fact that there was no intention to cover individuals could be made clear in the commentary.

42. Lastly, he supported the proposal of Mr. Verdross that the order of the two final provisos should be reversed, though the special rapporteur's wording should be retained.

43. Mr. AMADO said that, in spite of the explanations given by the special rapporteur, he was still uneasy about the use of the expression "which is governed by international law".

44. The expression was adequate if it was merely intended to cover questions of capacity, of the free consent to the treaty and of the other constituent elements of the intention of the states parties to the treaty.

But as far as the contents of a treaty were concerned, it happened very often that agreements between states were made subject to the private law of one of the two countries concerned. An example was the arrangements relating to wheat which existed between Argentina and Brazil. Those agreements constituted treaties; they were entered into within the framework of international law, but were governed as to the substance of their provisions by private municipal law.

45. Sir Humphrey WALDOCK, Special Rapporteur, replied that that was precisely why, in his original draft, he had used the expression "an agreement intended to be governed by international law". The expression "intended to be governed" left the states parties free to decide that the subject-matter of the treaty would be governed by private municipal law. The Commission had, however, decided to delete the words "intended to be".

46. With regard to Mr. Paredes' proposal, the question of freedom and spontaneity in the formation of the treaty would arise at a later stage in the draft articles. The point was a proper one, but hardly suitable for discussion at the definitions stage.

47. Mr. GROS said that the point mentioned by Mr. Amado had been discussed by the Commission when it had first considered the definition of "treaty". The problem of international contracts was a very real one, but the Commission was not called upon to deal at the moment with the nature and force of those contracts between two states, or between a state and a private company or individual. It would therefore be sufficient if the Commission indicated in the commentary that the problem of international contracts was not dealt with in the draft articles.

48. All countries had long-term contracts for the supply of certain commodities, but those contracts did not necessarily constitute treaties within the meaning of the draft articles. Of course, the position was different where contracts entered into by two or more states were governed by international law by the will of the parties; then they were genuine treaties.

49. With regard to Mr. de Luna's suggestion that the expression "public international law" should be used, certainly in French "*droit international*" was quite proper in the context; there could be no doubt in the minds of the reader that public international law was meant. That became all the clearer if the order of the last two provisos were reversed, as proposed by Mr. Verdross.

50. Mr. PAREDES said that, while an individual could not be a party to a treaty, private interests could be protected by a treaty. It was quite common for two states to enter into a treaty for the precise purpose of protecting the interests of private corporations and individuals. The contracting parties to the treaty, however, were invariably states.

51. He suggested therefore that, in article 1(c), the term "Party" should be defined as meaning "a state or other collective subject of international law". The use

of the adjective "collective" would exclude individuals.

52. Mr. CASTRÉN said that Mr. Verdross's proposal for the reversal of the order of the last two provisos was acceptable, if made as indicated by Mr. Tunkin.

53. He hesitated, however, to support Mr. Verdross's other suggestion for the introduction of the concept of a "community", because it did not cover international organizations.

54. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the Commission was defining "treaty" solely for the purposes of the draft articles, and consequently the explanations given by Mr. Gros constituted an adequate answer to the point raised by Mr. Amado. It would be sufficient to indicate in the commentary that the Commission did not take any position regarding the legal nature of the international contracts in question.

55. He could not accept the suggestion of Mr. Paredes for the insertion of the term "collective" in the definition of "party" in article 1(c); the interests of corporations were the most important which the parties had in mind when concluding a treaty which affected private interests and a corporation was surely a collective body.

56. He accepted the proposal of Mr. Verdross for the reversal of the order of the last two provisos, as modified by Mr. Tunkin.

57. Mr. AMADO said that he was still not satisfied with the explanations offered as to why international agreements had to be described as being governed by international law. If the international agreements to which he had referred were not treaties, why were they registered with the United Nations and published in the United Nations *Treaty Series*?

58. He was still convinced that the expression "governed by international law" was ambiguous and he suggested that it should be replaced by the expression "considered as such by international law". That formulation would make it clear that the definition covered all agreements regarded as treaties in international law and not merely those agreements the terms of which were governed by international law.

59. Mr. BARTOŠ said that the proviso "governed by international law" provided a clear line of demarcation as far as past treaties were concerned, because former international law practice had not confused treaties and contracts at private law, but the contemporary situation was more complex.

60. Numerous technical assistance agreements had been entered into by the United States of America with other countries. In many respects those agreements resembled private law contracts, but they nonetheless constituted genuine treaties subject to public international law. Although, as far as the performance of the contractual obligations was concerned, those agreements stipulated the application of certain provisions of United States private municipal law, they had all the distinctive features of international treaties. First, the jurisdiction of United States courts was expressly excluded; secondly, the agreements were registered with the United Nations. Moreover, certain discretionary powers in respect of

implementation and suspension were retained by the President of the United States, powers which were out of keeping both with a contractual relationship in private law and with the principle of the equality of states.

61. The practice of states thus showed that there were a great many agreements partaking both of contract and of international treaty; as a rule, however, those agreements were governed by international law. In view of that complex situation, he thought the formulation should stand, with the order of the two provisos reversed in the manner suggested by Mr. Verdross and agreed to by the special rapporteur.

62. He agreed with Mr. de Luna that in everyday use, the expression "international law" meant public international law. For that reason he did not insist on the insertion of the qualifying adjective "public" before "international law" in the text. He urged, however, that the commentary should explain that in the draft articles the term "international law" meant public international law.

63. He did not favour the introduction into the text of the articles of any reference to communities. That could be dangerous and might encourage claims that communities such as minorities would be considered as having legal personality in public international law, seeing that they had been recognized as having certain prerogatives in international law but were not capable of being parties to treaties. A term of that kind was not appropriate to the object of their endeavours.

64. Mr. AGO urged that the text proposed by the Drafting Committee should be adopted with the sole change of the inversion of the order of the last two provisos. That change should meet the point raised by Mr. Amado. The first proviso would specify that the treaty was concluded between two or more states or other subjects of international law; the second proviso would automatically exclude international contracts even when concluded between two states, since those contracts were not "governed by international law". Naturally, it would be necessary in many cases to examine the intention of the parties to the agreement: if the parties, although states, had intended to undertake only obligations under municipal law, the agreement was a contract and not a treaty.

65. He agreed with Mr. Bartoš that all references to "communities" should be excluded. The term would not cover the Holy See, perhaps the most important example of those "other subjects of international law" which concluded treaties.

66. Moreover, if the definition were to specify that it covered only communities, it could lend itself by implication to the erroneous interpretation that the Commission might consider individuals as subjects of international law. In fact, even those writers who, unlike himself, considered individuals as subjects of international law, had never suggested that an individual could be a party to a treaty; therefore the proposed specification was entirely unnecessary.

67. He agreed with Mr. Gros that it was unnecessary to qualify "international law" by the word "public". The

point should simply be referred to in the commentary.

68. Mr. BRIGGS said he withdrew his proposal to transfer to a separate paragraph the list of instruments in parentheses.

69. Many of the difficulties encountered during the discussion had been due to the use of the title "Definitions" in article 1. In fact, the Commission did not propose to lay down theoretical definitions, but merely to study the manner in which certain terms were used in the draft articles. He therefore suggested that the title of article 1 should be amended to read "Use of terms".

70. The CHAIRMAN said it appeared to be generally agreed that the final passage of the paragraph should be amended so that the first proviso, "which is concluded between two or more states or other subjects of international law", would precede the second proviso, "and is governed by international law".

71. If there were no objection, he would consider that the Commission agreed to refer the article, with that amendment, back to the Drafting Committee for final drafting.

*It was so agreed.*

The meeting rose at 11.40 a.m.

## 656th MEETING

*Monday, 4 June 1962, at 3 p.m.*

*Chairman: Mr. Radhabinod PAL*

### Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (*continued*)

ARTICLE 17. — POWER TO FORMULATE AND WITHDRAW RESERVATIONS (*resumed from the 654th meeting*)

ARTICLE 18. — CONSENT TO RESERVATIONS AND ITS EFFECTS (*resumed from the 654th meeting*)

ARTICLE 19. — OBJECTION TO RESERVATIONS AND ITS EFFECTS (*resumed from the 654th meeting*)

1. The CHAIRMAN invited the Commission to resume its consideration of articles 17, 18 and 19 on reservations.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that there seemed to be a strong majority in the Commission in favour of the principle stated in Alternative A, that in the case of general multilateral treaties the admissibility of reservations should be decided by each state within the framework of its relations with the reserving state. Some members had had difficulty in accepting that principle, but seemed to have agreed that for the time being the Commission could do little more than refer in the commentary to its disadvantages. Thus, the whole question seemed to be resolving itself into a matter for the Drafting Committee.

3. Mr. Ago had said that to adopt that principle could not be regarded as a very progressive step; he (the



special rapporteur) was inclined to agree, but felt that the principle approved by the majority of the Commission was the best solution in the circumstances.

4. The CHAIRMAN said he agreed with the special rapporteur that the majority of the Commission seemed to be in favour of the principle stated in Alternative A. The question therefore seemed ripe for referral to the Drafting Committee.

5. Mr. BRIGGS said he was not sure that there was a majority in favour of Alternative A. Although he would not ask for a vote on the question, he was against a provision that left the question of the admissibility of reservations to be settled between the reserving state and individual parties objecting to or accepting the reservation. In his opinion, the progressive development of international law had led from the abandonment of the unanimity rule to a swing towards the majority rule.

6. Mr. TSURUOKA said he hoped it was understood that the proposal for a collegiate decision on the admissibility of reservations, Alternative B, should be explained in detail in the commentary.

7. Mr. GROS said he agreed with Mr. Briggs that it was inappropriate to refer for the time being to a majority or minority view on the question, since the Chairman had wisely avoided taking votes, so as not to accentuate differences of opinion. Although there were two distinct trends of opinion in the Commission, discussion might eventually reconcile them. It could not yet be said that the Commission had agreed to propose as a rule the bilateral view of the effects of reservations. It would therefore be wiser to resume the study of other aspects of the law of treaties and defer further discussion on the subject of reservations, which was the most important before the Commission, in order to try to reach a joint solution.

8. The CHAIRMAN said he thought that the Commission's view on the main question before it, that of the admissibility of reservations, had emerged clearly enough, since nearly all members had expressed their opinion, but if any member considered that further discussion was required, he would not close the debate.

9. Mr. GROS said that a number of members were not present at the meeting. Perhaps a discussion on the three articles might be suspended for two or three days, during which time the articles prepared by the Drafting Committee could be considered.

10. The CHAIRMAN said that he would not press for a vote on the subject if there were any doubt as to whether the Commission had reached a decision on the matter.

11. Sir Humphrey WALDOCK, Special Rapporteur, thought that the Commission could give an indication to the Drafting Committee that the second draft of the articles should be based on the principles contained in his report. That would not, of course, constitute a final commitment on the part of the Commission.

12. Mr. YASSEEN pointed out that the special rapporteur had asked members of the Commission to give their views on the issue, and that those views had made it

quite clear where the dividing line lay between the majority who were in favour of the special rapporteur's solution and the minority who were against it.

13. Mr. AMADO said that, in the matter of reservations to multilateral treaties, international law was undergoing a radical transformation; it was changing from contract law and turning, in the case of general multilateral treaties, into quite a different legal system. He fully supported Mr. Yasseen's views; the special rapporteur's report, based on the English legal system, had been supported by members representing a wide variety of the legal systems of the world.

14. It might be said that the sole supporters of the contrary view were the exponents of the French legal system.

15. Mr. GROS said that French publicists had been neither the last nor the only ones to study the distinction between the law-making treaty and the contractual treaty, a distinction which was still of some importance at the present day. In the case of a law-making treaty like that being drafted by the Commission, he could not personally accept the idea that two states could to an unlimited extent vary a multilateral law-making treaty by means of a bilateral relationship without that system leading to the destruction of the very conception of the multilateral treaty. He would continue to hold that view, even if he remained in a minority of one. To convert law-making treaties into a series of different bilateral relationships was no contribution to the progressive development of international law.

16. Mr. CADIEUX said that the Commission was faced with the choice between suspending the discussion on reservations and referring the question to the Drafting Committee. He did not think that the time had yet come to take the former course, since absent members should be given an opportunity to comment; nor did he think that it would be desirable to take a vote, even though that might simplify the Drafting Committee's task.

17. The CHAIRMAN said it would be inadvisable to refer the articles to the Drafting Committee without a decision on the main principles concerned. For example, article 19, sub-paragraph 4(c), stated the principle that the effect of a reservation was confined to relations between the objecting and the reserving state, but several members had suggested that the question should be settled by a majority decision. The Drafting Committee could not take any useful action if the article were simply referred to it without any clear indication of the Commission's views.

18. Mr. YASSEEN said he did not think that either Mr. Gros or Mr. Briggs could deny that there was a preference in the Commission for the special rapporteur's solution. Of course, the two conflicting views could be discussed again when the Drafting Committee had reported back to the Commission.

19. Sir Humphrey WALDOCK, Special Rapporteur, said he thought the discussions of the past week had provided all the necessary indications. It was clear that the second draft of the three articles should be based on Alternative A, and not on Alternative B.

20. Mr. GROS said he agreed that the articles could be referred to the Drafting Committee, but only on the understanding that the Commission had made no definite pronouncement on certain important points, such as the one dealt with in article 19, paragraph 4.

21. The CHAIRMAN said that the problem of the applicability of the compatibility test to objections and consent would become less acute if the special rapporteur's solution with regard to the effect of objections to reservations were adopted.

22. Mr. ROSENNE said he was not abandoning his view that the compatibility rule was inherently applicable to objections to reservations.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like to have a few minor points of substance clarified. The Drafting Committee should be quite clear as to whether or not the Commission agreed to divide the whole question of reservations into the two spheres of general multilateral treaties, on the one hand, and other treaties, whether bilateral or plurilateral, on the other hand. In the case of plurilateral treaties, it would obviously be necessary to safeguard certain positions, such as the so-called inter-American practice. In other words, the Commission had to decide whether the residual rule for treaties other than general multilateral treaties was to be the unanimity rule.

24. The CHAIRMAN said that three classes of treaties were dealt with in article 19, paragraph 4. The rule had not been questioned in connexion with the treaties referred to in sub-paragraphs 4(a) and (b), since the debate had centred on the treaties dealt with in sub-paragraph 4(c).

25. Mr. JIMÉNEZ de ARÉCHAGA pointed out that several members had in fact disagreed with the suggestion that the unanimity rule should apply to reservations to plurilateral treaties, and had urged that the residual rule for general multilateral treaties should also be made applicable to general regional agreements, in conformity with inter-American practice.

26. Sir Humphrey WALDOCK, Special Rapporteur, said he sympathized with the point of view expressed by Mr. Jiménez de Aréchaga. It was indeed anomalous that the clauses favoured by the majority of the Commission, which were based on the inter-American system, should have to provide an exception for that very system. Although article 19, sub-paragraph 4(d), represented a saving clause for that practice, it should be borne in mind that the inter-American system was not followed by all regional groupings and that the contrary rule applied in European regional organizations. It had been difficult to cover the point in the way suggested by Mr. Jiménez de Aréchaga, and the Drafting Committee should therefore be asked to find some means of protecting the inter-American system, while making it quite clear that the Commission had not wished to create an intermediate class of treaties between general multilateral treaties of world-wide interest and treaties of concern to regional groups only.

27. Mr. JIMÉNEZ de ARÉCHAGA said he agreed that the matter might be referred to the Drafting Com-

mittee, but wished to point out that, since only a residual rule was being formulated, the paragraph proposed by the special rapporteur was not in fact a saving clause, but a proviso which appeared in all kinds of treaties.

28. Mr. TSURUOKA suggested that the Secretariat might prepare a study to show the advantages of the inter-American practice by tracing developments since 1938, when the system had been introduced. The study should state how many ratifications of treaties had been obtained before and after the introduction of the new system and, if there had been no marked acceleration of ratifications, whether the execution of treaties had been improved in other ways, from the point of view of attaining the objectives of the negotiators.

29. Mr. LIANG, Secretary of the Commission, said that he understood Mr. Tsuruoka's wish to be informed of the inter-American practice and that the Secretariat would be glad to prepare the study concerned. For the time being, he would refer members to his report to the Commission on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists in August-September 1959 which contained a section on reservations to multilateral treaties and a detailed history of the deliberations of the Organization of American States on the subject of reservations.<sup>1</sup> However, as Mr. Tsuruoka wished the Secretariat to investigate the inter-American system in detail, the assistance of the Organization of American States would have to be solicited; the document could not, therefore, be submitted to the Commission until the following year.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that it would also be extremely useful for the Commission to be informed of all the developments that had taken place in connexion with reservations in the United Nations since 1951, when the General Assembly had adopted its resolution 598(VI) on reservations to multilateral treaties.

31. Another substantive point with regard to the articles on reservations was the question of the presumption of consent after the expiry of twelve months after receipt of notice of a reservation. Some speakers had expressed doubts on the matter and had even wanted to reverse the presumption. The Commission should decide whether the presumption stated in article 18, paragraph 3(b), of his draft should be maintained by the Drafting Committee.

32. Mr. GROS said he would agree to the presumption being included in the Drafting Committee's text, on the understanding that the question could be raised again in the Commission.

33. Sir Humphrey WALDOCK, Special Rapporteur, asked whether the Commission was in agreement with the rule laid down in article 17, paragraph 3(b), which dealt with the question whether a reservation formulated at the time of signature had to be repeated, in order to be effective, at the time of ratification. It was immaterial

<sup>1</sup> *Yearbook of the International Law Commission 1960*, Vol. II (United Nations publication, Sales No.: 60.V.1, Vol. II), p. 124.

what the rule was in that case, so long as states knew what action they had to take. The Harvard Research draft had laid down the opposite rule, while the Fourth Meeting of the Inter-American Council of Jurists had approved a rule along the lines of that which appeared in his draft; an argument in favour of the alternative he had adopted was that it provided a degree of certainty which was not present in the other rule. No member of the Commission had objected to his choice, but he wished to know in particular whether Mr. Briggs would concur with it.

34. Mr. BRIGGS said he would be prepared to accept the special rapporteur's rule.

35. Sir Humphrey WALDOCK, Special Rapporteur, asked whether the Commission had any objection to article 18, paragraph 3(c), which laid down the rule that a state which acquired the right to participate in a treaty by accession was obliged to consent to all the reservations already formulated.

36. The CHAIRMAN, noting that there were no objections to that rule, suggested that articles 17, 18 and 19 should be referred to the Drafting Committee with instructions to follow the principles of the special rapporteur's draft, on the understanding that further discussion could take place on the issues referred to by Mr. Gros and that the Commission was in agreement on the points raised by the special rapporteur.

*It was so agreed.*

ARTICLE 20. — MODE AND DATE OF ENTRY INTO FORCE

37. The CHAIRMAN invited the special rapporteur to introduce article 20.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the rules he had put forward in article 20 were a logical consequence of those which had gone before. He expected that, as in the case of some previous articles, the Commission would wish to simplify and shorten the text.

39. Mr. BRIGGS said that, although he found the substance of the provisions of article 20 acceptable, he had some drafting proposals to make designed to simplify the text. For example, the special rapporteur's paragraph 1 could be condensed to read simply: "Unless otherwise provided in the treaty itself". He therefore proposed that the following paragraph should be substituted for paragraphs 1, 2(a) and 3(a):

"1. Unless otherwise provided in the treaty itself, a treaty which is not subject to ratification shall come into force:

"(a) if a bilateral or a restricted multilateral treaty, upon signature by all the states which adopted its text; and

"(b) if a general multilateral treaty, upon signature by not less than one-quarter of the states which adopted the text".

Paragraphs 2(b) and (c) and 3(b) and (c) should be similarly condensed.

40. Mr. CASTRÉN said that, in general, the article was satisfactory but the drafting should be simplified. For example, sub-paragraphs (i) and (ii) of para-

graph 2(a) could be combined and paragraph 5 deleted altogether.

41. In connexion with the proviso stated in paragraph 1(a), he pointed out that international labour conventions could enter into force after the deposit of one ratification only, but presumably that case was covered by the reference in paragraph 1(b) to the constitution of an international organization.

42. He doubted whether the one-fourth rule proposed in sub-paragraph 3(a)(ii) would be acceptable. In some instances the number required might be too great and in others inappropriate, for example, in the case of treaties with only four signatories.

43. In paragraph 6, a reference should be inserted to article 21, paragraph 2, which explained what was meant by a treaty's provisional entry into force.

44. The special rapporteur had himself been hesitant about including paragraph 7, as he had explained in paragraph (8) of the commentary, and it seemed inadvisable to mention the possibility of a treaty being brought into force by "subsequent acts" of the states concerned.

45. Mr. JIMÉNEZ de ARÉCHAGA said that he was in fundamental agreement with the special rapporteur's draft but considered that the distinction between multilateral and plurilateral treaties was illogical and not justified by practice. The Commission was framing residual rules designed to safeguard the will of the parties, and there was no justification for treating those two categories of treaty differently. The same rules should hold for all multilateral treaties, whatever their nature.

46. If the Commission were to adopt a less progressive attitude in regard to regional treaties, its draft might provoke an adverse reaction in certain countries.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the argument for maintaining the distinction was less strong in the case of article 20 than in that of the articles on reservations, but nevertheless practice showed that in many plurilateral treaties the principle of unanimity was still applied. A number of the rules under article 20, for example the one-fourth rule, might not be appropriate for treaties of a restricted character. He was therefore reluctant to follow Mr. Jiménez de Aréchaga's suggestion. In the case of world-wide treaties of universal application, certain presumptions departing from the unanimity principle could be made.

48. The trend of the discussion seemed to indicate that the Commission wished to make a distinction between general multilateral treaties and others, and that it was anxious to safeguard the special position of plurilateral treaties in the second group. A considerable amount of redrafting would be necessary to eliminate the references to plurilateral treaties in his original text.

49. Mr. JIMÉNEZ de ARÉCHAGA said that he had understood the Commission to have agreed that the distinction between plurilateral and multilateral treaties should be eliminated. The special rapporteur appeared to have a different understanding.

50. Mr. YASSEEN said that it was important that the Commission should examine the general rules applied to plurilateral treaties, which should be equated with bilateral treaties unless the nature of the treaty itself called for some other system.

51. The real distinction was between general multilateral treaties of universal concern and others. The former should be governed by rules different from those applicable to bilateral instruments.

52. Mr. JIMÉNEZ de ARÉCHAGA said that the observations made by the special rapporteur and Mr. Yasseen implied that the Commission's progressive codification would stop short of regional treaties, to which the old rules would still apply. He did not wish to press his point too far since the inter-American system had long-established practices, but the Commission should perhaps give some thought to the needs of other regions.

53. Mr. YASSEEN said that a closely knit group of states could, without difficulty, reach agreement on the rules they wished to apply to treaties within the group, but the Commission was preparing universal rules of a residual and non-obligatory character for application if the treaty itself was silent.

54. Mr. de LUNA said that, if the Commission failed to arrive at a definition of plurilateral treaties on the one hand and multilateral treaties on the other, Mr. Jiménez de Aréchaga was right; if it succeeded in doing so, then he was inclined to agree with Mr. Yasseen. In any event, a distinction should be drawn between multilateral treaties which were not of universal application and to which residual rules were not relevant, and other multilateral treaties.

55. Mr. AMADO said he was still sceptical about the distinction between plurilateral and multilateral treaties. As the Commission was aware, he was not able to associate himself with the Latin American doctrine in that regard. Instead of focusing its attention on the number and identity of signatories, the Commission should look more to whether the treaty was a law-making instrument laying down objective rules. Such treaties were a special feature of the modern age.

56. Mr. BARTOŠ said that it might be a mistake to cover only universal multilateral treaties in the draft. There were multilateral law-making treaties even at the regional level. The kind of residual rules under consideration would not be appropriate, for example, in the case of defence treaties laying down specific obligations for certain parties where virtually complete ratification would be necessary for them to enter into force or, at the other end of the scale, in the case of treaties on cultural or political matters where ratification by two signatories would be enough to bring the instrument into force between them.

57. The special case of international labour conventions had not become a general rule and should only be mentioned in the commentary.

58. Mr. EL-ERIAN said that, as practice varied widely even at the regional level and as there were many

different kinds of treaties, the Commission should eschew rigid distinctions and over-emphasis on the difference between multilateral and plurilateral treaties. Wherever possible it should work out general rules.

59. The CHAIRMAN suggested that further consideration of article 20 should be deferred to the next meeting to enable the Commission to take up item 4, because the observer for the Inter-American Juridical Committee would shortly be leaving Geneva.

*It was so agreed.*

#### **Co-operation with other bodies (A/CN.4/146) (item 4 of the agenda)**

60. Mr. LIANG, Secretary to the Commission, said that he had recently received two letters from Mr. Sen, Secretary to the Asian-African Legal Consultative Committee. By the first Mr. Sen had informed him that the Committee had been unable to send an observer to attend the Commission's fourteenth session. In his capacity as Secretary, he had replied expressing his regret and informing Mr. Sen that the Committee had a standing invitation to send an observer to the Commission's sessions.

61. In his second letter, Mr. Sen, acting on the decision taken at the Committee's fifth session, invited the Commission to be represented by an observer at the sixth session in 1963; the date and place had not yet been settled. The subject of state responsibility and possibly the question of the legality of nuclear tests and the law of treaties would be on the agenda.

62. Mr. Sen had gone on to say that the Committee attached the greatest importance to the attendance of a representative of the International Law Commission at its meetings. At its fourth session Mr. García-Amador had contributed a great deal to the discussion on the status of aliens and at its fifth session Mr. Pal had considerably assisted in the deliberations. The Committee found the presence of an independent jurist, who was also a member of the Commission, of immense value and hoped that the Commission would find it possible to send an observer to the coming session.

63. The Inter-American Council of Jurists was to hold its next session in El Salvador and as soon as a decision was reached about the date he would inform the Commission.

64. The CHAIRMAN proposed that the Commission should decide to send an observer to attend the sessions of both bodies. The decision as to who should attend would depend on the date and place of the sessions.

*It was so agreed.*

65. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.

66. Mr. GOBBI, Observer for the Inter-American Juridical Committee, said he was gratified to note that certain Latin American ideas were beginning to gain wider recognition; that process was particularly interesting in relation to the problem of reservations, which was an explosive one, even within the Inter-American

Juridical Committee. In spite of the differences of opinion, however, the Latin American doctrine had found its expression in the conclusions adopted by the Committee.

67. At its ordinary session in 1961, the Inter-American Juridical Committee had prepared a report summing up the Latin American contribution to the development of the principles governing the international responsibility of the state and the codification of those principles. The majority of the Committee had taken the view that it was preferable to confine the study to the Latin American countries because it was those countries which had made an original American contribution in the matter; the position of the United States had remained closer to the principles current in Europe and its original contribution had therefore not been so great.

68. Mr. Murdock had dissented from the majority view and had maintained that the study should have had the scope intended by the organ which had asked for it, and should not have been limited in a way determined by particular views; he had added that, if the views of the United States were excluded, the study would only give a partial account of the problem, leaving out important arbitration experience which it would have been useful to include.

69. He (Mr. Gobbi) had also expressed a dissenting view, but for different reasons. The report dealt with the topic of state responsibility in its broad sense, and also with the customary sanctions in the matter. In those respects, he held a radically different view from the Latin American doctrine.

70. Not only on substance but also on choice of method, he had disagreed with the majority. He would have preferred the study to deal more systematically, in the first instance, with the problem of international responsibility in general, which formed part of the general theory of international law; the study would then have dealt with the various specific problems of responsibility, responsibility for damage to aliens being the one in which the most original Latin American contribution had been made.

71. Accordingly, he wished to stress that the statement which followed expressed only his own personal views, and did not coincide with the position of the majority of the Inter-American Juridical Committee.

72. In the matter of state responsibility, there had been a traditional opposition in America, as in other parts of the world, between the authoritarianism of the big countries and the logical reaction to it of the smaller countries, which tended to adopt restrictive attitudes in order to avoid the possibility of forceful interference. The conscious or unconscious acceptance of Latin American doctrines had led to a considerable decrease in imperialistic manifestations by the larger countries. For example, in a case such as the Corfu Channel case, the more powerful country would in the past have demanded reparation directly, without having recourse to international justice.

73. Similar processes had taken place in America, resulting in a useful interchange of ideas which the

Committee's study did not adequately reflect. The study of the Inter-American Juridical Committee, by recording the positions of the majority and of Mr. Murdock, gave the impression that the traditional antagonism had reappeared with renewed intensity. In fact, however, a careful study of American practice and doctrine showed that there was a growing reciprocal understanding in the matter. He would illustrate that proposition by considering the three questions in respect of which the traditional antagonism had been most apparent: treatment of aliens, denial of justice and waiver of protection.

74. In respect of the treatment of aliens, the Latin American position could be summed up in the principle of the equality of treatment of nationals and aliens, on the ground that an alien should accept the jurisdiction of the country where he lived and not lay claim to privileged treatment. The United States of America claimed that a country which received aliens on its territory had the duty to extend to them adequate protection in accordance with a minimum standard of rights determined by international law.

75. In spite of their apparent opposition, both the Latin American and the United States views were based on the idea that principles of municipal law could be transposed to the international plane. That fact was obvious in the case of the Latin American doctrine, but the minimum standard doctrine also often involved, in fact, the claim to impose in international law standards drawn from a particular municipal law.

76. That traditional opposition had lost much of its strength, for extreme views were being modified. The doctrine of equality of treatment, correctly stated, was valid only in so far as there was no violation of international law; that was the logical consequence of the primacy of international law. Besides, the minimum standard doctrine did not in modern times imply the assertion of rules other than those derived from international principles and practice.

77. In respect of denial of justice, the Latin American position coincided with the traditional European view that denial of justice was a wrong arising from the defective administration of justice. Some United States authorities tended to consider that any organ of the state, and not only the judiciary, could commit a denial of justice; that view could not prevail, because if the conception of the denial of justice were to be made so extensive, it would embrace all international wrongs.

78. If, however, one limited the discussion to wrongs committed by the courts, the Latin American doctrine considered that only two sets of circumstances could give rise to state responsibility: denial of access to the courts to aliens, and unjustified delay in the dispensation of justice. Some United States jurists considered as denial of justice not only the two cases which he had indicated, but also such cases as those where the courts were used as an instrument of the Executive power to persecute aliens, and cases in which a judgment violated international obligations or was discriminatory in character. In the Latin American doctrine, those cases were not considered as denials of justice, although they gave rise

to international responsibility as violations of international law, for example, a discriminatory judicial decision which violated the rule of equality of treatment of nationals and aliens.

79. It was therefore clear that the proponents of the two different views in the matter of denial of justice were moving progressively closer to each other.

80. The question of waiver of protection raised the problem of the so-called Calvo clause, the validity of which was upheld in Latin America, but denied in the United States and also by the majority of European jurists. Those who had regarded the Calvo clause as automatically null and void had argued that a private individual could not waive a prerogative vested in the state, and, secondly, that the Calvo clause could have no other effect than that of enjoining aliens to observe the well-known rule relating to the exhaustion of local remedies.

81. There had recently been in the United States doctrine a welcome change in the form of an increasing tendency to recognize the validity of the Calvo clause, albeit with a limited scope, for example in the book by Shea "The Calvo Clause" and in the most recent Harvard drafts. The Calvo clause had also been recognized in United States court practice, as was shown by the North American Dredging Company and the Inter-Oceanic Railway cases.

82. Those developments in the United States and the increasing recognition of the validity and necessity of the Calvo clause in the countries of Asia and Africa showed that its future was assured, for it was closely linked with the concept of the individual as a subject of international law.

83. The foregoing considerations showed the absolute necessity of a careful review of the rules governing the international responsibility of the state for damage to aliens. The fundamental principle in the matter was that international responsibility arose from a violation of a rule of international law: it was that violation which gave rise to the duty to repair the damage caused.

84. The responsibility of the state for, say, military aggression or the violation of an international treaty, though ultimately based on the same principle, arose from the violation of a different rule of international law. In the case of damage to aliens, the rule violated was that relating to the adequate treatment of aliens, on the basis of equality with nationals according to the Latin American doctrine, or on the basis of a minimum standard according to the United States doctrine.

85. It was essential to determine the nature of the international wrong which gave rise to state responsibility. The traditional doctrine since Vattel had regarded the claim as a claim of the state, so that the claimant state would have the right, after obtaining damages, to go so far as to distribute the amount awarded to persons other than those who had suffered the damage. In other words, the individual who had sustained the damage disappeared from the scene as soon as his claim was espoused by his state; that situation was flagrantly

unjust and resulted from the traditional dualist conception of international law.

86. That traditional conception, which artificially considered the alien's state itself as the injured party, had been necessary because international law had not formerly recognized non-subjects of international law as possessing any rights under that law. That artificial approach had become obsolete, and accordingly the institution of state responsibility should be placed on a more adequate basis, as indicated by the Latin American doctrine.

87. A re-examination of the law of international claims showed that it was the injured alien who was the holder of the right to reparation. It was the alien who possessed certain rights by virtue of international law and was entitled to have them asserted in an international forum; it was true that the state of the alien could refrain from taking the necessary action, but that fact merely showed that individuals did not as yet possess the capacity to initiate international proceedings. The injured individual needed to assign his claim to the state, but the state had rights which were no greater and no less than those of the individual concerned.

88. The traditional doctrine had led, among other flagrant injustices, to a statement by a Claims Commission to the effect that a state did not commit an international wrong when it injured a stateless person. The majority of jurists, however, recognized that a state committed an international wrong if it treated any alien unjustly, regardless of his nationality or lack of nationality. It was unthinkable, for example, that a stateless person should be denied access to the courts or be deprived of his freedom otherwise than on grounds specified by the law.

89. The real position was that, as a result of the imperfect character of international law, a stateless person did not have an effective remedy at his disposal in order to assert his rights. His position would be the same as that of an alien whose country did not wish to protect him.

90. An objective analysis of the law of international claims showed that the injured individual was the true interested party. For example, it was the actual damage sustained by the alien himself, and never the injury suffered by the state, which constituted the basis for the assessment of the damages.

91. In conclusion, he said that the Spanish-American position could be summed up in three propositions. First, there should be equality of treatment as between nationals and aliens. Secondly, it was necessary to abandon the outmoded doctrine that an injury to an individual in violation of a rule of international law necessarily implied a violation of the rights of the state. Thirdly, there was a need for a better and more precise determination of the cases in which claims were receivable, in order to avoid unwarranted acts of interference ostensibly for the purpose of asserting a claim based on state responsibility. In that respect, the abuse of state responsibility had caused more damage to that institution than all the doctrinal arguments put forward against it.

92. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his impressive account of the Committee's activities. He assured him that the International Law Commission had greatly benefited from its co-operation with the Committee and fully expected that co-operation to continue; he asked him to convey to the Committee the Commission's gratitude for its continuing co-operation and for sending an observer to the session.

93. Mr. GOBBI, Observer for the Inter-American Juridical Committee, thanked the Chairman for his kind words and assured him that he would transmit his message to the Inter-American Juridical Committee.

94. The CHAIRMAN said that there remained to be dealt with under item 4 the report which he, as the Commission's observer, had submitted on the fifth session of the Asian-African Legal Consultative Committee (A/CN.4/146). He had been much impressed by the high level of the work done at that session and was glad to note the Commission's decision to continue co-operation with that Consultative Committee by sending an observer to the Committee's next session. If there were no comment, he would consider that the Commission agreed to take note of his report.

*It was so agreed.*

The meeting rose at 5.40 p.m.

## 657th MEETING

*Tuesday, 5 June 1962, at 10 a.m.*

*Chairman: Mr. Radhabinod PAL*

### **Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

#### **ARTICLE 20.—MODE AND DATE OF ENTRY INTO FORCE** (*resumed from the previous meeting*)

1. The CHAIRMAN invited the Commission to resume its discussion of article 20.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that a general desire had been expressed for the simplification of the wording of the article. There was also general agreement on the elimination of the distinction between plurilateral and multilateral treaties, as with other articles. There remained the problem of the treaty practice of regional organizations, and he suggested that the Drafting Committee should be asked to find a formula to deal with that problem.

3. The provisions of paragraph 6, together with those of article 21, paragraph 2, would in all probability be transferred by the Drafting Committee to article 19 *bis*, which would contain all the provisions on the rights and obligations of states prior to the entry into force of the treaty.

4. Mr. JIMÉNEZ de ARÉCHAGA said that he was perfectly satisfied with the special rapporteur's sugges-

tion that the Drafting Committee should formulate provisions to cover the question of regional treaties.

5. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 20 to the Drafting Committee, with the directions suggested by the special rapporteur, and to start to consider article 21.

*It was so agreed.*

#### **ARTICLE 21.—LEGAL EFFECTS OF ENTRY INTO FORCE**

6. Sir Humphrey WALDOCK, Special Rapporteur, said that the only question which arose in connexion with article 21 was whether it was necessary to include the provisions of paragraph 1(c). Perhaps the Drafting Committee could be asked to consider whether those provisions should not be transferred to the article on ratification.

7. Mr. CASTRÉN said he wished to propose the following drafting amendments:

8. First, the deletion of paragraph 1(a) as superfluous, and the consequential deletion of the word "accordingly" in the first line of paragraph 1(b).

9. Secondly, the deletion of the word "full" in the first part of paragraph 2(a); a treaty which entered into force provisionally could not be said to enter into "full" force.

10. Thirdly, the replacement in the last line of paragraph 2(a) of the words "until the treaty enters into full force" by the words "until the treaty enters into final force".

11. The expression "is unreasonably delayed" in paragraph 2(b) was far from clear, but it might not be possible to state the intention in more specific terms.

12. Mr. BRIGGS suggested that paragraph 1(b), instead of referring to rights and obligations which "come into operation", should state that the treaty would "become effective". The final proviso could then be redrafted to state that the treaty would become effective or come into force, even if it specified that some rights and obligations would only come into operation at some future date.

13. There would then be a clear distinction between the date when a treaty as such became effective, and the time when its provisions came into operation. As Manley Hudson put it, "The date of an instrument coming into force is not necessarily the date when its substantive provisions become applicable: the latter will depend upon the terms of the obligation assumed".<sup>1</sup> A good example was provided by the Geneva Convention of 1929 on the treatment of prisoners of war<sup>2</sup> which had become effective on 19 July 1931, the date of its entry into force, though its provisions had only come into operation on the outbreak of hostilities.

14. Mr. JIMÉNEZ de ARÉCHAGA said he doubted the advisability of the rule proposed *de lege ferenda* in

<sup>1</sup> *International Legislation*, Vol. I, Washington, 1931, Introduction, pp. LIV-LV.

<sup>2</sup> *League of Nations Treaty Series*, Vol. CXVIII.



paragraph 2(b); it could have the effect of upsetting certain established treaty relations. Furthermore, it seemed more relevant to the termination of treaties than to the legal effects of entry into force.

15. Mr. TUNKIN also doubted the advisability of including the rule in paragraph 2(b); it might be interpreted in such a manner as to allow a state to terminate the provisional application of a treaty, notwithstanding the provisions of the treaty itself, on the ground that, in that state's own view, there had been unreasonable delay in the entry into full force of the treaty.

16. Moreover, the question it dealt with was purely hypothetical. In practice, if a treaty provided for its provisional entry into force, it also normally laid down some time limit.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that he was quite prepared to drop the provisions of article 2(b), which he had only put forward tentatively. It was probable that, where two states agreed to the provisional entry into force of a treaty, they were in such a close relationship that no difficulties would arise. In fact, it sometimes occurred that a treaty remained in force provisionally throughout its life, the device of provisional entry into force being used merely because there was no expectation of Parliamentary approval for ratification within due time. In those cases, the treaty never entered formally into full force, because the objects of the treaty were achieved without the "provisional" character of the entry into force ever being terminated.

18. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to delete paragraph 2(b) and to refer the remainder of article 21 to the Drafting Committee, with the comments made during the discussion; it could then consider article 22.

*It was so agreed.*

#### ARTICLE 22. — THE REGISTRATION AND PUBLICATION OF TREATIES

19. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 22, said that the Commission had the choice between stating the existing United Nations law in the matter of registration and publication of treaties, and limiting the article to a mere reference to Article 102 of the United Nations Charter and to the regulations for the time being in force on the subject.

20. His draft of article 22 merely reproduced the essence of the General Assembly's Regulations for the registration and publication of treaties, contained in General Assembly resolution 97(I) of 14 December 1946, as amended by resolution 482(V) of 12 December 1950. However, a question of law arose in regard to new Members of the United Nations: were those new Members under an obligation to comply with the provisions of Article 102 of the Charter in respect of treaties entered into by them after the Charter had come into force but before they had become Members of the United Nations? That was what the General Assembly's Regulations appeared to lay down.

21. Mr. TUNKIN said he doubted the advisability of including paragraph 1, which would raise problems outside the scope of the draft articles. The Drafting Committee should be asked to replace it by a reference to the relevant provisions of the Charter. Paragraphs 1 and 2 could then be combined more or less along the following lines:

"The registration of a treaty under Article 102 of the Charter of the United Nations shall not take place until the treaty has come into force between two or more of the parties thereto."

22. Mr. de LUNA commended the special rapporteur for not adopting the rule once proposed by Sir Hersch Lauterpacht,<sup>3</sup> which would have voided a treaty concluded by a Member of the United Nations if not registered with the United Nations within six months of its entry into force. It would be most undesirable to make a treaty even voidable once it had come into force.

23. From the point of view of drafting, he thought that both the sub-paragraphs of paragraph 4 were redundant in view of the provisions of the previous paragraphs.

24. Mr. CASTRÉN said it was undesirable to impose on non-member states of the United Nations the obligation to register with the United Nations Secretariat every treaty entered into by them after 24 October 1945.

25. He failed to see the purpose of the provisions of sub-paragraph 3(b)(ii). How could a treaty which had already been registered with a specialized agency be registered by the agency?

26. Paragraph 3(c) did not state where registration was to take place. It was probably intended that registration should be effected with the Secretariat of the United Nations or of a specialized agency, but it would be preferable to say so expressly.

27. Mr. ROSENNE suggested that the provisions of both article 22 and article 23 should be combined in one short article, which would refer to Article 102 of the Charter of the United Nations and to the Regulations giving effect thereto.

28. So far as the provisions on registration were concerned, the substantive contents of both articles should be transferred to the commentary. The provisions concerning publication embodied instructions which were primarily for the Secretariat of the United Nations and did not directly concern states.

29. As a matter of law, it was also desirable to include in the commentary a very short paragraph reserving the position arising out of article 18 of the Covenant of the League of Nations on the subject of the registration of treaties. Many treaties registered with the League of Nations were still in force.

30. Mr. BARTOŠ said that the article should incorporate most of the provisions of the General Assembly's Regulations on the registration and publication of treaties. Those provisions should appear in the

<sup>3</sup> *Yearbook of the International Law Commission 1953*, Vol. II (United Nations publication, Sales No.: 59.V.4, Vol. II), p. 162, para. 5.

future convention on the law of treaties because there had been some controversy regarding the legal effect of the General Assembly's Regulations, which had been described sometimes as mere recommendations and sometimes as orders to the Secretariat. He regarded those Regulations as part of the internal law of the United Nations. Since there had been such controversy both in legal theory and in state practice, it was highly desirable to include the provisions in question in order to make them binding on states which would be bound by the future convention on the law of treaties.

31. He wished to draw attention to another legal problem relating to the effects of registration. The registration of a treaty could be said to have, with regard to states not parties to it, an effect similar to a notice in an Official Journal in municipal law. Of course, the substantive provisions of a treaty would only have effect as between the parties to it and not *erga omnes*; the registration and publication of a treaty by the United Nations Secretariat, however, made its existence known to all states, and third states should draw the necessary conclusions therefrom. The existence of a treaty, once it had been registered and published, could thus be invoked not only before United Nations organs but also, in his opinion, *vis-à-vis* third states, together with the known facts.

32. Mr. LACHS pointed out that, as indicated in paragraph 6, the Charter provisions on the subject of the registration of treaties were *lex imperfecta*.

33. The general rule of international law in the matter was that the obligation to register a treaty existed in two cases: first, where the treaty itself imposed that obligation upon the parties, and, secondly, where one of the parties had that obligation by virtue of an undertaking subscribed by it outside the terms of the treaty, for example, where the party was a Member of the United Nations and had that obligation by virtue of the Charter.

34. Both articles 22 and 23 should be shortened. Article 22 would state the existing rule of international law that he had just indicated.

35. He did not favour the incorporation in article 22 of the actual provisions of the General Assembly's Regulations, because that would involve the interpretation of those Regulations.

36. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Bartoš that the General Assembly's Regulations constituted United Nations internal law. The Secretary-General was competent to register treaties in accordance with the United Nations Charter, and the General Assembly's Regulations were instructions to the Secretary-General in pursuance of the relevant Charter provisions.

37. It was for the Commission to decide whether in article 22 it wished to incorporate the provisions of the Regulations or merely to make a reference to them.

38. Another question of substance to be decided by the Commission was whether the operation of the provisions of Article 102 of the Charter should be extended to states

which were not Members of the United Nations, but which would become parties to the future convention on the law of treaties. There appeared to be no obstacle to prevent those states from accepting such obligations, and the suggestion that they might do so would represent a modest contribution to the progressive development of international law, but one of real practical utility. Treaties formed such a large part of international law that the publication of their terms was vital. The registration system instituted by the League of Nations and the United Nations had had the great advantage of making treaty law available to all.

39. Mr. YASSEEN said it was not advisable to incorporate into the draft articles the actual provisions of the General Assembly's Regulations. To do so might have the effect of obstructing the future amendment of those provisions. In fact, the General Assembly had adopted those Regulations in pursuance of Article 102 of the Charter and the Assembly could amend them from time to time in the light of changing circumstances.

40. For those reasons, he favoured the suggestion that the provisions under discussion should be replaced by a reference to the relevant provisions of the Charter.

41. Mr. LACHS said that he fully agreed with the special rapporteur in his desire to make a contribution to the progressive development of international law in the matter. It was hoped by all that the United Nations would one day become universal but, for the time being, it was necessary to take into account certain political realities. Certain states were not properly represented in the United Nations, or were not admitted to the United Nations.

42. He supported the suggestion that the contents of both articles 22 and 23 should be transferred to the commentary and replaced in the body of the text by a reference to the relevant provisions of the Charter.

43. Mr. LIANG, Secretary to the Commission, said that, as had been pointed out by the special rapporteur, the General Assembly's Regulations were addressed primarily to the Secretariat; the Assembly had adopted them as instructions for carrying out the provisions of Article 102 of the Charter; those Regulations indicated to the Secretariat how it was to proceed with the process of registration. The Regulations were not in the nature of recommendations to states, although they had been approved by the Member States of the United Nations.

44. The question of incorporating those Regulations in the text of a future convention on the law of treaties raised certain complex problems. The first was of a technical character; it was an extremely delicate process to reproduce, in a treaty, provisions which were already in force under another instrument. The main question was whether the provisions in question would be reproduced in their entirety or only in their essential parts. At its second session, in 1950, the Commission had had before it the question of formulating a Draft Code of Offences against the Peace and Security of Mankind in which it had considered incorporating certain portions of the Genocide Convention of 1948. The problem had been found practically insoluble. The only safe course

would have been to reproduce the whole of the Genocide Convention. The incorporation of certain passages and the omission of others, however minor, would have weakened the force of the code and would have given rise to grave problems of interpretation.

45. Another problem was that of the possibility that the General Assembly might revise its Regulations, as it was always at liberty to do. If, however, the future convention on the law of treaties incorporated the Regulations as they stood, it would be necessary for the parties to that convention to resort to the elaborate process of revision whenever the General Assembly amended the Regulations.

46. On the whole, he considered that it was not advisable to incorporate the General Assembly's Regulations in the draft articles.

47. Mr. VERDROSS suggested the deletion of the last clause in paragraph 1, "if such registration and publication has not already been effected". It was difficult to reconcile that clause with the preceding clause which stated that every treaty should be registered and published "as soon as possible".

48. Sir Humphrey WALDOCK, Special Rapporteur, said that the clause in question would cover the case of a state which became a Member of the United Nations and had already previously registered certain treaties with the United Nations Secretariat. Some non-member states, such as Switzerland, had made a practice of registering their treaties with the United Nations Secretariat.

49. He noted that there was a general feeling in the Commission that article 22 should not set out in detail the contents of the Regulations but should merely refer to Article 102 of the Charter and the General Assembly's Regulations.

50. The possibility of amendment of the Regulations, to which the Secretary to the Commission had drawn attention, could be covered by referring to "the regulations for the time being in force".

51. He would like to know whether the Commission desired to limit registration strictly to States Members of the United Nations.

52. Mr. de LUNA said he noted that Mr. Lachs agreed that a non-member state could, under the terms of the treaty, undertake the obligation to register it with the United Nations Secretariat. There should therefore be no obstacle in the way of a non-member state assuming such an obligation in more general terms by virtue of the future convention on the law of treaties. Any state not wishing to assume such an obligation could make a reservation to the relevant article of the future convention: he recalled in that connexion his own liberal approach to the right to make reservations.

53. He had been impressed by the remarks of Mr. Bartoš on the subject of the effects of the publication of a treaty with respect to states not signatories to it, namely, that such a publication established the existence of the treaty *erga omnes*, although the substantive clauses of the treaty were binding only upon the parties thereto.

54. Mr. JIMÉNEZ de ARÉCHAGA said he supported the suggested simplification of articles 22 and 23, the main provisions of which could be reduced to a reference to the relevant provisions of the United Nations Charter and any Regulations issued in pursuance of those provisions.

55. That simplification would not preclude the adoption of a provision extending the United Nations process of registration to non-member states which were prepared to accept the obligation to register treaties with the United Nations Secretariat.

56. Sir Humphrey WALDOCK, Special Rapporteur, said he accepted the suggestion of Mr. de Luna and Mr. Jiménez de Aréchaga for the extension of the registration process to non-member states which were prepared to accept the obligation to register treaties with the United Nations Secretariat.

57. Mr. BARTOŠ urged the Commission to make a contribution, albeit a modest one, towards the development of international law in the matter. The Commission would be making such a contribution by reflecting in the draft articles the existing practice: it was very common for States non-members of the United Nations to stipulate in the treaties entered into by them that those treaties would be registered with the United Nations Secretariat, and the Secretary-General had extended his willing co-operation in the matter. Since that result could be achieved by means of a provision in the treaty itself, there was no reason why it should not be attained also by means of a general convention on the law of treaties.

58. The CHAIRMAN said that, if there were no objection, he would consider that the Commission adopted the suggestion put forward by Mr. de Luna and agreed to refer article 22 to the Drafting Committee, with the comments made during the discussion.

*It was so agreed.*

#### ARTICLE 23.—PROCEDURE OF REGISTRATION AND PUBLICATION

59. The CHAIRMAN suggested that article 23, which depended on article 22, should also be referred to the Drafting Committee with the comments made during the discussion.

*It was so agreed.*

#### ARTICLE 24.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS NO DEPOSITARY

60. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 24, said that the reports of his predecessors had not dealt with the question of the correction of the text of treaties and that there was no reference to the subject either in the Harvard Research Draft or in Satow's "Diplomatic Practice". He had therefore been rather at a loss for information on corrections and, as explained in his commentary, had based his draft on what he had found in Hackworth's "Digest of International Law" and the "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements" (ST/LEG/7). He would

therefore welcome any additional information from members of the Commission who were legal advisers to their governments.

61. Mr. BRIGGS, referring to paragraph 2, said it was not strictly accurate to speak of "two or more" texts of a treaty. He hoped the Drafting Committee would bear that comment in mind.

62. Mr. TUNKIN said that, although the list of the forms of correction contained in paragraph 1 as drafted by the special rapporteur seemed almost exhaustive, he could cite an additional example, that of an exchange of notes between the parties drawing attention to the error. Other members might think of other examples; the text should, therefore, be made more flexible.

63. Sir Humphrey WALDOCK, Special Rapporteur, agreeing with Mr. Tunkin, suggested the insertion of the words "unless the parties otherwise agree", so that the enumeration should not be interpreted as exhaustive.

64. Mr. LACHS said that the special rapporteur had done very useful work in drafting the clauses on correction of errors. With regard to paragraph 1, there might be errors other than typographical errors or omissions. It had happened, for example, that negotiators had inadvertently used the wrong words, as in the drafting of the Warsaw Convention of 1929,<sup>4</sup> where the word "transporteur" had been confused with "expéditeur"; the parties had agreed that the latter word was correct. When that Convention had entered into force, all the parties had been obliged to ratify the correction, but the United States Senate had qualified it as a reservation and ratified it as such. It should therefore be made quite clear that a correction was in fact a correction, as distinct from an amendment or a reservation.

65. Mr. BARTOŠ said he agreed with Mr. Lachs that not only typographical errors or omissions but even substantive errors sometimes occurred in treaties. For example, during the negotiations between France and Yugoslavia preceding the agreement of 2 August 1958 on the settlement of pre-war debts,<sup>5</sup> both francs and dollars had been mentioned but in drafting the agreement thousands of dollars had been referred to when francs had been meant. The error had passed unnoticed and both countries had ratified the agreement. The Yugoslav authorities had later notified the French negotiators of the error, and it had been agreed that it was an error. The agreement had, however, required a renewal of the ratifications, since a matter of substance had been involved. A similar case had occurred in connexion with the Agreement concerning minor frontier traffic between Yugoslavia and Italy, of 3 February 1949,<sup>6</sup> where, in an annex to the agreement, a list of the communes excluded from that traffic had erroneously been substituted for a list of those between

which traffic was allowed; although that error had been purely technical, the results had exceeded the scope of typographical errors or omissions. Where a negative was omitted, that might be regarded as a technical error, but had the effect of completely altering the obligation.

66. He would agree with the special rapporteur's draft in so far as it related to cases where the treaty had not yet been ratified; if, however, the treaty had already been ratified, the same procedure should be used for corrections as for acceptance or ratification. Such simple procedures as initialling, or even an exchange of notes, would not suffice, in view of the increase or diminution of the contractual obligations involved.

67. Mr. GROS said he agreed that paragraph 1 should not be limited to typographical errors or omissions. There were frontier treaties in which the wrong elevations had been referred to in the text through errors in map reading. In those cases, however, the simple procedure of an exchange of notes, relating to the correction only, had proved sufficient.

68. On the point raised by Mr. Bartoš, he (Mr. Gros) considered that it was for the states concerned to decide whether the change in obligations was so substantial as to necessitate a rectifying act of the same legal force as the original consent, or whether a simpler procedure, an exchange of notes or a *procès verbal*, would suffice. In any case, he doubted whether that point had any place in the article; it might be dealt with in the commentary.

69. Mr. YASSEEN said it should be possible to distinguish between various kinds of error. Purely technical errors could be corrected by very simple procedures. Sometimes, in domestic law, errors which were self-evident did not require any special procedure. For example, the French railway law of 11 November 1917 contained an article presumably intended to make it an offence to enter or leave a train until it had come to a complete stop. But the drafting of the article, No. 78, was so slipshod that, on a literal interpretation, passengers were permitted to enter or leave a train only while it was in motion. Despite that, the French court of appeal had found no difficulty in interpreting and applying the intention of the law.<sup>7</sup> The correction of typographical errors or omissions in treaties should also be made as simple as possible.

70. Mr. JIMÉNEZ de ARÉCHAGA noted that some members had suggested that the scope of the article should be broadened so as to provide for the correction not only of typographical errors or omissions but also of errors of substance. The Commission should, however, be careful not to consider, in the context of the article under discussion, the kind of error which vitiated consent. Such a material error could invalidate the treaty or give rise to the right of correction. For example, the descriptions of rivers in frontier treaties had in practice given rise to considerable difficulties and even to arbitration. The provision as drafted by the special rapporteur

<sup>4</sup> Convention for the Unification of Certain Rules regarding International Air Transport, Warsaw, 12 October 1929, League of Nations Treaty Series, Vol. CXXXVII.

<sup>5</sup> *Journal officiel de la République française*, 23 May 1959, p. 5244.

<sup>6</sup> United Nations Treaty Series, Vol. 33, p. 142.

<sup>7</sup> Dalloz, *Jurisprudence générale*, 1930. Part I, p. 101 (Crim. 8 mars 1930).

could give rise to misunderstandings; a state party to a frontier treaty in which a river was incorrectly described might claim under the special rapporteur's article that it was not bound by that clause of the treaty. The phrase "the signatory states shall by mutual agreement correct the error" in paragraph 1 caused that problem, and it should be made clear that agreement that the error had in fact occurred should be a prerequisite of correction.

71. The CHAIRMAN said it would appear that the same method of correction should not be used for both purely clerical errors and for substantive errors.

72. Mr. ROSENNE suggested that the point raised by Mr. Jiménez de Aréchaga might be dealt with by the Drafting Committee, which could perhaps use different terms to describe different kinds of error, for instance, "mistake" for errors of substance.

73. With regard to Mr. Yasseen's point, the fundamental difference between domestic law and the international treaties with which the Commission was dealing was the absence, in the latter case, of a normal system of adjudication; there was no procedure in international law parallel to the methods used by courts to deal with manifest errors in domestic legislation.

74. He supported Mr. Tunkin's view that the rule for corrections should be made more flexible.

75. Sir Humphrey WALDOCK, Special Rapporteur, said it was important to distinguish between correction of errors and amendment of the text. In speaking of substantive errors, members came close to the subject of the amendment of the text, and in such cases much depended on whether or not the parties agreed that an error had in fact occurred. It was when that point was contested that difficulties arose. In the case of typographical errors and omissions, there was usually no doubt, but the situation where there was some misuse of words in the texts in different languages was much more delicate and verged on the subject of amendment. The Commission should proceed very cautiously in extending the scope of paragraph 1.

76. Mr. PAREDES said that the procedure for correcting typographical errors or omissions should be different from the procedure for correcting substantive errors which might be due to misunderstandings of certain expressions or facts. Article 24 as drafted seemed to fit the case of purely technical errors, but could be amplified to deal more fully with substantive errors which altered the relationship between the parties and might jeopardise the very existence of the treaty.

77. It should be made absolutely clear that the technical errors referred to in paragraph 1 were merely errors arising out of the misuse of certain terms. If, however, such errors led to a misinterpretation of the facts, a complete revision of the text should be undertaken, in order to establish the obligations of the parties with entire accuracy. If the parties agreed that a substantive error had occurred, they could draft a new treaty, but if there was any controversy on the subject, the matter should be decided by the International Court of Justice.

78. Mr. GROS said that, if the special rapporteur intended to cover purely technical errors only, that inten-

tion should be made perfectly clear in the text. Apart from such technical errors, there were also substantive errors on the existence of which the parties were agreed and which, in practice, they often corrected by simple procedures. He doubted, therefore, whether a draft such as the one before the Commission should deal only with technical errors. If the words suggested by the special rapporteur, "unless the parties otherwise agree", were inserted, the parties would be given the possibility not only of using methods other than those enumerated in paragraph 1, but also, if errors which were not purely technical occurred, of proceeding by one of those other methods. In any case, the Commission should make itself quite clear on that point and he personally was in favour of a provision covering the correction of substantive errors as well.

79. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Gros, provided it was made clear that the parties were in agreement on the existence of an error.

80. Mr. LACHS said that the point raised by Mr. Gros appeared already to be taken into account in paragraph 1, since the agreement of the parties that an error had occurred was a prerequisite of the whole procedure of correction. Moreover, such agreement could cover the correction of all types of error.

81. Mr. TUNKIN said he agreed that the wording of paragraph 1 could cover all kinds of error and that the reference to mutual agreement provided the necessary safeguard of consent among the parties that an error had in fact occurred. He therefore agreed that the scope of the paragraph could be extended, by a reference to mutual agreement, to errors other than purely technical ones.

82. With regard to the point raised by Mr. Bartoš concerning the procedure to be followed in the case of a treaty which had already been ratified, he doubted the advisability of obliging states to follow the normal procedure of concluding treaties in the event of errors. The question was surely one which came within the constitutional law of the state concerned; the rule of international law should be that states themselves could choose the procedure for correcting errors in treaties, and if the constitutional law of a state required ratification in such cases, that state would be free to ratify the correction. To make such ratification mandatory, however, would unnecessarily complicate the procedure of correction.

83. Mr. BARTOŠ said that his point could not be dismissed so lightly. If it was agreed that it was by ratification that a state assumed a binding obligation, what was the situation of that obligation if the final text of a treaty had been ratified and was then changed substantively through an error in that text? In the case of binding obligations, where the actual content of the obligations was at issue, the question could not be regarded as merely procedural, and the simple procedures suggested might not suffice. After ratification had taken place, any changes affecting the substance of an obligation, even if they were due to errors, should be

made by the same procedure as that followed when the original obligation had been assumed.

84. Mr. LACHS said that he knew of cases in which corrections to treaties had been included in the instruments of ratification.

85. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the views expressed by Mr. Tunkin and Mr. Lachs. He had studied the question in Hackworth's 'Digest of International Law' with particular reference to the United States, where ratification raised conspicuous problems, and had found that, in United States practice, corrections were not always referred back to the Senate. It therefore seemed clear that it was for states to decide on the procedure for themselves, and that the point should not be covered in the text of the article itself.

86. The CHAIRMAN suggested that article 24 should be referred to the Drafting Committee for redrafting in the light of the comments made during the debate.

*It was so agreed.*

ARTICLE 25.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS A DEPOSITARY

87. Sir Humphrey WALDOCK, Special Rapporteur, said that in the main the provisions contained in article 25 followed the practice of the Secretary-General of the United Nations.

88. Mr. de LUNA considered that the same rules could apply both to technical errors and to defects of concordance.

89. He noted that no procedure was suggested in paragraph 4 for dealing with objections to the proposed corrections of a text, except in cases when the treaty was drawn up within an international organization or by a conference convened by one. That omission should be made good.

90. Sir Humphrey WALDOCK, Special Rapporteur, said that he would need time to reflect on Mr. de Luna's first suggestion. Errors arising from lack of concordance were particularly frequent and when they came before the courts were apt to involve points of substance. If the parties agreed on the existence of such errors, the procedure for correction should be that laid down for technical errors.

91. He accepted Mr. de Luna's second suggestion.

92. Mr. ROSENNE said that it might be necessary to distinguish between faulty concordance of the language versions actually negotiated and lack of concordance of the translated versions, which was more likely to be due to inadvertence.

93. Mr. BARTOŠ, commending the special rapporteur on the new text he had prepared, which reflected United Nations practice, pointed out that authentic texts in other languages were not regarded as translations. Some rule was necessary to govern corrections of concordance in the different languages, which were very frequently needed. He recalled that the problem of the correction of the Chinese text of the Convention on the Prevention and Punishment of the Crime of Genocide, mentioned

in the commentary, had been handled more as a political than as a legal matter.

94. Mr. VERDROSS said that the problem of technical errors, on the existence of which the parties could presumably easily reach agreement, was quite different from that created by lack of concordance of the text of a treaty in another language. Such lack of concordance could have been to some extent deliberate and might give rise to difficulties of interpretation. The problem of the interpretation of the text of a treaty drawn up in several languages was an entirely different problem from that of the correction of errors in the text.

95. Sir Humphrey WALDOCK, Special Rapporteur, said that the lack of concordance between texts in several languages was a serious problem, often involving questions of interpretation.

96. The CHAIRMAN suggested that article 25 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*

ARTICLE 26.—THE DEPOSITARY OF PLURILATERAL OR MULTILATERAL TREATIES

97. Sir Humphrey WALDOCK, Special Rapporteur, said that not much information was available on the subject dealt with in article 26, but he had tried to set out what he believed to be the general practice. He was uncertain whether the presumption he had made in paragraph 2(b) was justified for plurilateral treaties and would welcome guidance on that point.

98. Mr. VERDROSS said that paragraph 1 should not be expressed in its present mandatory form since no such rule as was there enunciated existed, though it was a fact that the depositary of a plurilateral or multilateral treaty was normally the state or international organization in whose archives the original texts had to be deposited. But according to international law, the contracting parties were free to choose whatever depositary they wished.

99. Mr. ROSENNE said he felt that the article should not be confined to multilateral treaties, however restricted, as suggested by the title; bilateral treaties too could be deposited with the Secretary-General.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne's suggestion was acceptable, the more so as it would dispense with the classification of treaties.

101. Mr. LACHS said he agreed with Mr. Verdross. A better balance would be achieved between paragraphs 1 and 2 if the former were redrafted to deal with the case where a depositary was designated.

102. In addition to treaties in simplified form, such as an exchange of notes between three or four states, there were a number of other treaties of a restricted type for which no depositary was designated and the texts of which remained in the archives of the parties.

103. Mr. BARTOŠ said that no provision was made in either article 26 or article 27 to cover the case where a depositary decided after a certain time to relinquish

his functions. That could happen when, because circumstances had changed, a depositary state wished to dissociate itself from a particular treaty. In that event the rule laid down in paragraph 3 should apply.

104. Another point which should be considered, though he was not certain whether it should be regulated in the draft, was the case where a depositary ceased to exist but the treaty obligations remained in force between the parties. For example, after the Little Entente had ceased to exist, certain regional obligations of a technical, not a political, character had not been repudiated by the signatories. Similarly, there was the question who, since the Belgrade Convention on the Danube of 1948, was the depositary for agreements concluded under the auspices of the former International Danube Commission. It was very dangerous to consider that treaties had lost all legal force because the depositary had gone out of existence. In his view, treaties survived the disappearance of the depositary.

105. Mr. LIANG, Secretary to the Commission, referring to paragraph 2 (a), said it would be desirable to make it clear that it was the Secretariat of an international organization which would serve as depositary. As far as the United Nations was concerned, the depositary was the Secretary-General or the Secretariat, not the organization. In the case of other international organizations it was also the secretariat of an organization that was designated as the depositary. His contention was borne out by article 22, on the registration of treaties, which specified in paragraph 1 that, where appropriate, treaties should be registered with the Secretariat of the United Nations, and by article 32 of the Convention on the High Seas, 1958, which required the instruments of ratification to be deposited with the Secretary-General.

106. Sir Humphrey WALDOCK, Special Rapporteur, said that, while appreciating the Secretary's argument, he believed it would be unwise to follow his suggestion because it was for the international organization itself to determine which of its organs should be a depositary. The provision should not be drafted in such a form as to be applicable only to the United Nations.

107. Mr. LACHS said that, in his opinion, the points raised by Mr. Bartoš, which concerned the termination or succession of treaties, should be dealt with elsewhere. Article 26 related to the initial stages of a treaty's existence.

108. Mr. TUNKIN said that both articles 26 and 27, which were inter-related, would need very careful discussion because of the need to check the dangerous abuse of the functions of a depositary, of which there had been many instances in recent years. Depositaries had been known to refuse, for reasons of foreign policy, to accept instruments of ratification properly executed; in so doing they had violated the provisions of the treaty whereby it was open to all states. He reserved the right to comment at greater length on the articles at a later stage.

109. With regard to article 26, he agreed with Mr. Verdross that the formulation to the effect that the depositary should normally be the state or international

organization in whose archives the original texts had to be deposited was inadequate, because that would mean that someone else could be a depositary, which was not the case.

110. The points raised by Mr. Bartoš, on which he had no comments to offer for the time being, concerned also other elements of the law of treaties, such as succession.

111. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee might be asked to amend paragraph 1 so as to take into account the point made by Mr. Verdross. He did not believe, however, that he had greatly offended in that regard, for the reference to an express provision in the treaty indicated that the negotiating states were entirely free to make what provision they wished concerning the depositary.

112. To take into account the first comment of Mr. Bartoš, paragraph 3 might be amended to provide for the case where a depositary ceased to act in that capacity, but he would be reluctant to enter into the difficult problem of the succession of states in that context.

113. He noted that no view had been expressed on the question whether it would be useful and justified to make the presumption that, if the treaty was silent, the "host" state should be responsible for notifying the receipt of instruments of ratification and other instruments relating to the treaty.

114. Mr. de LUNA said that the article might be redrafted so as to begin with the general proposition that the designation of a depositary was settled by the parties, and then to follow with residual rules for cases where no provision for a depositary had been made in the treaty.

115. Satisfaction would be given both to the Secretary and to the special rapporteur if the words "the appropriate organ of" were inserted before the words "the said organization" in paragraph 2 (a).

116. Mr. ROSENNE suggested that paragraph 1 was unnecessary, in view of the definition of "depositary" given in article 1 (m).

117. The Secretary's point could be met by the addition of the words "or organ of the international organization" at the end of paragraph 2.

118. Mr. JIMÉNEZ de ARÉCHAGA said he favoured the presumption contained in paragraph 2 (b), which would serve a useful purpose.

119. Perhaps an exception should be made for agreements in the form of an exchange of notes, which appeared not to require a depositary even when they had more than two parties.

120. The CHAIRMAN suggested that the article should be referred to the Drafting Committee for redrafting in the light of the discussion.

*It was so agreed.*

The meeting rose at 12.55 p.m.



## 658th MEETING

Wednesday, 6 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)**

**ARTICLE 27. — THE FUNCTIONS OF A DEPOSITARY**

1. The CHAIRMAN invited the Commission to consider article 27.
2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 27 attempted a comprehensive statement of the duties of the depositary; for that reason, the text was somewhat long. It could perhaps be shortened, for example, in its passages relating to reservations, by a reference back to the articles on the subject as ultimately adopted by the Commission.
3. The duties of the depositary were undoubtedly easier to perform if the depositary was the secretariat of an international organization; they were on the whole more burdensome for a state.
4. Mr. YASSEEN said he agreed with the special rapporteur's view, stated in his commentary, that the depositary was not a mere postbox. The depositary had a very useful and important administrative role to play. It was, however, essential to confine the duties of the depositary to purely administrative functions; there should be no suggestion that the depositary could have a role in any way resembling that of a judge or arbitrator.
5. Most of the provisions of article 27 described administrative functions in perfectly acceptable terms. Some, however, such as those in paragraph 6(a), would give the depositary the right to examine certain situations in the light of the terms of the treaty. That might be easy in some cases, as when a depositary had to verify the letters of credence of a representative. The position would be much more delicate, however, if the depositary were called upon to verify that a particular reservation was admissible, particularly if it were a question of determining whether it was compatible with "the object and purpose of the treaty". The Commission, from its discussion of article 17, was well aware of the difficulties to which that compatibility test could give rise.
6. A depositary could not, of course, be prevented from examining the compatibility of a reservation; there remained, however, the difficult question of determining the effects of that examination. The provisions proposed by the special rapporteur in article 27 did not state that the conclusion which might be reached by the depositary would be binding on the states parties to the treaty. It should be made clear that the opinion of the depositary on the question of compatibility could be circulated to the parties, but that the last word would always remain with the parties to the treaty themselves.
7. Mr. CASTRÉN said he agreed with Mr. Yasseen. It was not desirable to impose upon the depositary, as was done in paragraph 6(a), the responsibility for verifying whether a reservation was "expressly prohibited or impliedly excluded by the terms of the treaty" and consequently inadmissible. It was hard to see what the depositary could do in the circumstances; should it for example, refuse to accept the instrument of ratification or accession? The decision should be left to the interested states themselves, which would be called upon, under the terms of the articles on reservations, to give or refuse their consent. It was the duty of the depositary to communicate any reservations to all states parties to the treaty, without even expressing an opinion on the subject of their validity.
8. The Commission should not feel bound by the practice of the Secretary-General of the United Nations in the matter of the functions of a depositary. The Commission was attempting to codify the law applicable to all depositaries, whether secretariats of international organizations or states.
9. Mr. ROSENNE said that a number of purely legal questions needed to be clarified before article 27 could be formulated in detail.
10. The first was whether there existed any international law in the matter, or whether the functions of a depositary were purely and simply administrative, the depositary performing what was described in the commentary as a "procedural role in what is really the internal administration of the treaty". In his opinion, there existed a substantial body of international law on the subject of the functions of the depositary, the importance of which had only recently become apparent.
11. The next was whether there was any difference in law between the case where the depositary was one of the High Contracting Parties themselves, and the case where the depositary was the secretariat of an international organization. The issue was not purely theoretical. One of the most important questions to be determined, and one which he had encountered very soon after the independence of his country, was whether a party to a treaty which was entrusted with the function of depositary was entitled in law to exercise those functions in the light of its own national policy; was it, for instance, entitled to interpose its national policy on such a delicate issue as recognition? The particulars given in the reply by Israel to a questionnaire circulated in 1949 by the Secretary-General of the United Nations on the subject of the law of treaties<sup>1</sup> were of interest in that connection.
12. In his opinion, there was no fundamental difference in law between the case where the depositary was a party to the treaty and the case where the depositary was the secretariat of an international organization. In both cases, the depositary operated as an organ of the community of states from which it had accepted the depositary functions.
13. On those premises, the question arose by what general principle the depositary should be guided. On that point, he wished to quote two striking statements made by the late Mr. Kerno, the then Legal Counsel of

<sup>1</sup> *Yearbook of the International Law Commission 1950*, Vol. II (United Nations publication, Sales No.: 1957.V.3, Vol. II), p. 217.

the United Nations, at the third session of the International Law Commission. First, Mr. Kerno had quoted from the concluding passage of his own oral statement to the International Court of Justice in the case concerning the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide:<sup>2</sup> "The Secretary-General seeks only to be the faithful, conscientious and impartial servant of all those concerned".<sup>3</sup> His second statement had been made a few meetings later and stressed that the Secretary-General, in exercising his depositary functions, "considered himself to be the trustee of the parties to the convention and of the other Member States."<sup>4</sup> It was significant in the light of the rich common law background of the term, that the late Legal Counsel had used the term "trustee"; that the choice of the term had been deliberate was shown by his having repeated it at the next meeting.<sup>5</sup>

14. That conception of the duties of a depositary was fully consistent with the terms of one of the earliest resolutions adopted by the General Assembly, in which it had attempted to describe the duties of a depositary: resolution 24 (I) of 12 February 1946 on the transfer of certain functions, activities and assets of the League of Nations. Section I A, relating to certain instruments for which the League of Nations had undertaken to act as custodian of the original signed texts and to perform certain secretariat functions, described those functions as "functions, pertaining to a secretariat, which do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties".

15. Yet the General Assembly had never endorsed the mere postbox theory of the functions of the depositary. That was clear from the resolution he had cited and from subsequent resolutions.

16. The depositary should have a recognized power to take provisional decisions in relation to the nature and scope of an instrument submitted to it in the performance of the depositary functions. That conception of the depositary function involved what the Canadian representative at the 616th meeting of the Sixth Committee of the General Assembly, during the discussion at the fourteenth session on the Indian reservation to the Convention of the Inter-Governmental Maritime Consultative Organization, had described as "some adjudicative attributes".<sup>6</sup> The power of the depositary would not, however, extend to final adjudication and any decision would be purely provisional; if disagreement resulted from that provisional decision, adequate machinery existed for resolving the difficulties.

<sup>2</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Pleadings, Oral Arguments, Documents*, Advisory opinion of 28 May 1951, I.C.J. 1951, p. 325.

<sup>3</sup> *Yearbook of the International Law Commission 1951*, Vol. I (United Nations publication, Sales No. : 1957.V.6, Vol. I), 101st meeting, para. 40.

<sup>4</sup> *ibid.*, 104th meeting, para. 38.

<sup>5</sup> *ibid.*, 105th meeting, para. 55.

<sup>6</sup> *Official Records of the General Assembly, Sixth Committee, Summary Records of Meetings*, p. 83.

17. With regard to paragraph 6 (a), he was not convinced that the depositary had either the duty, the right or the power to verify that a reservation was "not one expressly prohibited, or impliedly excluded by the terms of the treaty and for that reason inadmissible". The depositary could not be given that power, because its exercise would imply a substantive decision. However, the depositary had the power to establish provisionally whether a particular statement constituted a reservation or not. The Secretary-General had done so in the case of a reservation to the IMCO Convention; only subsequently had it been established that a certain statement did not constitute a reservation, but the Secretary-General as a depositary had properly taken a provisional stand on that point.

18. The next question was to whom was a depositary responsible. Where the depositary was a state, it would be responsible to the Contracting Parties or to the community of states from which it had accepted the duties of a depositary. Where the depositary was the Secretary-General of an international organization, even if the treaty mentioned him personally, his appointment was not *ad personam*, but in his capacity as Secretary-General; accordingly, he was responsible to his own organization for the manner in which he discharged his depositary functions, so that the question of his discharge of those functions could be discussed in the appropriate organs of the organization.

19. The experience of the IMCO Convention had also shown the existence of a problem connected with the autonomy of the different international organizations. Although the problem had not actually been solved, he believed that the depositary should not be responsible to any other organization than that which he served as Secretary-General; for instance, in the case of the Indian reservation to the IMCO Convention, he was responsible not to the other organization as such, but to the parties to the IMCO Convention, of which he was the depositary.

20. Another problem arose out of the recent case-law of the International Court of Justice. In its judgment rendered on 26 November 1957 on the preliminary objections in the case between Portugal and India, the Court had decided, particularly with reference to the first and second objections by India, that a legal relationship could be established between India and Portugal by the deposit of an instrument, without India being aware that the instrument had been adopted and that that relationship had been so established.<sup>7</sup> He suggested that, independently of the particular question of the acceptance of compulsory jurisdiction under Article 36 (2) of the Statute of the Court, which was governed by that Statute, that rule was not suitable for inclusion in the draft articles. It was not a satisfactory rule for the purpose of the general law of treaties: a state was in principle entitled to know its precise legal position before that position produced its effects.

21. Thus, while he agreed with the general tenor of the

<sup>7</sup> *Case concerning the right of passage over Indian territory (Portugal v. India) (Preliminary objections)*, I.C.J. Reports 1957, p. 125 *et seq.*

article, he felt that a discussion of the legal issues to which he had referred should be included in the commentary.

22. With regard to the text of the article, he suggested that paragraph 3(d) should be amended to state that the depositary should inform "promptly" all the other interested states of the receipt of the instrument in question.

23. In the same paragraph, he did not think it was necessary to stipulate that the depositary should transmit the actual text of the instrument in question to all the states concerned: preferably, in keeping with the practice followed by the Secretary-General of the United Nations, only the essential contents of the instrument should be communicated.

24. Mr. JIMÉNEZ de ARÉCHAGA said he was in substantial agreement with the article, which constituted an adequate codification of the practice of the Secretary-General as depositary.

25. He suggested, however, that in paragraph 2(b) the words "or established in practice" should be added after the words "such further authentic texts in additional languages as may have been specified in the treaty". The Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7) showed that the Secretary-General also prepared translations into additional languages in cases where the treaty contained no provisions on the subject. The Commission should not give the impression that it intended to change that excellent practice.

26. Paragraph 2(c) indicated that the depositary had the important function of determining which states were entitled to become parties to the treaty. He agreed with Mr. Rosenne that there was no fundamental difference in that respect between the secretariat of an international organization and a state, and that a depositary should always act as an organ of the community of nations. In practice, however, the exercise of the depositary's functions must inevitably be influenced by the international policy of the state or the organization concerned. Neither a state nor an organization could be expected to send communications to, or establish contacts with, a state which it was its policy not to recognize. In fact, the Summary of the Practice of the Secretary-General showed that, where a treaty had been opened to accession by "all states" in accordance with its terms, the relevant clause of the treaty had been interpreted to cover only states Members of the United Nations and specialized agencies, states parties to the Statute of the International Court of Justice and states invited to the conference which had formulated the treaty.

27. There was one significant difference between a state and an international organization acting as depositary; in the case of an international organization, the policy would be that of the majority of the member states rather than the national policy of a particular state. It was therefore desirable to encourage the practice of using international organizations as depositary.

28. With regard to paragraph 3(d), he supported Mr. Rosenne's suggestion for the inclusion of the word "promptly", since the Commission had already agreed, in connexion with the deposit of ratifications, that the mere deposit of an instrument of ratification was sufficient to bring a treaty into force and that its effectiveness was not dependent on the communication of that instrument to other states.

29. In paragraph 4, he suggested the insertion of some indication that one of the duties of the depositary was to ensure that such provisions of the treaty as those on the time-limit for the deposit of instruments were duly complied with. It was necessary to specify in that connexion that the provisions of the treaty itself on the subject would prevail over those of the draft articles.

30. The duty specified in paragraph 6(c) existed also where the treaty was silent. After the words "any such provisions", therefore, some such phrase as "or in the absence of any such provisions" should be inserted.

31. With regard to paragraph 6(a), he agreed with previous speakers that the depositary's functions were limited to a preliminary verification, subject to the final decision of the parties to the treaty themselves. He would not exclude the right set forth in paragraph 6(a), but wished it to be made clear that the depositary should always circulate a reservation to all the states concerned; it had the right, of course, to append its opinion on the subject of the reservation as provided in paragraph 7(a),

32. Mr. de LUNA, after congratulating the special rapporteur for steering a commendable middle course between two extremes, said it was essential not to underrate the importance of the functions of the depositary; the Commission should depart from the tradition established in respect of bilateral treaties, as it had done in respect of reservations. As already mentioned by Mr. Tunkin and Mr. Rosenne, it was necessary to forestall abuses, particularly where a state might allow its functions as depositary to be affected by its national policy.

33. Historically, the law of treaties had its origins in the rules observed with respect to bilateral treaties. Even after the appearance of international congresses, collective treaties had been regarded as a series of individual bilateral treaties where all the signatory states exchanged ratifications with each other, as had been the case with the Final Act of the Congress of Vienna of 1815 and the Geneva Convention of 1864.

34. That elaborate process having been found cumbersome, the custom next grew up of exchanging ratifications with only one state, which had a special interest in the subject matter of the treaty or had acted as host to the conference which had formulated it. Finally, the concept had emerged of a collective treaty that was not just a juxtaposition of bilateral agreements and the functions of a depositary had then increased in importance. It was not possible, however, to go so far as to empower the depositary to determine unilaterally, and with binding force, the date of the entry into force of a treaty: to give the depositary such powers would lead to the abuses referred to by Mr. Tunkin.

35. It was for those reasons that he fully approved the interpretation given in paragraph 6 of the special rapporteur's commentary of the term "to determine" used in paragraph 84 of the Summary of the Practice of the Secretary-General (ST/LEG/7).

36. He agreed with Mr. Yasseen, Mr. Castrén and Mr. Rosenne on the nature of the depositary's functions. While there should be no suggestion that the depositary had any power to take unilateral decisions on substance and thus substitute its own decision for that of the states parties to the treaty, the depositary's functions should not be limited to those of a mere postbox. The postbox theory was a legacy of bilateralism.

37. The most important point in article 27 was that dealt with in paragraph 6 regarding reservations, and the Commission should not take a decision on that paragraph until it had agreed on the provisions on the subject of reservations.

38. He agreed with Mr. Rosenne that there was no difference in law between a state and an international secretariat as depositary, although in practice there would be the difference indicated by Mr. Jiménez de Aréchaga. He did not think, however, that any distinction should be drawn in the draft articles for that reason.

39. It was necessary to ensure legal certainty in relation to the treaty. Certainty was often more important in law than justice, as was shown by the existence of statutory limitations. It was therefore essential not to leave any doubt on such important subjects as the date of the entry into force of a multilateral treaty.

40. The Commission should strike a balance between the need for efficiency in the service of the treaty and the need to prevent any possible abuse by the depositary, particularly where that depositary was a state party to the treaty.

41. Mr. GROS commended the special rapporteur for eschewing theoretical considerations and proposing a set of rules drawn largely from practice.

42. Reference had been made to the possibility of an abuse being committed by the depositary. Such an abuse would imply bad faith on the part of the depositary, something which was extremely unlikely; it was a rule of international law that states must be presumed to be acting in good faith. In any case, he did not see how the contemplated abuse of powers by the depositary could represent any real danger.

43. In practice, the depositary state remained at the same time a party to the treaty. In practice, the depositary state did not have two separate departments to deal with correspondence in connexion with a treaty, one to consider that relating to the state's functions as a depositary and another to examine that relating to the state as a party to the treaty. The fact that a state was a depositary could not debar it from expressing its rights as a party to the treaty.

44. He supported the special rapporteur in not adopting the postbox theory of the functions of the depositary. Since the depositary did not act as a mere postbox, the department dealing with correspondence with other

states relating to a treaty, acting of course in good faith and with the knowledge gained as a result of the experience of the depositary state as a negotiator of the treaty, would consider whether the points raised in the correspondence relating to the treaty were acceptable or not. Naturally, in that correspondence, the depositary state would proceed differently, according as it was writing as depositary or as a party to the treaty.

45. If the depositary state were to commit an abuse, through confusing its right as a party to pronounce on the effect of a reservation with its obligation as depositary to transmit the reservation provided it was *prima facie* admissible, the party or parties concerned would have an easy remedy at their disposal: the reserving state could send a copy of its reservation to all the contracting parties and protest against the abuse allegedly committed by the depositary.

46. In view of the existence of that remedy against abuse, he agreed with the special rapporteur that article 27 should contain provisions which would permit the depositary to verify the validity of any communications received by it in connexion with the treaty.

47. All the examples of possible abuses given by Mr. Tunkin at the previous meeting related to problems of concern to the parties as a whole, cases in which the depositary, as a contracting party, had taken a certain position. There had never been any case in which the depositary had taken an abusive final decision where the matter could not be settled by agreement between the parties to the treaty; the depositary had no means of imposing its own views.

48. In short, it was for the parties as a whole to settle any dispute that might arise in connexion with the action of the depositary.

49. He therefore saw no reason why the depositary should be under an obligation to transmit to all the other states concerned the text of an obviously inadmissible reservation, for example, a reservation expressly excluded by the terms of the treaty.

50. A more delicate problem could arise in cases where the assessment of the validity of a reservation proved difficult. However, even under the postbox theory the depositary would transmit the text of all reservations to all the states concerned in compliance with its obligations, and obviously, at the same time, would communicate its opinion as a contracting party to the other states, a capacity which it did not forfeit by reason of its functions as depositary.

51. For those reasons, he found the proposals of the special rapporteur acceptable, subject to drafting improvements.

52. Mr. VERDROSS associated himself with the comments made by Mr. Yasseen, Mr. Castrén and Mr. de Luna. Clearly, a distinction should be drawn between the communication of instruments concerning the treaty to the parties, and decisions of substance. The special rapporteur's text seemed to go too far: a depositary could certainly not determine whether a

reservation was prohibited under the terms of the treaty or was incompatible with its object. That decision could be made only by the parties. The article should stipulate that the function of the depositary was to make any observations necessary on the instrument and to communicate both the instrument and the comments to the parties.

53. Mr. LACHS said that the central issue was the extent of a depositary's functions. A depositary was appointed by the parties for reasons of practical convenience and could not possess any rights beyond those vested in it by them. The depositary could certainly not exercise any interpretative functions which might affect the rights of the parties.

54. Regrettably there had been cases, for example, in connexion with the International Sanitary Conventions of 1894 and 1903 and the International Convention on the Protection of Literary and Artistic Works, of a depositary yielding to the temptation of not keeping separate its functions as a depositary and as a party to the treaty and of attaching its own comments when notifying the other Parties of the receipt of instruments. Some difficulties had also arisen in the early stages of both League of Nations and United Nations practice. Of course, ill will should not be presumed but nevertheless, in order to prevent such occurrences in the future, it was important in the article to circumscribe the depositary's functions as much as possible while taking care not to prejudice the smooth operation of the treaty.

55. In addition to the important restriction that questions of interpretation should be settled by the parties themselves, an express provision was also necessary to prevent the depositary from having any influence on the entry into force of the treaty.

56. On the whole the special rapporteur's text was consistent with his own line of thought, but he had strong objections to paragraph 4 (b) and to some of the provisions in paragraph 6, which vested excessive functions in a depositary. Some amendments in the light of the discussion would be essential in order to avoid misconstructions or difficulties such as those which in the past had resulted from an abuse of powers by a depositary.

57. Mr. LIANG, Secretary to the Commission, said that some misunderstanding seemed to have arisen over the wording of the second sentence in paragraph 84 of the Summary of the Practice of the Secretary-General. The document had been drafted in French and there was a slight shade of meaning between the word "*déterminer*", used in the French text, and the words "to determine", in the English. The former had a less rigorous connotation but even the latter could not be held to contain any implication of a unilateral decision or one with binding effect.

58. The functions of a depositary lay midway between serving as a post office and acting as an organ for sovereign determination; it had never been contended that a depositary possessed the latter power. Yet, the depositary had to make determinations of facts and occasionally of mixed questions of fact and law. The

Secretary-General of the United Nations, for example, had to determine, as a depositary, questions in accordance with the relevant clauses of the agreement. Thus, if a reservation were filed to a clause which was not open to reservations, the instrument of ratification of the reserving state could not be counted among those necessary to bring the treaty into force.

59. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Yasseen and other members of the Commission that the intention of the article should be made clear. He had used the word "verify", which also appeared in the Summary of the Practice of the Secretary-General, to describe a process, something short of determination, by which the depositary provisionally took a position as to whether on the face of it a ratification or reservation was in order. Some minor element of interpretation was inescapable because, as all members agreed, a depositary could not simply act as a post office and communicate all the instruments received without examination. Apart from the more serious possibility of an intentional attempt by one of the parties to file a reservation that was expressly prohibited by the treaty, the process of verification was useful as a means of calling attention to minor errors or faults due to inadvertence.

60. The draft omitted to indicate, and that omission should be made good, what took place after that provisional process of verification, particularly if a divergence of view arose between the depositary and the state concerned.

61. Clearly, the other parties should be informed if an instrument was not in order and a collective decision should be taken. The depositary certainly could not take a unilateral decision.

62. Mr. LIU said he not only agreed with the special rapporteur's remarks, but would go even further and state that, by virtue of the right possessed by each party to the treaty, the depositary would be free, when transmitting any instrument, to attach its own observations. The fact of being a depositary should not restrict its rights in that regard, and he foresaw no danger of abuse.

63. The international status of the Secretary-General of the United Nations, or of any other international organization acting as a depositary, was such that he would be particularly anxious to be impartial. He knew of no case where the Secretary-General had taken any action beyond that of pure verification or determination of facts.

64. Mr. TUNKIN, amplifying his observations at the previous meeting, said that although article 27 at first sight seemed unobjectionable, closer examination revealed that it failed to provide adequate safeguards against the unlawful acts committed by depositaries in recent years. The article might also lend itself to an excessively broad interpretation as conferring rights going beyond those normally vested in a depositary.

65. In answer to the question what were the attributes of a depositary, he would reply that they were juridically quite distinct from those of a party to the treaty and

involved very different functions. A depositary's functions were defined by the consent of the parties and prescribed in the treaty itself. It was, for instance, inadmissible for a depositary to refuse to accept the instrument of ratification of a state which it did not recognize but which, under the terms of the treaty, was entitled to become a party; nor should the depositary take advantage of its functions to resort to procedural measures designed to prevent the admission of a certain state. Cases of both types had occurred in practice.

66. The article should include some kind of definition of the nature of the institution of depositary, based on what actually happened in international life, and should specify more precisely the scope of a depositary's functions.

67. He agreed with the special rapporteur that a depositary was not a mere postbox, but emphasized that, if there were any uncertainty about an instrument filed with it, the depositary possessed no right of decision whatever. However, in the sense attributed to it by the special rapporteur, the word "verify" was appropriate to describe a certain formal process of establishing a factual situation that should then be communicated to the parties. He was also right in proposing that the next stage, after that process had been completed, should be covered in the article.

68. Mr. PAREDES said that he could not express a final opinion on article 27 until he had received the Spanish text, but in general found himself in agreement with Mr. Tunkin.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission seemed to be largely in agreement as to the general nature of the institution and that the depositary was an agent or trustee of the parties. The Drafting Committee should be able to improve the text in a manner that would take the Commission's observations into account.

70. The CHAIRMAN observed that there seemed to be a feeling that in some respects the powers the article conferred on a depositary were a little too wide. He suggested that it should be referred to the Drafting Committee.

*It was so agreed.*

71. Mr. BARTOŠ proposed that the special rapporteur and the Drafting Committee be requested to prepare an article on discrepancies in the texts of a treaty in several languages. The matter had been raised by Mr. Rosenne and himself at the previous meeting.<sup>8</sup>

72. Sir Humphrey WALDOCK, Special Rapporteur, said that in that case it would be helpful if Mr. Bartoš and Mr. Rosenne would provide him with a brief outline in writing indicating the kind of provision they had in mind.

*It was so agreed.*

## DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*resumed from the 655th meeting*)

### ARTICLE 2. — SCOPE OF THE PRESENT ARTICLES

73. The CHAIRMAN said that the Drafting Committee had prepared the following redraft of article 2:

"1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph (a).

"2. The mere fact that, by reason of the provisions of the preceding paragraph, the present articles do not apply to any kind of international agreements not in written form shall not be understood as affecting in any way such legal force as these agreements may possess under general international law."

74. Mr. TSURUOKA proposed the deletion of the word "may" before the word "possess" in paragraph 2.

75. Mr. CASTRÉN suggested that the word "general" in the same paragraph should also be deleted, since international agreements not in written form might be recognized to possess legal force.

76. Mr. VERDROSS said that the clause had been drafted in that way deliberately so as to leave open the question whether or not a treaty not in written form possessed legal force under international law.

77. Sir Humphrey WALDOCK, Special Rapporteur, confirmed that that part of paragraph 2 had been drafted in that manner because he had understood that, as in 1959,<sup>9</sup> the Commission did not wish to express any view as to the legal effect of agreements not in written form.

78. Mr. BARTOŠ said that the Commission should decide once and for all what was meant in the French text by the expression "*droit international commun*". The adjective "*commun*" seemed to exclude agreements possessing legal force under regional international law. It would therefore be better to use the adjective "*général*".

79. Mr. BRIGGS said that the drafting of paragraph 2 might be improved if it were shortened to read:

"The fact that these articles do not apply to international agreements not in written form shall not affect in any way such legal force as these agreements may possess under general international law".

80. Mr. GROS, speaking as Chairman of the Drafting Committee, said that the Committee would take Mr. Briggs' suggestions into account. The wording which Mr. Tsuruoka had asked should be changed conformed with the intention of the special rapporteur.

81. Mr. AMADO said that the words "in any way" in the second paragraph appeared to be redundant.

82. Mr. ROSENNE suggested that the wording "such legal force as these agreements may possess under general international law" should be replaced by the

<sup>8</sup> 657th meeting, paras. 92 and 93.

<sup>9</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 95.

wording "the legal force of these agreements under general international law".

83. Sir Humphrey WALDOCK, Special Rapporteur, said that there was a considerable difference in meaning between the two formulations. The effect of Mr. Rosenne's amendment would be to concede that the agreements in question did possess legal force under general international law.

84. Mr. GROS observed that, while the English text was perhaps more precise than the French, there was no substantive difference between the two.

85. Mr. ROSENNE said he would not press his suggestion.

86. The CHAIRMAN suggested that article 2 should be referred back to the Drafting Committee for redrafting in the light of the comments made during the discussion.

*It was so agreed.*

#### ARTICLE 3. — CAPACITY TO CONCLUDE TREATIES

87. The CHAIRMAN said the Drafting Committee had prepared the following redraft of article 3:

"1. Capacity to conclude treaties under international law is possessed by states and by other subjects of international law.

"2. The capacity to conclude treaties may be limited by the provisions of a treaty relating to that capacity.

"3. In a federation, the capacity to conclude treaties depends on the federal constitution.

"4. In the case of international organizations, the capacity to conclude treaties depends on the instrument by which the organization concerned was constituted."

88. Mr. VERDROSS said that the word "federation" in paragraph 3 was ambiguous. For example, the treaty-making capacity of the sovereign states composing the German Federation set up by the Congress of Vienna had surely not depended on a federal constitution. It would be more accurate to say that in a federal state, capacity to conclude treaties depended on the constitution of that state.

89. Mr. YASSEEN said he wished to reserve his position on paragraph 2. The limitations it referred to did not produce incapacity, for a treaty could not render a state incapable of making treaties. A state whose capacity was thus limited could therefore conclude a treaty despite the limitations laid down by treaty. A treaty concluded by that state would not be void, or even voidable, though in departing from the terms of a pre-existing treaty providing for such limitations, the state might have incurred responsibility.

90. Mr. CASTRÉN said that paragraph 1 was not quite satisfactory. Capacity to conclude treaties under international law was not possessed by all states; some states, such as the members of several federal states, lacked that capacity entirely, and some subjects of international law other than states, such as individuals and some international organizations, were in the same position.

He proposed therefore that the words "members of the international community" should be inserted after the word "states" and that the adjective "certain" should be inserted before the word "other". More detailed explanations could be given in the commentary.

91. With regard to paragraph 2, capacity to conclude treaties might be limited not only by a treaty, but also by a rule of general international law, for example, the rule governing the right of insurgents recognized as belligerents to conclude treaties. He accordingly proposed that paragraph 2 should be amended to read, either

"Capacity to conclude treaties may be limited by international law", or

"Capacity to conclude treaties may be limited by general international law or by the provisions of a treaty relating to that capacity".

92. So far as paragraph 3 was concerned, it was not enough to refer to federations only; there were other unions of states whose members did not have an unlimited right to conclude treaties. He therefore proposed that the paragraph should be amended to read:

"In a union of states, capacity to conclude treaties depends on the constitution or on the treaty forming the basis of the union".

93. Mr. BRIGGS said that paragraphs 2 and 3 should be deleted.

94. With regard to paragraph 2, when the special rapporteur had introduced his draft of the article, he had stated that it did not deal with restrictions on international capacity,<sup>10</sup> since that question seemed to belong to the group of articles on validity. The statement that capacity to conclude treaties might be limited by the provisions of a treaty represented a denial of the Commission's assumption that, if a state could not conclude any treaties, it was not in fact a state. The Harvard Research draft referred only to limitations of capacity to conclude certain treaties.

95. With regard to paragraph 3, he agreed with Mr. Verdross that "federation" was an ambiguous term. The United States of America, Switzerland, Mexico and Brazil could not properly be called federations. Furthermore, the Drafting Committee's text of the paragraph stated in effect that capacity to conclude treaties depended on a national constitution; but the special rapporteur had drafted the article in his original draft on the premise that international capacity could not be conferred by the constitution of the federal state alone. The use of the term "federation" might be proper in the case of a union of states based on a treaty.

96. His conclusion was that an article consisting of paragraphs 1 and 4 would suffice, although paragraph 4 should be broadened. The instrument by which the organization concerned was constituted might have been modified and, moreover, he was not sure that capacity always derived from such an instrument; in some cases, it might derive from the practice of the organization.

<sup>10</sup> 639th meeting, para. 4.



97. Mr. BARTOŠ said he could not agree with Mr. Castrén that the word "certain" should be inserted before "other subjects of international law" in paragraph 1. It should be explained in the commentary that the reference was to subjects of international law whose treaty-making capacity was recognized by the instruments by which they were constituted or by rules of international law.

98. With regard to paragraph 2, he did not think that reference should be made to "certain" treaties, as had been done in the Harvard Research draft; that point might be explained in the commentary. He agreed with Mr. Castrén that reference should be made to limitations resulting from rules of international law, since certain objective and normative institutions of international law, in addition to the provisions of treaties, imposed such limitations. It would also be advisable to state in the commentary that the limitations in question were those resulting from treaties governing the legal status of subjects of international law.

99. In paragraph 3, the reference to a constitution was inadequate. While most federations had constitutions, some of them were bound by treaties among the component states or by some other instrument of a constituent character. It would therefore be better to refer to the instrument by which the federal state or union of states was constituted rather than to the constitution, particularly with a capital C.

100. Mr. ROSENNE said that paragraph 3 should be deleted; the idea contained in it should be amplified in the commentary. Throughout its work on the special rapporteur's draft, the Commission had taken care to keep the international law of treaties separate from domestic law, and it should not now abandon that approach.

101. Mr. EL-ERIAN said he agreed with Mr. Briggs that paragraphs 2 and 3 should be deleted and that in paragraph 4 reference merely to the instrument by which the organization was constituted might not be sufficiently comprehensive.

102. Sir Humphrey WALDOCK, Special Rapporteur, said that he could not feel particularly enthusiastic about the article as redrafted. He had originally felt that the Commission should give its views on problems arising in connexion with treaty-making capacity, but the Commission had decided that an elaborate provision would be too complex. The truncated article before the Commission was based on quite different conceptions from his own. He agreed with those members who had pointed out that paragraph 3 dealt with national constitutional questions, whereas the Commission should try to confine its texts to the international aspects. He doubted whether it was worth while retaining the article at all.

103. Mr. AMADO observed that the article on capacity in the Harvard Research draft was extremely concise. The Commission too should not adopt a lengthy or detailed article for, as Mr. Briggs had pointed out, much of the substance of such a provision would in fact relate to the question of validity of treaties. The article

should be extremely brief and should contain only the essential points relating to treaty-making capacity.

104. Mr. TUNKIN said he saw considerable merit in Mr. Briggs' suggestion that paragraph 2 should be deleted. The possibility of limiting the treaty-making capacity should not even be mentioned in the text of the article itself.

105. He did not think that Mr. Castrén's proposed addition of the words "members of the international community" in paragraph 1 improved the paragraph. States and other subjects of international law were obviously members of the international community, participating in international relations; the addition would therefore only add to the ambiguity which already existed in that paragraph.

106. He endorsed Mr. Briggs' suggestion that the formulation of paragraph 4 might be broadened.

107. Mr. AMADO said he agreed with Mr. Tunkin that Mr. Castrén's proposed addition to paragraph 1 was unnecessary. Indeed, he would support any suggestion which could help to reduce the article to essentials.

108. The CHAIRMAN asked whether the Commission wished to drop the article altogether.

109. Mr. CADIEUX said that, although the Drafting Committee could not be said to have solved all the problems involved, the Commission should not take such a drastic step as to omit the article altogether. Its four paragraphs followed each other logically and broadly reflected the lengthy discussions which the Commission had held on the subject. As much as possible of the text should therefore be retained.

110. Mr. AMADO said that all the suggestions that had been made for shortening the article had been made after mature reflection.

111. Mr. EL-ERIAN considered that the time had come to refer the article back to the Drafting Committee, which would have ample indications from the debate as to what should be kept in the article itself and what should be transferred to the commentary.

112. The CHAIRMAN observed that the Commission had before it a number of proposals of substance, with which the Drafting Committee could not deal.

113. Sir Humphrey WALDOCK, Special Rapporteur, agreed that the Commission should decide whether or not it wished to retain paragraphs 2 and 3. The objection to paragraph 3 was that it stated the matter from the point of view of constitutional law, and not from that of international law. Perhaps the paragraph might be revised to read: "In a federal state, the capacity of the federal state and its component states to conclude treaties depends on the federal constitution".

114. He believed that the criticisms of paragraph 2 were sound, since it dealt with a point which really concerned the articles on validity, particularly if the concept of general international law, as well as that of treaties, was introduced. That would raise the whole question of whether there was *ordre public* in international law and whether certain types of treaties, such as conventions condoning slavery, were, so to speak,

forbidden. He thought that the treaties which the Commission had in mind were instruments of a constitutional type which limited capacity. If the paragraph were retained, he thought it should be transposed to the end of the article, as paragraph 4.

115. In principle, the Commission should retain an article on capacity, but in that case it might have to define "subject of international law". The Commission might be criticized for referring to subjects of international law without definition.

116. Mr. BRIGGS said that the special rapporteur's proposed revision of paragraph 3 did not meet his objection. He still felt that paragraphs 2 and 3 should be deleted, though an article on capacity should be retained in the draft.

117. The CHAIRMAN put to the vote the proposal that paragraph 2 should be deleted.

*The proposal was rejected by 7 votes to 7 with 7 abstentions.*

118. The CHAIRMAN put to the vote the proposal that paragraph 3 should be deleted.

*The proposal was rejected by 12 votes to 8, with 1 abstention.*

119. The CHAIRMAN put to the vote paragraph 3 as amended by the special rapporteur.

*Paragraph 3, as thus amended, was adopted by 15 votes to none, with 6 abstentions.*

120. Mr. EL-ERIAN said that, since paragraph 2 was to be retained, he hoped that the Drafting Committee would take into account Mr. Briggs' suggestion that the provision should relate to capacity to conclude certain types of treaties.

121. The CHAIRMAN suggested that article 3 should be referred back to the Drafting Committee for revision in the light of the decisions taken and of the comments made during the debate.

*It was so agreed.*

The meeting rose at 1 p.m.

## 659th MEETING

Thursday, 7 June 1962, at 10 a.m.

Chairman : Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

**ARTICLE 4.—AUTHORITY TO NEGOTIATE, DRAW UP, AUTHENTICATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY**

1. The CHAIRMAN invited the Commission to continue its consideration of the provisional articles submitted by the Drafting Committee, whose redraft of article 4 read as follows:

"1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate, or sign a treaty on behalf of their state.

"2. Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their state and the state to which they are accredited.

"3. Subject to the provisions of paragraphs 1 and 2 above, a representative of a state shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his state.

"4. (a) Subject to the provisions of paragraph 1 above, a representative of a state shall be required to furnish evidence of his authority to sign (whether in full or *ad referendum*) a treaty on behalf of his state by producing an instrument of full-powers.

"(b) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full-powers, unless called for by the other negotiating state.

"5. In the event of an instrument of ratification, accession or acceptance being executed by a representative of the state other than the Head of State, he may be required to furnish evidence of his authority.

"6. (a) The instrument of full-powers, where required, may either be one restricted to the performance of the particular act in question or a general grant of full-powers which covers the performance of that act.

"(b) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the state concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be provisionally accepted, subject to the production in due course of an instrument of full-powers, executed in proper form.

"(c) Similarly, a letter or telegram evidencing the grant of full-powers sent by a state's Permanent Representative to an international organization may also be provisionally accepted, subject to the production in due course of an instrument of full-powers executed in proper form."

2. Mr. ROSENNE said that, although he was in general agreement with the Drafting Committee's redraft, he wished to suggest a few substantive changes. First, under paragraph 4(b) representatives were not obliged to produce an instrument of full-powers in the case of treaties in simplified form. He thought that provision went too far, and that the exemption should be limited to the head of a diplomatic mission in the country to which he was accredited.

3. Secondly, paragraph 5, under which the Head of State was not required to furnish evidence of his authority to ratify, accede to or accept a treaty, did not

go far enough; the exemption should be extended to the other two classes of persons referred to in paragraph 1, as in the special rapporteur's original text. In some countries, such as his own, the Foreign Minister might execute instruments of ratification, accession or acceptance by virtue of a general government decision; consequently, the restriction laid down in paragraph 5 might cause considerable dislocation in existing treaty-making practices.

4. Next, the article could be drafted in considerably more precise form. For example, paragraph 1 might include the exception provided for in paragraph 5. Paragraph 2 might also deal with all the powers of a head of diplomatic mission in the country to which he was accredited, and the exceptions provided for in paragraph 4(b) might be incorporated in that paragraph. In paragraph 3, it might be neater to delete the words "Subject to the provisions of paragraphs 1 and 2 above, a representative" and to replace them by the words "Other representatives".

5. The Drafting Committee might consider whether heads of permanent missions to international organizations should not be treated on a par with heads of diplomatic missions for the purposes of agreements with the organizations concerned. It would be somewhat anomalous if, for example, an ambassador accredited to the United Nations, who was often a senior diplomatic official, were placed on a lower level in that respect than a head of a diplomatic mission.

6. Finally, the expression in paragraph 5, "an instrument of ratification, accession or acceptance being executed", did not appear in the original draft; he asked whether it related to the signature or to the deposit of the instrument concerned.

7. Mr. VERDROSS said he wished to revert to a point which had been raised during the first reading of the article. He was not sure whether under existing international law the Head of State alone could negotiate, draw up, authenticate, and sign a treaty. He believed that the current practice in countries with parliamentary systems was that the negotiation, drafting, authentication and signature of treaties were functions performed by persons other than the Head of State, who ratified a treaty which had been negotiated, drafted and signed by other organs of the state; the situation was different in countries with presidential systems, where the Head of State was also the Head of Government. The old rule advocated by Anzilotti was that the Head of State under parliamentary systems had *jus representationis omnimodae*, but later writers had maintained that the constitutional limitations of the Head of State were also of importance at the international level. Personally, he had no strong objection to the Commission's codifying either of those rules but it should be clearly understood that, if it accepted the Drafting Committee's text, it would be confirming the old rule and not the modern one. In his opinion, it would be best to say that Heads of State were considered as so authorized by the rules of internal law, if they declared that they were acting on behalf of the state.

8. Mr. CASTRÉN considered that the redraft of the article was generally acceptable, though it might be advisable to place it after the articles on negotiation, signature and ratification, accession and acceptance.

9. With regard to "treaties in simplified form", referred to for the first time in the new paragraph 4(b), the term should be defined in article 1 or in any case explained in the commentary.

10. Sir Humphrey WALDOCK, Special Rapporteur, said that a definition of agreements in simplified form would be submitted to the Commission.

11. Mr. TUNKIN said he was in general agreement with Mr. Rosenne that the structure of the article was not quite correct, while from the point of view of substance, he would go even further than Mr. Rosenne.

12. With regard to paragraph 5, the practice of requiring accredited officials to furnish evidence of authority to deposit or exchange instruments of ratification, accession or acceptance was not a desirable one, and there were very few instances when full-powers were in fact required. Existing practice would therefore be reflected if heads of diplomatic missions and permanent representatives to international organizations, such as the United Nations, were added to the three categories of persons exempted by paragraph 1 from the duty to furnish evidence of authority when depositing an instrument of ratification.

13. With regard to paragraph 6(b), the letter or telegram evidencing the grant of full-powers referred to in that provision was usually accepted as sufficient pending the transmission of the instruments of full-powers. The Commission should therefore accept that useful practice as a rule of international law and encourage it by substituting the word "shall" for "may" in the fourth line.

14. Since both dealt with essentially the same question, paragraphs 6(b) and (c) could be combined unless paragraph 6(c) were omitted altogether and a reference to permanent representatives to an international organization included in paragraph 6(b).

15. Sir Humphrey WALDOCK, Special Rapporteur, said that the word "executed" in paragraph 5 actually meant "signed", in the legal sense of a signature appended to make an instrument effective. Since the use of that word had given rise to difficulties, he suggested that the Drafting Committee should be asked to find a different wording to convey that meaning.

16. That interpretation of the word "executed" was particularly important in connexion with Mr. Tunkin's suggested amendment of paragraph 5. Instruments of ratification, accession or acceptance were normally signed by the Head of State and sometimes by a Head of Government or the Foreign Minister, but it was extremely unusual for the head of a diplomatic mission to sign such instruments, although he might be engaged in the exchange or deposit of such instruments. In drafting paragraph 5, the Drafting Committee had had in mind the occasional cases where, for example, a permanent representative to an international organiza-

tion might be instructed to sign an instrument; the paragraph was not, however, intended to cover the deposit of such instruments.

17. Mr. TUNKIN said that, if that were the case, there seemed to be some confusion in paragraph 5. A clear distinction should be made between the constitutional act and the exchange and deposit of instruments of ratification, which constituted international acts.

18. Mr. AMADO said that the use of the word "*établi*" in the French text of paragraph 5 struck him as curious, despite the special rapporteur's explanations. He could not conceive any representative of a state other than the Head of State signing an instrument of ratification. It was most important that the expressions used in the draft international convention being prepared by the Commission should be accurate. He recalled the strong objections which Mr. Hudson had raised to the term "authentication" in Mr. Brierly's first report on the law of treaties.<sup>1</sup> Mr. Hudson had said that it was hardly necessary to consider the question of authentication of texts of treaties and that the term "authentication" was only used when a treaty was drawn up in several languages; he had never heard it said that signature was one of the ways of authenticating the texts of treaties, and it was unnecessary to devote an article to authentication. Mr. Brierly, who had been Chairman of the Commission at the time, had agreed that the word "authentication" was somewhat ambiguous, and thought that Mr. Hudson had taken it in a sense different from that intended by the Commission.<sup>2</sup> He (Mr. Amado) would urge a return to more scrupulous attention to the exact meaning of words; he could not be satisfied with the way in which the verb "*établir*" was being given a juridical meaning which it did not in fact possess.

19. Mr. ROSENNE said he could not support Mr. Tunkin's suggestion for the amalgamation of paragraphs 6(b) and (c). The idea reflected in paragraph 6(b) was that the head of a diplomatic mission had certain powers in respect of the negotiation of a treaty in the country to which he was accredited, whether or not the treaty was being concluded with that country. On the other hand, under paragraph 6(c), that right should be limited to treaties concluded within the framework of the organization to which the permanent representative was accredited. Accordingly, if the two clauses were merged, there would be no provision to cover the difficult situation which might arise in the United States, where a number of heads of diplomatic missions and permanent representatives to the United Nations could perform the same act. He therefore urged that the two provisions should be kept separate.

20. In view of the special rapporteur's explanation of the use of the word "executed", he thought that paragraph 5 as drafted might be unnecessary and could be amalgamated with paragraph 1.

21. With regard to Mr. Amado's comments on authentication, he said that he had been called upon to authenticate treaties, by initialling and by signature, and with or without production of full-powers.

22. Mr. LIU said that the instruments of ratification, accession or acceptance referred to in paragraph 5 became important in the final stage of the conclusion of a treaty. Paragraph 1, on the other hand, was concerned with the negotiating stage of treaty-making, where evidence of authority obviously had to be furnished. Paragraph 5 thus seemed to be confusing and unnecessary.

23. Mr. TSURUOKA asked if the special rapporteur would give his views on the question whether paragraph 5 should be retained.

24. Sir Humphrey WALDOCK, Special Rapporteur, said he had no objection to a provision placing Heads of Government and Foreign Ministers on the same level as Heads of State for the purpose of the execution of instruments of ratification, accession or acceptance. Such a provision would probably correspond to modern practice in the matter, particularly in the case of treaties in simplified form. Accordingly, paragraph 5 might be omitted, but he would suggest that a clause should be added to paragraph 1, stating that, in the event of the instruments concerned being executed by a representative of the state other than the Head of State, Head of Government or Foreign Minister, evidence of authority might be required. On the other hand, the Commission might consider that such a provision was unnecessary.

25. Mr. EL-ERIAN pointed out that rule 27 of the rules of procedure of the General Assembly provided that the credentials of representatives might be issued by Heads of State, Heads of Government or Foreign Ministers.

26. Mr. BARTOŠ said he considered the provision in paragraph 5 both necessary and useful. The classical rule that only powers issued by the Head of State were valid had largely given way to the modern national and international practice, whereby other representatives of the state were authorized to execute instruments of ratification, accession or acceptance; very often it was the Minister for Foreign Affairs who was so authorized. There was no contradiction between that practice and the rule in paragraph 5, because any such state representative was always able to furnish evidence, not necessarily in the form of a certificate, of his authority.

27. With regard to Mr. El-Erian's comment, he observed that the rules of procedure of the General Assembly related only to the right of certain persons to represent their countries in negotiations; accordingly, such representatives did not require full-powers issued by the Head of State.

28. The CHAIRMAN noted that the consensus of opinion in the Commission seemed to be that Heads of Government and Foreign Ministers should be placed on the same level as Heads of State for the purposes of paragraph 5; the paragraph should therefore be redrafted accordingly.

<sup>1</sup> *Yearbook of International Law Commission 1951*, Vol. I (United Nations publication, Sales No.: 1957.V.6, Vol. I), p. 152, paras. 1 and 9.

<sup>2</sup> *ibid.*, p. 153, para. 19.

29. In view of the special rapporteur's explanation of the meaning of the word "executed" as used in that paragraph, an appropriate amendment should be made.

30. The Drafting Committee should also consider both Mr. Tunkin's suggestion for the merging of paragraphs 6(b) and (c) and Mr. Rosenne's objection to that suggestion.

31. It seemed to be agreed that, as suggested by Mr. Tunkin, the word "may" in those two provisions should be replaced by the word "shall".

32. Mr. TUNKIN thought the Drafting Committee might be asked to consider also whether the reference in paragraph 5 to instruments of ratification should not be separated from the reference to instruments of accession or acceptance, since it was important to state clearly that full-powers should not be required from an ambassador or a representative of an international organization in the case of the exchange or deposit of instruments of ratification.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin's point would be met by the proposed amendment of the word "executed". The question of the deposit of the instruments did not arise, and in the cases referred to in paragraph 5 it would obviously be indicated in the instrument itself that it emanated from a sufficiently high authority.

34. With regard to Mr. Rosenne's comments on paragraph 6, he suggested that the Drafting Committee should use wording which would confine the scope of paragraph 6(c) to treaties negotiated within the organization concerned.

35. Mr. ROSENNE asked whether there were any objections to his suggestion that heads of permanent missions to international organizations should be treated on a par with heads of diplomatic missions in paragraph 2.

36. Sir Humphrey WALDOCK, Special Rapporteur, said he had no objection to that suggestion, which seemed to correspond to modern practice.

37. Mr. ROSENNE asked whether his suggestion that the exemption provided for in paragraph 4(b) should be limited to heads of diplomatic missions was acceptable to the Commission.

38. Sir Humphrey WALDOCK, Special Rapporteur, said he did not think it advisable to follow that suggestion. Treaties in simplified form were becoming increasingly common, and the position of the other negotiating state was entirely protected by the possibility of requiring the representative concerned to produce an instrument of full-powers, if called upon.

39. Mr. AMADO said he doubted whether a representative of the state other than the Head of State could actually ratify a treaty. If merely the exchange of instruments of ratification was involved, paragraph 5 would be satisfactory, but ratification was a sovereign act and, as such, could be performed only by the Head of State.

40. Sir Humphrey WALDOCK, Special Rapporteur, observed that, for less formal instruments such as inter-

departmental agreements, instruments of ratification were often executed by the Foreign Minister. National practice in the matter differed, but it was impossible to exclude cases where instruments of ratification could be signed by representatives of a state other than the Head of State.

41. Mr. AMADO pointed out that whereas in British practice, signature was tantamount to ratification, a different practice was followed by many countries.

42. Mr. LIU, with regard to paragraph 5, said that since an instrument of ratification, accession or acceptance was executed or signed in accordance with the constitutional law of the state concerned, it was not clear to whom the representatives concerned were to furnish evidence of their authority. It was the international act of exchanging those instruments that required the production of full-powers, and not the act of signature, authority for which emanated from the signatory state itself.

43. Sir Humphrey WALDOCK, Special Rapporteur, said he thought that Mr. Liu's point might be met by a slight redrafting of the last phrase of paragraph 5.

44. Mr. ROSENNE said that he would not press his suggestion with regard to paragraph 4(b), but that he formally reserved his position on that question.

45. The CHAIRMAN suggested that article 4 should be referred back to the Drafting Committee for redrafting in the light of the Commission's deliberations.

*It was so agreed.*

#### ARTICLE 4 *bis*. — NEGOTIATION AND DRAWING UP OF A TREATY

46. The CHAIRMAN said that the Drafting Committee had prepared an article 4 *bis* which read as follows:

"A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other official channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference convened by the organization, or in some organ of the organization itself."

47. Sir Humphrey WALDOCK, Special Rapporteur, said that as requested by Mr. Ago at the 642nd meeting it had been decided to insert a general article indicating the process of negotiating and drawing up the text of a treaty. Article 4 *bis* restated article 6, paragraph 1, of the text adopted by the Commission at its eleventh session,<sup>3</sup> which was based on and largely followed article 15 of Sir Gerald Fitzmaurice's first draft,<sup>4</sup> the only difference from the 1959 text being that the

<sup>3</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 98.

<sup>4</sup> *Yearbook of the International Law Commission 1956*, Vol. II (United Nations publication, Sales No.: 1956.V.3, Vol. II), p. 110.

adjective "convenient" had been omitted before the word "official" in the second line.

48. Mr. CASTRÉN said that the article was quite unnecessary in an international convention and that the special rapporteur had been right to omit it from his original draft. He would take a different view if the Commission were preparing a code; but states and governments were fully aware of the procedures of negotiating and drawing up treaties, and the practice of international organizations was also well-known. He proposed that the article be deleted.

49. Mr. AGO said he could not agree with Mr. Castrén. It seemed only logical to include such an article in an international convention which constantly referred to negotiations between states, whether conducted through diplomatic channels or at international conferences or in the assembly of an international organization. Article 5, paragraph 1(a), contained only one of the countless examples of references to the negotiation and drawing up of a treaty; it seemed curious to refer to "the participating states" without stating what they were participating in.

50. Mr. de LUNA said that, as the article proclaimed no rights or obligations and did not possess the character of a preamble, it should not form part of the substantive articles. Its content belonged to the article on definitions.

51. Mr. CADIEUX pointed out that the provision failed to stress that the essential purpose of the negotiations was to achieve consent between the parties. He doubted whether the article should be retained and was particularly dissatisfied by the restrictive effect of the word "official", which would presumably exclude agreements negotiated by agents.

52. Mr. EL-ERIAN said he believed the article served a useful purpose.

53. Mr. AGO said that Mr. Cadieux's observation seemed to indicate that he had not distinguished between the process of negotiation and the adoption of the text. Naturally, a treaty did not come into existence until ratified, but if the Commission's draft was to deal with the whole process of treaty-making it should start with the first stage.

54. Mr. AMADO said that the article said nothing more than what was self-evident and though unobjectionable, was hardly necessary.

55. Mr. TUNKIN said he agreed with Mr. Amado; it would be inadvisable to retain the article. The draft articles were not intended to cover every possible feature of treaty-making and certainly should not lay down rules about channels of negotiation. Such a passage, being purely descriptive, would be inappropriate in a draft convention.

56. Mr. GROS said that Mr. Tunkin's argument could be extended to other articles which described well-known facts. The matter should not be approached from too absolute a standpoint. In his opinion, the article was useful because it represented a logical introduction to article 5 in which the existence of various types of negotiation was reflected, and without article 4 *bis*, article 5 was hard to understand.

57. The CHAIRMAN put to the vote Mr. Castrén's proposal that article 4 *bis* be deleted.

*The proposal was rejected by 10 votes to 10 with 3 abstentions.*

58. Sir Humphrey WALDOCK, Special Rapporteur, said the Commission was only engaged on a first reading and too much should not be made of the arguments for and against including article 4 *bis*. No doubt governments would have something to say about it in their observations. He was uncertain whether it would serve a useful purpose, but for the time being had voted for its retention.

59. Mr. VERDROSS suggested that the text could be simplified by putting a comma at the end of the first sentence, deleting the second sentence as far as and including the words "convened by the organization," and changing the final phrase to read "or in some organ of an international organization".

60. Mr. AMADO suggested that the text as thus amended might form the first paragraph of article 5, the title of which would then be appropriately modified.

61. Sir Humphrey WALDOCK, Special Rapporteur, said he thought it would be better to keep the article on the adoption of the text of a treaty separate.

62. In reply to Mr. Cadieux's objection, he explained that the word "official" was only meant to indicate an authorized channel. The 1959 draft had included the additional epithet "convenient" but the Drafting Committee had dropped it as too vague. He suggested the substitution of the word "agreed" for the word "official".

63. The CHAIRMAN suggested that article 4 *bis* as amended by Mr. Verdross and the special rapporteur should be referred to the Drafting Committee.

*It was so agreed.*

#### ARTICLE 5. — ADOPTION OF THE TEXT OF A TREATY

64. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared a new text for article 5 which read as follows:

"1. The adoption of the text of a treaty takes place:

"(a) by the consent of all the participating states unless they have agreed to apply another rule, or unless the case falls within sub-paragraphs (b) and (c) below;

"(b) in the case of a treaty drawn up at an international conference convened by the states concerned or by an international organization, by the voting rule that the conference shall, by a simple majority, decide to apply;

"(c) in the case of a treaty drawn up within an international organization, by any voting rules in force in the organization."

Paragraphs 2 and 3 were reserved pending consideration of the new article 19 *bis*.

65. Mr. BRIGGS said it was difficult to understand the relationship between the two provisos in sub-paragraph (a) and sub-paragraphs (b) and (c).

66. Mr. CASTRÉN said that in general the text was acceptable but the words "convened by the states concerned or by an international organization" should be deleted from sub-paragraph (b) as redundant: there was no other method of convening an international conference.

67. Mr. TSURUOKA said he was troubled by the reference in sub-paragraph (b) to the simple majority rule; he suggested that it should be omitted.

68. Mr. AGO suggested that the second proviso in sub-paragraph (a) should be dropped, leaving the paragraph to state the general principle. It would be followed by the provisions contained in sub-paragraphs (b) and (c) which dealt with special cases.

69. The point raised by Mr. Tsuruoka had been discussed at length on previous occasions. In his opinion it was important to maintain the simple majority rule so as to avoid the risk of the conference becoming embroiled at the outset in a procedural dispute which might prevent it from getting under way.

70. Mr. TUNKIN said he was inclined to agree with Mr. Tsuruoka, because he doubted whether the draft should include rigid procedural rules. Despite the argument put forward by Mr. Ago, in the past conferences had managed without such a rule. It was true that the rules of procedure of a conference were usually adopted by a simple majority, but in some cases a unanimity rule had been applied, as in the case of the Antarctic Conference. The article was not intended to differentiate between general conferences and conferences restricted to a group of states, so that the rule should be a general one.

71. Mr. de LUNA said he supported Mr. Ago's suggestion concerning sub-paragraph (a).

72. He also agreed with Mr. Ago as to the necessity of including the simple majority rule in sub-paragraph (b), which represented progress. Regional or restricted conferences would still be free to agree on a different rule.

73. Mr. BARTOŠ asked whether sub-paragraph (c) was intended to cover also treaties drawn up at a conference convened under the auspices of an international organization. In some cases the invitation to attend conferences convened by the United Nations had specified that, pending the adoption of the rules of procedure of the conference, the rules drawn up as a model by the organs of the United Nations would apply provisionally, with the consequence that the final decision of the conference could be made by the two-thirds rule.

74. Mr. EL-ERIAN pointed out that article 5 was descriptive in character and should not be too rigid. He proposed that it be redrafted to read:

"1. The adoption of the text of a treaty takes place:

"(a) by the consent of all the participating states unless they have agreed to apply another rule;

"(b) in the case of a treaty drawn up at an international conference convened by the states

concerned or by an international organization, by the voting rule that the participating states shall decide to apply;

"(c) in the case of a treaty drawn up within an international organization, by any voting rules in force in the organization."

75. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. de Luna that the only progressive element in the article was the simple majority rule in sub-paragraph (b). The rule should be made applicable to general multilateral treaties, if the Commission was to be consistent in formulating progressive rules for them.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that at its eleventh session the Commission had decided to include a residual rule that the rules of procedure should be adopted by a simple majority.<sup>5</sup> Such a rule would obviate the risk of delay during the opening stages of the conference and, he believed, reflected modern practice. As such it should not arouse serious objection.

77. He presumed that for a treaty drawn up within an international organization the rules of the organization would apply.

78. Mr. JIMÉNEZ de ARÉCHAGA said he could not agree that sub-paragraphs (b) and (c) contained residual rules.

79. The CHAIRMAN observed that there seemed to be no objection to the deletion of the second proviso in sub-paragraph (a); that should meet the point raised by Mr. Briggs.

80. Mr. BRIGGS said that it would not entirely solve his difficulty.

81. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Briggs had raised what was essentially a drafting point, which could be left to the Drafting Committee. The purpose of the second proviso was to refer specifically to the cases dealt with in the two succeeding sub-paragraphs.

82. So far as substance was concerned, the question was whether the Commission wished to abandon the decision it had taken at the eleventh session to insert the simple majority rule.

83. Mr. LACHS said that he still had some doubts about the relationship between sub-paragraph (a) and sub-paragraphs (b) and (c). The difficulty was that, if sub-paragraphs (b) and (c) were intended to put forward a *lex specialis*, they failed to provide for the case where the parties decided on a different system. That might easily become necessary because of special circumstances. In order to illustrate the kind of problem that might arise under sub-paragraph (c) he pointed out that, despite the majority rule applied in many organs of the United Nations, the Committee on Peaceful Uses of Outer Space had decided to proceed by reaching agreement in its work without the need for voting.

<sup>5</sup> Yearbook of the International Law Commission 1959, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 100, para. 10 (d).



84. Again, practice indicated that the simple majority rule could not be regarded as universally applied in the cases covered by sub-paragraph (b). A two-thirds majority for the adoption of the rules of procedure at the Paris Peace Conference of 1946 had been laid down as a precondition of convocation.

85. In view of those variations in practice, sub-paragraphs (b) and (c) seemed hardly satisfactory.

86. Mr. TSURUOKA said that, while he would not press for the deletion of the words "by a simple majority", he felt that some relaxation of the rule laid down in sub-paragraph 1 (b) was needed. It would be better to limit the rule to multilateral treaties, as in the corresponding clause of the special rapporteur's original draft.

87. In addition, if the intention was to formulate a residual rule, it would be appropriate to commence it with a proviso along the following lines:

"Unless the Conference shall otherwise decide..."

88. Sir Humphrey WALDOCK, Special Rapporteur, said that he had intended to make precisely that proposal in order to establish the relationship between the rule set out in sub-paragraph (a) and that contained in sub-paragraph (b).

89. Mr. EL-ERIAN stressed that, by his proposal, he had not intended to impair in any way the position of international organizations. In view of the remarks of Mr. Lachs, he would amend the concluding words of his sub-paragraph (c) to read:

"...by any voting rules in force or other arrangements applicable in the organization".

90. The proposal that in sub-paragraph (b) the proviso "Unless the Conference shall otherwise decide" should be added did not make it clear by what majority that decision would be adopted. If it were intended to introduce a flexible rule in the matter, the best course would be to adopt his own proposal and not to refer to "a simple majority" at all.

91. Sir Humphrey WALDOCK, Special Rapporteur, said that there was a difference between the cases covered by sub-paragraphs (b) and (c). In the cases covered by sub-paragraph (c), a distinction should be made between the process of preparing a text in committee, for which a more flexible procedure could be applied, and the actual adoption of the text, which would have to take place in accordance with the voting rules of the organization.

92. Mr. AGO said that he felt strongly, like Mr. de Luna, that the reference in sub-paragraph (b) to the adoption of the voting rule by a simple majority constituted the only significant contribution which the Commission would make by its article 5. If that provision were to be dropped, as suggested by Mr. El-Erian, article 5 would be merely descriptive and would not serve any useful purpose.

93. The rule embodied in the Drafting Committee's article 5 reflected the existing practice and would be helpful to international conferences. It would inform

a conference that, in the absence of unanimous agreement over the adoption of its voting rules, it could initiate its proceedings by adopting them by a simple majority. Such a system was necessary in order to enable the conference to make a useful start with its work; otherwise it would be brought to a standstill at the outset by a discussion on the question, on which it might prove impossible to reach a decision what voting rule should be used for the purpose of the adoption of the voting rules of the conference.

94. Mr. VERDROSS noted that, in sub-paragraph (b) as proposed by Mr. El-Erian, there was no indication of how the participating states would decide on the voting rule to be applied: would it be unanimously or by a specified majority?

95. Mr. EL-ERIAN said that the points raised by Mr. Ago and Mr. Verdross were perfectly valid in theory but in practice there would be no difficulty. In practice, a conference was usually preceded by preparatory work, either by the secretariat of an international organization or by some preparatory committee. That preparatory work normally included the drafting of a set of provisional rules of procedure to enable the conference to conduct its business until the adoption of its final rules of procedure; international conferences had been conducted in that manner for many years without any difficulty. Conferences did not convene spontaneously only to reach an impasse on the question of the adoption of their rules of procedure.

96. Mr. ROSENNE suggested that the word "any" before the words "voting rules" in sub-paragraph (c) should be replaced by "the". His suggestion applied both to the original text and to the amended text proposed by Mr. El-Erian.

97. The CHAIRMAN said that the suggestion was of a drafting character; it would be referred to the Drafting Committee.

98. Mr. LIU stressed the need for some residual rule to enable a conference to adopt its rules of procedure. There was much force in the remark of Mr. Verdross regarding Mr. El-Erian's proposal for sub-paragraph (b).

99. The CHAIRMAN pointed out that when the special rapporteur had suggested the introduction in sub-paragraph (b) of the proviso "Unless the Conference shall otherwise decide", Mr. El-Erian himself had asked by what majority the decision would be taken.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that the simple majority rule had been intended as a residual rule. It might be possible to make that fact clear by adopting Mr. El-Erian's text for sub-paragraph (b) but with the addition of a passage along the following lines:

"or failing any such decision, by such voting rule as they, by a simple majority, shall adopt".

101. Mr. EL-ERIAN said that he would need to reflect on that suggestion.

102. Mr. TUNKIN stressed the need to avoid the confusion that would result from any attempt to deal in

the same provision with the rules for the adoption of the text of a treaty and with the rules for the adoption of the rules of procedure of a conference. As far as the adoption of the text of a treaty was concerned, article 5 should perhaps simply state that, in the case of a treaty drawn up at an international conference, that adoption took place by a two-thirds majority unless the conference decided otherwise.

103. Mr. ROSENNE said that the real difficulty probably arose from the fact that sub-paragraph (b) attempted to deal in one and the same provision with two types of conference: conferences convened by the states concerned and conferences convened by an international organization. The simple majority rule for the adoption of rules of procedure was easier to adopt in the case of a conference convened by an international organization. In the case of a conference convened by the states concerned, he saw much force in the proposal by Mr. El-Erian.

104. Mr. TUNKIN pointed out that the two-thirds majority rule constituted the general practice for conferences, whether convened by the states concerned or by an international organization. That rule should therefore be adopted as the residual rule. It would not promote friendly relations between states if the Commission were to recommend a simple majority rule, which would constitute a constant temptation to impose upon certain states the text of some future treaty.

105. Mr. ROSENNE said that he was not in any real disagreement with Mr. Tunkin; as far as the type of majority rule was concerned, he had no intention of disturbing the existing practice. He had merely wished to point out that the majority rule, whether a simple or a qualified majority, was more suited to a conference convened by an international organization than to a conference convened by the states concerned.

106. Mr. BRIGGS said he opposed Mr. El-Erian's proposal because it dropped the valuable simple majority rule for the adoption of the relevant rules of procedure; moreover, Mr. El-Erian's text, like that proposed by the Drafting Committee, did not solve the problem of the relationship between sub-paragraph (a) on the one hand and sub-paragraphs (b) and (c) on the other.

107. If the intention was to make the provisions of sub-paragraph (a) the residual rule, then sub-paragraph (a) should be placed after sub-paragraphs (b) and (c) and reworded on the following lines:

"In all other cases, by the consent of all the participating states unless they have agreed to apply another rule".

108. Sir Humphrey WALDOCK, Special Rapporteur, suggested, as a convenient compromise solution, that the reference in sub-paragraph (b) to "a simple majority" should be replaced by a reference to a two-thirds majority.

109. Mr. TUNKIN said he would support that suggestion.

110. Mr. EL-ERIAN agreed that the special rap-

porteur's suggestion should be referred to the Drafting Committee.

111. Mr. YASSEEN strongly supported the special rapporteur's suggestion. Since the text of the treaty itself would normally be adopted by a two-thirds majority, it would be an elegant solution to provide for a similar majority for the adoption of the rules of procedure under which the text would have to be adopted.

112. Mr. BARTOŠ said that he would be unable to vote on the new text to be formulated if, like the present one, it attempted to deal in one and the same provision with conferences convened by the states concerned and with conferences convened by an international organization. In the former case, the convening instrument embodied the provisional rules of procedure; in the latter case, the provisional rules of procedure were those established by the organization itself.

113. Those considerations apart, he accepted as the residual rule the two-thirds majority rule, which was in keeping with international practice for conferences convened by the United Nations.

114. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to invite the special rapporteur to submit a revised draft of article 5.

*It was so agreed.*

#### ARTICLE 6.—AUTHENTICATION OF THE TEXT

115. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had redrafted article 6 to read as follows:

"1. Unless another procedure has been prescribed in the text or agreed upon by the participating states, the text of the treaty as finally adopted may be authenticated in any of the following ways:

"(a) initialling of the text by the representatives of the states concerned;

"(b) incorporation of the text in the Final Act of the Conference in which it was adopted;

"(c) incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

"2. In addition, signature of the text by a representative of a participating state, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 of this article.

"3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty. No additions or amendments may afterwards be made to the text except by means of the adoption and authentication of a further text providing for such additions or amendments."

116. Mr. TSURUOKA suggested the deletion of the words "prescribed in the text or" in the first line of paragraph 1. It would be sufficient to state that the provisions in sub-paragraphs (a), (b) and (c) applied unless another procedure had been agreed upon by the participating states.

117. Mr. BARTOŠ said that, although the words indicated by Mr. Tsuruoka were not absolutely necessary, he would support their retention. It was a fairly common practice for a treaty to prescribe the procedure whereby its text would be rendered definitive. In fact, that procedure might not be the same for all sections of the treaty; for example, as had happened in practice, a treaty might provide that the text of its annexes would be established and authenticated by a group of experts, the main body of the treaty being established by the plenipotentiaries themselves.

118. Mr. VERDROSS supported the suggestion for the deletion of the words "prescribed in the text or". If "another procedure" were to be prescribed in the text of the treaty itself, it would have been "agreed upon by the participating states" and would therefore be covered by the remaining provisions of paragraph 1.

119. Mr. BARTOŠ, while agreeing in principle with Mr. Verdross, pointed out that it was a well-established practice to prescribe an authentication procedure in the text of the treaty itself. He accordingly suggested that the passage under discussion should read:

"...prescribed in the text or otherwise agreed upon..."

120. Mr. TUNKIN said the provisions of the second sentence of paragraph 3 were unduly rigid. An authenticated text could be amended by the common consent of the parties otherwise than "by means of the adoption and authentication of a further text".

121. Mr. GROS expressed concern at the use of the term "participating states"; that expression was particularly unsatisfactory in French, because the word "*participant*" could not stand alone; the expression should be completed by indicating the act in which the state was participating. Either the expression "participating states" would have to be defined in general terms in article 1, or in the present case some other expression, such as "states participating in the negotiation", would have to be used. He suggested that the Commission should follow the latter course instead of attempting a general definition of "participating state", which would inevitably be rather cumbersome, something like: "A state which takes part in any act in the course of the process of conclusion of a treaty".

122. Sir Humphrey WALDOCK, Special Rapporteur, recalled that the original term used had been "negotiating states", but since the discussion on the article at the 643rd meeting, it had been replaced by "participating states" to meet the objections of some members. Presumably, the same objections would be made to the expression "states participating in the negotiations".

123. Mr. ROSENNE said that, to him, "participating states" meant, in the context, states participating in the authentication of the text. It was not uncommon for a state to be invited to a conference and to take no other part in it than to participate in the final meeting at which the text of a treaty was adopted. Such a state could properly be called a "participating state", but it would not be a "negotiating state".

124. Mr. AGO, supporting Mr. Gros' suggestion, said that even in the case mentioned by Mr. Rosenne, the state concerned would still be participating in the negotiations.

125. Mr. AMADO also supported Mr. Gros' suggestion.

126. Mr. BARTOŠ said that, on practical grounds, he supported Mr. Gros' suggestion. Sometimes, the actual authentication was effected, not by all the states participating in the negotiations, but only by a few specially authorized for that purpose, as in the case of the four powers which had authenticated the texts of the Paris Peace Conference in 1946. In cases of that type, the states concerned acted on behalf of all the negotiating states and in pursuance of a decision of those states agreeing to that procedure. It was therefore appropriate to make it clear that, in that case as in all others, all negotiating states would participate in the process of authentication, either directly or by accredited intermediaries.

127. Mr. CASTRÉN also supported Mr. Gros' suggestion and pointed out that the expression "participating states" was also used in article 5, where it would similarly have to be amended.

128. Mr. CADIEUX suggested the use of the expression "states which have participated in the negotiations".

129. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept the proposal of Mr. Bartoš for adding the word "otherwise" before the words "agreed upon" in paragraph 1. The case where the procedure was prescribed in the text of the treaty itself was, in fact, the more usual; the words "otherwise agreed upon" would merely indicate that there was no intention to exclude other possibilities.

130. In paragraph 3, he suggested the deletion of the second sentence so as to leave open the question of possible arrangements for the introduction of additions and amendments to the text.

131. The CHAIRMAN said that, if there were no objections, he would consider that the Commission approved article 6 with the amendments accepted by the special rapporteur, subject to the drafting points raised during the discussion.

*It was so agreed.*

The meeting rose at 1.5 p.m.

## 660th MEETING

Friday, 8 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)**

**DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (continued)**

**ARTICLE 5. — ADOPTION OF THE TEXT OF A TREATY**

1. The CHAIRMAN said that, as requested at the previous meeting, the special rapporteur had prepared redraft of article 5 that read:

“The adoption of the text of a treaty takes place:

“(a) in the case of a treaty drawn up at an international conference convened by the states concerned or by an international organization, by the vote of two-thirds of the states participating in the conference, unless by the same majority they shall decide to adopt another voting rule;

“(b) in the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question;

“(c) in other cases, by the mutual agreement of the states participating in the negotiations.”

*Article 5 as thus redrafted was approved.*

**ARTICLE 8. — SIGNATURE AND INITIALLING OF THE TREATY**

2. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had prepared a redraft of article 8 that read:

“1. (a) Signature of a treaty shall normally take place at the conclusion of the negotiations or of the meeting or conference at which the text has been adopted.

“(b) The states participating in the adoption of the text may, however, provide either in the treaty itself or in a separate agreement:

“(i) that signature shall take place on a subsequent occasion; or

“(ii) that the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

“2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the state concerned, in which case the signature is subject to confirmation.

“(b) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

“(c) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

“3. (a) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate

only as an authentication of the text. A further separate act of signature is required to constitute the state concerned a signatory of the treaty.

“(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the state concerned shall become a signatory of the treaty.”

3. Mr. de LUNA said that he agreed with the substance of article 8 but thought the drafting could be simplified by combining paragraphs 2 and 3 in a single paragraph. Both signature *ad referendum* and initialling had the effect of authenticating the text of the treaty and it should be possible to express that fact in a single sentence. The main difference, which could be expressed by means of another sentence, was that the confirmation of a signature *ad referendum* had a retroactive effect, whereas in the case of initialling followed by the subsequent signature of the treaty, it was the date of the signature and not that of initialling which was the operative date.

4. Neither signature *ad referendum* nor initialling implied an obligation in good faith not to frustrate the purposes of the treaty. If the states concerned did not intend to assume even such a limited obligation, they acted as in the case of the Locarno Treaty of 1925, which had been first initialled and later signed by the Contracting Parties.

5. Mr. AMADO suggested that sub-paragraphs (a) and (b) of paragraph 1 might be combined in a single provision reading:

“Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text has been adopted, the states participating in that adoption may provide:”

6. The CHAIRMAN suggested that article 8 should be referred back to the Drafting Committee with the observations of Mr. de Luna and Mr. Amado.

*It was so agreed.*

**ARTICLE 9. — LEGAL EFFECTS OF A SIGNATURE**

7. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had prepared a redraft of article 9 reading as follows:

“1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 6, paragraph 2, signature of a treaty shall have the effects stated in the following paragraphs.

“2. Where the treaty is subject to ratification under the provisions of articles 10 or 16 of the present articles, signature shall not establish the consent of the signatory state to be bound by the treaty. However, signature shall:

“(a) qualify the signatory state to proceed to the ratification of the treaty in conformity with its provisions; and

“(b) bring into operation the applicable provisions of article 19 *bis*.

"3. Where the treaty is not subject to ratification under the provisions of articles 10 or 16 of the present articles, signature shall:

"(a) establish the consent of the signatory state to be bound by the treaty and,

"(b) if the treaty is not yet in force, bring into operation the applicable provisions of article 19 *bis*."

8. Mr. de LUNA pointed out that all the rules so far adopted by the Commission referred to written treaties not in simplified form. But in practice, as far as bilateral treaties were concerned, the simplified form was the more usual. For the majority of bilateral treaties, therefore, the rules adopted by the Commission would not apply.

9. Mr. CASTRÉN suggested that, in paragraphs 2 and 3, the words "of the present articles", which appeared after the words "the provisions of articles 10 or 16", should be omitted as superfluous, for all the references to articles were references to "the present articles".

10. Furthermore, article 16 concerned participation in a treaty by acceptance or approval; he therefore suggested that, after the word "ratification" in both paragraphs 2 and 3, the words "acceptance or approval" should be added.

11. Mr. BARTOŠ said he wished to make a reservation in respect of paragraph 3. That paragraph contained a reference to article 10, paragraph 2 (a) of which stated that a treaty would not be subject to ratification if it provided that it would come into force upon signature. That statement was only true if the signature was affixed by a representative endowed with authority to give final consent to the entry into force of the treaty. Otherwise, the modern conception of the institution of ratification as a means of parliamentary control would be impaired. He proposed to raise the point when the Commission came to adopt article 10.

12. Mr. BRIGGS said the drafting of article 9 struck him as awkward.

13. He shared the doubts of Mr. Bartoš as to the references to article 10, and pointed out that article 16 did not refer to ratification.

14. He suggested that the article should be re-arranged so that the first paragraph set out the main legal effect of signature, which was to establish the consent of the state to be bound by the treaty. The article would then be worded along the following lines:

"1. Except where signed *ad referendum*, the signature of a treaty which is not subject to ratification shall establish the consent of the signatory state to be bound by the treaty.

"2. Where a treaty is subject to ratification, the signature serves as a method of authentication.

"3. The signature of a treaty, whether or not subject to ratification, shall bring into operation the applicable provisions of article 19 *bis*."

15. Mr. TSURUOKA drew attention to the situation which would arise in the case of a signature *ad referendum*. Under existing law, when such a signature was confirmed, its effective date became that on which the

treaty became binding. Such retroactive effect could cause technical difficulties in the counting of signatures for the purpose of the entry into force of the treaty, because it could give rise to doubt as to the date of entry into force, a matter to which he had already drawn attention in connexion with article 12.<sup>1</sup>

16. Mr. AGO said that Mr. Briggs' suggestion and Mr. Tsuruoka's point could be referred to the Drafting Committee.

17. He suggested the deletion from paragraphs 2 and 3 of the words "under the provisions of articles 10 or 16 of the present articles" and supported the suggestion that the words "or acceptance" should be added after the word "ratification". A treaty was subject to ratification or acceptance under the general rules of international law and not only under the provisions of the draft articles.

18. He did not like the drafting of paragraphs 2 (b) and 3 (b), particularly the French version. It would be more correct to state that, in the event of signature, the relevant provisions of article 19 *bis* shall apply.

19. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that it would be better to drop the passages mentioned by Mr. Ago and to add, after the expression "subject to ratification" the words "acceptance or approval".

20. With regard to the redraft suggested by Mr. Briggs, the order of the provisions in article 9 was a reflection of the attitude adopted by the Commission to article 10. If the Commission finally agreed to state in article 10 that in principle treaties required ratification, it would be appropriate in article 9 to deal first with treaties subject to ratification and then with treaties not subject to ratification.

21. The point raised by Mr. Tsuruoka involved a minor question of substance.

22. Mr. de LUNA, with regard to the point raised by Mr. Tsuruoka, said it was difficult to see how signature *ad referendum* could be legally interpreted otherwise than as a signature subject to a suspensive condition. By virtue of the legal character of the condition, its fulfilment necessarily had a retroactive effect.

23. Mr. TSURUOKA said that he did not wish to press his point; he had merely raised the question because he felt that it deserved study.

24. The CHAIRMAN suggested that article 9 should be referred back to the Drafting Committee.

*It was so agreed.*

#### ARTICLE 10. — RATIFICATION

25. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had prepared a redraft of article 10 reading as follows:

"1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in the next paragraph.

"2. A treaty shall be presumed not to be subject to ratification by a signatory state where:

<sup>1</sup> 647th meeting, para. 102.

“(a) the treaty itself provides that it shall come into force upon signature ;

“(b) the credentials, full-powers or other instrument issued to the representative of the state in question authorize him by his signature alone to establish the consent of the state to be bound by the treaty, without ratification ;

“(c) the intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention ;

“(d) the treaty is one in simplified form.

“3. However, even in cases falling under the preceding paragraph, ratification is necessary where :

“(a) the treaty itself expressly contemplates that it shall be subject to ratification by the signatory states ;

“(b) the intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention ;

“(c) the representative of the state in question has expressly signed ‘subject to ratification’ or his credentials, full-powers or other instrument duly exhibited by him to the representatives of the other negotiating states expressly limit the authority conferred upon him to signing ‘subject to ratification’.”

26. Mr. CASTRÉN said that during the earlier debate he had expressed the view that, in the absence of any express provision on ratification, the presumption should be that ratification was not necessary. However, the majority view had been to the contrary, and the Drafting Committee’s text had taken that majority view into account. Actually, in state practice, nearly all treaties in simplified form entered into force without ratification, and that fact had been recognized in the Drafting Committee’s text.

27. The Drafting Committee had admitted so many exceptions to the rule laid down in paragraph 1 that there was little rule left. Nevertheless, he would accept the majority decision and put forward only drafting amendments.

28. In paragraph 2, sub-paragraph (d) should be placed at the beginning of the paragraph, because treaties in simplified form were the more usual.

29. The whole of paragraph 3 should be deleted. The cases mentioned in its various sub-paragraphs constituted exceptions to the exceptions provided for in paragraph 2, and accordingly came within the scope of the general rule laid down in paragraph 1. In fact, all the provisions of paragraph 3 were in reality exceptions to those contained in sub-paragraph (d) of paragraph 2, which dealt with treaties in simplified form. If, therefore, it were decided to maintain the provisions of paragraph 3, they should be linked with those of paragraph 2 (d). Another possible solution would be to transfer the contents of paragraph 3 to the end of paragraph 1 where they would serve to illustrate the general rule

in paragraph 1, preceded by some such formula as “In particular”.

30. Mr. ROSENNE said the statement of principle contained in paragraph 1 should be transferred to the commentary. Article 10 would then consist of a paragraph along the lines of paragraph 3, stating what types of treaty were subject to ratification, followed by a second paragraph along the lines of paragraph 2, indicating what types of treaty were not subject to ratification.

31. Mr. BARTOŠ said that the Drafting Committee’s text was a praiseworthy attempt to reconcile the different views expressed in the Commission during the earlier debate on the subject of ratification, but like all compromises, it suffered from a number of defects. He could accept paragraphs 1 and 3, but not paragraph 2. So far as sub-paragraphs 2 (a) and (b) were concerned, he could agree to the possibility of the exceptions mentioned but only on condition either that the signature was given by the organ competent to dispense with ratification, or that ratification was dispensed with by virtue of full-powers issued by that competent organ.

32. He was opposed to the provisions of sub-paragraphs 2 (c) and (d) on grounds of principle. So far as sub-paragraph 2 (c) was concerned, it was not advisable to formulate a provision in terms which might give rise to a dispute as to the intention of the parties a purely subjective element which destroyed the principle.

33. So far as sub-paragraph 2 (d) was concerned, the external form of a treaty should not determine whether it was subject to ratification. For that purpose, the substance of the treaty should be decisive.

34. Another reason why he opposed the form as the criterion was that it would invite anti-democratic practices, in that it would enable active diplomats to bind their states without consulting the competent organs, thereby avoiding the control of the representative body of the people. It would be regrettable if diplomats, by being able to choose the form of a treaty, acquired the power to contract irrevocable obligations for their states under international law.

35. He would like his statement to be recorded in the summary record and treated as a vote against article 10, paragraph 2, though he was not asking for a formal vote on it.

36. Mr. VERDROSS said that paragraph 1 correctly stated the existing practice in respect of treaties not in simplified form. Treaties in simplified form, however, were not subject to ratification.

37. He suggested, therefore, in order to meet the point raised by Mr. Castrén, that article 10 should commence with a paragraph along the following lines :

“In principle, treaties not concluded in simplified form require ratification unless they fall within one of the exceptions provided for in the next paragraph”.

38. A second paragraph would then set out the exceptions to that rule.

39. Mr. CASTRÉN said he could accept Mr. Verdross’ suggestion.

40. Mr. BARTOŠ said that if Mr. Verdross' suggestion were adopted, he would be compelled on principle to vote against the article as a whole.

41. Mr. YASSEEN said he had some misgivings with regard to sub-paragraph 2(c), which referred to the intention to dispense with ratification, an intention which would appear from statements made in the course of negotiations. It seemed difficult to admit that an abstract intention, which was not reflected in any way in the provisions of the treaty, could have any legal effect on the formation of the treaty. Such a solution would be difficult to reconcile with the accepted rules of legal interpretation.

42. Mr. JIMÉNEZ de ARÉCHAGA said that it would be inadvisable to upset the delicate balance of the article, the provisions of which reflected a compromise between the various views expressed in the lengthy discussion during the first reading.

43. Paragraph 1 stated the basic rule in the matter which would serve to decide doubtful cases; it was therefore essential.

44. With regard to paragraph 2, he did not agree with the exception stated in sub-paragraph (d), but was prepared to accept it as part of the compromise.

45. With regard to paragraph 3, its provisions were necessary in order to enable states like the Latin American states to use treaties in simplified form. In the practice of those states, it was the substance of a treaty which determined whether it was subject to ratification; paragraph 3 made it possible for those states to use the simplified form and at the same time observe their rules concerning ratification, where applicable.

46. For those reasons, he concluded that it would be dangerous to disturb the structure of article 10.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the redraft represented a compromise and the drafting could hardly therefore be very elegant. The various paragraphs had been introduced in order to take into account the different points of view expressed during the discussion.

48. Mr. GROS, supporting the special rapporteur, said that after a prolonged discussion, article 10 had been referred to the Drafting Committee, which had taken into account all the remarks made during that discussion. A delicate balance had been struck in the Committee between the opposing views. Like all compromise solutions, the redraft had its defects but if any of its components were taken away, the whole structure would collapse. That applied particularly to paragraph 1.

49. He hoped the Commission, unless it wished to re-open the whole discussion on the substance, would accept the compromise formula reflected in the Drafting Committee's text, whatever its defects, because it was the text most likely to gain acceptance by states.

50. The CHAIRMAN suggested that article 10 should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*

ARTICLE 7. — PARTICIPATION IN A TREATY, ARTICLE 7 *bis*. — THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES, and ARTICLE 7 *ter*. — THE PROCEDURE FOR PARTICIPATING IN A TREATY.

51. Sir Humphrey WALDOCK, Special Rapporteur, said that at the 643rd meeting, it had been agreed that consideration of article 7 should be postponed until the Commission took up the articles concerning accession. At the opening of the 648th meeting, it had been agreed that it should be further postponed until after the Commission had settled some of the questions raised by article 13. After article 13 had been discussed at length for nearly three meetings, it had been decided to refer the text to the Drafting Committee, the Commission had then passed on to article 14, and article 7 had never been considered at all. The Drafting Committee had now prepared three new articles, 7, 7 *bis* and 7 *ter*, based on the previous articles 7 and 13; they read as follows:

“ARTICLE 7. — PARTICIPATION IN A TREATY

“1. A treaty is open to the participation of every state whose participation is expressly provided for in the treaty itself.

“2. Moreover, unless a contrary intention is expressed in the treaty or otherwise appears from the circumstances of the negotiations, a treaty shall be deemed to be open to the participation of any state which took part in the adoption of its text or which, though it did not take part in the adoption of the text, was invited to attend the conference at which the treaty was drawn up.

“ARTICLE 7 *bis* (former article 13) — THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES

“1. Participation in a treaty may be opened to states other than those mentioned in article 7 by the subsequent agreement of all the states which adopted the treaty; provided that, if the treaty is already in force and ... years have elapsed since the date of its adoption, the agreement only of the parties to the treaty shall be necessary.

“2. Unless a contrary intention is expressed in the treaty or otherwise appears from the circumstances of the negotiations, a general multilateral treaty may be opened to the participation of states other than those mentioned in article 7:

“(a) in the case of a treaty drawn up at an international conference convened by the states concerned, by the subsequent consent of two-thirds of the states which drew up the treaty, provided that, if the treaty is already in force and ... years have elapsed since the date of its adoption, the consent only of two-thirds of the parties to the treaty shall be necessary;

“(b) in the case of a treaty drawn up either in an international organization, or at an international conference convened by an international organization, by a decision of the competent organ of the



organization in question, adopted in accordance with the applicable voting rule of such organ.

“3. (a) When the depositary of a general multilateral treaty receives a formal request from a state desiring to be admitted to participation in the treaty under the provisions of paragraph 2 of this article, the depositary:

“(i) in a case falling under sub-paragraph 2 (a), shall communicate the request to the states whose consent to such participation is specified in that sub-paragraph as being material;

“(ii) in a case falling under sub-paragraph 2 (b), shall bring the request, as soon as possible, before the competent organ of the organization in question.

“(b) The consent of a state to which a request has been communicated under sub-paragraph 3 (a) (i) shall be presumed after the expiry of twelve months from the date of the communication, if it has not notified the depositary of its objection to the request.

“4. When a state is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more states, an objecting state may, if it thinks fit, notify the state in question that the treaty shall not come into force between the two states.

“ARTICLE 7 *ter*. — THE PROCEDURE FOR PARTICIPATING IN A TREATY

“Unless a different procedure has been agreed upon by the negotiating states, participation in a treaty takes place in accordance with the principles and procedures laid down in articles 8 to 18 of the present articles.”

52. Those three new articles constituted an attempt to deal comprehensively with the question of participation in a treaty, so as to cover signature, ratification, accession and acceptance. In his original draft, the question of the so-called “right of participation” had been dealt with, although not specifically mentioned, in articles 7 (The states entitled to sign a treaty) and 13 (Participation in a treaty by accession).

53. The Commission should choose between the general approach as reflected in the new articles 7, 7 *bis* and 7 *ter* and the traditional approach of dealing first with signature and then with the other forms of participation in a treaty.

54. The three new articles showed that the question of participation arose not only in connexion with signature but also in connexion with the other processes. In the case of certain general multilateral treaties, for example, acceptance was the only procedure for participation contemplated in the treaty.

55. In article 7 *bis*, the rules laid down in paragraph 2 (a) were in line with the two-thirds majority rule adopted by the Commission as the residual rule for the adoption of the text of the treaty by an international conference.

56. Mr. BARTOŠ said that the Commission should take a decision on whether to deal with the three articles separately or together.

57. Mr. de LUNA pointed out that subjects of international law other than states could participate in treaties: the statement in article 7, paragraph 1, was therefore not strictly correct. It was true that the Commission had decided not to deal with international organizations, but it was equally true that subjects of international law other than states or international organizations could enter into treaties.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of articles 7, 7 *bis* and 7 *ter* could not very well apply to belligerent communities. The only other possible subject of international law would be the Holy See, which could, if necessary, be expressly included in a definition of the term “state”.

59. Mr. VERDROSS proposed the deletion of the inelegant word “Moreover” at the beginning of article 7, paragraph 2.

60. Mr. CASTRÉN proposed the deletion of the passage “though it did not take part in the adoption of the text” in the same paragraph.

61. Mr. LACHS said that article 7 raised the problem of the relationship between open and closed treaties to which he had drawn attention during the earlier general discussion on article 13.<sup>2</sup> In his opinion the article ought to open the door more widely to general participation. The silence of a treaty on that point ought not necessarily to be interpreted as meaning that the treaty was closed to other states; it might have been due to the inability of the parties to reach agreement on the relevant clauses or to their desire to await events and see how the treaty operated.

62. Certain general multilateral treaties ought by their very nature to be as widely open to accession as possible. Paragraph 1 should therefore be transferred to the end of the article, since it stated a residual rule.

63. The proportion between states invited and states not invited to participate in an international conference for drawing up a general treaty had changed since the codification conferences of The Hague, and in the interest of full implementation it was desirable not to debar states which had not taken part in the drawing up of a treaty from participating in it.

64. Mr. LIANG, Secretary to the Commission, pointed out that in the final acts of the Geneva Conference on the Law of the Sea and the Vienna Conference on Diplomatic Relations and Immunities, the Holy See had been listed among the states represented.

65. Mr. ROSENNE said the Drafting Committee should give some thought to the meaning it wished to attach to the word “participation”, which had been used in a different sense in some of the articles already adopted. It should also consider whether or not it wished to retain the word “deemed” in article 7, paragraph 2. That

<sup>2</sup> 650th meeting, paras. 22-29.

word had the effect of creating a legal fiction, as he had learnt from painful personal experience when he had lost a case before the International Court that had turned on that word.

66. The form of words devised by the Drafting Committee to meet the point he had raised during the discussion about the attendant circumstances of the negotiations was excellently conceived.

67. Mr. AGO said that he had no objection to the substance of article 7, but the order violated the rules of logic. As it stood, it might almost be construed to mean that states which took part in the adoption of the text could not participate in the treaty unless that was expressly provided for in the treaty itself. But they were first and foremost the states which could participate automatically, and that should be stated in a paragraph at the beginning of the article. That paragraph should be followed by the provision concerning states which had been invited to attend the conference but which had not taken part in the adoption of the text. Paragraph 1 should then be moved to form the last paragraph of the article.

68. Mr. BRIGGS said he was uncertain of the scope of article 7. Was "participation" to be understood as identical in meaning with "becoming a party"?

69. Article 7 *bis* seemed to be concerned with accession or acceptance; was it intended to cover any other forms of participation?

70. Article 7 *ter* seemed too broad and too vague. What were the implications of the reference to articles 8 to 18?

71. Sir Humphrey WALDOCK, Special Rapporteur, suggested that Mr. Briggs had perhaps adopted too narrow an approach. Some multilateral treaties were only open to participation by acceptance while others only contemplated signature. It would therefore be a mistake to provide for accession only. Any of the procedures dealt with in the succeeding articles up to article 18, with the exception of that concerned with the legal effects of ratification, might apply according to the terms of the treaty. Perhaps that should be stated more explicitly.

72. He agreed with Mr. Ago's suggestion for reversing the order of the paragraphs of article 7 and for dealing separately with the questions of participation by the states that took part in the adoption of the text and participation by those attending the conference but not taking part in the adoption of the text.

73. Mr. LACHS had raised a major problem of substance. The Drafting Committee's text was based on the Commission's discussion, from which it emerged that there should not be anything in the nature of a general right of participation without reference to the procedure by which participation was effected, or to some form of consent either by the states which had taken part in the drafting of the treaty or by the parties. The general view in the Commission appeared to be that in respect of general multilateral treaties states should have some say in the matter of the partners with which they would or would not have treaty relations and that the Com-

mission should go as far as it could in the direction of opening such treaties to accession. But modern practice indicated that there was a limit beyond which states were unwilling to go. For example, participation by others was sometimes made subject to the approval of the General Assembly.

74. Mr. LACHS noted that the special rapporteur had conceded that the question of participation in general multilateral treaties raised a major problem. There were general treaties in existence, and there would no doubt be others in the future, not necessarily drawn up within the United Nations, with different provisions from those put forward in article 7 concerning participation. The presumption based on the nature of the treaty itself in the case of silence should be in favour of its being open to additional states. If the negotiating states had not expressly provided to the contrary, they should not have the power to prevent others from participating.

75. Mr. YASSEEN said that Mr. Lachs' comment was entirely correct and consistent with modern realities, particularly with regard to general multilateral treaties of universal concern such as conventions codifying rules of international law. It was not only in the interest of the parties that the rules laid down in such treaties should be as nearly as possible universal but also in the interests of the international community as a whole. Accordingly, it was undesirable to formulate any presumption whereby, if the treaty was silent, other states would be debarred from participation.

76. Mr. CADIEUX considered that the Drafting Committee had faithfully followed the Commission's instructions; the discussion on substantive issues should not be reopened.

77. Mr. TABIBI said he fully supported the view expressed by Mr. Lachs; he saw no objection to reopening the discussion on a matter of such importance. If a treaty contained no express provision on participation and if its nature was such that wide participation was desirable, a presumption to that effect should be the rule.

78. Difficulties were likely to arise from the reference to the circumstances of the negotiations. Who was to judge what could be inferred from them? Moreover, the attitude of parties might well undergo a change with the passage of time.

79. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that, contrary to what the Commission appeared to have favoured, Mr. Lachs seemed to be arguing for the insertion in article 7 of provisions concerning participation by states not invited to the conference or contemplated in the treaty itself. His understanding had been that the Commission wished to deal with that matter in a separate article.

80. Mr. GROS, speaking as Chairman of the Drafting Committee, pointed out that the Committee had been asked to deal with the subject under the two different aspects of the states which were the original parties to the treaty and the states which could later become parties to the treaty by other procedures.

81. Speaking as a member of the Commission, he said that it had been understood, both in the Commission and in the Drafting Committee, that the general discussion on the articles concerned could be re-opened. He accordingly wished to point out that there was nothing dramatic about the provision in article 7, paragraph 1. It did not contain, as some members had alleged, any restriction preventing wide-scale accession to collective treaties. Indeed, a great deal had to be assumed to arrive at Mr. Lachs' argument. For example, it had to be assumed that, in the case of a treaty of general interest to the community of states, there had been two major errors of negotiation, those of silence and oversight. If it was merely a question of the silence of the treaty, despite the fact that the problem had been discussed at the conference, the obvious inference was that the negotiating states had been unable to agree, in most cases for lack of a two-thirds majority, on the conditions under which the treaty should be open for accession by other states. But how were the negotiators to have a new general rule of law imposed on them by which the treaty would be open to all states, although the problem had been discussed but no agreement reached on that very point? Such a rule was juridically incomprehensible and could have no justification either in logic or in law. Moreover, during the negotiation of any multilateral treaty of general interest, there were always discussions on the conditions on which the treaty could be opened for accession by other states than the states participating in the negotiations. The only case to which Mr. Lachs' argument applied was the highly unlikely case where the question had not been discussed at all by the negotiators, in other words, the case of complete oversight.

82. Mr. LACHS agreed with Mr. Gros that there would be nothing dramatic about accepting the formulation in article 7, paragraph 1, but suggested that the amendment he had proposed would also not produce any dramatic effect. Mr. Gros had said that the two elements involved were silence and oversight; he (Mr. Lachs) would suggest that those elements fell into different categories, because silence in itself might be the consequence of two different factors, absence of agreement, or oversight.

83. However, he was more concerned with another point. In the course of the operation of the treaty, states might change their views and alter their positions; even if at the time the treaty was drafted and signed the necessary majority could not be achieved owing to lack of agreement, that did not mean that it might not be achieved later. The consequences of a decision taken at the time of negotiation should not be perpetuated throughout the existence of the treaty; the possibilities of evolution, of which there were many examples in history, could not be ignored.

84. While he agreed with Mr. Gros that it was inadmissible to impose on states any decision as to the states with which they should be bound by a treaty, he believed that, in the matter at issue, the Commission should proceed on certain presumptions. If a treaty related to a vital issue affecting the whole international community,

and if owing to forgetfulness the treaty was silent on the subject of participation, the presumption should be in favour of giving the treaty an open character; if that silence was due to lack of agreement, the Commission's draft would allow for changes in position. In article 7 the Commission was really concerned with the drafting of a residuary rule.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Lachs' view was not borne out by state practice; had it been so, he would have been ready to write in such a rule. To take an instance from real life, no more general treaty than the Convention on Diplomatic Relations could be imagined, and yet, as in other recent multilateral treaties, the procedure for the participation of additional states followed broadly the lines of that laid down in article 7 *bis*.

86. The CHAIRMAN said that the drafting changes suggested by Mr. Rosenne and Mr. Ago could be referred to the Drafting Committee, which might also be asked to see whether Mr. Lachs' point could be covered.

87. Mr. GROS said that he could not accept the Chairman's last suggestion because Mr. Lachs' point was one of substance and his proposal could not be taken into account without disregarding the Commission's decision. Presumably Mr. Lachs wished to delete the rest of paragraph 1 of article 7 after the words "every state".

88. Mr. LACHS said that he had not made any such far-reaching proposal. What he had hoped to persuade the Commission to do was to reverse the order of the paragraphs and to state in the existing paragraph 2 that, in the absence of any express provision in general multilateral treaties, the presumption should be in favour of their being open to participation by all states.

89. Sir Humphrey WALDOCK, Special Rapporteur, asked that the Commission should come to a decision on the issue of substance so that he could proceed with the preparation of the commentary. He hoped that, drafting changes apart, the general structure of articles 7 and 7 *bis* would be preserved.

90. Mr. AMADO said that, for the time being, the structure of the two articles should be kept. After the comments of governments had been received, the Commission could give further consideration to the extremely interesting view propounded by Mr. Lachs.

91. Mr. YASSEEN asked that Mr. Lachs' view be recorded in the commentary so that governments would be encouraged to comment on it.

*It was so agreed.*

*Article 7, with the drafting changes suggested by Mr. Rosenne and Mr. Ago, was referred back to the Drafting Committee.*

92. Mr. VERDROSS suggested that the second part of paragraph 1 of article 7 *bis* should be deleted. According to that provision, if four states concluded a treaty and two others were admitted to participation after the treaty had entered into force, the number of

contracting parties would be raised to six, but the consent of only the first four would be needed for the admission of a seventh state. But all six had to have a say in the matter. The situation dealt with in paragraph 2 of that article was quite different, since it referred to treaties drawn up at international conferences or within international organizations.

93. Mr. CASTRÉN said that article 7 *bis* seemed to be generally satisfactory, but he wished to make a comment on paragraph 2. He had already agreed that no distinction should be made between conferences convened by the states concerned and conferences convened by an international organization. In both cases, the conference should be free to decide whether other states should be allowed to become parties to the treaty drafted and adopted by the conference. He accordingly suggested that the words "convened by the states concerned" should be deleted in sub-paragraph 2 (a) and the words "or at an international conference convened by an international organization" in sub-paragraph 2 (b).

94. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that Mr. Castrén's suggestion affected the substance of the article, on which the Commission had already taken a decision, and could not be treated as a drafting amendment.

95. Mr. YASSEEN said he had already stated his views on sub-paragraph 2 (b) of article 7 *bis* during the discussion on article 13.<sup>3</sup> Although it was an acceptable proposition that a decision of the competent organ of an international organization was necessary in order that a state could become a party to a treaty drawn up within the organization, the same was not true in the case of a treaty drawn up at an international conference, even one convened by an international organization. He reserved his position on that subject.

96. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Verdross' argument should really give rise to an amendment different from that he had proposed. Mr. Verdross had been concerned at the possibility that states admitted to participation in the treaty might have no say in the decision to admit further states. A slight drafting amendment to paragraph 1 should cover that point, but it was not necessary to delete the second part altogether; that had been included because the Commission had agreed that the time might come when states which had not taken advantage of their rights to become parties to a treaty should not be allowed a say in the decision to exclude other states from participation.

97. Mr. EL-ERIAN said he agreed with Mr. Castrén that in the context no distinction should be drawn between conferences convened by the states concerned and those convened by an international organization.

98. Mr. TUNKIN, reverting to article 7, said that the Commission should be careful, in drafting its article on participation in a treaty, to approach the problem from the point of view of the progressive development of international law. Treaties relating to matters of interest

to all states should be open to the participation of all states, and no group of countries had the right to debar any state from participation in such treaties: in international relations, no particular group of countries was entitled to lay down rules on matters of common interest. The Drafting Committee had been told that there was a practice in the United Nations whereby only certain states were allowed to participate in treaties concluded under United Nations auspices: examples of such treaties were the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations. That practice was dictated by cold war policy and designed to prevent certain socialist states from participating in such general multilateral treaties. It denied the very basis of contemporary international law. The Commission should be guided not by that practice, but by the purposes and principles of the United Nations as laid down in the Charter, and should therefore beware of taking any step which might result in consecrating the practice as a rule of law. The only way to contribute to the progressive development of international law in respect of the issue before the Commission was to reject that practice, to be guided by the principles of contemporary international law and to draw from those principles the inevitable conclusion that treaties dealing with subjects of general interest should be open to all states.

99. The CHAIRMAN observed that the Commission's decision on the basic principles of articles 7 and 7 *bis* remained unchanged.

100. Sir Humphrey WALDOCK, Special Rapporteur, said the Commission had already decided that the arguments advanced in opposition to those principles should be fully set out in the commentary.

101. It was hardly worth beginning to discuss article 7 *ter*, which merely provided an introduction to articles 8 to 18. Indeed, the Commission might decide that the article was superfluous.

102. The CHAIRMAN suggested that article 7 *bis* should be referred to the Drafting Committee for revision in the light of the drafting suggestions made in the Commission, and that discussion of article 7 *ter* should be deferred for the time being.

*It was so agreed.*

The meeting rose at 12.30 p.m.

<sup>3</sup> 649th meeting, para. 46.

## 661st MEETING

Wednesday, 13 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

**DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE** (*continued*)

ARTICLE 19 *bis*.—THE RIGHTS AND OBLIGATIONS OF STATES PRIOR TO THE ENTRY INTO FORCE OF A TREATY

1. The CHAIRMAN invited the special rapporteur to introduce article 19 *bis*, a new article which had been prepared by the Drafting Committee and which read as follows:

“1. A state which takes part in the negotiation, drawing up or adoption of a treaty is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

“2. Pending the entry into force of a treaty and provided always that such entry into force is not unduly delayed, the same obligation shall apply to the state which, by signature, ratification, accession, acceptance or approval has established its consent to be bound by the treaty”.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that in the course of the discussion of various articles, it had been suggested that particular points should be transferred to article 19 *bis*. One of those points was the question of provisional entry into force. The Drafting Committee had decided, however, that that question should be dealt with in the articles concerning entry into force.<sup>1</sup>

3. The Drafting Committee had further decided that the question of the legal force of the final clauses of a treaty, before the treaty had come into force, should be dealt with in the provisions concerning authentication.

4. After some discussion as to what article 19 *bis* should include, the Drafting Committee had finally reduced it to two paragraphs, one relating to the position of the state which takes part in the negotiation or drawing up of a treaty, and the other to the position of the state which commits itself to be bound by one of the acts of signature, ratification, accession, acceptance or approval. In discussing earlier in connexion with article 5 the question of the obligation on a state to refrain from any action that might frustrate the object of the treaty, the Commission had not in any sense taken a position; it had merely reserved a decision on that point.<sup>2</sup> But in dealing with the position of a state which commits itself to be bound by a treaty, it was not possible to proceed by the negative method. If the Commission accepted the Drafting Committee's text in article 19 *bis*, it would be going rather further than he had done in his original draft, but he thought it would

be right to say that the obligation in question did in fact exist.

5. The CHAIRMAN said that, if there were no objection, he would consider that article 19 *bis* was approved.

*It was so agreed.*

**ARTICLE 22.—THE REGISTRATION AND PUBLICATION OF TREATIES**

6. The CHAIRMAN invited the special rapporteur to introduce the Drafting Committee's redraft of article 22, which read as follows:

“1. The registration and publication of treaties entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

“2. Treaties entered into by any party to the present articles, not a member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

“3. The procedure for the registration and publication of treaties shall be governed by the regulations in force for the application of Article 102 of the Charter.”

7. Sir Humphrey WALDOCK, Special Rapporteur, said that the redraft was very brief. The Drafting Committee had carried out the Commission's instructions not to state rules on the subject, but to deal with the matter by reference to the United Nations Charter and to the regulations made under the Charter. Under paragraph 2, states not members of the United Nations but parties to the convention which the Commission was drafting were obliged to register treaties with the United Nations Secretariat, but could not be subject to the sanctions provided for in Article 102 of the Charter.

8. Mr. ROSENNE pointed out that the words “or filed and recorded as appropriate” which had appeared in brackets after the word “registered” in paragraph 1 of the special rapporteur's original draft of the article had been omitted from the Drafting Committee's version.

9. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words should be included in paragraph 2, since it was the practice of the Secretariat to file and record treaties submitted by states not members of the United Nations.

10. The CHAIRMAN said that, if there were no objection, he would consider that article 22, as thus amended, was approved.

*It was so agreed.*

**ARTICLE 24.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS NO DEPOSITARY**

11. The CHAIRMAN said the Drafting Committee had prepared a redraft of article 24, which read as follows:

“1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested states shall by mutual agreement correct the error either:

“(a) by having the appropriate correction made in the text of the treaty and causing the correction

<sup>1</sup> 657th meeting, para. 3.

<sup>2</sup> 643rd meeting, para. 47.

to be initialled in the margin by representatives duly authorized for that purpose ;

“(b) by executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make ; or

“(c) by executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

“2. The provisions of paragraph 1 shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to consider the wording of one of the texts inexact and requiring to be corrected.

“3. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the erroneous text as from the date the latter was adopted.”

12. Sir Humphrey WALDOCK, Special Rapporteur, said that the article did not differ fundamentally from his original draft, but certain points raised in the discussion had been taken into account.

13. Mr. CADIEUX said that, in the French text of paragraph 2, the wording “*deux ou plusieurs*” should be replaced by “*deux ou multiples*”.

14. Mr. GROS said that he thought that both meant the same thing, but he preferred the former.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Briggs had expressed his reluctance to accept the wording “two or more authentic texts of a treaty”. Had that view been accepted, the word “version” would have been used instead of “authentic text”. In the opinion of the Drafting Committee, however, it was correct to speak of two or more authentic texts, and not of two or more versions. Two or more versions of a treaty would imply that one of them was not authentic.

16. Mr. BARTOŠ said that both he and Mr. Rosenne had raised the question of the concordance of the texts of treaties drawn up in different language versions. They had since agreed that the new text of article 24, paragraph 2, covered not only errors in the authenticated text of a treaty, but also discrepancies between the different versions of the treaty drawn up in several languages. If the special rapporteur would agree to insert an explanation to that effect in the commentary, there would be no need to lay down the rule in the article itself.

17. Another point which might be mentioned in the commentary was that, although it had been decided that the corrected text had no retroactive effect, it was nevertheless possible for the parties to insert in the text an express provision making the correction retroactive.

18. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that, in his original draft of article 24, paragraph 3, he had included the words “unless the states concerned shall otherwise decide”. If that clause were included in the new text of the article, Mr. Bartoš’ point might be met.

19. Mr. LIANG, Secretary of the Commission, said he was not quite clear as to the force of the words “it is proposed” in paragraph 2. Perhaps the second half of the paragraph could be altered to read “and where it is considered that the wording of one of the texts is inexact and requires to be corrected”.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that, in his original draft, he had stressed the need for the parties to agree that an error had occurred, because there was a real danger of one party unilaterally declaring that the text was inexact and using that as a pretext for not accepting the treaty. Agreement was a prerequisite for the correction of errors. In discussing article 25, on the correction of errors in the text of treaties for which there is a depositary, the whole question of agreement on the existence of errors would have to be viewed differently ; in such cases objections to the text were made either by the depositary or by one of the parties, and a notice was circulated to all the interested states. Paragraph 3 of article 25 described that procedure, and the Drafting Committee, believing that the procedure in cases where there was no depositary was broadly the same, had used similar phraseology in paragraph 2 of article 24, especially since agreement was expressly provided for in paragraph 1. It had been thought that there would necessarily be a formal proposal that the wording of one of the texts should be regarded as inexact.

21. Mr. LIANG, Secretary of the Commission, suggested that in that case the last part of paragraph 2 should be replaced by the words “and where a request has been made to correct one of the texts”. The Drafting Committee’s wording was not explicit enough to convey that the proposal was to be formal.

22. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the last part of the paragraph should read “and where it is proposed to correct the wording of one of the texts”.

23. Mr. YASSEEN said that corrections of errors should be given retroactive effect, as was in fact done in paragraph 3. A genuine correction should be intended to restore the provision which the parties had originally had in mind. He would refrain from referring to the rules of domestic law on the matter ; the conclusion he had reached was due to the very nature of the error and of the correction. In deference to Mr. Bartoš’ point, however, the words “unless the parties shall otherwise decide” might be added at the end of the paragraph. That addition seemed to be justified, since it might be said that in certain specific cases non-recognition of the retroactive effect of a correction would mean that the parties ascribed to that correction a significance exceeding that of merely revealing their original intentions.

24. Mr. LACHS said that the adjective “erroneous” in sub-paragraph 1(c) did not properly describe the text to be corrected, whose main feature was that it was the original text ; it just happened to be erroneous. The emphasis should therefore be placed not on the error but on the originality, and the adjective “original” should be substituted for “erroneous”.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that if the Drafting Committee decided to retain the sub-paragraph in its existing form, the word "defective" might be a more appropriate word than "erroneous".

26. The CHAIRMAN suggested that article 24 should be referred back to the Drafting Committee for re-drafting.

*It was so agreed.*

#### ARTICLE 1.—DEFINITIONS

27. The CHAIRMAN said that the Drafting Committee had submitted a redraft of article 1, which read as follows:

"1. (a) 'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more states or other subjects of international law and governed by international law.

"(b) 'Treaty in simplified form' means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.

"(c) 'General multilateral treaty' means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to states as a whole.

"(d) 'Ratification', 'Accession', 'Acceptance', and 'Approval' mean in each case the act whereby a state establishes on the international plane its consent to be bound by a treaty.

"(e) 'Full-powers' means a formal instrument issued by the competent authority of a state authorizing a given person to represent the state either generally for the purpose of concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

"(f) 'Reservation' means a unilateral statement made by a state, when signing, ratifying, acceding to or accepting a treaty whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that state.

"(g) 'Depositary' means the state or international organization entrusted with the functions of custodian of the authentic text and of all instruments relating to the treaty.

"2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any state."

He suggested that the various sub-paragraphs of paragraph 1 should be discussed in order.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that the new draft of article 1 was a good deal shorter than his original draft. The definitions of "Party", "Adoption", "Authentication", "Signature" and "Signature *ad referendum*" had been omitted but would be explained in the articles concerned. The Drafting Committee had, however, included definitions of "Treaty in simplified form", "General multilateral treaty" and "Reservation". The Drafting Committee had had considerable difficulty with the definitions of "Ratification", "Accession", "Acceptance" and "Approval".

29. Mr. TSURUOKA suggested that, at the beginning of article 1, an introductory passage along the following lines should be inserted:

"For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them."

*It was so agreed.*

30. Mr. PAREDES said that he reserved his position on the first definition, sub-paragraph 1 (a), and would abstain from any vote on it.

*Sub-paragraph 1 (a) was approved.*

31. Sir Humphrey WALDOCK, Special Rapporteur, introducing sub-paragraph 1 (b), said that the Drafting Committee had found that it could not define "Treaty in simplified form" except by means of illustrations, for, if it were defined in abstract terms, the Commission would also have to define a treaty in the formal sense. The difficulty in preparing a complete definition lay in the fact that certain instruments, such as protocols, might be either treaties in simplified form or other treaties. It had therefore been decided to indicate the sense in which the term was used in the draft articles by naming certain instruments. The Drafting Committee had been tempted to define the meaning of the term by reference to ratification—or its absence—but had found that such a definition was not really admissible, because some treaties in simplified form were in fact subject to ratification.

*Sub-paragraph 1 (b) was approved.*

32. Sir Humphrey WALDOCK, Special Rapporteur, referring to sub-paragraph 1 (c), said that the essential feature of a general multilateral treaty was the general character of its objects. That general character was expressed in two forms in the sub-paragraph, through reference to the general norms of international law and to matters of general interest to states. The purpose of the second reference was to broaden the scope of the definition, since there were many multilateral treaties which, although entirely general, did not relate to norms of international law. For example, general agreements on formalities for the introduction of motor vehicles into various countries were of general interest to all states, but could not be said to concern general norms of international law.

*Sub-paragraph 1 (c) was approved.*

33. Sir Humphrey WALDOCK, Special Rapporteur, said that the four definitions in sub-paragraph 1 (d) had originally been separate. The Drafting Committee had



at first tried to distinguish between the various forms whereby a state committed itself to be bound by a treaty, and had had no difficulty in drawing such a distinction between ratification and the other forms. But it had gradually reached the conclusion that the various forms of committing a state were largely a matter of terminology. Ratification and acceptance might seem to be different procedures, since ratification had a long history in international law; but some forms of acceptance were very similar to ratification, while others were very close to accession. It was also hard to distinguish between approval and acceptance. The Drafting Committee had consequently decided that the only point that really needed to be stressed was that all four terms meant an act, effective internationally, which denoted a state's consent to be bound by a treaty; differences of procedure would be apparent from the relevant articles.

34. Mr. VERDROSS said that, while he could accept sub-paragraph (d) in substance, he must point out that signature also could establish the final consent of a state to be bound by a treaty. Unless some reference to signature were included, the provisions of sub-paragraph (d) would not be consistent with those of article 9, on the legal effects of signature.

35. Mr. TUNKIN said he agreed with Mr. Verdross that a reference to signature should be added. He also suggested that, after the words "the act", the words "so designated" should be inserted.

36. Mr. BRIGGS asked how the provisions of article 1, sub-paragraph (d), would differ from those of articles 7, 7 *bis* and 7 *ter*, which dealt with participation in a treaty, and covered ratification, accession, acceptance, approval and some of the legal effects of signature.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 7, 7 *bis* and 7 *ter* dealt with the range of states to which a treaty was open. The procedure by which participation took place would be dealt with in subsequent articles. Separate articles would deal with signature, ratification, accession, acceptance and approval; those articles would be short because the substance was already in articles 7, 7 *bis* and 7 *ter*.

38. Mr. AMADO asked for an explanation of the expression "established on the international plane"; in sub-paragraph (a) the term "treaty" was already defined as an "international" agreement.

39. Also in connexion with sub-paragraph (a), he repeated his earlier reservations with regard to the expression "governed by international law", an expression which he could not accept.

40. The least that could be said of that definition was that there was unnecessary repetition of the term "international".

41. Mr. GROS, Chairman of the Drafting Committee, said that the Drafting Committee had carefully weighed the remarks and the suggestion made by Mr. Amado at the 655th meeting, but had preferred not to depart from the decision of the Commission in 1959 to include the expressions "international agreement" and "governed by international law" in the definition of "treaty" in

sub-paragraph (a).<sup>3</sup>

42. The use of the expression "international agreement" was correct in a definition which was to appear in a convention embodying rules of international law; it served to indicate that the term "treaty" did not include, for example, agreements between a private individual or company and a state.

43. As to Mr. Amado's dissenting opinion regarding the expression "governed by international law" based on his observation that agreements between states existed which were subject to the private law of one of the two states concerned, the Drafting Committee had come to the conclusion that a reference to it should be included in the commentary. The Committee had taken the view that, since such agreements were not governed by international law, they fell outside the definition of "treaty" for the purposes of the draft articles.

44. With regard to sub-paragraph (d), all the members of the Drafting Committee had agreed that the clause should indicate that ratification, accession, acceptance and approval meant the act whereby a state established its consent to be bound by a treaty, not on the constitutional but on the international plane. Constitutional authorization to ratify might be extremely important in internal law but the sole intention in sub-paragraph (d) was to define the international act by which the decision, taken on the internal constitutional plane, was brought to the knowledge of the other parties to the treaty. Sub-paragraph (d) defined the international act by which the consent of the state to be bound by the treaty became manifest; that act took effect, in the case of ratification, by the deposit or the exchange of the instruments of ratification.

45. Sir Humphrey WALDOCK, Special Rapporteur, said that if signature had to be included in sub-paragraph (d), it would have to be dealt with separately because signature had sometimes the effect of merely authenticating the text and sometimes that of finally committing the state.

46. Mr. LIANG, Secretary to the Commission, said that the French term "*manifeste*" was preferable to the English term "establishes", which suggested connotations that might not have been present in the minds of the members of the Drafting Committee.

47. Sir Humphrey WALDOCK, Special Rapporteur, said he preferred the English term. It was not enough for the state to "manifest" its intention to be bound by the treaty; that intention had already been made manifest by the signature which was subject to ratification. Sub-paragraph (d) was meant to refer to the communication of the instrument of ratification by means of its deposit or its exchange for the corresponding instrument; it was that deposit or exchange which constituted the international act of ratification.

48. Mr. VERDROSS said that he could accept sub-paragraph (d) subject to the additions proposed by Mr. Tunkin.

<sup>3</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No.: 59.V.1, Vol. II), p. 95.

49. He also thought that it should be possible to include a reference to signature; the difficulty indicated by the special rapporteur could be avoided by referring to "final signature".
50. Mr. AMADO thanked the Chairman of the Drafting Committee for his explanations, which he accepted. He would be reluctant, however, to accept the use of the word "establishes" in the English text, perhaps the word "publishes" or "expresses" would be better.
51. Mr. TABIBI said he supported the suggestion of Mr. Verdross that a reference to signature should be included in sub-paragraph (d). Final signature was an important method of establishing the consent of a state to be bound by a treaty; more and more treaties did not need ratification and in those cases signature was the only international act which signified the commitment of states.
52. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Amado, pointed out that his original definition did not contain the word "establishes", which had been introduced by the Drafting Committee, largely because it was not possible to say that the state became a party to the treaty. For a state to become a party to a treaty, the treaty had to enter into force, and entry into force usually depended on a specified number of ratifications or accessions. None of the terms suggested by Mr. Amado contained all the implications of the word "establishes".
53. Mr. AMADO said he would not press the point.
54. Mr. ROSENNE, supporting the use of the word "establishes", suggested that the French text should be brought into line with the English.
55. To take account of the point made by Mr. Verdross, he suggested that the full stop at the end of sub-paragraph (d) should be replaced by a comma and the words "where signature is not sufficient for that purpose" added. That would avoid the danger of defining the term "signature", which was used in several meanings, including that of full signature.
56. The CHAIRMAN suggested that sub-paragraph (d) should be referred back to the Drafting Committee with the suggestions made during the discussion.
- It was so agreed.*
57. Sir Humphrey WALDOCK, Special Rapporteur, introducing sub-paragraph (e), said that the definition of "full-powers" was a modified version of that contained in his original draft.
58. Mr. VERDROSS suggested the inclusion of a reference to the possibility that full-powers might authorize the person concerned to conclude the treaty definitively. He did not know whether the use of the words "for the purpose of concluding a treaty" was intended to cover the situation.
59. Sir Humphrey WALDOCK, Special Rapporteur, replied that there had been no intention to cover final acceptance of a treaty by means of the expression "for the purpose of concluding a treaty".
60. Sub-paragraph (e) drew a distinction between full-powers which authorized a person to represent a state for the whole process of concluding a treaty, from negotiation to signature, and full-powers which only covered a particular stage of that process such as negotiation, signature or the execution of an instrument relating to the treaty.
61. Mr. de LUNA said that, in addition to the two possibilities indicated by the special rapporteur and that mentioned by Mr. Verdross, there was a fourth: that the full-powers might authorize the representative in general terms to negotiate any treaty whatsoever.
62. Mr. LIANG, Secretary to the Commission, said that he had never encountered a case of full-powers couched in general terms authorizing a representative to conclude a treaty "definitively", covering the whole process up to and including the deposit of the instrument of ratification. In any case, the full-powers would have to specify all the acts which the representative was authorized to perform.
63. Where full-powers were given "to conclude a treaty", they covered only the negotiation, adoption and authentication of the text. If the representative was to have authority to sign a treaty, the fact should be explicitly stated; full-powers would not authorize the representative finally to commit the state concerned.
64. The provisions of sub-paragraph (e) seemed to cover two cases: that of full-powers authorizing a person to represent the state for the whole process of conclusion of the treaty up to signature, and that of full-powers for the particular purpose of negotiating or signing a treaty or of the deposit of ratifications.
65. Mr. GROS said that state practice offered examples of full-powers which covered all the stages of conclusion of a treaty.
66. Mr. TUNKIN pointed out that the answer to the question whether the full-powers covered the process of finally committing the state might depend on the terms of the treaty itself. Full-powers were usually given for the purpose of negotiating and signing a treaty; if, under the terms of the treaty as ultimately agreed upon, no ratification were required, the full-powers would cover the final act of commitment by the state.
67. Mr. BARTOŠ pointed out that the general power of attorney of municipal law, which made the representative or attorney an *alter ego* of the grantor of the power of attorney, was an institution unknown to international law. He had never encountered a case where a representative had been authorized generally to sign any treaty whatsoever. In international practice, the expression "general full-powers" simply meant full-powers to perform all acts relating to a particular treaty or group of treaties, or to all the documents which might be the outcome of a conference or a particular set of negotiations. It was necessary to clarify the language of sub-paragraph (e) and avoid any expression which suggested the idea of a general power of attorney.
68. Sir Humphrey WALDOCK, Special Rapporteur, said that he was in entire agreement with Mr. Bartoš. He suggested that the expression "generally for the purpose of concluding a treaty" should be replaced by language indicating that the full-powers could authorize a given person to represent the state for the comprehen-

sive process of the conclusion of the treaty, including all the various stages involved. That change would involve the elimination of the unsatisfactory term "generally".

69. The CHAIRMAN suggested that sub-paragraph (e) should be referred back to the Drafting Committee.

*It was so agreed.*

70. Sir Humphrey WALDOCK, Special Rapporteur, introducing sub-paragraph (f), explained that the Drafting Committee had dropped the reference to a "condition" and had decided that the substance of the second sentence in the original definition of a reservation could be dealt with in the commentary. The point was of importance because explanatory statements were quite often made and sometimes constituted a concealed reservation.

71. Mr. ROSENNE suggested that, as "approval" had been mentioned specifically in sub-paragraph (d), the word "approving" should be added in sub-paragraph (f).

*It was so agreed.*

*Sub-paragraph (f) as thus amended was approved.*

72. Sir Humphrey WALDOCK, Special Rapporteur, introducing sub-paragraph (g), said that the Drafting Committee had discussed the possibility, particularly in relation to the Red Cross, that there could be other depositaries, but not one of the Committee's members who were legal advisers to their governments could recall a single instance of a depositary not being either a state or an international organization.

73. Mr. ROSENNE pointed out that the word "authentic" had been used in a different sense in the revised version of article 24. In order to avoid confusion it should be replaced by the word "original" in sub-paragraph (g).

74. Mr. BRIGGS suggested that the reference was to the "original instrument" rather than the text.

75. Mr. LACHS agreed with Mr. Briggs.

76. Mr. TSURUOKA observed that no adjective was needed to qualify the word "text".

77. Mr. YASSEEN agreed with Mr. Tsuruoka.

78. Mr. CADIEUX said that if the word "authentic" were deleted, the words "of the treaty" should be inserted after the word "text".

*Sub-paragraph (g) as thus amended was approved.*

79. Sir Humphrey WALDOCK, Special Rapporteur, introducing paragraph 2, said that the provision had been discussed at the 655th meeting in connexion with article 1, on definitions, and its general form appeared to have commended itself to the Commission, except that Mr. Briggs had suggested that it should follow sub-paragraph (c). Personally, he would prefer that it should remain at the end of the article as a general provision.

80. Mr. BRIGGS said he could agree to that.

81. Mr. de LUNA and Mr. CADIEUX asked that the French text should be brought into line with the English.

*It was so agreed.*

*Paragraph 2 was approved.*

The meeting rose at 12.25 p.m.

## 662nd MEETING

Thursday, 14 June 1962, at 11.15 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 25.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS A DEPOSITARY

1. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had made a number of drafting changes in his original article 25 and proposed the following redraft:

"1. (a) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the states which participated in the adoption of the text and to the attention of any other states which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction.

"(b) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the states which are or may become parties to the treaty.

"2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the states mentioned in paragraph 1 (b) of the present article.

"3. The provisions of paragraph 1 shall likewise apply where two or more authentic texts of a treaty are not concordant, and a proposal is made that the wording of one of the texts should be deemed to be inaccurate and to require correction.

"4. If an objection is raised to a proposal to correct a text under the provisions of paragraph 1 or 3 of the present article, the depositary shall notify the objection to all the states concerned, together with any other replies received in response to the notifications mentioned in paragraphs 1 and 3. However, if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

"5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the states concerned shall otherwise decide."

2. Mr. BARTOŠ said that paragraph 1 (a) of the new draft should indicate who would be responsible for pointing out that there was a mistake in the text. A passage should be added to the effect that either the depositary or a state might raise the matter.

3. Sir Humphrey WALDOCK, Special Rapporteur, said he thought the Drafting Committee might be asked to draft a suitable passage to cover the point.

4. Mr. CASTRÉN suggested that paragraph 4 should be amplified so as to indicate what would happen if one state maintained against all the others an objection to a proposed correction. Mr. de Luna had drawn attention to that gap in the special rapporteur's original draft.<sup>1</sup>

5. Mr. BARTOŠ supported that suggestion, and added that the commentary at least should also mention that a depositary should notify the United Nations Secretary-General of any corrections made in the text of a treaty registered with the United Nations.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that the point raised by Mr. Castrén had been discussed by the Drafting Committee, which had confirmed the view he had expressed during the earlier debate that it would be undesirable to lay down a procedure to cover the case where the parties could not reach agreement on a correction. It would be wiser not to regulate the matter by an express provision, but to leave it to be settled by consultation between the states concerned.

7. He agreed with the addition suggested by Mr. Bartoš and considered that it belonged logically to paragraph 5.

8. Mr. de LUNA said that he could not entirely accept the special rapporteur's view. Paragraph 4, as it stood, might result in the objecting state exercising a kind of veto which could obstruct corrections. Surely, it should be possible to insert a rule under which a dispute concerning a proposed correction to a treaty would be settled by the same voting rule as governed the adoption of the text.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be interested to know the Commission's opinion on what was admittedly a gap in the text. A rule of the kind suggested by Mr. de Luna would certainly be reasonable but would involve an elaborate process of notification and consultation.

10. Mr. CADIEUX suggested that the question might be dealt with in the commentary which should indicate that the Commission had discussed the two alternatives of either inserting a rule, or leaving the question to be settled by consultation between the states concerned. Personally, he favoured the latter course.

11. The CHAIRMAN suggested that, as no formal

amendment had been proposed, the special rapporteur might be requested to draft an appropriate passage covering the point, for inclusion in the commentary.

*It was so agreed.*

12. Mr. LIANG, Secretary to the Commission, pointed out that the wording of the last part of paragraph 3 should be changed so as to bring it into line with the amended text of paragraph 2 of article 24.

*It was so agreed.*

*Article 25 as thus amended was approved.*

#### ARTICLE 26. — THE DEPOSITARY OF MULTILATERAL TREATIES

13. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared the following redraft of article 26, which was a condensed version of his original provisions concerning the appointment of a depositary in cases where the treaty was silent.

"1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the states which adopted it shall have otherwise determined, the depositary shall be :

"(a) in the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization ;

"(b) in the case of a treaty drawn up at a conference convened by the states concerned, the state on whose territory the conference is convened.

"2. In the event of a depositary declining or failing to take up its functions, the negotiating states shall consult together concerning the nomination of another depositary."

*Article 26 was approved.*

#### INTRODUCTION TO CHAPTER II IN THE COMMISSION'S DRAFT REPORT

14. The CHAIRMAN said that the special rapporteur wished to have the guidance of the Commission as to the content of the introduction to the chapter in the Commission's report to the General Assembly, dealing with the law of treaties.

15. Sir Humphrey WALDOCK, Special Rapporteur, said that section A of the introduction to his own report was largely an account of what had been done at past sessions and though it might not be of great value, it should perhaps be retained and brought up to date with a statement on the work done at the current session.

16. Mr. TABIBI said that although the introduction to the special rapporteur's report had been extremely useful, particularly to new members like himself, its inclusion in the Commission's draft report might not only create difficulties for governments because of the need for additional translation and study but also encourage them, instead of concentrating on the draft

<sup>1</sup> 657th meeting, para. 89.

articles, to comment on such matters as the Commission's previous decision to prepare a convention rather than a code. The introduction would, in any case, be reproduced in the Commission's *Yearbook*.

17. Mr. CADIEUX said that an introduction would be needed in the chapter on the law of treaties in the Commission's report, and the introduction contained in the special rapporteur's report could serve with some modifications.

18. First, a clearer exposition should be given of the reasons why the Commission had reversed its original decision in favour of a code and decided to prepare draft articles suitable for a convention. The reasons for its earlier decision to prepare a model code had been adequately explained in the Commission's report in its eleventh session.<sup>2</sup>

19. Secondly, at the beginning of section B some explanation should be added of the Commission's decision to confine itself for the time being to the preparation of a draft containing articles on the conclusion, entry into force and registration of treaties.

20. Thirdly, it should be explained that the treaties of international organizations were not being dealt with in the present draft.

21. An introduction in that modified form would certainly be helpful to governments in preparing their comments on the draft.

22. Mr. ROSENNE said that an introduction on the lines of that prepared by the special rapporteur was necessary but should be condensed and brought up to date.

23. First, a new section should be added to follow section A, summarizing the discussions in the General Assembly since 1946 on the law of treaties, covering the functions of the depositary, reservations, lack of concordance between versions in different languages, the amendment of treaties, and registration. There had also been a general discussion on the codification of the law of treaties, culminating in resolution 1686 (XVI). As the Commission was presenting, for the first time, a fully articulated set of articles in response to the General Assembly's request, it was important to indicate in the introduction that it had taken full account of the General Assembly's discussions. There was a precedent for such a course in the introduction to the Commission's draft on consular relations.<sup>3</sup> It would also be fully in conformity with article 20 (a) of the Commission's Statute.

24. Secondly, the Secretariat might be asked to prepare a paper for the Commission's next session and for future deliberations on the question, reproducing various decisions taken by the General Assembly on the law of treaties and pertinent extracts from the reports of the

Sixth Committee to the plenary Assembly, which constituted an explanation of the Assembly's decisions.

25. Thirdly, it was essential to include in the Commission's report on the current session a fuller explanation of its reasons for its decision preferring a convention on the law of treaties to a code. He did not question the wisdom of the Commission's decision in 1961 to consolidate its work on the law of treaties in that form<sup>4</sup> and agreed substantially with the views expressed by Mr. Ago at the 620th meeting. Nevertheless, he wished to draw attention to the passage in the Commission's report on its eleventh session in 1959 which stated that the law of treaties was not itself dependent on treaty, but was part of general customary international law.<sup>5</sup> In his opinion, the Commission owed it to the General Assembly, to governments and to the legal profession as a whole to elaborate on the reasons for that change and to explain how to overcome the theoretical barrier of giving binding force to a convention on the law of treaties.

26. Mr. BRIGGS said it would be easier to discuss the introduction if the special rapporteur could submit a text to the Commission.

27. Mr. TUNKIN said that the special rapporteur's text constituted a good basis for an introduction to the draft articles, although some alterations were obviously necessary.

28. He noted that in paragraph 6 of the introduction to his report, the special rapporteur had stated that in its report for 1959 the Commission had drawn particular attention to the fact that it did not envisage its work on the law of treaties as taking the form of one or more international conventions but had favoured the idea of "a code of a general character". He (Mr. Tunkin) had re-read the summary records of the eleventh session, and his impression was that the Commission had not in fact favoured a code, but had merely left aside the question of the form which its work on the law of treaties was to take; it had simply discussed the draft articles as submitted by Sir Gerald Fitzmaurice. It might, however, be said that the Commission had tended to favour the idea of a code in 1956, when Sir Gerald had submitted his preliminary report.

29. Secondly, with regard to treaties concluded by international organizations, the Commission had decided not to deal with the question for the time being, and it would be premature to suggest in the introduction that that complex problem, which was different from that of treaties concluded between states, should be dealt with in a chapter or in a separate convention.

30. Mr. LIANG, Secretary to the Commission, said that the nature of the Commission's report to the General Assembly should be borne in mind. Since the Commission was submitting some of the draft articles on the law of treaties to governments for comment, it

<sup>2</sup> *Yearbook of the International Law Commission 1959*, Vol. II (United Nations publication, Sales No. : 59.V.1, Vol. II), p. 91.

<sup>3</sup> *Yearbook of the International Law Commission, 1961*, Vol. II (United Nations publication, Sales No. : 61.V.1, Vol. II), p. 90.

<sup>4</sup> *ibid.*, p. 128.

<sup>5</sup> *Yearbook of the International Law Commission, 1959*, Vol. II (United Nations publication, Sales No. : 59.V.1, Vol. II), p. 91.

could not produce a definitive report. The report on the current session would be similar to that on its twelfth session, in 1960, when the draft articles on consular intercourse and immunities had been transmitted to governments by circular letter of 27 September 1960, asking them to communicate their comments by 1 February 1961. The report on the thirteenth session stated that, during the discussion by the General Assembly of the International Law Commission's report on the work of its twelfth session, of which the draft articles on consular intercourse and immunities formed the main part, there had been an exchange of views on the draft as a whole and on the form it should take, although owing to its provisional nature, the draft had been submitted to the Assembly for information only.<sup>6</sup> The same procedure should obviously be followed in the case of the draft articles on the law of treaties. Consequently, the report on the fourteenth session should not be as elaborate as when a definitive draft was completed. The introduction should be succinct, and should not enter into questions which should be reserved for the final report.

31. With regard to Mr. Rosenne's suggestion that a summary of earlier General Assembly debates on the law of treaties should be prepared, he thought that that should appear in the final report, rather than in the preliminary documentation. In any case, he very much doubted whether the special rapporteur would be able to prepare such a report in the short time remaining. Naturally, in 1963, the Commission would examine ways and means of making its commentary on the law of treaties as rich in content and as useful in substance as was envisaged in article 24 of the Statute. The best course therefore seemed to be for the special rapporteur to submit to the Commission a draft introduction which would take into account the observations made during the debate.

32. Mr. TUNKIN said the Commission had decided, two or three years previously, that governments should have two years in which to submit their comments on drafts prepared by the Commission. An exception had been made in the case of the draft on consular intercourse and immunities, owing to special circumstances. If, therefore, the articles which the Commission was discussing were submitted to the General Assembly, the Commission would not be able to hold the second reading until 1964. It should be stated in the introduction that that part of the draft was to be submitted to governments.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that he was anxious to obtain the Commission's advice on the introduction. It was obvious that he could not prepare the summary which Mr. Rosenne had asked for, since the Secretariat was much better equipped than any special rapporteur to deal with the matter.

34. The most important point raised during the debate was that of the switch from the idea of a code to that

of a convention. The question had been discussed briefly at the thirteenth session, and his impression of the debate had been that members all had different reasons for considering a convention desirable. He had been convinced that, in the existing international situation, a code could never serve the same effective purpose as a convention drawn up satisfactorily and then adopted by states. Moreover, governments would not have the same interest in an academic code as they would in a convention, which they would sign and take seriously at every stage of its conclusion. A convention would therefore represent a more valuable end-product of the Commission's work than a code. But since the question had not been discussed in detail at the previous session, he would welcome observations from members to reinforce the position that had been taken.

35. Mr. de LUNA said that the experience of the two Conferences on the Law of the Sea, held at Geneva in 1958 and 1960, and of the 1961 Vienna Conference on Diplomatic Relations bore out the wisdom of the Commission's decision to formulate the draft articles on the law of treaties with a view to a draft convention rather than a code.

36. Even where certain rules of customary international law were not in dispute, it was of great practical utility to give the newly independent states an opportunity to state their position on those rules as reflected in a draft convention submitted to an international conference of plenipotentiaries. The new states thereby gave their formal approval to the rules in question, thus clarifying the position and establishing the law on a firm footing.

37. The CHAIRMAN said that the Commission had no intention of altering its decision to formulate the draft articles with a view to the conclusion of a convention on the law of treaties.

38. With regard to the introduction to the chapter on the law of treaties in the Commission's report for the present session, there appeared to be general agreement that, subject to minor corrections, the introductory part of the special rapporteur's report constituted a satisfactory basis.

39. With regard to Mr. Rosenne's suggestion, he thought the session was too far advanced for it to be considered for the present session; it might be considered in connexion with the second reading. Meanwhile, he joined other members in requesting the Secretariat to prepare a comprehensive paper on the subject of the discussions in the General Assembly relating to the law of treaties.

40. Sir Humphrey WALDOCK, Special Rapporteur, said he would take Mr. Tunkin's observation into account and make the necessary adjustments in the relevant passage of the introduction which he would prepare.

41. With regard to the treaties of international organizations, he had done a good deal of research on the subject and prepared a number of draft articles. He had not, however, submitted them to the Commission because he felt it was not advisable to finalize articles on the treaties of international organizations before the

<sup>6</sup> *Yearbook of the International Law Commission 1961*, Vol. II (United Nations publication, Sales No.: 61.V.1, Vol. II), p. 90.

Commission had completed the draft articles on treaties between states. The introduction to the report would, of course, reflect the Commission's decision to deal only with treaties between states.

42. Another point which would have to be mentioned in the Commission's report was the decision of the Commission that, at its next session, he would submit a report on the validity of treaties.

43. Lastly, for the purposes of the publication of his report as part of the 1962 *Yearbook* of the Commission, he would supplement the appendix with a short addendum dealing with the question of reservations to the IMCO Convention, which had been brought to his attention after he had written that report.

44. Mr. BARTOŠ stressed that, as a matter of principle, when the Commission adopted one of its reports, the approval of each of the paragraphs by a vote of the Commission represented a decision on the part of the Commission. By voting in favour of the paragraph of the report which stated that the Commission would prepare the convention on the law of treaties, it had pronounced in favour of that decision. The Commission's decisions were not irreversible, but their existence could not be ignored.

45. The CHAIRMAN said that the special rapporteur would prepare, in the light of the discussion, a draft of the introduction to chapter II of the Commission's report for submission to the Commission at a later meeting.

The meeting rose at 12.35 p.m.

### 663rd MEETING

Monday, 18 June 1962, at 3 p.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

**DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE** (*resumed from the previous meeting*)

#### ARTICLE 17.—FORMULATION OF RESERVATIONS

1. The CHAIRMAN invited the special rapporteur to introduce the new draft articles on reservations which had been prepared by the Drafting Committee.

2. Sir Humphrey WALDOCK, Special Rapporteur, explained that the various provisions on reservations had been revised by the Drafting Committee; the original three articles, 17, 18 and 19, had been replaced by five new articles, numbered 17, 18, 18 *bis*, 18 *ter* and 19.

3. Article 18 *ter* on the legal effect of reservations and article 19 on the withdrawal of reservations were short, since most of the substance was contained in article 17, formulation of reservations, article 18, acceptance of and objection to reservations, and 18 *bis*, validity of

reservations. The drafting of those three articles had involved a considerable rearrangement of his original draft provisions. The rearrangement did not, however, greatly affect article 17, the new text of which read:

"1. A state may, when signing, ratifying, acceding to or accepting a treaty, formulate a reservation unless:

"(a) the making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

"(b) the treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

"(c) the treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

"(d) in the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

"2. (a) Reservations, which must be in writing, may be formulated:

"(i) upon the occasion of the adoption of the treaty, either on the face of the treaty itself or in the Final Act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

"(ii) if, after being adopted, the treaty remains open for signature, upon signing the treaty; or

"(iii) upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.

"(b) A reservation formulated upon the occasion of the adoption of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving state, when carrying out the act establishing its own consent to be bound by the treaty, confirms in some formal manner its intention to maintain its reservation.

"3. A reservation formulated subsequently to the adoption of the treaty must be communicated (a) in the case of a treaty for which there is no depositary, to any other state party to the treaty or to which it is open to become a party to the treaty; and (b) in other cases, to the depositary, which shall transmit the text of the reservation to any such state."

4. In paragraph 1, the compatibility test was set out in sub-paragraph (d) for the case where the treaty was silent concerning the making of reservations.

5. Paragraph 2 dealt with the method of formulating reservations.



6. Paragraph 3 dealt with the communication of reservations and was considerably shorter than the previous text, though it retained most of the substance.

7. Mr. ROSENNE said he could accept article 17 as proposed by the Drafting Committee, but would like to suggest a number of changes.

8. To reflect the true intention of the Commission, in the introductory portion of paragraph 1, a reference to "approval" should be added after the words "when signing, ratifying, acceding to or accepting" and the word "multilateral" should be added before the word "treaty".

9. At the end of sub-paragraph 2(b), the words "confirms formally" should be substituted for "confirms in a formal manner".

10. In paragraph 3, the expression "every other state" should be substituted for "any other state".

11. Mr. BRIGGS said he doubted the correctness of the English terminology in paragraph 1 where the introductory portion referred to the "formulation" and the various sub-paragraphs to the "making" of reservations. The difficulty did not arise in the French text.

12. For the sake of simplicity, sub-paragraphs 1(b) and (c) could be merged. As he saw it, the distinction was between the case set out in sub-paragraph (a), where all reservations were prohibited, and the case set out in sub-paragraphs (b) and (c), where only some reservations were either expressly prohibited or impliedly excluded.

13. Sub-paragraph 1(d) could be simplified by deleting the words "in the case where the treaty is silent concerning the making of reservations". It was inconceivable that states would authorize reservations that were incompatible with the object and purpose of the treaty.

14. He accordingly suggested that paragraph 1 be redrafted to read:

"1. A state may, when signing, ratifying, acceding to or accepting a treaty, formulate a reservation unless:

"(a) all reservations are prohibited by the terms of the treaty or by the established rules of an international organization; or

"(b) any particular reservation is expressly prohibited or impliedly excluded by the terms of the treaty or by the established rules of an international organization; or

"(c) the reservation is incompatible with the object and purpose of the treaty."

15. In paragraph 2, sub-paragraphs (a) (i) and (b), and in paragraph 3, he suggested that the words "the adoption of the text of the treaty" should be substituted for "the adoption of the treaty".

16. In sub-paragraph 2(a)(ii), the desired meaning could be expressed simply by the words "upon signing the treaty".

17. In paragraph 3, he supported Mr. Rosenne's suggestion that the expression "any other state" should be replaced by "every other state".

18. Mr. TABIBI said that, while he would not insist on the deletion of sub-paragraph 1(d), he still maintained the view he had expressed in the general discussion on article 17;<sup>1</sup> he did not favour any rigid rule along the lines of that provision and thought that it was advisable to facilitate rather than to hinder the making of reservations.

19. He noted the reference in sub-paragraph 2(a)(iii) to "a *procès-verbal*". That reference could prove misleading because delegations occasionally made reservations in the course of speeches at a treaty-making conference; on at least one occasion, it had been suggested that, because a "reservation" had been entered in the records of the meetings of a conference, it constituted a valid reservation to the treaty ultimately adopted by that conference.

20. Mr. BARTOŠ said that the drafting of sub-paragraph 1(a) was inadequate. It seemed to suggest that, if two states were members of an international organization, they could not in any circumstances, even by agreement between themselves, make and accept reciprocally a reservation which was at variance with the established rules of that international organization. The intention was, however, to limit the application of that provision to the case where the treaty had been signed under the auspices of the international organization concerned or at a conference convened by that organization, or perhaps where the states concerned had entered into a specific commitment to the organization which conflicted with the substance of the reservation. It should be possible to improve the drafting so as to bring out that intention clearly.

21. In sub-paragraph 2(a)(i) he did not see what "other instrument" could be meant. If the intention was to refer to ratification, he must point out that ratification took place after the adoption of the treaty and not "in connexion with" that adoption. Besides, the formulation of a reservation in the instrument of ratification was already covered by sub-paragraph 2(a)(iii).

22. Sub-paragraph 2(a)(iii) did not specify who would draw up the document recording a reservation formulated upon the exchange or deposit of instruments of ratification, accession or acceptance. It could be either the reserving state itself or all the states which had participated in the adoption of the treaty.

23. Mr. TSURUOKA said he could not agree to the individualistic system of reservation as instituted in the present draft article for the reason that under that system, the criterion of compatibility, which ought to be an objective criterion, was left entirely to the appraisal of each individual state, and a treaty might be put into effect as between a reserving state and an accepting state. He would, however, refrain from further elaborating the point at that stage.

<sup>1</sup> 651st meeting, paras. 72 and 73.

24. The provisions of sub-paragraph 1 (d) were insufficient. The case he had in mind was where a state wished to object to a reservation on grounds other than its incompatibility with the object and purpose of the treaty. For example, a reservation, without being actually incompatible with the object of the treaty, might conflict with some rule of customary international law. Again, a reservation could constitute a breach of the reserving state's obligations toward other states under a pre-existing treaty.

25. For example, a state might have *vis-à-vis* twenty other states a treaty obligation to submit to the International Court of Justice all disputes relating to the interpretation of treaties in general. A multilateral treaty might then be adopted with a clause providing for the submission to the International Court of Justice of all disputes relating to the interpretation of the treaty. If, then, the state in question entered a reservation to that very clause, its reservation might not be incompatible with the object and purpose of the treaty, but it would certainly constitute a breach of its pre-existing treaty obligations to the other twenty states. It was inadmissible to suggest that none of those twenty states could invoke that breach as grounds for objection to the reservation.

26. Sir Humphrey WALDOCK, Special Rapporteur, replied that the point raised by Mr. Tsuruoka related more to the validity of treaties and therefore belonged to the next series of draft articles. It would be an extremely complicated business to cover that point in article 17.

27. In article 18, however, the question of the acceptance or rejection of reservations had not been linked to the compatibility test. A state could therefore make its own decision and, if it considered a reservation inconsistent with the obligations of the reserving state under a pre-existing treaty, it was free to take that fact into account when objecting to the reservation.

28. Mr. TSURUOKA said that he had raised the question because, in the course of the discussion, some members had suggested that the objecting state was bound by the compatibility test. He was, however, satisfied with the explanation given by the special rapporteur that states could take into consideration any valid reason when deciding on the acceptance or rejection of a reservation. He requested that that explanation be included in the commentary.

29. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that that should be done.

30. With regard to the drafting suggestions which had been made, he could accept those by Mr. Rosenne and Mr. Bartoš and also Mr. Briggs' suggestion that in paragraphs 2 and 3 the expression "the adoption of the text of the treaty" should be used instead of "the adoption of the treaty".

31. With regard to Mr. Briggs' point concerning the expressions "formulate a reservation" and "the making of reservations", sub-paragraphs 1 (a), (b) and (c) appropriately used the latter expression because a treaty would not deal with the mere formulation of reservations: if it authorized a particular reservation, explicitly

or implicitly, then that reservation would take effect and it was therefore correct to speak of the "making" of a reservation. In the introductory portion of paragraph 1, on the other hand, the reference was to the formulation of a reservation which had not yet taken effect and which could therefore, not be said to have been "made".

32. He could not accept the suggested merging of sub-paragraphs (b) and (c). Sub-paragraph (c) served a useful purpose by making it clear that, where the treaty expressly authorized the making of a specified category of reservations, the implication was that all other categories of reservations were excluded. It was desirable to express that implication clearly.

33. In reply to Mr. Tabibi, the reason for the reference to "a *procès-verbal*" in paragraph 2 (a) (iii) was that sometimes at the time of the deposit of an instrument of ratification, a reservation was put in a short "*procès-verbal*" attached to that instrument and deposited at the same time.

34. The question of oral reservations was an important one, but it belonged rather to the question of reservations at the time of the adoption of the treaty, which was dealt with in sub-paragraph 2 (a) (i). There had, in fact, been some controversy regarding speeches made in the course of a conference and the claim that statements made in such speeches were to be regarded as the formulation of reservations. In that connexion, he drew attention to the provisions of sub-paragraph 2 (b), which required formal confirmation of a reservation formulated upon the occasion of the adoption of a treaty and which should go a long way towards disposing of the difficulty mentioned by Mr. Tabibi.

35. The CHAIRMAN suggested that article 17 should be referred back to the Drafting Committee.

*It was so agreed.*

#### ARTICLE 18. — ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

36. Sir Humphrey WALDOCK, Special Rapporteur, said that the new article 18 covered both acceptance of and objection to reservations; the contents of the two former articles 18 and 19 had been considerably reduced in length without, however, leaving out anything of substance.

The text proposed by the Drafting Committee read:

"1. Acceptance of a reservation not provided for by the treaty itself may be express or implied.

"2. A reservation may be accepted expressly:

"(a) in any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

"(b) by a formal notification of the acceptance of the reservation addressed to the depositary of the treaty, or if there is no depositary, to the reserving state and any other state entitled to become a party to the treaty.

"3. (a) A reservation shall be presumed to have been accepted by a state if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

"(b) An objection by a state which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not taken the steps necessary to establish its own consent to be bound by the treaty.

"4. An objection to a reservation shall be formulated in writing and shall be notified :

"(a) in the case of a treaty for which there is no depositary, to the reserving state and to any other state party to the treaty or to which it is open to become a party ; and

"(b) in other cases, to the depositary."

37. Mr. TSURUOKA said that he would deal first with the presumption of acceptance set out in paragraph 3 (a). As he understood them, the provisions of articles 17, 18 and 18 *bis* embodied a system under which a series of bilateral relationships would be established. He must therefore stress the need to observe the principle of the equality of states, which was the very foundation of international law. That principle would be violated if, as indicated in paragraph 3 (a), a state could, by the mere passage of twelve months after its receipt of notice of a reservation, find that, unbeknown to itself, it was in treaty relations with the reserving state.

38. The presumption in paragraph 3 (a) could be defended if unanimity were the rule for the acceptance of reservations ; it would then serve to introduce an element of flexibility in the application of a somewhat rigid rule. But with the system of bilateral relationships adopted in articles 17, 18 and 18 *bis*, the presumption should be that a state which did not explicitly accept a reservation thereby rejected it.

39. Paragraph 3 (b) also violated the principle of the equality of states. Under its provisions, a state which wished to ratify the treaty without reservations but which had made an objection to another state's reservation, was allowed only two years from the date of its objection to establish its own consent to be bound by the treaty. If to the period of two years were added that of twelve months provided in paragraph 3 (a) for raising the objection, the non-reserving state would have at most three years in which to complete the process of ratification and acceptance of the treaty. In view of possible parliamentary delays that period was not at all long, and it seemed to him at variance with the principle of the equality of states to specify that the mere passage of that period deprived an objecting state of the right to reject the reservation. He did not believe that the reserving state had the right to impose upon other states treaty relations on its own terms.

40. Mr. ROSENNE said that article 18 was acceptable. He appreciated the reason why the compatibility test was not specifically mentioned ; a reference to that test

was unnecessary in view of the provision in article 18 *bis*, paragraph 2 (b), since the test was inherent in the whole system now proposed by the Drafting Committee.

41. He shared some of Mr. Tsuruoka's doubts about the need for paragraph 3 (b). Moreover, if it were retained, it should form a separate paragraph since it dealt with a different point.

42. Although there was force in some of Mr. Tsuruoka's criticisms of paragraph 3 (a), it was nevertheless a desirable provision because it helped to clarify the legal position. It was not advisable to make it obligatory for states to reply in writing one way or the other about reservations.

43. He had, however, one suggestion to make for paragraph 3 (a), which he hoped was purely of a drafting character. Whereas paragraph 1 referred to the express or implied acceptance of a reservation, paragraph 3 (a) introduced the notion of a presumption, which created a legal fiction with all the attendant difficulties that that could cause in international law and in relations between states. The Drafting Committee should consider using the wording of paragraph 1 and stating clearly what was meant by an implied acceptance. The doubts liable to be created by the existing wording of paragraph 3 (a) would then be removed.

44. In keeping with his earlier suggestion concerning article 17, paragraph 3, he suggested that the words "any state" in paragraphs 2 (b) and 4 (a) of article 18 should be replaced by the words "every state" or "all states".

45. Mr. de LUNA said he agreed with Mr. Rosenne that paragraph 3 (b) should form a separate paragraph. In substance, that provision was correct. Effect should be given to an objection, provided the objecting state showed an interest in becoming a party to the treaty. Perhaps that idea would be better expressed if some such wording as "manifested in a valid manner" were used instead of "taken the steps necessary to establish".

46. Despite Mr. Tsuruoka's objection, he believed that paragraph 3 (a) should be retained so as to safeguard as far as possible the homogeneity of the regime established by the treaty.

47. Mr. BRIGGS said that, if the Commission's approach were accepted as desirable, then the substance of article 18 was acceptable but sub-paragraph 2 (b) failed to indicate at what point in time a reservation was accepted.

48. Mr. TABIBI said that, while he had no objection to the substance of article 18, the acceptance of or objection to a reservation should always be express ; the presumption allowed in paragraph 3 (a) would only create confusion.

49. A minor technical point was that reminders might have to be sent to states to ensure that they sent off notifications of acceptance or objection. The membership of the United Nations had doubled in recent years and included a number of new states which might lack experience in handling legal documents.

50. Mr. VERDROSS, commending the Drafting Committee on its remarkable achievement, said that the article was acceptable but Mr. Tsuruoka was perhaps right in saying that the time-limit of twelve months laid down in paragraph 3 (a) was too short: it might be better not to fix a specific period until the comments of governments had been received.

51. Mr. TSURUOKA said that he was still not convinced of the need for paragraph 3 (a); it might have the serious result of allowing a minority to impose its will on the majority.

52. If it were retained in the modified form suggested by Mr. Tabibi, states should be required to communicate their acceptance or objection in writing.

53. Sir Humphrey WALDOCK, Special Rapporteur, said he could not agree with Mr. Tsuruoka that the presumption in paragraph 3 (a) was unnecessary. It was important that the treaty relations between any two states should not remain undefined until a dispute arose. Moreover, such a presumption appeared in a number of recent treaties, in which the period specified for the lodging of objections was usually a shorter one than that proposed in the text before the Commission.

54. Although he had had some doubts about the provision contained in paragraph 3 (b), he had come round to the view that it served some purpose and should not cause undue concern. Any state could put in a notice of objection and withdraw it later. He agreed, however, that the provision could form a separate paragraph.

55. Mr. BARTOŠ said that he was troubled by the way in which the presumption in paragraph 3 (a) was expressed. The text did not describe the presumption as conclusive and consequently could be interpreted as meaning that, even after the expiry of twelve months, the presumption could be rebutted, in which case the time-limit became pointless. His recollection of the discussion was that the Commission had decided to the contrary, and had considered the time-limit for the formulation of objections to a reservation as an absolute limit and that once it had expired, the validity of a reservation was unassailable.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that the presumption was meant to be conclusive. Mr. Bartoš's point, which was essentially a drafting one, could be referred to the Drafting Committee, together with the point raised by Mr. Rosenne.

57. Mr. TABIBI said that, for the sake of the certainty of the law, it should be stipulated that states had to notify acceptance or rejection of a reservation. He hoped that the emphatic views expressed on that point by some members would be taken into account by the special rapporteur and the Drafting Committee.

58. Mr. TSURUOKA said that, though still dissatisfied, he would not press for the amendment of paragraph 3 (a) but hoped that mention would be made in the commentary that states not wishing to be bound by a reservation should express their objection as early as possible. The precise time-limit for signifying an objection could be left open pending the comments of governments. The

slowness of ratification of the conventions concluded at the Geneva Conference on the Law of the Sea of 1958 suggested that three years was by no means too long a period.

59. Sir Humphrey WALDOCK, Special Rapporteur, suggested that it would be prudent to leave the time-limit in paragraph 3 (b) blank pending the comments of governments.

60. The CHAIRMAN suggested that article 18 should be referred back to the Drafting Committee.

*It was so agreed.*

#### ARTICLE 18 bis. — THE VALIDITY OF RESERVATIONS

61. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee had prepared a new article, on the validity of reservations, which read:

"1. (a) In the cases contemplated in sub-paragraphs (b) and (c) of article 17, paragraph 1, acceptance of a reservation not excluded by the terms of a treaty is not required to establish its validity;

"(b) In the case contemplated in sub-paragraph (d) of article 17, paragraph 1, the validity of a reservation depends upon the acceptance of the reservation in accordance with the provisions of paragraphs 2 to 4 of this article.

"2. Except in a case falling under paragraph 3 and unless the treaty shall otherwise provide, the following rules apply in the case of a reservation to a multilateral treaty:

"(a) acceptance of the reservation by any state to which it is open to become a party to the treaty establishes the validity of the reservation as between that state and the reserving state, and constitutes the reserving state a party to the treaty in relation to such state, if or as soon as the treaty is in force;

"(b) an objection to the reservation precludes the entry into force of the treaty as between the objecting and the reserving states, unless a contrary intention shall have been expressed by the objecting state.

"3. In the case of a treaty which is the constituent instrument of an international organization, when objection is taken by a state to a reservation, the question of the validity of the reservation shall be determined, unless the treaty otherwise provides, by decision of the competent organ of the organization in question.

"4. The provisions of paragraphs 1 and 2 do not apply to a multilateral treaty concluded between a restricted group of states, in which case a reservation shall only be valid if accepted by all the states parties to the treaty or to which it is open to become a party to the treaty, except when:

"(a) a different rule is laid down in the treaty itself, or

"(b) the rules in force in a regional or other organization otherwise prescribe".

62. The article drew a distinction between general multilateral treaties and multilateral treaties concluded between a restricted group of states. Somewhat reluctantly, as special rapporteur, he had agreed with the majority in the Drafting Committee that the flexible system should apply also to multilateral treaties not of a general character but concluded between a considerable number of states. On the other hand, the unanimity rule would have to be retained for the latter category. In effect, the Drafting Committee had carried the inter-American system a little beyond what had been contemplated by the Commission.

63. Mr. VERDROSS said that there was a flagrant contradiction between article 18 *bis*, paragraph 1 (b) and article 17, sub-paragraph 1 (d). In no circumstances could a reservation incompatible with the object and purpose of a treaty be acceptable. Consequently, the opening phrase of the former provision should be revised so as to stipulate that in case of doubt as to the compatibility of a reservation with the object and purpose of the treaty, its validity would depend upon the acceptance of the reservation in accordance with the provisions of paragraphs 2 to 4.

64. The distinction between an ordinary multilateral treaty and a multilateral treaty concluded between a restricted group of states was not clear, since no numerical criterion was laid down by which to determine what constituted a "restricted" group. Paragraph 4 should be dropped, or else redrafted so as to be applicable to multilateral treaties which were not general in character.

65. Some definition by reference to the capacity to conclude international treaties should be inserted to qualify the "competent organ" mentioned in paragraph 3.

66. Mr. AMADO associated himself with the tributes paid to the Drafting Committee on its excellent work. The articles it had prepared were remarkable for their clarity and structure.

67. The system proposed in article 18 *bis* did honour to the Latin American continent, but it should be remembered that inter-American practice on reservations had not been very uniform. It had been developed in connexion with law-making treaties and not with agreements concerned with the regulation of conflicting state interests, and therefore aimed to leave certain doors open. He was unable to subscribe to Mr. Tsuruoka's view because in certain branches of international law it was impossible to escape being vague.

68. With regard to paragraph 4, the records of the earlier discussions on reservations would show that he had expressed disagreement with the somewhat extreme views of Mr. Jiménez de Aréchaga on the ground that the principle of the integrity of a treaty should be upheld and the unanimity rule applied unless the states concerned decided otherwise.

69. Mr. CASTRÉN said he agreed with Mr. Verdross that the formulation and content of paragraph 1 were unsatisfactory. Paragraph 1 (a) referred to the cases provided for in sub-paragraphs 1 (b) and (c) of article 17,

but sub-paragraph 1 (b) of article 17 referred only to reservations expressly prohibited by the treaty, while sub-paragraph 1 (c) referred to similar cases, although it was differently phrased.

70. Paragraph 1 (b) of article 18 *bis*, however, provided that even a reservation which was incompatible with the object and purpose of the treaty could be accepted by other states and so become valid; article 18 *bis* thus permitted what was expressly prohibited by article 17. Of course, states were free to accept any reservations made by other states, and there were marginal cases in which it could not be said with certainty that a reservation was or was not contrary to the provisions or to the object and purpose of the treaty; but it seemed inadvisable in the draft convention first to prohibit and then to invite states to submit doubtful reservations.

71. He therefore proposed the following more neutral wording for paragraph 1 of article 18 *bis*:

"The validity of a reservation which is formulated in accordance with the provisions of article 17 and which is not expressly authorized by the treaty depends upon the acceptance of the reservation in accordance with the provisions of paragraphs 2 to 4 of this article".

It was obvious that reservations expressly authorized by the treaty were valid without re-acceptance by the other states concerned, but it was better to say so explicitly in the draft convention.

72. A reference to paragraph 4 should appear in the opening phrase of paragraph 2, since treaties concluded between a restricted group of states were also multilateral treaties, as was stated expressly in paragraph 4. To bring the English and French texts into line the words "if or" in the final phrase of paragraph 2 (a) in the English text should be deleted.

73. Paragraphs 1 and 2 should not be referred to in paragraph 4; their mention there might lead to the inference that paragraph 1 was also applicable in the cases dealt with in paragraph 4. He therefore suggested that the opening of paragraph 4 should be redrafted to read: "In the case of a multilateral treaty concluded between a restricted group of states, a reservation shall only be valid ..., except when", after which would follow immediately the provision forming the existing sub-paragraph (a). Sub-paragraph (b) would be deleted as unclear, for it referred to regional "or other" organizations, whereas organizations in general were dealt with in paragraph 3. To cover the case dealt with in sub-paragraph 4 (b), the words "or regional" should be inserted after the word "international" in paragraph 3.

74. The order of paragraphs 3 and 4 should be reversed.

75. Mr. BARTOŠ said there seemed to be some inconsistency between article 18 *bis*, paragraph 1 (a), and the provisions in article 18 concerning the acceptance of a reservation not provided for in the treaty.

76. With regard to article 18 *bis*, paragraph 4, it was understandable that that provision should apply to the case where a restricted group of states made a treaty expressly excluding reservations; but if the treaty did

not exclude reservations, then, even if the treaty was concluded by a restricted group of states, the provision should not debar the parties from making reservations if the treaty was not of general interest and the content of the reservation did not conflict with the objects of the treaty.

77. In the case of paragraph 1 (a), he would agree to the provision if it were amended to state that, in cases where there was no express acceptance of a reservation and there were no objections, it was unnecessary to establish the validity of a reservation; and he would prefer that it should be stated that paragraph 4 referred only to multilateral treaties which were not of general interest.

78. Mr. AGO said he was grateful to members for drawing attention to faults of drafting. The ambiguity noted in paragraph 1 (a) could easily be remedied and he agreed with Mr. Verdross and Mr. Castrén concerning the contradictions between that provision and article 17, paragraph 1. He accordingly suggested that article 18 *bis*, paragraph 1 (a) should be redrafted to read:

“In cases where a treaty contains express provisions on reservations, the acceptance of a reservation which is not excluded by the terms of the treaty is not required to establish its validity”.

79. The contradiction referred to by Mr. Verdross in connexion with paragraph 1 (b) was more serious, in that it related to cases where a treaty was silent concerning the making of reservations. He suggested that paragraph 1 (b) should be redrafted to read:

“In the case where a treaty does not contain express provisions on the making of reservations, the validity of a reservation which is not incompatible with the object and purpose of the treaty depends upon the acceptance of the reservation in accordance with the provisions of paragraphs 2 to 4 of this article”.

That wording would be in line with article 17 and would eliminate all ambiguity.

80. The drafting of paragraph 4 presented considerable difficulties. The word “multilateral” might be omitted; in that way a clearer distinction would be drawn between reservations to multilateral treaties *generaliter*, which were dealt with in paragraph 2, and reservations to treaties concluded by a restricted group of states. Also, in the French text the words “*conclu entre*” might be substituted for the words “*conclu par*”. But the Commission could not go very much further in altering the paragraph, since it seemed unavoidable to leave some margin for interpretation.

81. Mr. TUNKIN said that paragraph 4 as drafted might be a source of considerable confusion. The existence of multilateral treaties concluded between a restricted group of states could not be denied, but it seemed dangerous to suggest a specific unanimity rule for the acceptance of reservations to such instruments. First, it was extremely difficult to delimit that category of treaties and, secondly, the advisability of suggesting a specific rule governing reservations to that particular category, instead of merely laying down a rule applicable in most cases, was questionable. It would be much wiser

for the Commission to be content with the general rule in paragraph 2 applicable to reservations to multilateral treaties *generaliter*. As he had already said, most “restricted” treaties would contain express provisions concerning reservations and, if such a treaty was silent on the matter, the problem could be settled by some additional agreement among the small group of states concerned. In view of those considerations, he suggested that paragraph 4 might be deleted altogether.

82. He had considerable doubts concerning Mr. Ago's proposed amendment to paragraph 1 (b). It seemed somewhat contradictory to say that, if a treaty was silent on the subject of reservations, the validity of a reservation not incompatible with the object and purpose of the treaty depended upon the acceptance of the reservation. Non-acceptance in itself was likely to depend on the compatibility of the reservation with the object and purpose of the treaty, and indeed, the reservation's incompatibility with the object of the treaty might be the sole reason for an objection. Mr. Ago's amendment, however, implied that a compatibility test should first be applied and the problem of acceptance would arise later if the reservation passed the test. In practice, the acceptance or non-acceptance of a reservation by states was determined by their views on whether or not the reservation passed the compatibility test.

83. Mr. de LUNA said he fully endorsed Mr. Ago's amendment to paragraph 1 (a).

84. On the other hand, he shared Mr. Tunkin's misgivings over Mr. Ago's amendment to paragraph 1 (b). In article 17, sub-paragraph 1 (d) affirmed the principle that, where the treaty was silent on the subject, reservations had to be compatible with the object and purpose of the treaty; article 18 *bis* ought not to contain an exception to that principle. The problem was, first, who was to pass judgment on the compatibility of a reservation with the object of the treaty, and, secondly, should the admissibility of a reservation be subject to the unanimity rule, in which event any party or potential party to the treaty would be given the power to act as judge? In his opinion, every state should have the right to express its views on the compatibility of a reservation with the object of a treaty to which it was a party or potential party; it had to be assumed that states, like individuals, were governed by the same moral rules, or at least by the same logic. He could not agree that it was only a drafting point that was involved. Logic demanded that the decision should be left to each state and to the consequent relations between the reserving state and the state which objected on grounds that the reservation was incompatible with the object and purpose of the treaty.

85. He shared Mr. Verdross's and Mr. Tunkin's views concerning paragraph 4. While he understood the underlying idea of the paragraph, he did not see how, in practice, any distinction could be drawn between treaties concluded between restricted groups of states and treaties which were not of general interest. The paragraph might lead to considerable confusion and it would be wiser to omit it altogether and leave only the general rule in paragraph 2.

86. Mr. AGO said he appealed to Mr. Tunkin and Mr. de Luna not to ask members who were in basic disagreement with the majority of the Commission to compromise even further than they had already done. The only remaining safeguard in the matter of reservations was that, in the case of the silence of the treaty, the reservation concerned should not be incompatible with the object and purpose of the treaty. Either the clause had an objective value, and the validity of reservations could not depend solely on acceptance by every state concerned, or it had no value at all. Mr. Tunkin and Mr. de Luna were saying in effect that the validity of any reservation, whether or not it was compatible with the object and purpose of the treaty, depended on the acceptance by states; that thesis completely nullified the provisions of article 17, paragraph 1.

87. With regard to the objections made to paragraph 4, members seemed to be forgetting that the system formerly applicable to all treaties was the rule set out in that paragraph. The new trend in the Commission was to extend the so-called inter-American system to all multilateral treaties, and not even only to general multilateral treaties; however, he did not think that such extreme consequences could extend to treaties concluded between four or five states, since that would have very dangerous consequences for the conclusion of treaties between restricted groups—a category which formed the vast majority of treaties. There were, of course, considerable drafting difficulties involved, but he could not agree to deleting the rule or making it impossible to operate. The Drafting Committee might re-examine the question, but he wished to state categorically that he personally was unable to go any further towards a compromise than he already had done.

88. Mr. CASTRÉN said that Mr. Ago's amendments to paragraph 1 improved the draft, but he still shared the doubts expressed by other members. He urged the Drafting Committee to consider the neutral formulation which he himself had suggested; by avoiding a specific reference to article 17, the need to take a definite position on various controversial points would be eliminated.

89. Mr. VERDROSS, in connexion with paragraph 4, observed that a really restricted group of states concluding a treaty would always come to an agreement on whether or not reservations to the treaty were admissible. If six states were concluding a treaty and one made a reservation which was accepted by one of the other contracting parties, he saw no reason why such a reservation could not be valid between those two states.

90. Mr. AGO said he could not share that view.

91. Sir Humphrey WALDOCK, Special Rapporteur, said it was obvious that, if the parties had to be unanimous in accepting a reservation and a state made a reservation to which another wished to object, the parties would never agree to accept it. The rule, as he saw it, was that a reservation to which an objection was made would exclude the reserving state from the treaty unless it withdrew the reservation.

92. He himself had serious doubts concerning paragraph 4, but on quite different grounds from those given

by Mr. Tunkin. Originally the Commission had contemplated applying the relatively new inter-American system of reservations to general multilateral treaties, and had defined general multilateral treaties mainly in order to facilitate the drafting of article 18 *bis*, and, to a lesser extent, article 7 *bis*. But the multilateral system, or rather the system of the Latin American states, had now been expanded to cover multilateral treaties as a whole and some members felt that that went very far because there were treaties between comparatively small groups of states which had certainly never contemplated any such system as governing their treaty relations; that was why it had been thought essential to put in a cautionary paragraph like paragraph 4.

93. Personally he would, of course, have been more inclined to accept the original proposal of Mr. Verdross, which was to distinguish between general multilateral treaties and non-general multilateral treaties;<sup>2</sup> that was the intention when they had begun their discussion. But if they now had to enlarge the application of the Latin American principle to multilateral treaties, then they had to find some formula to cover that smaller group of paragraph 4. The drafting difficulty was a very real one, but the point was one of great substance and they must not simply pass it off as a question of drafting.

94. Mr. TUNKIN said he thought Mr. Ago had exaggerated the danger of omitting paragraph 4; he agreed with Mr. Verdross that, in the case of "restricted" treaties, the small group of states concerned would be able to settle the question whether a reservation was admissible.

95. Furthermore, when the convention which the Commission was drafting entered into force, a new situation would be created, and states would be aware of the implications of adopting the convention; the general rule concerning reservations to multilateral treaties would be known to everyone and, when a restricted group of states concluded a treaty, that group would bear in mind the existence of a residuary rule which might apply if the treaty itself contained no provision on reservations. In his opinion, the Commission should adopt the clear, general and unambiguous provision contained in paragraph 2; he was quite sure that the confusion which paragraph 4 might introduce would not only not advance the practice in the matter, but might even cause disputes between states.

96. Moreover, the meaning of "restricted group" might be interpreted in a number of ways: a group of forty was restricted in comparison with 110 states, and the importance of the article for treaties of local interest should not be exaggerated. There would be no practical difficulties in settling such matters, but the convention would be much more comprehensible without such a provision.

97. Mr. GROS said that the article had been drafted and provisionally accepted with reservations to general multilateral treaties in mind and that those members who had not agreed with the idea of extending the inter-

<sup>2</sup> 642nd meeting, para. 56.



American system to such treaties had made a considerable concession in accepting a compromise solution. The fact that he had agreed to take part in drafting that compromise in no way meant that he had been convinced by the opposing argument, but merely that he had bowed to the majority in the Drafting Committee and in the Commission. As Mr. Ago had pointed out, members who held those views had found it possible to accept that system accompanied by a precise definition of general multilateral treaties; but since paragraph 2 now applied to all multilateral treaties without exception, it would not be reasonable to extend the inter-American system to treaties concluded by a few states only. The rule laid down in paragraph 4, containing the descriptive term "a restricted group of states", was not ideal, but it did represent a practical criterion. It was essential to retain the delicate balance on which the compromise had rested: either paragraph 4 should be retained in its existing form, or the Commission should return to the special rapporteur's original text, in which paragraph 2 referred only to general multilateral treaties.

The meeting rose at 6.5 p.m.

#### 664th MEETING

Tuesday, 19 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

#### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

##### ARTICLE 18 *bis*. — THE VALIDITY OF RESERVATIONS (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Drafting Committee's new article, 18 *bis*.

2. Speaking as a member of the Commission, he proposed that paragraph 1 should be deleted altogether. The provisions of article 17, paragraph 1, stating the cases in which a reservation to a treaty could not be formulated, raised the question of the validity of reservations, and the deletion of paragraph 1 of article 18 *bis* would not therefore remove any essential concept from the draft articles.

3. On the other hand, the introductory part of paragraph 2 should be amended to read: "Where a multilateral treaty is silent concerning the making of reservations and except in a case falling under paragraph 3, the following rules should apply:..."

4. He could not, however, agree with the proposal put forward by other members for the deletion of paragraph 4. The result of that deletion would be that reservations to any multilateral treaty would come within the scope of paragraph 2, whereas it would not be in conformity with current practice to omit all reference to treaties concluded between a restricted

group of states. The Commission should take a formal decision on the proposal for the deletion of paragraph 4.

5. Mr. AGO said the Chairman's proposal might be workable in the case of paragraph 1 (*a*), but the difficulty in connexion with paragraph 1 (*b*) would still remain. If paragraph 2 referred only to cases where the treaty was silent concerning the making of reservations, then it would be implied that any reservation, whether or not compatible with the object and purpose of the treaty, could be accepted, in which event the proviso in article 17, sub-paragraph 1 (*d*), would be practically nullified.

6. The CHAIRMAN, speaking as a member of the Commission, said that, although article 17 contained no express mention of the validity of reservations, its sub-paragraph 1 (*d*) prohibited reservations — in cases where the treaty was silent on the matter — which were incompatible with the object and purpose of the treaty. That rule would remain, even if nothing was stated on the subject in article 18 *bis*. Since article 18 *bis* related only to the effects of the acceptance of and objections to reservations, it could hardly affect the terms of article 17, sub-paragraph 1 (*d*), particularly since that provision did not specify who was to decide the question of compatibility. Nothing would be lost by omitting article 18 *bis*, paragraph 1, which was bound to lead to confusion, however it might be formulated.

7. Mr. GROS, speaking as a member of the Commission, said that any substantive change in the structure of article 18 *bis* would destroy the delicate balance which had been achieved as a compromise between two opposing points of view. The prohibition of certain reservations, laid down in article 17, was in itself an indication of the validity of other reservations, and as such referred the reader to the article on validity.

8. The scope of the concept of incompatibility could have been specified, but the Commission had decided against that and in favour of rules providing for a criterion without any control by reference to which a state could decide whether a reservation was or was not incompatible with the object and purpose of the treaty. Thus, the existing compatibility clause opened the door to conflicting views concerning particular reservations. If that vague provision alone were maintained and the principle not reaffirmed in article 18 *bis*, paragraph 1 (*b*), no safeguard would remain: under the amendment proposed by the Chairman, the validity of reservations to any treaty which was not bilateral would be determined by the provisions of paragraph 2. In his opinion, that system was unsatisfactory and, moreover, did not correspond to current practice.

9. The difference between the treaties referred to in paragraphs 2 and 4 respectively was in effect the difference between multilateral and plurilateral treaties; and there could be no denying that in actual practice there was a difference between treaties concluded by, say, eight or ten states, and collective treaties properly so-called. He appealed to the Commission not to upset the balance of the article by deleting paragraph 4 and pointed out to those who wished to change the system

of reservations that to destroy the whole structure of the existing system was not the best means to that end.

10. Sir Humphrey WALDOCK, Special Rapporteur, observed that the Chairman had not proposed the deletion of paragraph 4.

11. He (Sir Humphrey) suggested that the Chairman's proposed amendment to the introductory part of paragraph 2 should include a reference to paragraph 4, so that the second phrase would read "...and except in cases falling under paragraphs 3 and 4...".

12. Mr. CADIEUX said he agreed with Mr. Gros that it was only logical to retain paragraph 4, in order to maintain the balance of the compromise that had been achieved with such difficulty. Perhaps the objections of certain members to paragraph 4 were based on the ambiguity of the expression "a restricted group of states". The meaning of that expression might be explained in the commentary, or the Drafting Committee might find a new wording.

13. Mr. TUNKIN said he would concede that Mr. Gros had a point, since the existence of "restricted" treaties, where the problem of reservations arose in a particular light, could not be denied.

14. If current practice were taken into account and if reference were made to the advisory opinion of the International Court of Justice in the Reservations to the Genocide Convention Case and to General Assembly resolution 598(VI), it would be found that the only rule on the subject was entirely general, that in cases where the treaty was silent on the subject of reservations states could make reservations which were compatible with the object and purpose of the treaty, and that parties to the treaty might accept or reject reservations. Furthermore, the advisory opinion of the International Court implied that reservations should be accepted if they were compatible with the object and purpose of the treaty and that each state should decide for itself on the issue of compatibility.

15. The rule he had cited was the only general rule of international law which was currently accepted. Some members, however, seemed anxious to retain something of the old League of Nations unanimity rule for reservations. Although they had been obliged to yield to the majority, they were still trying to insert into the draft remnants of that former practice, which had not been accepted by the General Assembly. Paragraph 4 as drafted might open the door to many disputes, since the expression "a restricted group of states" was extremely vague. In practice, in the rare cases where a treaty concluded between a few states was silent on the subject of reservations, the states concerned would have no difficulty in reaching agreement on how to deal with the question and, if not, the general rule of paragraph 2 of article 18 *bis* would be applicable. The Commission, therefore, should not retain vestiges of the old practice in the matter of reservations but should accept the clear-cut rule laid down in paragraph 2.

16. Sir Humphrey WALDOCK, Special Rapporteur, said that although, in drafting his original articles on reservations, he had naturally paid great attention to the

General Assembly's debates on reservations and to the advisory opinion of the International Court, he had not formed the view that the General Assembly had taken the position referred to by Mr. Tunkin—although of course it might do so at some later date. Nor could he agree that the advisory opinion of the International Court of Justice went as far as Mr. Tunkin contended, for it contained a number of very cautious phrases. For example, it said "it is well established that in its treaty relations a state cannot be bound without its consent, and that consequently no reservation can be effective against any state without its agreement thereto". And it referred to the notion of the integrity of the Convention as adopted as "a notion which in its traditional concept involved the proposition that no reservation was valid unless it was accepted by all the contracting parties without exception, as would have been the case if it had been stated during the negotiations". It described that concept, which was directly inspired by the notion of contract, as "of undisputed value as a principle".<sup>1</sup> Nevertheless, as far as the Genocide Convention was concerned, the Court had thought it proper to refer to various circumstances, particularly to the clearly universal character of the United Nations under whose auspices the Convention had been concluded, which would lead to a more flexible application of the principle. Extensive participation in conventions of that type had, the Court noted, already given rise to greater flexibility in the international practice concerning multilateral conventions and to a departure from the unanimity rule.

17. In an earlier draft of article 18 *bis* on which the Drafting Committee had worked, the principle contained in paragraph 2 had been limited to general multilateral treaties, but the whole structure of the article had gradually been altered in the Committee, which had decided that the limitation might be relaxed if the position of what he had called "plurilateral" treaties were properly safeguarded in paragraph 4. Despite the difficulty of defining the meaning of "a restricted group of states" in paragraph 4, that paragraph and paragraph 2 represented the balance on which the whole article was based.

18. If paragraph 4 were deleted, the Commission should consider adopting Mr. Verdross's proposal that, for the purpose of the admissibility of reservations, multilateral treaties of general interest should be distinguished from multilateral treaties of limited interest. That seemed to be a practical solution, because there would then be no indication that the principle laid down in paragraph 2 would apply to plurilateral treaties.

19. Mr. AGO said he quite agreed with the special rapporteur that, even in the event of compliance with the provisions of article 17, acceptance was an essential prerequisite of the effect of reservations in the relations between the reserving and the accepting state.

20. The whole point was that when the treaty was silent on the matter of reservations it was essential to be

<sup>1</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports, 1951, p. 21.

consistent with the rule already accepted that a reservation incompatible with the object and purpose of the treaty was inadmissible.

21. As had been rightly pointed out by Mr. Verdross, the rule concerning the compatibility of a reservation with the object of a treaty was to be confirmed also in regard to acceptance, and he (Mr. Ago) could not agree that any reservation automatically became valid upon its acceptance. In his opinion, there could not be two different principles, one governing the formulation of reservations and the other governing their acceptance. If that were accepted, the compatibility test would not become an objective test of the admissibility of reservations but merely a test by reference to which particular states might freely decide in every case on the acceptability of the reservation. In that case, it seemed unnecessary to retain the rule set out in article 17, subparagraph 1 (*d*). Indeed, he would prefer to see that provision deleted, rather than reversed in article 18 *bis*. He hoped that those views would be clearly set out in the commentary and in the summary record.

22. As for Mr. Tunkin's defence of his proposal for the deletion of paragraph 4, he (Mr. Ago) would submit that the actual practice in the matter was not as described by Mr. Tunkin. Members who held the opposite view were not trying to return to an out-moded practice, as Mr. Tunkin had suggested; on the other hand, Mr. Tunkin seemed to be going rather far in his speculation regarding the future. The Commission's best course would be to reflect the current practice by reverting to Mr. Verdross's proposal, which seemed to be the only way of breaking the deadlock.

23. Mr. TUNKIN said he could not accept Mr. Ago's views. All the principles of international law were objective, and the compatibility test as laid down in the advisory opinion of the International Court was one such objective principle. On the other hand, opinions might differ as to whether a particular reservation was compatible or incompatible with the object and purpose of a treaty. Such differences of opinion occurred frequently in international law, since there was no authority over sovereign states, but that did not mean that the rules in themselves were not objective. Mr. Ago's argument, carried to its logical conclusion, could only lead to a denial of the existence of objective rules of international law.

24. He would agree, however, that the compatibility test should be reflected in article 18 *bis*, in accordance with the advisory opinion of the International Court, which had stated, on question II, "that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving state was not a party to the Convention."<sup>2</sup> That had been the view expressed by Mr. Rosenne at the beginning of the Commission's discussion of the articles on reservations.

25. Mr. Gros, Mr. Ago and the special rapporteur proposed that, if paragraph 4 were deleted, the Com-

mission should return to the original formulation of paragraph 2, and refer only to general multilateral treaties. That could, however, lead to difficulties because the expression "general multilateral treaties" might be held to cover only such instruments as the Geneva Convention on the Law of the Sea, the Vienna Convention on Diplomatic Relations, and various Red Cross conventions. Such a view would exclude from the application of the rule in question a very large group of international treaties, such as the Convention on Fisheries in the North-East Atlantic and the Convention on Fisheries in the North Pacific, which would thus be assimilated to the third group of treaties, concluded by some five or six states, and instruments affecting perhaps thirty or forty states might be subjected to the unanimity rule. Such an outcome could hardly be regarded as a contribution to the progressive development of international law.

26. Mr. AMADO said he noted that the members of the Drafting Committee were unfortunately not unanimous in their support of the Committee's proposals for article 18 *bis*; Mr. Tunkin in particular dissented from the views of the Chairman and the other members of the Committee.

27. At the previous meeting, he himself had supported paragraph 4.<sup>3</sup> He still felt, notwithstanding the able arguments of Mr. Tunkin, that the principle of the integrity of treaties and the unanimity rule for the acceptance of reservations formed part of the irreducible nucleus of essential principles of international law. As a great French poet had said, "You should always know how far too far you can go". Personally he could not go so far as to accept, and he was sure that no professor of international law in any Brazilian university would believe that he ever could accept, the idea that a treaty with only eight or ten parties could be open to reservations in the manner provided in article 18 *bis*, paragraph 2.

28. It was not possible, in regard to reservations, to treat in the same manner a general multilateral treaty signed by eighty or more states and a treaty signed by eight or ten states. Normally, a small group of states would take the precaution of including a reservations clause in the treaty itself but, in the event of the treaty being silent, the provisions of paragraph 2 (*a*) could not be applied.

29. There had been a tendency towards a partial departure from the principle of the integrity of treaties in the case of leading general multilateral treaties. That partial departure had been based on the consideration that it was not reasonable to permit a single state to thwart the wishes of perhaps eighty states, in connexion with the statement of rules of international law. The position in regard to that type of law-making treaty was radically different from that obtaining in respect of the traditional contractual treaty.

30. He therefore readily accepted paragraph 4, although he would favour a more precise formulation of the idea embodied in the expression "a restricted group of

<sup>2</sup> *ibid*, p. 29.

<sup>3</sup> 663rd meeting, para. 68.

states". Greater precision of language was essential if the Commission was to perform its duty to formulate rules of international law which would be acceptable to states.

31. Mr. VERDROSS said that, contrary to what had been implied by some speakers, he had not proposed that paragraph 4 should be retained, but had merely expressed the view that, if it should be retained, the expression "multilateral treaties concluded between a restricted group of states" should be clarified. Mr. Ago obviously had in mind a special category of treaties by which economic communities were established; it followed from the very nature of such treaties that reservations were inadmissible. On the other hand, there were other treaties concluded between a relatively small number of states, to which the unanimity rule could be applied; for example, if a convention on the status of aliens contained a provision that aliens might be allowed to practise law, it would be absurd not to allow any state to submit a reservation to that provision. The question whether a reservation was admissible between the reserving state and the accepting state did not therefore depend on the number of contracting parties, but on the nature of the treaty. The solution might therefore be to lay down a special rule in which reference would be made to the character of the treaty itself.

32. Mr. de LUNA said he completely failed to see how the deletion or maintenance of paragraph 4 could possibly affect the principle of compatability as set out in article 17, paragraph 1 (*d*). It had been decided that that principle was applicable to multilateral treaties under article 18 *bis*, paragraph 2, and paragraph 4 merely contained an exception to the rule stated in that paragraph. He agreed with Mr. Verdross that the existing formulation of paragraph 4 was unsatisfactory; if better wording could not be found, he was in favour of its deletion, since deletion would in no way affect the application of the compatability rule to paragraph 2.

33. Mr. TUNKIN said that Mr. Amado seemed to have misunderstood him. He had admitted at the previous meeting that there were treaties between certain groups of states to which the general rule should not apply if the treaty was silent on the matter of reservations;<sup>4</sup> the reason was that such instruments were closer to bilateral treaties than to multilateral treaties.

34. With regard to the problem of the advisability of retaining paragraph 4, the main point was that the expression "a restricted group of states" was open to different interpretations. His idea had therefore been to leave it to the parties to settle the question among themselves in each of those special cases, and simply to state the general rule in the matter. On the other hand, the special rapporteur might suggest an amended form of paragraph 4 which would give the idea clearer expression.

35. Mr. YASSEEN said that he favoured freedom to make reservations to treaties. Although absolute freedom of reservations did not constitute a rule of positive inter-

national law, there was a definite trend in the direction of such freedom. The Commission had therefore acted wisely in stating in article 17, paragraph 1, the principle of freedom of reservations.

36. He was well aware of the difficulties which the Drafting Committee had had to face before arriving at the formula embodied in paragraph 4 in order to meet certain special situations. There undoubtedly existed multilateral treaties of limited scope which ought not to be open to reservations and the integrity of which should be maintained. Unfortunately, the language adopted by the Drafting Committee was unsatisfactory because of the vagueness of the term "restricted group of states"; the discussion in the Commission had demonstrated that any attempt to apply the provisions of paragraph 4 would lead to controversy on that account.

37. He had been impressed by the remark of Mr. Bartoš at a previous meeting<sup>5</sup> that the number of contracting parties was not the decisive factor in distinguishing between general and other multilateral treaties. The number of the parties did not affect the nature or the character of the treaty; certain treaties concluded among a few states had all the characteristics of general multilateral treaties, although their application might be confined to a particular region or to a small group of states.

38. For those reasons, he could not accept paragraph 4 in the form submitted by the Drafting Committee and supported by Mr. Gros. He suggested that, to the criterion based on the number of states parties to a treaty, should be added a further criterion derived perhaps from the object of the treaty or from the distinction between treaties dealing with matters of general concern and those dealing with matters of concern to a particular region or to a particular group of states.

39. Unless a criterion of that type could be found, it would be preferable to drop paragraph 4 altogether because its provisions were likely to lead to controversies in their interpretation. The omission of those provisions would not involve any real danger, because a small number of states should normally be able to reach agreement easily on an express reservations clause for inclusion in the treaty.

40. Mr. GROS pointed out that the new version of article 18 *bis* was in no sense his proposal and that he was radically opposed to the system it advocated, which represented the collective decision of the Drafting Committee. He could not subscribe to the doctrine that a state could make any reservation it wished and that a reservation became valid simply because another state accepted it.

41. Paragraph 4 was the only provision of article 18 *bis* which in any way reflected his views. Unless that paragraph were retained, he could not accept the article as a whole.

42. Mr. YASSEEN said he was aware that Mr. Gros did not favour the system provided in article 18 *bis*.

<sup>4</sup> 662nd meeting, para. 95.

<sup>5</sup> 656th meeting, para. 56; see also, however, 643rd meeting, para. 73.

He had merely mentioned Mr. Gros as one of the members whose views differed from his own.

43. Mr. AGO said that all members of the Commission knew how far state practice went in the matter of reservations and should not endeavour to represent that practice as favouring their own views; nor should members suggest that there was an element of progress in favouring reservations. Reservations had a negative character in that they prevented certain rules of international law from entering into force; it could not therefore be suggested that to favour reservations would contribute to the progressive development of international law.

44. The rule stated in paragraph 4 did not apply to all treaties; it was simply a residuary rule which would apply, to use the words of paragraph 4(a), "except when a different rule is laid down in the treaty itself". It was perfectly logical that the presumption stated in paragraph 4 should be the opposite of that stated in paragraph 2. In the case of a general multilateral treaty, the possibility of making reservations could be regarded as the rule; it was rather exceptional for reservations not to be permitted. In the case of a multilateral treaty concluded between a restricted number of states, the reverse was true; it was only exceptionally that reservations were permitted; therefore, the residuary rule for that case should be that a reservation would only be valid if accepted by all the states which were parties to the treaty or to which it was open to become parties to the treaty.

45. A criterion based on the nature of the treaty had been suggested, but any such criterion would be open to arbitrary interpretation. He therefore urged the Commission to adopt the suggestion he had made at the previous meeting, that the only criterion in paragraph 4 should be that relating to the restricted number of states.<sup>6</sup>

46. Mr. TUNKIN said that members should admit that different opinions were held with regard to the new tendencies in international law and its progressive development; the problem had been thoroughly discussed in the Sixth Committee during the sixteenth session of the General Assembly and the various views expressed during that discussion had reflected the political tendencies of states.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of paragraph 2 reflected a developing practice with regard to general multilateral treaties. Those treaties should be open to the widest possible participation because they established the law for the community of nations. It was therefore appropriate to adopt more flexible rules concerning reservations to such treaties. The same approach, however, could not be adopted for treaties which did not present those features.

48. As he saw it, there were two courses open to the Commission. One was to draw a distinction between general multilateral treaties and other multilateral treaties; the other was to draw a distinction between

treaties which dealt with matters of concern only to a restricted group of states and treaties which dealt with matters of more general concern.

49. The concept of treaties of concern only to a restricted group of states had been introduced by him in his definition of "plurilateral treaty" in his original draft of article 1(d). With some drafting improvements, that provision might form the basis for an acceptable compromise for paragraph 4. Without paragraph 4, he could not accept article 18 *bis* as a whole.

50. Mr. AGO said that he yielded to none in his support for the progressive development of international law. But the institution of reservations, though necessary, nonetheless constituted a brake on the progressive development of international law because it hindered the adoption of rules of international law.

51. Mr. BARTOŠ said he agreed with Mr. Yasseen that paragraph 4 should be re-drafted. If it were amended as suggested by Mr. Yasseen he would support it, but if it were left in the form proposed by the Drafting Committee and a vote were taken, he would have to abstain.

52. The criterion proposed by the Drafting Committee, based on the number of states parties to the treaty, was not sufficient; it was necessary to have regard also to the object of the treaty. Indeed, the criterion based on the object of the treaty must be regarded as fundamental. The Commission should never lose sight of the fact that it was called upon not only to codify existing rules of international law, but also to contribute to the progressive development of international law. It was for that reason that he differed, for once, from Mr. Ago.

53. Jurists were, by the very nature of their profession, inclined to be conservative, but, in the case under discussion, it was necessary to eschew conservatism and take into account the modern developments of society; the need to adopt that approach had been stressed by an institution generally regarded as the most conservative of all, namely, the Roman Catholic Church, which, in the latest Papal encyclicals, showed itself to be a progressive factor in international affairs. He could not understand why conservatism should appear so marked in the Commission, which had always enjoyed the well-merited reputation of being favourable to the progressive development of international law, which was what was now at stake.

54. Mr. CADIEUX said that there appeared to be no real disagreement in the Commission on substance. All realized that many members could accept the provisions of paragraph 2 only if a provision along the lines of paragraph 4 to cover treaties between a restricted group of states were also included. Any apparent disagreement was due to the difficulty of finding satisfactory language for the provisions of paragraph 4. He therefore suggested that paragraph 4 should be referred back to the Drafting Committee for re-drafting in the light of the discussion.

55. Mr. TUNKIN suggested, as a compromise, that the opening clause of paragraph 4 should be amended: the term "restricted group of states" to be replaced by "a small group of states", and the criterion suggested

<sup>6</sup> 663rd meeting, para. 80.

by Mr. Verdross and Mr. Yasseen, based on the nature of the treaty, to be introduced.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that the term "small" was perhaps preferable to "restricted" or "limited", both of which were somewhat inadequate because very few treaties were in fact completely open in the sense that any state could participate in them. Members knew what they wished to describe by means of expressions such as "a restricted group of states" or "a small group of states", but it was difficult to find a perfect formula.

57. He suggested that the Drafting Committee be asked to redraft paragraph 4, taking into consideration not only Mr. Tunkin's last proposal but also the need to introduce an additional criterion in the form of a reference to treaties of concern to a small number of states.

58. The CHAIRMAN said there appeared to be general agreement to refer paragraph 4 back to the Drafting Committee for redrafting along the lines proposed by the special rapporteur.

59. Mr. CASTRÉN pointed out that the Chairman himself had proposed the deletion of paragraph 1 and the redrafting of paragraph 2.<sup>7</sup> He supported that proposal and withdrew his own proposal.<sup>8</sup>

60. Sir Humphrey WALDOCK, Special Rapporteur, recalled that Mr. Ago had suggested that a distinction should be drawn between acceptance of and objection to a reservation for the purpose of the application of the compatibility test. Mr. Ago had pointed out that a reservation which was incompatible with the object and purpose of the treaty could not possibly be "accepted". In addition, he had not disputed that it was possible to object to a reservation on grounds other than its incompatibility with the object and purpose of the treaty.

61. Mr. AGO proposed that the Drafting Committee should be invited to review paragraphs 1 and 2, taking into account the proposals made by the Chairman, Mr. Castrén and himself.

62. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer the whole of article 18 *bis* back to the Drafting Committee for redrafting in the light of the various amendments proposed and views expressed in the course of the discussion.

*It was so agreed.*

#### ARTICLE 18 *ter*. — THE LEGAL EFFECT OF RESERVATIONS

63. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared a draft of a new article, 18 *ter*, which read:

"1. A reservation established as valid in accordance with the provisions of article 18 *bis* operates:

"(a) to exempt the reserving state from the provisions of the treaty to which the reservation relates to the extent of the reservation;

"(b) reciprocally to entitle any other state party to the treaty to claim the same exemption from the provisions of the treaty in its relations with the reserving state.

"2. A reservation operates only in the relations between the other parties to the treaty and the reserving state; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*."

64. Mr. CADIEUX pointed out that, in paragraph 1 (a), the French version "*soustraire ... à l'application des dispositions du traité*" did not correspond to the original English, "to exempt ... from the provisions of the treaty".

65. Mr. BARTOŠ suggested that, in the first sentence of paragraph 2, the words "the other parties of the treaty" should be qualified by some such words as "which have accepted the reservation". Without such qualification, the sentence in question would, if taken literally, completely nullify the right to object to a reservation.

66. Sir Humphrey WALDOCK, Special Rapporteur, said he accepted the suggestion of Mr. Bartoš; the Drafting Committee would re-examine the French version of paragraph 1 (a) to take into account the comment by Mr. Cadieux.

*Article 18 *ter* was approved, subject to those changes.*

#### ARTICLE 19. — THE WITHDRAWAL OF RESERVATIONS

67. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared a new article, on the withdrawal of reservations, which read:

"1. A reservation may be withdrawn at any time and the consent of a state which has accepted the reservation is not required for its withdrawal.

"2. Upon withdrawal of a reservation the provisions of paragraph 1 of article 18 *ter* cease to apply."

68. Mr. BARTOŠ said that the article failed to indicate at what point in time the withdrawal of a reservation took legal effect. In view of the disputes to which that matter had given rise in international practice, he asked the special rapporteur to state in the text precisely when the legal effects of a declaration of withdrawal of a reservation began to operate.

69. Sir Humphrey WALDOCK, Special Rapporteur, said it might be provided that the withdrawal would be operative as from the time of its notification.

70. Mr. BARTOŠ said that lack of a provision to that effect might result in a violation of the treaty, seeing that while a reservation was still in force, other states were entitled to assume that the principle of reciprocity would apply in their relations with reserving states; it should be stipulated that the withdrawal of a reservation was effective from the time of receipt of the notification by each individual state party to the treaty.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that a provision to that effect could be incorporated in the article. Notification of the withdrawal of a reservation would normally be made through a depositary.

*Article 19 was approved, subject to that change.*

<sup>7</sup> *vide supra*, paras. 2 and 3.

<sup>8</sup> 663rd meeting, para. 71.

## ARTICLE 27. — THE FUNCTIONS OF A DEPOSITARY

72. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared a redraft of article 27, which read:

"1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all states parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

"2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in the subsequent paragraphs of this article.

"3. The depositary shall have the duty:

"(a) to prepare any further authentic texts in additional languages that may be required either under the terms of the treaty or the rules in force in an international organization;

"(b) to prepare certified copies of the original text or texts and transmit such copies to the states mentioned in paragraph 1;

"(c) to receive in deposit all instruments and ratifications relating to the treaty and to execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument relating to the treaty;

"(d) to furnish to the state concerned an acknowledgment in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the other states mentioned in paragraph 1 of the receipt of such instrument or notification.

"4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

"5. On a reservation having been formulated, the depositary shall have the duty:

"(a) to examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations;

"(b) to communicate the text of any reservation and any notifications of its acceptance or objection to the interested states as prescribed in articles 17 and 18 of the present articles.

"6. On receiving a request from a state desiring to accede to a treaty under the provisions of article 7*bis*, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

"7. Where a treaty is to come into force upon its signature by a specified number of states or upon the deposit of a specified number of instruments of ratifi-

cation, acceptance or accession or upon some uncertain event, the depositary shall have the duty:

"(a) promptly to inform all the states mentioned in paragraph 1 when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

"(b) to draw up a *procès-verbal* of the entry into force of the treaty, if the provisions of the treaty so require.

"8. In the event of any difference arising between a state and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if it deems it necessary, bring the question to the attention of the other interested states."

73. The Drafting Committee's main concern had been to take into account the views expressed during the discussion about the character of the depositary's functions, particularly in regard to the verification of instruments and acts connected with the treaty, and to shorten the original text. It had sought to express the notion that the depositary acted on behalf of all the signatories in an impartial manner and that in the matter of verification the depositary was not called upon to make any determination but only to examine the instruments. What happened after that examination was left undefined because it would depend on the nature of the treaty. In the event of a difference of opinion between the depositary and one of the interested states, the depositary was bound, under paragraph 8, to bring the matter to the attention of the other states concerned.

74. The CHAIRMAN suggested that the article should be discussed paragraph by paragraph.

*It was so agreed.*

## Paragraph 1

75. Mr. CADIEUX asked whether the word "custodian" had been correctly rendered into French.

76. Mr. GROS said that the point had been discussed by the Drafting Committee which had rejected the word "*conservateur*" as unsatisfactory. It realized that the French expression "*à la garde*" was not an exact rendering of the English.

*Paragraph 1 was approved.*

## Paragraph 2

*Paragraph 2 was approved without comment.*

## Paragraph 3

77. Mr. BARTOŠ, referring to the French text of paragraph 3 (a), said that the word "*établir*" signified something that went beyond the function contemplated. The depositary had no authority to "establish" the authentic texts. The English and French texts of the paragraph did not agree.

78. Mr. AMADO said that he also was dissatisfied with the French version of paragraph 3 (a); he saw no reason why the word "*préparer*", which would bring the text



more closely into line with the English, should not be used.

79. Mr. LACHS said that the Drafting Committee had not intended that the depositary should be responsible for the translation of authentic texts; its function under the paragraph in question was only to supply additional copies. The French text should be rectified to conform with the English.

*It was so agreed.*

80. Mr. ELIAS proposed the substitution of the words "such additional language as" for the words "additional languages that", in paragraph 3 (a).

81. Sir Humphrey WALDOCK, Special Rapporteur, accepted Mr. Elias's amendment.

*Paragraph 3 as thus amended was approved.*

*Paragraph 4*

*Paragraph 4 was approved without comment.*

*Paragraph 5*

82. Mr. BARTOŠ, with regard to sub-paragraph (a), asked what would be the depositary's duty if examination disclosed that the formulation of the reservation was not in conformity with the provisions of the treaty.

83. Sir Humphrey WALDOCK, Special Rapporteur, replied that the Drafting Committee had thought it best to leave the matter open. If, on the face of it, the reservation seemed not to be in conformity with the treaty, the depositary would take the matter up with the reserving state, but if a serious difference of opinion arose, the provisions of paragraph 8 would apply. It was probably better to trust the wisdom of the depositary than to be too explicit.

84. Mr. BARTOŠ said that a clause should be added stating the depositary's obligation to communicate the results of its examination to the interested states so that they were not left in the dark.

85. Mr. AMADO said that the beginning of sub-paragraph (a) should be redrafted in more precise terms to read: "to examine whether the reservation is formulated in conformity with, etc."

86. Mr. CADIEUX suggested that some flexibility was needed: it should not be obligatory for the depositary to notify other interested states of the result of its examination of reservations.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that he would hesitate to be more specific in sub-paragraph (a) as urged by Mr. Bartoš, because, in cases where through inadvertence the reservation was not in conformity with the provisions of the treaty, it would be much better if the matter could be put right by the depositary's communicating with the reserving state without having to notify the other states. The "Summary of the Practice of the Secretary-General" indicated that irregularities of that kind did occur and no state would wish to have them publicised.

88. Mr. LACHS said that the Drafting Committee fully realized that the depositary could not be empowered to interpret the treaty. All it could do, on receipt of a reser-

vation, was to verify that the reservation conformed with the provisions of the treaty and, if any defect was noted, to bring it to the attention of the reserving state. It would certainly be undesirable to notify others of any such defect; the matter could be left to the good sense of the depositary. If, however, a treaty expressly prohibited all reservations but a reservation was nevertheless communicated, then the depositary would have to remind the state in question of the provision prohibiting reservations and notify the other parties.

89. Mr. BARTOŠ said he had raised the matter not out of any theoretical considerations but because instances had actually occurred in which the secretariat of an international organization had taken it upon itself to interpret a reservation, and, despite the terms of General Assembly resolution 598 (VI), had prevented certain states from participating in an organization or a treaty; that had happened in the case both of the International Civil Aviation Organization and of the Universal Postal Union. Being firmly opposed to any such practice, he was anxious that its recurrence should be prevented by the inclusion of an appropriate provision in the text.

90. Mr. AGO said that he also considered that it was possible to be a little more specific in sub-paragraph (a), which dealt with an important and delicate matter. The present wording left room for doubt as to the object of the examination. If the reservation was not apparently in conformity with the provisions of the treaty, the depositary should communicate with the reserving state before notifying the other states. There was a risk that the other states might not enter their objections in time, in which case a reservation patently at variance with the provisions of the treaty might come into force.

91. Mr. de LUNA said he agreed with Mr. Bartoš and Mr. Ago. Unless sub-paragraph (a) were amplified, paragraph 8 would lose much, if not all, of its force.

92. Sir Humphrey WALDOCK, Special Rapporteur, asked whether Mr. Bartoš would be satisfied if the provision contained in paragraph 5 (a) were explicitly linked with paragraph 8 and it were made clear that the depositary had no power to adjudicate in the event of a difference on the subject of a reservation.

93. Mr. BARTOŠ said that he would be satisfied with the special rapporteur's new proposal if some such words as "and if necessary to communicate with the state which formulated the reservation" were added at the end of the sub-paragraph.

94. Mr. AGO emphasized that the purpose of the examination was to avoid unnecessary differences. Clearly, it was the duty of the depositary to inform a state which had formulated a reservation which was not admissible under the terms of the treaty that its reservation was not admissible.

95. He supported Mr. Amado's amendment.

96. The CHAIRMAN suggested that sub-paragraph (a) be amended in the way proposed by Mr. Amado and Mr. Bartoš.

*It was so agreed.*

*Paragraph 5 as thus amended was approved.*

*Paragraph 6**Paragraph 6 was approved without comment.**Paragraph 7**Paragraph 7 was approved without comment.**Paragraph 8*

97. Mr. de LUNA, observing that much had been said about the possibility of depositaries abusing their functions, said it would be advisable not to give them the discretionary power implied in the phrase "if it deems it necessary". Those words should accordingly be deleted.

98. Mr. CASTRÉN said he agreed that the discretion given to the depositary was too wide. The phrase to which Mr. de Luna objected might be replaced by the words "if the difference is not settled within a reasonable period".

99. Mr. TABIBI said that the article omitted to provide for the case where a depositary ceased to exercise its functions. That might happen in the case of a succession of states or the winding up of an international organization.

100. Mr. BARTOŠ said that he would not go so far as Mr. de Luna or Mr. Castrén, but would suggest the insertion of the words "at the request of the state concerned or" after the words "the depositary shall". A state might not necessarily wish to have a difference with the depositary communicated to other interested states. It might feel that its difference was not worth bringing to the attention of other states. In that case its wish should be respected and the incident regarded as closed.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Bartoš's amendment was acceptable. Mr. Tabibi's point could be covered by an appropriate addition to article 26, paragraph 2.

*Paragraph 8 as amended by Mr. Bartoš was approved.**Article 27, as amended, was approved.*

The meeting rose at 1 p.m.

**665th MEETING***Wednesday, 20 June 1962, at 10 a.m.**Chairman: Mr. Radhabinod PAL***Law of treaties (A/CN.4/144 and Add.1) (item 1 of the agenda) (continued)****DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (continued)**

1. The CHAIRMAN invited the special rapporteur to read out the new texts of four articles which had been submitted by the Drafting Committee. Article 11, in its original form as article 13, had been referred to the Drafting Committee at the 650th meeting; article 12, formerly 16, had also been referred to the Drafting Committee at the 650th meeting; article 13, formerly

article 11, had been referred to the Drafting Committee at the 647th meeting; and article 14, formerly article 12, had also been referred to the Drafting Committee at the 647th meeting.

**ARTICLE 11. — ACCESSION**

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 11, formerly article 13, read:

"A state may become a party to a treaty by accession in conformity with the provisions of articles 7 and 7 bis of the present articles when:

"(a) it is not a signatory to the treaty or, being a signatory, has failed within a prescribed time-limit to establish its consent to be bound by the treaty; and

"(b) the treaty specifies accession as the procedure to be used for becoming a party to it."

*Article 11 was approved.***ARTICLE 12. — ACCEPTANCE OR APPROVAL**

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 12, formerly article 16, read:

"A state may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 7 and 7 bis when:

"(a) the treaty provides that it shall be open to signature subject to acceptance (or approval) and the state in question had so signed the treaty; or

"(b) the treaty provides that it shall be open to participation by simple acceptance (or approval) either without any prior signature or after signature by a state which has failed within a prescribed time-limit to establish its consent to be bound by the treaty."

*Article 12 was approved.***ARTICLE 13. — THE PROCEDURE OF RATIFICATION, ACCESSION, ACCEPTANCE AND APPROVAL**

4. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 13, formerly article 11, read:

"1. (a) Ratification, accession, acceptance, or approval shall be carried out by means of a written instrument.

"(b) Unless the treaty itself expressly contemplates that the participating states may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

"(c) If a treaty offers to the participating states a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

"2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory states, the instrument shall become operative:

"(a) in the case of a treaty for which there is no depositary, upon the formal communication of the instrument to the other party or parties, and in the case of a bilateral treaty, normally by means of an exchange of the instrument in question, duly certified by the representatives of the states carrying out the exchange ;

"(b) in other cases, upon deposit of the instrument with the depositary of the treaty.

"3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with sub-paragraph (b) of the preceding paragraph, the ratifying state shall be given an acknowledgment of the deposit of its instrument of ratification, and the other signatory states shall be notified promptly both of the fact of such deposit and of the terms of the instrument."

5. Mr. CASTRÉN pointed out that, in the English text of paragraph 3, the fifth and sixth lines mistakenly referred to "its instrument of ratification" instead of just to "its instrument".

6. Mr. ROSENNE in turn pointed out that, in the fourth line, the English text referred to "the ratifying state" instead of to "the state in question".

7. The CHAIRMAN said that the necessary corrections would be made to the English text.

*Article 13 was approved.*

#### ARTICLE 14. — LEGAL EFFECTS OF RATIFICATION, ACCESSION, ACCEPTANCE AND APPROVAL

8. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's new text for article 14, formerly article 12, read :

"The communication of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 13 :

"(a) establishes the consent of the ratifying, acceding, accepting or approving state to be bound by the treaty, and

"(b) if the treaty is not yet in force, brings into operation the applicable provisions of article 19 *bis*, paragraph 2."

9. Mr. de LUNA noted that the new article 14, which dealt in a single provision with the legal effects of ratification, accession, acceptance and approval, did not contain any indication as to whether those acts had a retroactive effect or not. Some reference to that question was necessary, particularly since the position was not the same in all cases ; it was simple where ratification was concerned, but more complex in the case of accession, acceptance or approval.

10. Paragraph 4 of the special rapporteur's draft article 12 had stipulated that : "Unless the treaty provides otherwise, ratification shall not have any retroactive effect" and he (Mr. de Luna) had approved that rule, which was consistent with the modern conception of ratification.

11. For, as he had pointed out during the discussion of article 9,<sup>1</sup> ratification was no longer regarded, on the analogy of the power of attorney of private law, as the confirmation by the principal that his agent had not acted *ultra vires* ; it was not considered as the fulfilment of a suspensive condition and had therefore no *ex tunc* or retroactive effect.

12. He would not go so far as to say that it was an established rule of customary international law that ratification was effective *ex nunc*. For although the non-retroactivity of ratification had been recognized by an English Court as early as 1813 in the "Eliza Ann" case,<sup>2</sup> and in international case-law by the Italian-Venezuelan Mixed Claims Commission in 1903 in the "Sambiaggio" case<sup>3</sup> and more recently by the award in the case between Germany and the Reparations Commission<sup>4</sup> in 1924, a contrary practice had been followed by United States Courts, despite the fact that the non-retroactivity rule was laid down in article 8 of the Havana Convention on Treaties of 20 February 1928 and in article 11 of the Harvard Draft.

13. As far as accession, acceptance and approval were concerned, they were generally effective from their date, but not invariably. For example, whereas in cases where a state acceded to a treaty in response to an invitation by the states parties to the treaty, the accession was effective only *ex nunc*, the position was different in cases where accession, in order to be effective, required the consent of the states which were parties to the treaty or which had participated in the formulation of the treaty ; in that case, it was more logical to regard the accession as taking effect not from its date but from the date on which the necessary consent to it had been given. Acceptance followed by signature was similar to accession.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that, as the Commission was aware, he had originally proposed a provision stating that ratification did not operate retroactively, even though practice in that regard was well enough established not to make such an express statement strictly necessary.

15. As the article on entry into force was to provide that, unless otherwise stipulated in the treaty, it would become effective for each party on the date on which the state established its consent to be bound, the Drafting Committee had decided that the point would have been adequately covered. But as far as ratification was concerned, some mention of non-retroactivity could be made in article 14 as well.

16. He had not quite grasped Mr. de Luna's point concerning the effect of acceptance. Where there was a right of acceptance under article 7 or 7 *bis*, it was hard to see how, in the absence of an express provision

<sup>1</sup> 645th meeting, para. 22.

<sup>2</sup> Dodson, *Reports of cases argued and determined in the High Court of Admiralty, 1811-22*.

<sup>3</sup> *Reports of International Arbitral Awards*, Vol. X, pp. 499-525.

<sup>4</sup> *ibid*, Vol. I, pp. 429-430 and 518-524.

to the contrary, the treaty could come into force for the accepting state on any date other than that of the instrument of acceptance.

17. Mr. de LUNA said that he would be quite satisfied if article 14 stated that ratification did not operate retroactively. Though the non-retroactivity of ratifications was recognized quite generally and was consistent with the modern conception of the institution of ratification, he was uncertain whether it had acquired the force of a customary rule of international law. Such a clause would therefore constitute a mildly progressive element in the draft.

18. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like to know the Commission's views on the desirability of including a reference to the non-retroactivity of ratifications in article 14.

19. Mr. BRIGGS said he was uncertain whether an express clause to that effect was needed in article 14 itself; he suggested that, instead, the substance of the special rapporteur's original draft article 12, paragraph 4, should appear in the commentary.

20. Mr. ROSENNE supported Mr. Briggs' suggestion.

21. Mr. de LUNA said the course suggested by Mr. Briggs was acceptable to him.

*Mr. Briggs' suggestion was adopted.*

*Article 14 was approved.*

22. Mr. TSURUOKA said that he wished to revert to a point he had raised in connexion with the original article 12,<sup>5</sup> because of the uncertainty that might arise about the date of entry into force when some of the signatures appended were given *ad referendum*. Perhaps there was room for an innovation by stipulating that such signatures would not have retroactive effect.

23. Sir Humphrey WALDOCK, Special Rapporteur, observed that such an innovation would alter the character of *ad referendum* signatures which, with the speed of modern communications, had become more rare. That method of attaching, as it were, a provisional signature because of uncertainty about the precise powers of the signatory or for some other reason, could admittedly give rise to an anomaly, but the practice was that, once confirmed, such a signature took effect from the date when it had been made. It should be borne in mind that signature *ad referendum* was a different thing from signature subject to ratification.

24. Mr. TSURUOKA said that he would not press for any change in the draft to meet his point, but would like at least to see some reference to it in the commentary.

The meeting rose at 10.35 a.m.

## 666th MEETING

Friday, 22 June 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

#### ARTICLE 1. — DEFINITIONS

1. The CHAIRMAN invited the Commission to consider the redrafts of a number of articles which had been referred to the Drafting Committee a second time. Article 1 should be considered paragraph by paragraph; it read:

"1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

"(a) 'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more states or other subjects of international law and governed by international law.

"(b) 'Treaty in simplified form' means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.

"(c) 'General multilateral treaty' means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to states as a whole.

"(d) 'Signature', 'Ratification', 'Accession', 'Acceptance', and 'Approval' mean in each case the act so named whereby a state establishes on the international plane its consent to be bound by a treaty. Signature, however, also means, according to the context, an act whereby a state authenticates the text of a treaty without establishing its consent to be bound.

"(e) 'Full-powers' means a formal instrument issued by the competent authority of a state authorizing a given person to represent the state either for the purpose of carrying out all the acts necessary for concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

"(f) 'Reservation' means a unilateral statement made by a state, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that state.

"(g) 'Depositary' means the state or international organization entrusted with the functions of

<sup>5</sup> 647th meeting, para. 102.

custodian of the text of the treaty and of all instruments relating to the treaty.

"2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any state."

*Paragraph 1 (a)*

2. Mr. PAREDES asked that his abstention on the definition of "treaty" given in paragraph 1 (a) should be recorded.

*Paragraph 1 (a) was adopted.*

*Paragraph 1 (b)*

*Paragraph 1 (b) was adopted.*

*Paragraph 1 (c)*

*Paragraph 1 (c) was adopted.*

*Paragraph 1 (d)*

3. Mr. BRIGGS said that "signature" seemed out of place in sub-paragraph (d) which stated not what "signature", "ratification", "accession", "acceptance" and "approval" constituted but rather the legal effect of those acts.

4. He suggested that the reference to signature should be dropped, or alternatively, that a separate paragraph should be included on the subject of signature.

5. Sir Humphrey WALDOCK, Special Rapporteur, recalled that in his original draft there had been such a separate paragraph on the subject of signature.

6. The Drafting Committee had had similar doubts to those expressed by Mr. Briggs but, on balance, had considered that sub-paragraph (d) would be incomplete without a mention of signature. Moreover, if a separate paragraph were to be included on signature, it would be necessary to enter into far too much detail, because signature was a more complicated matter than the other acts mentioned in sub-paragraph (d).

7. Mr. BRIGGS said he would not press the point.

*Paragraph 1 (d) was adopted.*

*Paragraph 1 (e)*

8. Mr. ROSENNE said that he wished to suggest certain changes to sub-paragraph (e), related to amendments which he intended to propose to article 4: first, to insert after the words "instrument issued by the competent authority of the state", the words "containing the credentials"; and secondly, to add to sub-paragraph (e) the sentence contained in paragraph 6 (a) of article 4, which was pure definition.

9. The CHAIRMAN suggested that a decision on sub-paragraph (e) be deferred until the Commission considered article 4.

*It was so agreed.*

*Paragraph 1 (f)*

*Paragraph 1 (f) was adopted.*

*Paragraph 1 (g)*

*Paragraph 1 (g) was adopted.*

*Paragraph 2*

*Paragraph 2 was adopted.*

## ARTICLE 2. — SCOPE OF THE PRESENT ARTICLES

10. The CHAIRMAN said that the Drafting Committee proposed the following redraft of article 2:

"1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (a).

"2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law."

11. Mr. ROSENNE suggested that, in paragraph 1, the concluding words "article 1, paragraph 1 (a)" should be amended to read "article 1, paragraphs 1 (a) and 1 (b); the intention of the Commission had been to cover treaties in simplified form, which were defined in paragraph 1 (b).

12. Sir Humphrey WALDOCK, Special Rapporteur, said that, in that case, a reference to paragraph 1 (c) of article 1 would also have to be added, because general multilateral treaties were also covered by the draft articles.

13. Mr. ROSENNE said that perhaps a reference simply to article 1 might suffice.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that his own preference was for the retention of the reference to paragraph 1 (a), because the definition in that provision had been introduced for the express purpose of defining the scope of the draft articles.

15. Mr. ROSENNE said he would not press the point.

*Article 2 was adopted.*

## ARTICLE 3. — CAPACITY TO CONCLUDE TREATIES

16. The CHAIRMAN said that the Drafting Committee proposed the following redraft of article 3:

"1. Capacity to conclude treaties under international law is possessed by states and by other subjects of international law.

"2. Capacity to conclude treaties may be limited by the provisions of a treaty relating to that capacity.

"3. In a federal state, the capacity of the federal state and its component states to conclude treaties depends on the federal constitution.

"4. In the case of international organizations capacity to conclude treaties depends on the constitution of the organization concerned."

17. Mr. BRIGGS proposed that paragraphs 2, 3 and 4 should be deleted.

18. Paragraph 3 was based on a misconception. A state with a federal form of government was a sovereign state and as such had treaty-making capacity under international law, as stated in paragraph 1.

19. Paragraph 3 was also inaccurate because it seemed to suggest that the capacity of the United States of America, for example, to conclude treaties depended on the Constitution of the United States, whereas it was based on international law; it also seemed to state that the capacity of, say, Texas to conclude treaties depended not on international law but on the Constitution of the

United States. It was therefore preferable to delete paragraph 3 altogether rather than leave in the draft articles the inaccurate statements it contained.

20. Paragraph 4 was open to the same criticism. The term "international organization" was unduly vague and seemed to suggest that even a private international organization which was not an inter-governmental organization might have the capacity to conclude treaties. If a paragraph on the treaty-making capacity of international organizations was to be included at all, he preferred the original text proposed by the special rapporteur which set out the relevant rules of international law in more precise detail.

21. Mr. CASTRÉN said that paragraph 1 was drafted in excessively general terms; not all states and "other subjects of international law" possessed the capacity to conclude treaties. However, he was not proposing any amendment to the paragraph and would be satisfied with an explanation in the commentary.

22. Mr. VERDROSS proposed that, in paragraph 3, the words "the federal state and" should be deleted and that the expression "component states" should be replaced by some such expression as "member states of a federal state". Only the member states of such a federal state were subject to any limitations in respect of treaty-making; the federal state itself was a sovereign state and as such possessed the full capacity to conclude treaties under international law, as stated in paragraph 1.

23. Mr. TUNKIN said he supported the amendments proposed by Mr. Verdross. With regard to states members of a federal state, the presumption should be that, unless they were placed under a restriction by the federal constitution, international law did not put any obstacles in the way of their concluding treaties.

24. He also supported the proposal by Mr. Briggs for deleting paragraph 4. It would not be accurate to suggest that the treaty-making capacity of an international organization depended solely on the constitution of the organization. A statement to that effect could be taken to mean that, if a small number of states set up an international organization and gave it treaty-making capacity by the constituent instrument, all other states would have to consider treaties signed by that organization as international treaties. While such a statement would be true for states members of the organization, other states would not be so bound; in fact, other states might even consider that the international organization in question was contrary to international law.

25. An additional reason for deleting paragraph 4 was that the Commission did not intend to deal in the draft articles with treaties concluded by international organizations.

26. Mr. EL-ERIAN supported the proposal by Mr. Briggs for deleting paragraph 2. If that paragraph were to be retained at all, it should at least be qualified in the same manner as article 3 of the Harvard Draft, which stated: "The capacity to enter into treaties is possessed by all states, but the capacity of states to enter into certain treaties may be limited."

27. He also supported the proposal by Mr. Briggs for the deletion of paragraph 4; he fully agreed with the reasons given both by Mr. Briggs and Mr. Tunkin in support of that proposal. It was true that, in the draft articles, the Commission would occasionally have to deal with certain problems relating to international organizations. The draft articles as a whole, however, were intended to deal essentially with treaties concluded by states. Paragraph 4 therefore, besides being inadequate, because if any attempt was to be made to deal with international organizations the provisions would have to be much more elaborate, was also unnecessary.

28. Mr. BARTOŠ said he found the provisions of paragraph 1 satisfactory; they stated the general rule; the exceptions were set out in the following paragraphs.

29. Paragraph 2 should be retained, but an explanation should be added in the commentary dealing with the points raised in the course of the discussion.

30. With regard to paragraph 3, he supported the proposal by Mr. Verdross that the reference to the federal state itself should be deleted; a federal state was a sovereign state and its treaty-making capacity depended on international law and not on its constitution. It was the capacity of the component or member states of a federal state which could be limited by the federal constitution.

31. With regard to paragraph 4, he thought like Mr. Tunkin that its provisions might be construed as suggesting that the constitution of an organization could have an effect *erga omnes*. Personally, he would be prepared to accept paragraph 4 provided it was made clear in the commentary that the constitution of an international organization would only have effect as between the parties that had accepted that constitution and not *erga omnes*. More and more international organizations were coming into being, some of them very limited in scope; some of those organizations were strongly disliked by certain states, which went so far as to deny their very existence.

32. It was not advisable to make a general pronouncement which would give the impression that all states were obliged to recognize in advance that any and every international organization had treaty-making capacity. Moreover, account should be taken of the fact that it was a general rule of international law that treaty-making capacity was limited to the extent necessary to enable the organization in question to perform its duties.

33. Mr. AGO said he was prepared to accept the proposal for deleting paragraph 4, if that was the Commission's wish. International organizations possessed the capacity to conclude treaties by virtue of paragraph 1, which stated that that capacity was "possessed—by states and other subjects of international law"; those "other subjects" included international organizations.

34. He supported the proposal by Mr. Verdross that the reference to the Federal state could be omitted from paragraph 3, so that the paragraph would refer only to the member states of a federal state.

35. Sir Humphrey WALDOCK, Special Rapporteur, referring to the remarks of Mr. El-Erian on paragraph 2,

pointed out that the words "relating to that capacity" which qualified the term "treaty", had been introduced precisely for the purpose of limiting the effects of paragraph 2 to a certain type of treaty. The reference was to a treaty which, for example, placed treaty-making under the control of an organ common to several states. The intention had been to exclude limitations derived from other treaties, limitations which would give rise to questions of state responsibility or to questions of the validity of a treaty, but not to questions of treaty-making capacity.

36. He accepted the proposal of Mr. Verdross that in paragraph 3 the reference to the federal state should be deleted and that the paragraph should speak only of the component or member states of a federal state.

37. With regard to the capacity of component states of a federal state, the point raised by Mr. Tunkin was a difficult one. If it were suggested, as a rule of general international law, that such a component state had treaty-making capacity unless the federal constitution stated otherwise, a very delicate situation would arise. Very few federal constitutions contained express provisions on that point: the absence of treaty-making capacity on the part of the component states was deduced from the general structure of the federal union.

38. With regard to the proposal for deleting paragraph 4, he thought the paragraph had its usefulness because it dealt with the limitations imposed upon the treaty-making capacity of an international organization by its constitution. The treaty-making capacity of an organization was nearly always limited to its object and purpose; the organization was not entitled to enter into any kind of treaty.

39. The expression "the constitution of the organization concerned" had been chosen because it was broader than "constituent instrument"; it covered also the rules in force in the organization. In most organizations, the treaty-making capacity had been limited by the practice instituted by those who had operated the organization under its constitution.

40. It would be possible to omit paragraph 4, but in that case it would be necessary to explain in the commentary that the Commission intended to deal separately on some future occasion with treaties concluded by international organizations. He still felt, however, that article 3 was the right context for the provisions of paragraph 4, because the article dealt with the capacity to conclude treaties in general and not only with the capacity of states to conclude treaties.

41. He was opposed to Mr. Briggs' proposal for the deletion of paragraphs 2, 3 and 4.

42. If article 3 were to consist only of paragraph 1, it would be preferable to delete the article altogether and to rely on the definition contained in article 1, paragraph 1 (a), which already spoke of "subjects of international law".

43. He would be prepared, however, to delete paragraph 4 on the condition he had already stated, and to introduce drafting changes in paragraphs 2 and 3 to meet the points raised in the course of the discussion.

44. Mr. TUNKIN said that paragraph 2 might be interpreted to mean that treaties limiting a state's capacity might be concluded without due consideration for the principles of international law. In his opinion, any limitation of capacity to conclude treaties should be compatible with international law; treaties which were sometimes imposed on weak states by various means practically constituted violations of international law.

45. He did not feel very strongly about either the retention or the deletion of paragraph 4.

46. Mr. VERDROSS pointed out that the limiting treaties referred to in paragraph 2 were presumed to be valid; the provision could in no case be held to refer to treaties imposed on states in violation of Article 2 (4) of the United Nations Charter.

47. With regard to paragraph 3, there was no distinction in international law between the various types of states which might compose a federal state. His amendment would cover all cases, from those where the states were merely internal territorial divisions to those where they had a very high degree of autonomy, as, for example, in the case of the Ukrainian and Byelorussian Soviet Socialist Republics, which were members of the United Nations.

48. Mr. YASSEEN said that an article on capacity to conclude treaties should be included in the draft convention, but he had considerable doubts concerning the advisability of retaining paragraph 4. Although the substance of the paragraph was unexceptionable, the provision seemed to be out of place in a set of articles dealing with treaty law in inter-state relations.

49. Paragraph 3 reflected a reality of international life, but he agreed with Mr. Verdross that reference should be made only to the component states; federal states, like all other states, possessed the capacity to conclude treaties by virtue of international law, and not by virtue of their constitutions.

50. Paragraph 2 presented a technical difficulty, since a limitation of capacity could not be regarded as producing incapacity; a treaty entered into by a state whose capacity was limited was not void or even voidable, though it might conflict with the limiting treaty and as such engage the state's international responsibility.

51. Mr. de LUNA said he was in favour of retaining paragraphs 2, 3 and 4 and supported Mr. Verdross's amendment to paragraph 3.

52. He thought that Mr. Briggs' objection to paragraph 4 might be met if the term "international organization" were defined in article 1. Such a definition seemed to be justified by the fact that the term was used several times in the draft articles.

53. Mr. AMADO observed that, although many speakers had criticized the article, no specific proposals had been made, except to delete certain paragraphs, especially paragraph 4.

54. He did not think that Mr. de Luna's suggestion was feasible, since the status of international organizations had not yet been defined in international law.



Moreover, it was hardly possible to ask the special rapporteur to try to prepare such a difficult definition at that late date.

55. With regard to paragraph 3, he considered that the test of the capacity of a component state of a federal state was its sovereignty.

56. He thought that the Commission should approve the article as drafted.

57. Sir Humphrey WALDOCK, Special Rapporteur, said he would like further guidance from the Commission in connexion with paragraph 2. If the majority were not enthusiastic about retaining it, he would suggest that the commission keep paragraph 1, add to it some mention of the problem of federal states, and delete the rest of the article.

58. It could be explained in the commentary that the expression "other subjects of international law" included international organizations.

59. Paragraph 2 had been included because some members had wished to cover treaties of a constitutional type, such as those concerning a customs union or a common market, which involved a state's surrender of part of its sovereignty to the common activities of a group of states. In his opinion, however, the paragraph added nothing to general knowledge and did not improve the draft.

60. Mr. TSURUOKA said that, since the article was descriptive, there was no question of introducing any innovations into it. The point of issue seemed to be whether the article should be kept as it was or limited to paragraph 1, with a detailed commentary. He had no strong feelings either way.

61. Mr. AGO said he agreed that paragraph 4, though useful, was not essential, since international organizations were already covered in paragraph 1.

62. With regard to paragraph 2, he agreed with Mr. Tunkin that all treaties had to be compatible with general international law. The question of limitations had been discussed at length, and it had emerged from the debate that in most cases treaties in fact created special obligations to refrain from concluding certain treaties rather than limitations of capacity properly so called. There were, however, cases where unions of states or special relations between states were constituted by a treaty, and the treaty-making capacity of the parties was actually limited. The article would be incomplete without some mention of those treaties and he was therefore in favour of retaining paragraph 2.

63. Mr. ROSENNE suggested that the whole article should be deleted. Paragraph 1 stated the obvious, and could not be regarded either as codification or as progressive development of international law; paragraphs 2 and 4 related basically to validity and interpretation of other treaties; while paragraph 3 was really concerned with the interpretation of national constitutions. Capacity in international law had quite a different function from capacity in the municipal law of contract. It would be enough to include some reference to capacity in the commentary to article 1, paragraph 1 (a).

64. The CHAIRMAN noted that the majority of the Commission seemed to be in favour of paragraph 1 and of Mr. Verdross's amendment to paragraph 3. On the other hand, Mr. Briggs' proposal for the deletion of paragraphs 2, 3 and 4 and Mr. Rosenne's suggestion that the whole article should be deleted had not been supported. He put to the vote the proposal for the deletion of paragraph 4.

*The proposal was rejected by 8 votes to 8, with 2 abstentions.*

65. The CHAIRMAN put to the vote the proposal for the deletion of paragraph 2.

*The proposal was adopted by 9 votes to 8, with 2 abstentions.*

*Paragraph 1 was adopted by 18 votes to none, with 1 abstention.*

*Paragraph 3, as amended by Mr. Verdross, was adopted by 9 votes to 7, with 3 abstentions.*

*Paragraph 4 was adopted by 9 votes to 8 with 2 abstentions.*

*Article 3 as a whole, as amended, was adopted by 12 votes to 1, with 5 abstentions.*

66. Mr. AGO said he could not regard the procedure of deleting or retaining clauses of the draft by one or two votes as satisfactory.

#### ARTICLE 4.—AUTHORITY TO NEGOTIATE, DRAW UP, AUTHENTICATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

67. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 4:

"1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate, or sign a treaty on behalf of their state.

"2. (a) Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their state and the state to which they are accredited.

"(b) The same rule applies in the case of the head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question.

"3. Any other representative of a state shall be required to furnish evidence in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his state.

"4. (a) Subject to the provisions of paragraph 1 above, a representative of a state shall be required to furnish evidence of his authority to sign (whether in full or *ad referendum*) a treaty on behalf of his state by producing an instrument of full-powers.

"(b) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full-powers, unless called for by the other negotiating state.

"5. In the event of an instrument of ratification, accession or acceptance being signed by a representative of the state other than the Head of State, Head of Government or Foreign Minister, he shall be required to furnish evidence of his authority.

"6.(a) The instrument of full-powers, where required, may either be one restricted to the performance of the particular act in question or a general grant of full-powers which covers the performance of that act.

"(b) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the state concerned or by the head of its diplomatic mission in the country where the treaty is negotiated shall be provisionally accepted, subject to the production in due course of an instrument of full-powers, executed in proper form.

"(c) The same rule applies to a letter or telegram sent by the head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2(b)."

68. Mr. BRIGGS asked whether, under paragraph 2(b), the head of a permanent mission to an international organization who was attending an international conference at which a multilateral treaty was drawn up would not be required to furnish evidence of his authority.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had not envisaged the cases to which Mr. Briggs had referred. A strict reading of paragraph 2(b) would indeed exempt heads of permanent missions from presenting their credentials at a conference such as the Geneva Conference on the Law of the Sea or the Vienna Conference on Diplomatic Relations.

70. Mr. BARTOŠ said he reserved his position on paragraph 4(b), which, while imposing binding obligations on states, exempted representatives from producing full-powers in the circumstances contemplated. In his opinion the general rule of international law whereby the representatives of states should always be furnished with full-powers was justified by the need to prevent abuse or reckless conduct by representatives not subject to any restriction in undertaking obligations on behalf of their states without the knowledge of the responsible bodies and without prior thorough examination and mature appraisal by the authorities competent to accept such obligations. He emphasized once again that it was not the form of the treaty, even though the treaty might be in simplified form, but the substance of the treaty which was the deciding factor in determining what body was competent to accept or to grant authority to accept an obligation arising out of the treaty.

71. Nor could he support paragraph 6(a), which was neither practical nor in conformity with present-day international law. He referred to the considerations which had been expressed during the general discussion against the *procura* as a general authority to perform acts in international law.

72. Mr. ROSENNE suggested, first, that the word "approve" should be included in the title of the article, and the word "approval" in paragraph 5.

73. He suggested secondly, that the words "or between their state and the organization to which they are accredited" should be added at the end of paragraph 2(b), in order to reflect the Commission's wish to place heads of a permanent mission to an international organization on an equal footing with heads of a diplomatic mission.

74. Thirdly, he reserved his position on paragraph 4(b), for the reasons he had given when the Drafting Committee's first redraft of the article had been discussed.<sup>1</sup>

75. Fourthly, he suggested that the words "that representative" should be substituted for the word "he" in paragraph 5.

76. Fifthly, he suggested that the term "written credentials" in paragraph 3 should be replaced by the term "instrument of full-powers"; however, he would not object strongly to the retention of the existing text, if a reference to credentials appeared in the definition of full-powers in article 1.

77. Finally, he considered that the right context for the provisions of paragraph 6(a) was article 1.

78. Mr. TUNKIN said that paragraph 2(b) went beyond existing practice: permanent representatives to international organizations could not negotiate or take part in any other stages in the conclusion of a treaty drawn up under the auspices of an international organization without full-powers. The point had not in fact been discussed by the Drafting Committee.

79. Mr. de LUNA said he agreed that the scope of paragraph 2(b) should be restricted in the way suggested by Mr. Rosenne.

80. He thought the reference to "a general grant" of full-powers in paragraph 6(a) might be open to misunderstanding.

81. Mr. AMADO considered that paragraph 2(b) should be deleted.

82. He supported the amendment suggested by Mr. Rosenne to paragraph 3.

83. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2(b) had been inserted at the express wish of the Commission.<sup>2</sup> In modern times, heads of permanent missions to international organizations possessed certain treaty-making functions analogous to those exercised by heads of diplomatic missions. He agreed, however, that the provision should be limited in the way proposed by Mr. Rosenne. That course was preferable to deleting paragraph 2(b) altogether, for if the provision were dropped states would not have an opportunity of commenting on it.

84. Mr. TUNKIN considered that paragraph 2(b) could only be retained if its scope were limited to treaties

<sup>1</sup> 659th meeting, para. 2.

<sup>2</sup> *ibid.*, paras. 35 and 36.

drawn up between the state represented by the head of the permanent mission and the organization to which he was accredited. It would be at variance with practice to go further and imply that heads of such missions could negotiate, draw up or sign any treaty without full-powers.

*Paragraph 2 (b) as amended by Mr. Rosenne was adopted.*

85. Mr. LACHS said that the Drafting Committee had borne in mind Mr. Bartoš's earlier observations concerning full-powers. If paragraph 6 (a) as drafted still did not give him satisfaction, perhaps the word "general" might be deleted.

86. Mr. BARTOŠ and Mr. de LUNA said that they would be satisfied with that deletion.

*It was agreed that the word "general" in paragraph 6 (a) should be deleted.*

*Article 4 as thus amended was adopted.*

#### ARTICLE 4 *bis*. — NEGOTIATION AND DRAWING UP OF A TREATY

87. The CHAIRMAN said that the Drafting Committee proposed the following redraft of article 4 *bis* :

"A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself."

88. Mr. CASTRÉN said that at an earlier meeting a similar provision had not gained the support of the majority but the Commission had decided to retain it provisionally pending revision by the Drafting Committee.<sup>3</sup> Even those who had favoured such an article had not been altogether satisfied with the wording. The new redraft seemed almost the same and he proposed that it be deleted.

89. Sir Humphrey WALDOCK, Special Rapporteur, acknowledged that article 4 *bis* was not indispensable. It had been put forward in response to Mr. Ago's plea that it was logically necessary as an introduction to the subsequent articles. No such article had been included in his original draft.

90. Mr. AMADO said that, although Mr. Ago usually had very persuasive reasons to back up his proposals, in the particular instance it was impossible to agree that such an article was really needed. He felt bound to oppose it.

91. Mr. GROS said that, in Mr. Ago's temporary absence, he wished to point out that without article 4 *bis*, article 5 (which dealt with the different ways of adopting a text) would be incomprehensible. In other words, article 4 *bis* served as an explanatory introduction to what followed.

92. Sir Humphrey WALDOCK, Special Rapporteur, thought that perhaps article 4 *bis* might be transferred to form the first paragraph of article 5.

93. The CHAIRMAN put to the vote Mr. Castrén's proposal for the deletion of article 4 *bis*.

*The proposal was rejected by 8 votes to 4, with 5 abstentions.*

94. Mr. AMADO said that, in view of Mr. Gros' explanation of the relationship between article 4 *bis* and article 5, instead of opposing the article, he had abstained from voting.

95. The CHAIRMAN proposed that article 4 *bis* should be retained as a separate article.

*The proposal was adopted by 8 votes to 4, with 5 abstentions.*

*Article 4 bis was adopted.*

#### ARTICLE 5. — ADOPTION OF THE TEXT OF A TREATY

96. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 5.

"The adoption of the text of a treaty takes place :

"(a) in the case of a treaty drawn up at an international conference convened by the states concerned or by an international organization, by the vote of two-thirds of the states participating in the conference, unless by the same majority they shall decide to adopt another voting rule ;

"(b) in the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question ;

"(c) in other cases, by the mutual agreement of the states participating in the negotiations."

97. Mr. CASTRÉN, observing that only the substance of paragraph 1 of the special rapporteur's original article 5 had been retained and that paragraph 3 had been transferred to article 19 *bis*, asked what was the intention in regard to paragraph 2 of the original text.

98. Sir Humphrey WALDOCK, Special Rapporteur, explained that the Drafting Committee had decided to deal with obligations after the adoption of the text in article 19 *bis* and had concluded that paragraph 2, which had originally been expressed in negative form, could be dropped as unnecessary, given the new structure of article 5.

99. Mr. CASTRÉN said that he was satisfied with that explanation.

*Article 5 was adopted.*

#### ARTICLE 6. — AUTHENTICATION OF THE TEXT

100. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 6 :

"1. Unless another procedure has been prescribed in the text or otherwise agreed upon by states participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways :

<sup>3</sup> 659th meeting, paras. 46 to 63.

"(a) initialling of the text by the representatives of the states concerned ;

"(b) incorporation of the text in the Final Act of the Conference in which it was adopted ;

"(c) incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

"2. In addition, signature of the text, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 of this article.

"3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty."

101. Mr. TSURUOKA, with regard to the opening phrase of paragraph 1, suggested that in the commentary mention should be made of cases where a procedure not listed in the article had been prescribed in the text of a treaty.

102. Sir Humphrey WALDOCK, Special Rapporteur, said that he was aware that Mr. Tsuruoka believed that there had been no such cases. The Drafting Committee had nevertheless inserted the proviso as a precaution since some other procedure was at least conceivable ; for example, in the case of treaties concluded within an international organization, the text might be authenticated by the signature of the president of the conference.

103. Mr. ROSENNE said that, unless he was mistaken, the convention setting up the International Civil Aviation Organization had required the depositary to prepare the text in one of the languages.

104. Mr. TSURUOKA said that, in view of the Special Rapporteur's explanation, he would not press his point.

*Article 6 was adopted.*

#### ARTICLE 7. — PARTICIPATION IN A TREATY

105. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 7 :

"1. Every state may become a party to a treaty which participated in the adoption of the text or to which the treaty is expressly made open by its terms.

"2. Unless a contrary intention is expressed in the treaty or otherwise appears from the circumstances of the negotiations, a treaty is open to the participation of any state which, though it did not take part in the adoption of the text, was invited to attend the conference at which the treaty was drawn up."

106. Mr. LACHS said he reserved his position in regard to article 7, which as drafted conflicted with the view he had upheld both in the Commission<sup>4</sup> and in the Drafting Committee.

107. Mr. TUNKIN said that article 7 was absolutely unacceptable and wholly at variance with the fundamental principles of modern international law, for it was based on the premise that every treaty was closed unless it contained a provision to the contrary. According to present-day international law, certain treaties by their very nature could not be closed to participation by other states. The article should therefore lay down the rule that treaties dealing with matters of legitimate interest to all states should be open to participation by all states. In that way, the principle of the equality of states would be safeguarded and no state or group of states would be able to exclude any other state or group of states from negotiating and participating in a treaty dealing with matters of common concern.

108. Mr. YASSEEN said that, as he had contended on a previous occasion,<sup>5</sup> general multilateral treaties, and more particularly those dealing with matters of common concern or designed to codify rules of international law, could not be regarded as closed to any state whatsoever. He therefore reserved his position on article 7.

109. Mr. de LUNA pointed out that article 7 did not purport to put forward any rule as to the open or closed character of treaties : the participation of states in a treaty depended on the nature of the instrument. In his opinion, in the case of general multilateral treaties the residuary rule should be reversed ; such treaties should be open to general participation.

110. Sir Humphrey WALDOCK, Special Rapporteur, explained that article 7 should be read in conjunction with article 7 *bis* which dealt with the procedure for participation in terms giving the parties some say in the matter. He emphatically denied that article 7 had been inspired by a desire to close treaties to a limited circle of states. Article 7 *bis* in fact contemplated wide participation.

111. Mr. BARTOŠ proposed that a paragraph be added to article 7 stating as the residuary rule for general multilateral treaties that they were open to participation by states generally.

112. Mr. TUNKIN said that he was unable to accept the special rapporteur's argument, since article 7 *bis* did nothing to alter the rule implicit in article 7.

113. Sir Humphrey WALDOCK, Special Rapporteur, said that although article 7 *bis* did not change article 7, it did provide for wide participation. As he had explained earlier, practice showed that whereas states wished treaties to be open to wide participation, usually they stipulated that the decision on admission to general treaties should lie with, for example, the General Assembly. In the face of that fact he felt unable to agree with the proposition that a natural right of participation existed, regardless of the opinion of the states which had drafted the treaty and brought it into being.

114. Mr. TUNKIN proposed the addition of a new paragraph to article 7 to the effect that general multilateral treaties, as defined in article 1, should be open to the participation of all states.

<sup>4</sup> 660th meeting, paras. 61-63, 74, 82-84, 88.

<sup>5</sup> *ibid.*, para. 75.

115. Mr. LACHS said that he was concerned with the relationship between the rule and the exception. The Commission should defend the principle of universality, that whenever a treaty was silent on the subject of participation, the presumption should be in favour of universality. If the states concerned wished to exclude others from participating, an express provision to that effect would be necessary to defeat the presumption.

116. Mr. GROS said that Mr. Lachs' argument was not logically watertight. The definition of a general multilateral treaty contained in article 1 was designed solely "for the purposes of the present articles". The Drafting Committee had not sought to work out a theoretical definition. That being so, the distinction between an international general multilateral treaty and what he would call an ordinary multilateral treaty could not be introduced into article 7. Many multilateral treaties dealt with general rules of international law or matters of common concern but were concluded between, say, ten, fifteen or twenty states, such as fisheries conventions.

117. The system put forward in article 7 was an equitable one.

118. Mr. TSURUOKA said that the principle of the equality of states should be applied throughout the draft and he supported article 7 which should help to attenuate departures from that principle. If a provision were added to the effect that general multilateral treaties were open to the participation of all states, then a consequential provision would be needed in the articles on reservations prohibiting reservations to such treaties.

119. Mr. EL-ERIAN said that he had considerable doubts about article 7 and associated himself with those who had defended the principle of universality. Unless a provision were inserted to the effect that, as a residuary rule, treaties containing general rules of international law and on matters of common concern were open to participation by all states, he would have to reserve his position.

120. Mr. ELIAS proposed that a new paragraph 1 be inserted at the beginning of article 7 stating that general multilateral treaties were open to the participation of all sovereign states. The existing paragraph 1 would then have to be modified so as to be made applicable to other types of treaties.

121. Mr. VERDROSS agreed with Mr. de Luna that international treaties enunciating universal rules of law should be open to all states and that a provision to that effect should be added to article 7. It would be contradictory to devise universal rules of law and then to exclude states from participating in the relevant instrument.

122. Mr. AMADO, supporting article 7, said it was incontrovertible that states had special interests and that some multilateral treaties were not of general concern. However, he favoured Mr. de Luna's proposal, which was consistent with the modern trend of opening general law-making treaties to all states.

123. Sir Humphrey WALDOCK, Special Rapporteur, said that, while sympathizing with some of the views

expressed, he considered that the Commission should be guided by practice. No treaty of more general concern could be cited than the Vienna Convention on Diplomatic Relations, which was also the most recent example of a codifying treaty; yet the negotiating states had not included a provision making it open to all. The kind of rule proposed by Mr. Tunkin and those who supported his view would run directly counter to practice.

124. Mr. TUNKIN said that the special rapporteur's defence of article 7, on the ground that it reflected current practice, was untenable. The restrictions embodied in the Vienna Convention on Diplomatic Relations and the Geneva Conventions on the Law of the Sea had been inspired by a cold war policy and were intended to exclude certain states from participating in instruments designed to enunciate general rules of law. States pursuing such a policy consistently violated fundamental rules of international law, and no jurist could countenance the Commission's taking the retrograde step of consecrating a practice which was both unprogressive and contrary to international law.

125. Mr. Elias' proposal was a small step in the right direction, but did not go far enough.

126. Mr. LACHS said that, although the special rapporteur was correct in his description of practice during the past ten years, a decade could not furnish conclusive evidence of what was the law. Recent restrictions on participation in general treaties, as in the case of the Genocide Convention, were alien to the character of such treaties and contrary to the interests of the participating states themselves. The special rapporteur had drawn attention to a phenomenon which had, in fact, put a brake on the general development of international law by creating closed groups of states, one eligible and the other not eligible to participate in general treaties. He was compelled to disagree with the proposition that that practice should guide the Commission. There were examples, from the Treaty of Paris of 1928 to the Geneva Conventions of 1949, of treaties that were open to all.

127. Sir Humphrey WALDOCK, Special Rapporteur, said he had not been influenced in any way by considerations connected with the cold war. Treaty relations were a matter for states, which could not be forced into such relations against their will and which should have a say in the question of participation.

128. He would point out to Mr. Lachs that the number of open treaties was, in fact, exceedingly small. In most treaties of the kind under consideration, wide participation was provided for, but the decision rested in the hands of a collegiate body. Surely it could not be argued that a rule whereby participation was determined by a two-thirds majority of the General Assembly was retrograde.

129. Mr. TUNKIN said that the special rapporteur had shirked the issue. By what right could a group of states claim authority to exclude others from a Convention on the High Seas or a Convention on Diplomatic Relations which, by their very nature, were of interest to all states? Times had changed, and certain Powers could no longer

exclude others from the circle of those eligible to participate in treaties.

The meeting rose at 1.5 p.m.

### 667th MEETING

Monday, 25 June 1962, at 3 p.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*continued*)

#### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*continued*)

##### ARTICLE 7.—PARTICIPATION IN A TREATY (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of the Drafting Committee's redraft of article 7.

2. Mr. Elias had also submitted a redraft of the article, which read:

"1. In the case of a general multilateral treaty, participation shall be open to every sovereign state.

"2. In all other cases, participation shall be open to every state:

"(a) which took part in the adoption of the text of the treaty, or

"(b) to which the treaty is expressly made open by its terms, or

"(c) which was invited to attend the conference at which the treaty was drawn up, unless a contrary intention appears from the treaty itself or from the circumstances of the negotiations."

3. Mr. BRIGGS said that article 7 was much less important than article 7 *bis* concerning the opening of a treaty to the participation of additional states. Article 7, paragraph 1, contained an axiomatic statement, and paragraph 2 was unlikely to assume much significance. A great deal of the discussion at the previous meeting had been hardly relevant and he very much regretted the references to the cold war: the Commission was not the proper forum for that.

4. The special rapporteur, on the other hand, had clearly expounded the international law on the subject of participation in treaties, and he wholly endorsed his views.

5. There was no rule of international law which permitted every state to become a party to any treaty: indeed, the reverse was true. States could only become parties to a treaty on the terms laid down in the instrument itself or with the consent of the other parties. There was thus no justification for the assertion that certain states had been excluded from general multilateral treaties. The entities excluded from the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations were not generally regarded as states, in particular by the United Nations.

To his knowledge, the only instance of the exclusion of states from a general multilateral treaty as defined in article 1 of the draft had been the Soviet Union Government's veto of the admission of Austria, Italy and Japan to participation in the Charter of the United Nations.

6. He could not support the proposition that there was a unilateral right either to exclude states from participation or to demand participation in a treaty. He was therefore unable to accept paragraph 1 of Mr. Elias's proposal.

7. Mr. CADIEUX said that he would have to oppose Mr. Elias's proposed redraft. First, it impinged upon the complex problem of recognition, with all its political implications. Not only had that problem not been studied by the Commission, but he was uncertain whether such a study would confirm the conclusion reached in Mr. Elias's proposal.

8. If, instead of endorsing the practice of the majority of the States Members of the United Nations, the Commission allowed itself to be guided by other than purely technical considerations and, under the influence of political preconceptions, accepted the innovation proposed by Mr. Elias, advantage would be taken of that fact by states which opposed United Nations practice, and the Commission's prestige would suffer. The proposal also posed special difficulties for those members who were also legal advisers to their governments, for if they supported the proposal their attitude might be interpreted as committing their governments to a certain view concerning the problem of recognition. A legal adviser could hardly dissociate himself from his government's official policy.

9. On technical grounds, the proposal was wholly unacceptable, because it was at variance with the basic principle of the law of treaties, which was respect for the will of the parties. It was inconceivable that states which, as part of their general policy, did not recognize certain entities, would, for the purposes of certain treaties, allow them to become parties. If the Commission wished to codify rules of international law, it must recognize the practice of the majority, and if it wished to contribute to the progressive development of international law, it was unlikely to achieve that object by telling governments what policy they should follow.

10. His conclusion, therefore, was that Mr. Elias's proposal was inopportune for material reasons, unjustified for technical reasons, and objectionable for practical reasons: he would vote against it.

11. Mr. YASSEEN urged the Commission to keep the question in proper perspective. It was engaged in formulating not a general but a residuary rule. The express provisions of a treaty, either opening it to participation by certain states or excluding certain others, had to be respected. The only question was how a treaty's silence on the subject of participation should be interpreted. In his own opinion, it was legitimate to presume that the silence of a general multilateral treaty dealing with questions of common concern or codifying general rules of international law should be construed to mean that the treaty was open to all sovereign states.

Such a presumption was not arbitrary but flowed naturally from the character of the treaty itself. Admittedly a different practice existed at the moment, but it could not provide the basis for a residuary rule.

12. Mr. de LUNA proposed the addition of a new paragraph 3 at the end of article 7 to read: "In the case of a general multilateral treaty, it is open to any state to become a party thereto, unless the treaty provides otherwise".

13. His amendment took account of the principle defended by certain members, with which he agreed, that in view of the character of general multilateral treaties it was illogical to interpret the silence of such a treaty on the question of participation as meaning that the treaty was closed. In other words, he proposed a residuary rule the reverse of that upheld by the Permanent Court of International Justice in its judgment of 25 May 1926 in the case concerning certain German interests in Polish Upper Silesia,<sup>1</sup> but had added the proviso that the treaty could provide otherwise.

14. As an international lawyer, he considered that the political attitude of states to the complex problem of recognition was not always consistent, and that sometimes political considerations overrode legal ones. It was contrary to the laws of logic to presume, in the event of the treaty's silence, that a general multilateral treaty was closed. His compromise solution was based on the special nature of general multilateral treaties, and also sought to respect the principle of unanimity. That his amendment involved no innovation was proved by the provisions of article 19 of the Havana Convention on Treaties of 1928<sup>2</sup> and of article 7 in Professor Lauterpacht's two drafts of 1953 and 1954.

15. Mr. BARTOŠ said he could not agree with the proposition that the silence of a general multilateral treaty on the subject of participation should be interpreted to mean that the treaty was closed to additional states. In modern times, the reverse was likely to be true, though he would not go so far as to assert that all general multilateral treaties were open. Regrettably, as Mr. Tunkin had indicated at the previous meeting, some states had been excluded from participating in certain treaties of that kind, even though concerned with rules which should be applied by the whole international community, such as the Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations. Such exclusions could lead to the violation of rules which were intended to be universal. He therefore urged that the Commission should, in the interests of the progressive development of international law, establish in its draft the presumption that general multilateral treaties were open if they contained no express provision to the contrary.

16. He was not opposed to the underlying idea of paragraph 1 of Mr. Elias's proposal, but felt that its scope should be restricted so as to correspond with reality. States could not be denied the right to choose

their partners in treaty relations, but they could be expected to indicate in advance an intention to exclude certain others from participating in any treaty they were drawing up. He accordingly supported Mr. de Luna's amendment.

17. Mr. AGO said that it was essential to recognize the fundamental principle of the freedom of the parties to choose with what states they would enter into treaty relationship. He realized, of course, that general multilateral treaties posed a very special problem.

18. Mr. Elias's proposal, however, did much more than state a presumption with regard to that category of treaties; it put forward a mandatory rule, of a kind practically unknown to international law and wholly unjustified, under which the parties would not even be able to restrict participation in a treaty by express provision in the instrument itself.

19. Mr. Yasseen's approach was more reasonable in that he had suggested that the residuary rule should be that the silence of a general multilateral treaty meant that it was open to the participation of other states. He (Mr. Ago) would even have some hesitation in subscribing to that line of argument, though willing to support an affirmation to the effect that such a presumption was desirable. The reason why he was apprehensive of any automatic residuary rule was that it might have dangerous consequences. For example, was there good ground for supposing that a state, or states, deliberately not invited to the conference at which the treaty was drawn up, had an automatic right to participate later? Such a rule might lead to most undesirable disputes if certain entities, which not all states recognized as sovereign, expressed a desire to participate and claimed a right to do so on the basis of such a rule. Again, it was questionable whether such a rule could confer a right of participation on a state against which sanctions were being applied by the United Nations.

20. Mr. AMADO said that the general multilateral treaties described by some members of the Commission were more in the nature of international legislation than treaties. They perhaps conformed to an ideal which all truly international jurists had in mind, but if participants were not free to choose their partners, they could no longer be strictly regarded as treaties. Consequently he had serious misgivings about the argument that silence should be interpreted in favour of a treaty being open to all states, and he intended to oppose any extreme solution which he felt sure would not find favour among Member States of the United Nations.

21. Mr. TUNKIN said that Mr. Cadieux and Mr. Ago had introduced some quite extraneous considerations, such as the question of recognition, which had nothing whatsoever to do with participation in a treaty. Some of the parties to practically every recent general multilateral treaty did not recognize each other or had strained relations with one another, yet that did not prevent them from participating in the same treaty. In modern times, international personality did not depend upon recognition.

22. In answer to the argument that states could not be forced to enter into treaty relations against their will,

<sup>1</sup> P.C.I.J., Series A — No. 7, p. 28.

<sup>2</sup> Hudson, *International Legislation*. Vol. IV (1931), p. 2378.



he could only say that they were free to stay outside the treaty. The principle of the freedom of the parties should not be pushed to the extent of excluding *jus cogens* from the far-reaching field of the law of treaties. After all, rules of *jus cogens* clearly existed; for example, the conclusion of aggressive pacts was manifestly inadmissible under international law.

23. The nature of the treaty was, in fact, the most vital consideration in determining participation. Some matters were of interest to the whole international community, and he had been surprised to hear Mr. Bartoš suggest that certain states could be excluded from participating in treaties designed to deal with problems of common concern. The principle of peaceful co-existence, irrespective of political, social or economic systems, imposed certain obligations on states and, among them, the duty to collaborate to some extent. That being so, by what right had one group of states excluded others from participating in a convention on the high seas, in violation of one of the fundamental principles of international law?

24. Paragraph 1 of Mr. Elias's proposal was juridically absolutely correct, and in conformity with existing international law.

25. He appreciated Mr. de Luna's attempt to find a compromise solution, but considered that his proposal was not very logical and did not go far enough.

26. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had considered article 7 *bis*, but had been unable to proceed with the drafting because its content was bound to be affected by the discussion on article 7. Of particular importance was the impact of Mr. Elias's proposal on paragraph 2 of article 7 *bis*.

27. It had been argued that it was reasonable to infer from the fact that a state had been invited to attend a conference that it could become a party to the resulting treaty unless the contrary was stated at the Conference. Mr. Ago had pointed out, however, that in the case of general multilateral treaties, drafted at conferences convened by world-wide organizations, the fact of invitation did not carry the same implication.

28. Mr. Tunkin had said that *jus cogens* in the matter overrode the express will of states; he (the special rapporteur) would submit, however, that in the case of such general multilateral treaties as the Conventions on the Law of the Sea and the Convention on Diplomatic Relations, it was not merely a question of the will of the states concerned, but of the will of the General Assembly, to which, under the modern treaty practice, was entrusted the power to issue the invitations to accede to the treaty. Mr. Elias's proposal would have the effect of taking the matter out of the hands of the General Assembly. He believed that that would be an unwise step on the part of the Commission, and, moreover, he doubted whether it was appropriate for the Commission to advance such a proposal in the face of the existing treaty practice. In his opinion, the will of states must be taken into account.

29. With regard to Mr. Yasseen's view that, in the case of a treaty's silence on the subject of participation it

might be presumed that the treaty was open to all states, he pointed out that two cases might arise: either invitations to attend the negotiating conference would be issued to all states, or else certain states would be excluded. In the latter case, Mr. Yasseen's presumption would go against a clear indication given in the invitations to the negotiating conference. In the case of multilateral treaties of general interest, invitations were usually sent automatically to almost all states, and the omission of a state had a certain significance.

30. Furthermore, although Mr. Tunkin's assertion that the question of recognition did not arise might be upheld theoretically, he could not agree that the same applied in practice. The difficult position of a depositary in cases where a state which was not on the list of any of the world-wide organizations attempted to deposit an instrument of accession or acceptance should also be borne in mind. While he more or less shared Mr. Tunkin's views on the place of recognition in international law, he could not agree that recognition was irrelevant in the context of an invitation to participate in a treaty. He accordingly felt that the Commission should not take a step which was at variance with existing practice.

31. Mr. TSURUOKA said he agreed with Mr. Briggs, Mr. Cadieux, Mr. Ago and Mr. Amado that it was an important principle of international law that states should be free to choose their partners in treaty relations. That was one of the principles which distinguished international from municipal law, for the latter was binding on all subjects of the state concerned.

32. He could not share Mr. Yasseen's view on the presumption that a general multilateral treaty was open to all states if the treaty was silent on the matter. The silence of the treaty could have great significance, particularly in existing international practice, whereby conventions at international conferences were usually adopted by a two-thirds majority. The effect of Mr. Yasseen's presumption would be to impose the minority opinion on the majority.

33. Mr. LACHS said that, in defining general multilateral treaties, as it had done in article 1, the Commission committed itself to a general application of international law, since the relevant definition spoke of treaties dealing with matters of general interest to all states. It was accordingly difficult to reconcile the imposition of such binding rules on all states with the possibility of debarring certain states from participation in the treaty.

34. While he agreed with Mr. Ago that states could not be forced into treaty relations with each other, it seemed impossible to exclude any state from treaties of a general character which laid down rules which were meant to be universal. The idea of universality was the logical consequence of the definition of general multilateral treaties; the contrary view entailed a risk of slipping into a kind of pluralism, in which states would be divided into specific groups and the generally binding principles of international law would not be recognized.

35. Moreover, in performing its task of codifying international law, the Commission should bear in mind its

duty to ensure the progressive development of the rules of law in accordance with certain principles. That was one of the most important elements of the Commission's work. The right to legislate could not be the privilege of the members of a private club; it belonged to all states. Recognition or non-recognition of one state by another had little bearing on the question; certain States Members of the United Nations had no diplomatic relations with each other, yet they had all subscribed to the Charter.

36. The Commission should take a broader view of article 7, in conformity with the general principles of international law, which clearly made it necessary to accord special treatment to general multilateral treaties.

37. Mr. BARTOŠ said that, since it could not yet be said that international legislation as such existed, an element of state sovereignty should be retained in the draft concerning treaty relations. Treaties were still being made in the form of contracts, and hence it was only logical that there should be no obligation for any state to enter into treaty relations with all states. From the practical point of view, moreover, the provisions of a treaty depended on the circle of states concluding the instrument.

38. The super-state was not yet a reality of international law, and although no state ought to be able to claim greater sovereignty than others, although the universality of the treaty ought to be observed in all cases, and although the General Assembly was competent to warn states against the consequences of non-observance of the principle of universality, it could not be said that such universality was a feature of modern international life. That was a point that should be taken into account in the drafting of a text which was designed to be accepted by as many states as possible.

39. Mr. ELIAS said he had not expected his proposal to be discussed within the context of the cold war and with the political overtones which had been introduced into the debate. The object of his proposal was to make it clear that the considerations guiding the Commission should not be based only on the rules advocated by the long-established states, since the overwhelming majority of States Members of the United Nations would be prepared to accept more progressive rules. He quite agreed with Mr. Tunkin and Mr. Lachs that the argument of recognition was beside the point. The Commission's task should not be conceived as a duty either to codify rules laid down in the eighteenth and nineteenth centuries, or to sweep away important rules of international law; its task was to ascertain whether or not the older rules had any direct relevance to modern international life and to modify them where necessary. The Commission should be bold enough to advance proposals for the progressive development of international law. Consequently, when the choice lay between the principle of the "open door" and that of the "closed shop", it seemed obvious that the former was the progressive principle and that, far from violating any fundamental principle of law, it clearly reflected the modern international situation. He was sure that most of the Asian

and African states would support that view in the General Assembly.

40. As a compromise solution, he proposed that the words "unless the treaty otherwise provides" should be added at the end of paragraph 1 of his draft.

41. Mr. AGO pointed out that the Drafting Committee had followed the Commission's instructions in preparing its text, and that the Commission's present difficulties arose from the fact that a completely new alternative had now been proposed.

42. Apart from the problems he had already mentioned, a much more serious problem might arise if the rule proposed by Mr. Elias were extended to the multilateral treaties concluded under the auspices of many international organizations. Under the constitution of the ILO, for instance, participation in its conventions was confined to members of the organization. The reason for that rule was that the ILO exercised a certain supervision over the operation of the conventions and that supervision could only be exercised over Member States. An analogous rule applied in the case of instruments concluded under the auspices of certain other specialized agencies. If those instruments were opened to all states which were not members of the organization, the whole system of supervision would be destroyed. The overwhelming majority of general multilateral treaties were concluded under the auspices of international organizations, and their internal rules should therefore be taken into account. Accordingly, the universality rule which was being advocated was not only revolutionary, but would make it practically impossible for certain international organizations to operate effectively.

43. Mr. TUNKIN said he could assure Mr. Ago that the situation in the event of the acceptance of Mr. Elias's modified proposal would not be as sombre as he seemed to think. The practice of states in the matter had for years been to regard multilateral treaties of general interest as being open to all states, for example, the Hague Conventions of 1899 and 1907 and all Red Cross Conventions, and there was therefore nothing revolutionary about the proposal. Furthermore, if a state entitled to participate in a general multilateral convention under that rule committed a serious violation of international law, it could hardly be said that to debar it from participation in such a general treaty as, for example, the Geneva Convention on the High Seas would constitute a correspondingly serious sanction. Mr. Elias's amended proposal went much less far than his original text and, in fact, constituted a compromise similar to that proposed by Mr. de Luna.

44. Mr. GROS said he wished to clarify a purely juridical aspect of the question, which was the true function of the Commission, without regard to any other kind of consideration.

45. The practice on which the special rapporteur had based his draft did not date back to the eighteenth or nineteenth century, as Mr. Elias had averred; it was the practice that the General Assembly had adopted in 1958 and 1960, in the case of the Geneva Conferences on the Law of the Sea, and in 1961 in the case of the Vienna

Convention on Diplomatic Relations. Under that practice, the rule was that general multilateral treaties were open to the states expressly named therein; there was no residuary rule that in principle such treaties were open to all states. The reason was that there was not just one category of general multilateral conventions; there were several. The present difficulty had arisen because the distinction drawn in the special rapporteur's original draft between multilateral and plurilateral treaties had been dropped.

46. Nor was there any support for such a rule in opinions of the International Court of Justice. In its advisory opinion on reservations to the Genocide Convention, the Court had stated specifically that its opinion was based on the special character and single purpose of that Convention, thus implying that there were other types of general multilateral treaties. If the Commission wished to be both logical and progressive, it should not only contemplate a clause opening every general multilateral treaty to all states, but also adopt a provision enabling all states to participate in the negotiation of such treaties. To maintain that there was no relation between recognition and the subject was to ignore an essential element of the problem. In his opinion, the rules stated in the Drafting Committee's text were both equitable and progressive, since they took into account both current United Nations practice and the existence of several categories of multilateral general treaty which could not all be brought under one and the same régime.

47. Mr. YASSEEN said he did not believe that there was any rule of international law against the opening of general multilateral treaties to participation by all states. On the contrary, the parties to such a treaty always had to agree on rules opening such a treaty to participation by certain states only; that implied a deliberate act by the states concerned and their awareness of the absence of any rule against participation by all states in cases where the treaty itself was silent on the matter. The fact that efforts were made to avoid such silence seemed to prove that, in the case of treaties of general interest, the residuary rule was that they should be open to all states.

48. Mr. VERDROSS suggested that Mr. Elias's modified proposal could be accepted if the treaties to which Mr. Ago had referred were excluded. In that case, only treaties enunciating universal rules of international law would be open to all nations.

49. Mr. de LUNA withdrew his proposal, which, he said, was covered by Mr. Elias's modified proposal.

50. Mr. AGO asked what would happen if the treaty was silent on the subject of participation, but the constitution of the international organization concerned, or the rules in force in it, contained specific provisions in that regard.

51. The CHAIRMAN appealed to members not to raise substantive matters at that late stage of the Commission's proceedings. He put Mr. Elias's proposal, as amended, to the vote.

*Mr. Elias's amended proposal was adopted by 10 votes to 7, with 3 abstentions.*

*Article 7 was adopted.*

52. Mr. GROS asked that it should be noted in the commentary that the members who had voted against Mr. Elias's proposal had done so because they thought it quite inapplicable to current international practice.

*It was so agreed.*

53. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the terms of article 7 *bis* would now have to be reviewed in the light of the Commission's decision concerning article 7.

54. The CHAIRMAN said that, to allow time for such review, the Commission would next consider articles 18 *bis*, 18 *ter* and 19.

#### ARTICLE 18 *bis*. — THE EFFECT OF RESERVATIONS

55. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee submitted the following redraft of article 18 *bis*, the title of which was now changed from "The validity of reservations" to "The effect of reservations":

"1. (a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.

"(b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 of this article shall apply.

"2. Except in cases falling under paragraphs 3 and 4 and unless the treaty otherwise provides,

"(a) acceptance by any state to which it is open to become a party to the treaty constitutes the reserving state a party to the treaty in relation to such state, as soon as the treaty is in force;

"(b) an objection to a reservation by a state which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving state, unless a contrary intention shall have been expressed by the objecting state.

"3. Except in a case falling under paragraph 4, the effect of a reservation to a treaty which has been concluded between a small group of states shall be conditional upon its acceptance by all the states concerned, unless

"(a) the treaty otherwise provides, or

"(b) the group is an international organization which applies a different rule to treaties concluded under its auspices.

"4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides."

56. The main difficulty in drafting the article had been to bring its provisions into line with the principle laid down in article 17, paragraph 1, that a reservation could be formulated if compatible with the object and purpose of the treaty.

57. So far as the effect of reservations was concerned, the ultimate criterion, in the absence of an adjudicating body, was the consent or objection of other states.

58. Mr. AMADO, criticizing the French wording of paragraph 1 (b), said it was not appropriate to say that a treaty was silent "*sur la question des réserves*"; the English wording, "silent in regard to the making of reservations", was more appropriate.

59. Mr. CASTRÉN suggested that the somewhat unsatisfactory opening of paragraph 3 (b) should be amended to read: "the states are members of an international organization which applies...".

60. Mr. BRIGGS said that he could accept in principle paragraphs 3 and 4 but would have to vote against the article as a whole because paragraph 2 (a) did not accurately reflect the relevant rules of international law.

61. Paragraph 2 (a) endeavoured to extend to all treaties a United Nations practice which applied only to certain multilateral treaties. Under that paragraph, states would be given a unilateral right to participate in treaties and an unlimited right to formulate reservations. It reflected the reactionary view that a state had a unilateral right to choose the law by which it would be bound. The only limitations to its freedom of action provided in paragraph 2 (a) were, first, that at least one other state must accept the reservation and, secondly, that an objection by another state precluded the entry into force of the treaty as between the objecting and the reserving state. However, the reserving state could still pose as a party to a treaty while releasing itself from the general rule of law.

62. Mr. TSURUOKA said that he supported the views expressed by Mr. Briggs.

63. Mr. GROS said that he too was in full agreement with Mr. Briggs.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that the dissenting view of Mr. Briggs, Mr. Tsuruoka and Mr. Gros would find expression in the commentary to the article.

65. Mr. ROSENNE proposed that in the English text of paragraph 2 (a) the words "of a reservation" should be added after the word "acceptance".

66. He welcomed the inclusion in paragraph 2 (b) of a reference to the compatibility test in connexion with the objection to a reservation.

67. He asked what was the meaning of the words in paragraph 1 (a) "a reservation expressly or impliedly permitted by the terms of the treaty", having regard to the terms of article 17.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that the words quoted by Mr. Rosenne were meant to cover the cases mentioned in article 17, especially in paragraphs 1 (a) and (c) of that article.

69. He accepted the drafting changes suggested by Mr. Amado, Mr. Castrén and Mr. Rosenne.

70. The CHAIRMAN said that, if there were no objection, he would consider that the Commission adopted

article 18 *bis* with the drafting changes accepted by the special rapporteur.

*It was so agreed.*

#### ARTICLE 18 *ter*. — THE LEGAL EFFECT OF RESERVATIONS

71. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee submitted the following modified draft of article 18 *ter* which had already been approved by the Commission:<sup>3</sup>

"1. A reservation established in accordance with the provisions of article 18 *bis* operates:

"(a) to modify for the reserving state the provisions of the treaty to which the reservation relates to the extent of the reservation; and

"(b) reciprocally to entitle any other state party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving state.

"2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the reserving state; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*."

72. The title, "The legal effect of reservations", would now have to be amended because of its similarity to the title of article 18 *bis*, "The effect of reservations".

*Article 18 *ter* was adopted.*

#### ARTICLE 19. — THE WITHDRAWAL OF RESERVATIONS

73. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee submitted the following modified draft of article 19 which had already been approved by the Commission:<sup>4</sup>

"1. A reservation may be withdrawn at any time and the consent of a state which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other states concerned.

"2. Upon withdrawal of a reservation the provisions of article 18 *ter* cease to apply."

74. The Drafting Committee had taken into account a request by Mr. Bartoš<sup>5</sup> that the article should state precisely when the legal effect of a withdrawal of a reservation began to operate.

75. Mr. BARTOŠ said he was satisfied with the second sentence now added to paragraph 1.

*Article 19 was adopted.*

<sup>3</sup> 664th meeting, para. 66.

<sup>4</sup> *ibid.*, para. 71.

<sup>5</sup> 664th meeting, para. 68.

# DRAFT REPORT OF THE COMMISSION ON THE WORK OF ITS FOURTEENTH SESSION

## CHAPTER II: LAW OF TREATIES

(A/CN.4/L.101/Add.1)

### Introduction

76. The CHAIRMAN invited the Commission to consider paragraph by paragraph the introduction to chapter II of the Commission's draft report (A/CN.4/L.101/Add.1).

*Paragraph 1 was adopted.*

*Paragraph 2 was adopted.*

77. Mr. BRIGGS suggested that paragraph 3 should include an extract from the advisory opinion of the International Court of Justice on reservations to the Genocide Convention.

*It was so agreed.*

*Paragraph 3 as amended was adopted.*

*Paragraph 4 was adopted.*

*Paragraph 5 was adopted.*

78. Mr. CASTRÉN said that, in view of the Commission's decision to formulate the draft articles in the form of a convention, it was undesirable to elaborate on the arguments in favour of a "code", as was done in paragraph 6.

79. Mr. TUNKIN agreed with Mr. Castrén and felt that a wrong impression could be given by that paragraph.

80. Sir Humphrey WALDOCK, Special Rapporteur, said that although he felt the Commission had been right in deciding in favour of a convention rather than a code, he considered that the arguments in favour of a code should be set out in the introduction in order to give a more balanced picture.

81. Mr. CASTRÉN and Mr. TUNKIN said they did not wish to press the point.

*Paragraph 6 was adopted.*

*Paragraph 7 was adopted.*

*Paragraph 8 was adopted.*

*Paragraph 9 was adopted.*

82. Mr. CADIEUX said the statement in paragraph 10 that articles 26 and 27 were "to be regarded as provisional in character" struck him as unsatisfactory. At that stage the whole set of articles was provisional.

83. He suggested that the passage in question should be amended to state that articles 26 and 27 would be re-examined by the Commission.

*It was so agreed.*

*Paragraph 10 as thus amended was adopted.*

84. Mr. CADIEUX suggested that the expression "international organizations" in paragraph 11 should be made more precise by introducing the adjective "inter-governmental".

85. Mr. TUNKIN supported that suggestion.

86. Mr. AGO said that the expression "treaties of international organizations" was unsatisfactory; "treaties to which international organizations are parties" would be an improvement.

87. Mr. EL-ERIAN supported Mr. Ago's suggestion.

88. He also supported Mr. Cadieux's suggestion, which was in line with the terminology used by the General Assembly itself in its resolution 1289 (XIII) of 5 December 1958.

89. Lastly, he suggested that the phrase "international organizations possess the capacity to enter into international agreements" should be qualified by the addition of the words: "as a general rule". The Commission had in the past found that the treaty-making power of certain international intergovernmental organizations was clear, while that of others was not.

90. Sir Humphrey WALDOCK said he could accept the drafting changes proposed by Mr. Cadieux and Mr. Ago.

91. To meet Mr. El-Erian's point, he suggested that the passage in question should be amended to read: "international organizations may possess a certain capacity to enter into international agreements".

92. The CHAIRMAN said that, if there were no objection, he would consider the Commission agreed to accept paragraph 11 with the drafting amendments accepted by the special rapporteur.

*Paragraph 11 as thus amended was adopted.*

93. Mr. TUNKIN, criticizing the second sentence of paragraph 12, said the Commission had not sought to "codify the modern practice of states in treaty-making"; it had sought to codify the rules of international law in force on the subject.

94. The remainder of the second sentence, as also the third and fourth sentences, was unnecessary.

95. Mr. AMADO said that the statements contained in the third and fourth sentences of paragraph 12, while true, were not essential.

96. Sir Humphrey WALDOCK, Special Rapporteur, suggested that, to meet the objections of Mr. Tunkin and Mr. Amado, paragraph 12, as from the second sentence, should be redrafted along the following lines:

"In preparing the draft articles, the Commission has sought to codify the rules of international law concerning the conclusion of treaties. At the same time, these draft articles contain elements of progressive development, as well as of codification of the law."

*Paragraph 12 as thus amended was adopted.*

The meeting rose at 6.5 p.m.

## 668th MEETING

Tuesday, 26 June 1962, at 9.30 a.m.

Chairman: Mr. Radhabinod PAL

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) *(resumed from the previous meeting)*

**DRAFT ARTICLES SUBMITTED BY THE  
DRAFTING COMMITTEE**

*(resumed from the previous meeting)*

# ARTICLE 8. — SIGNATURE AND INITIALLING OF THE TREATY

1. The CHAIRMAN invited the Commission to consider articles 8 to 14, 17 and 18 as redrafted by the Drafting Committee; several of the articles had already been approved by the Commission.

2. Mr. PAREDES said that he would abstain on all the articles because he had not received the Spanish text.

3. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee proposed the following redraft of article 8:

“1. Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the states participating in the adoption of the text may provide either in the treaty itself or in a separate agreement:

“(i) that signature shall take place on a subsequent occasion; or

“(ii) that the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

“2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the state concerned, in which case the signature is subject to confirmation.

“(b) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

“(c) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

“3. (a) The treaty, instead of being signed, may be initialed, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the state concerned a signatory of the treaty.

“(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the state concerned shall become a signatory of the treaty.”

4. In paragraph 1, sub-paragraphs (a) and (b) of the earlier draft had been combined as suggested by Mr. Amado.<sup>1</sup>

*Article 8 was adopted.*

# ARTICLE 9. — LEGAL EFFECTS OF A SIGNATURE

5. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee proposed the following redraft of article 9:

“1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 6, paragraph 2, the signature of a treaty shall have the effects stated in the following paragraphs.

“2. Where the treaty is subject to ratification, acceptance or approval, signature does not establish the consent of the signatory state to be bound by the treaty. However, the signature

“(a) shall qualify the signatory state to proceed to the ratification, acceptance or approval of the treaty in conformity with its provisions; and

“(b) shall confirm or, as the case may be, bring into operation the obligation in paragraph 1 of article 19 *bis*.

“3. Where the treaty is not subject to ratification, acceptance or approval, signature shall:

“(a) establish the consent of the signatory state to be bound by the treaty; and

“(b) if the treaty is not yet in force, shall bring into operation the obligation in paragraph 2 of article 19 *bis*.”

6. He drew attention to the words in paragraph 2 (b), “Shall confirm or, as the case may be, bring into operation...”. The reason for those words was that, under the scheme of article 19 *bis*, the obligation not to frustrate the purpose of the treaty applied to a state which had participated in the negotiations; in the case of such a state, therefore, signature would reinforce an obligation which already existed.

*Article 9 was adopted.*

# ARTICLE 10. — RATIFICATION

7. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee proposed the following redraft of article 10:

“1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in the next paragraph.

“2. A treaty shall be presumed not to be subject to ratification by a signatory state where:

“(a) the treaty itself provides that it shall come into force upon signature;

“(b) the credentials, full-powers or other instrument issued to the representative of the state in question authorize him by his signature alone to establish the consent of the state to be bound by the treaty, without ratification;

“(c) the intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

“(d) the treaty is one in simplified form.

“3. However, even in cases falling under the preceding paragraph, ratification is necessary where:

“(a) the treaty itself expressly contemplates that it shall be subject to ratification by the signatory states;

“(b) the intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

“(c) the representative of the state in question

<sup>1</sup> 660th meeting, para. 5.

has expressly signed 'subject to ratification' or his credentials, full-powers or other instrument duly exhibited by him to the representatives of the other negotiating states expressly limit the authority conferred upon him to signing 'subject to ratification'."

8. Mr. ROSENNE said that he would have to dissent completely from article 10. He could not accept the principle stated in paragraph 1, and could not therefore accept either paragraph 2 which was in the form of an exception to that principle, or paragraph 3 which was apparently in the form of an exception to the exception. The reasons for his dissent appeared more fully in what he had said in the 646th and 660th meetings, and he asked that his dissent should be recorded.

9. Mr. TUNKIN said that paragraph 1 of article 10 was completely at variance with the existing rules of international law. It was not correct to state that treaties in principle required ratification; the true situation was that a treaty required ratification if it expressly so provided. In all other cases, a treaty was not subject to ratification under international law. Ratification might, of course, be required under the constitutional law of a country, but that did not affect the position in international law.

10. It was entirely for the parties to a treaty to decide whether ratification was required or not. In modern practice, most treaties did not require ratification, and there were no grounds whatsoever for considering those treaties as an exception to a rule.

11. Mr. CASTRÉN said he agreed with Mr. Rosenne and Mr. Tunkin; he would not, however, vote against article 10, because it allowed so many exceptions to the principle stated in paragraph 1 that the force of that paragraph was considerably weakened.

12. Mr. BARTOŠ said that he would be unable to vote in favour of sub-paragraphs 2(c) and 2(d). Ratification was the act by which a state committed itself to be bound by a treaty; it was an important act which produced serious consequences. He could not admit that the question whether a treaty was subject to ratification or not should be left uncertain, as would occur under the provisions of sub-paragraph 2(c).

13. Nor could he accept sub-paragraph 2(d), under which the requirement of ratification would depend not on the substance but on the form of the treaty.

14. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the text represented a compromise, and was accordingly unlikely to satisfy anyone fully. The majority view, however, had been that if a general rule had to be stated, it should be that treaties required ratification.

15. His personal view was that there were in fact two rules, one applicable to formal treaties and the other to simplified treaties.

16. As special rapporteur, he suggested that the opening words of paragraph 3 should be amended to read:

"3. However, even in cases falling under sub-paragraphs (a) and (d) of the preceding paragraph, ratification is necessary where:"

17. Sub-paragraphs 2(b) and 2(c) referred to cases where a clear intention to dispense with ratification had been expressed; it was inconceivable that a contrary intention would appear from the same set of circumstances and so give rise to the application of paragraph 3.

18. Mr. BARTOŠ said that, in the light of the explanations given by the special rapporteur, he would have to dissent from the whole of paragraph 2, in the interests of the defence of the sovereignty of small states. No negotiator was authorized to dispense with ratification, and any suggestion to that effect could only facilitate pressure by powerful nations upon smaller ones in connexion with the signing of international agreements.

19. Mr. CADIEUX supported the amendment suggested by the special rapporteur.

20. Mr. YASSEEN said he reserved his position on article 10, for the reasons stated by him during the earlier discussion.<sup>2</sup>

*The special rapporteur's amendment was adopted.*

*Article 10 as thus amended was adopted.*

#### ARTICLE 11.—ACCESSION

21. The CHAIRMAN said that the Drafting Committee proposed the following redraft of article 11:

"A state may become a party to a treaty by accession in conformity with the provisions of articles 7 and 7 bis of the present articles when

"(a) it has not signed the treaty and either the treaty specifies accession as the procedure to be used by such a state for becoming a party, or

"(b) the treaty has become open to accession by the state in question under the provisions of article 7 bis."

22. The article contained references to article 7 bis. Its adoption would therefore be subject to the understanding that the Commission would revert to it if it were in any way affected by the provisions of article 7 bis when adopted in final form.

*Article 11 was adopted on that understanding.*

#### ARTICLE 12.—ACCEPTANCE OR APPROVAL

23. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee proposed the following redraft of article 12:

"A state may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 7 and 7 bis when:

"(a) the treaty provides that it shall be open to signature subject to acceptance or approval and the state in question has so signed the treaty; or

"(b) the treaty provides that it shall be open to participation by simple acceptance or approval without prior signature."

24. Mr. CASTRÉN suggested that the French text of sub-paragraph (a) should be amended to correspond with the English: "has so signed the treaty".

*It was so agreed.*

*Article 12 was adopted.*

<sup>2</sup> 660th meeting, para. 41.



ARTICLE 13. — THE PROCEDURE OF RATIFICATION,  
ACCESSION, ACCEPTANCE AND APPROVAL

25. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee proposed the following redraft of article 13:

“1. (a) Ratification, accession, acceptance or approval shall be carried out by means of a written instrument.

“(b) Unless the treaty itself expressly contemplates that the participating states may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

“(c) If a treaty offers to the participating states a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

“2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory states, the instrument shall become operative:

“(a) in the case of a treaty for which there is no depositary, upon the formal communication of the instrument to the other party or parties, and in the case of a bilateral treaty normally by means of an exchange of the instrument in question, duly certified by the representatives of the states carrying out the exchange;

“(b) in other cases, upon deposit of the instrument with the depositary of the treaty.

“3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with sub-paragraph (b) of the preceding paragraph, the state in question shall be given an acknowledgment of the deposit of its instrument, and the other signatory states shall be notified promptly both of the fact of such deposit and of the terms of the instrument.”

*Article 13 was adopted.*

ARTICLE 14. — LEGAL EFFECTS OF RATIFICATION,  
ACCESSION, ACCEPTANCE AND APPROVAL

26. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee proposed the following redraft of article 14:

“The communication of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 13:

“(a) establishes the consent of the ratifying, acceding, accepting or approving state to be bound by the treaty, and

“(b) if the treaty is not yet in force, brings into operation the applicable provisions of article 19 *bis*, paragraph 2.”

*Article 14 was adopted.*

ARTICLE 17. — FORMULATION OF RESERVATIONS

27. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee proposed the following redraft of article 17:

“1. A state may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

“(a) the making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

“(b) the treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

“(c) the treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

“(d) in the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

“2. (a) Reservations, which must be in writing, may be formulated:

“(i) upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the Final Act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

“(ii) upon signing the treaty at a subsequent date; or

“(iii) upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.

“(b) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving state, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation.

“3. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated (a) in the case of a treaty for which there is no depositary, to every other state party to the treaty or to which it is open to become a party to the treaty; and (b) in other cases, to the depositary, which shall transmit the text of the reservation to every such state.”

28. Mr. BARTOŠ said that the statement in sub-paragraph 2(a)(i) was correct. However, it sometimes happened that a state wished to participate in a treaty but was unable to obtain from the depositary the final act or the records of the other documents of the conference in which the reservations of some of the participants

were recorded. Inability to obtain essential information of that kind frequently led to difficulties which gave rise to litigation over the precise content of the contractual obligations, particularly their scope and interpretation. Perhaps it could be explained in the commentary that participating states should be able to ascertain the contents of such documents and that the depositary was obliged to obtain those documents and place them at the disposal of the states concerned.

29. Sir Humphrey WALDOCK, Special Rapporteur, said that he would include an explanation to that effect in the commentary.

*Article 17 was adopted.*

#### ARTICLE 18.—ACCEPTANCE OF AND OBJECTION TO RESERVATIONS

30. Sir Humphrey WALDOCK, Special Rapporteur, said the Drafting Committee proposed the following redraft of article 18:

“1. Acceptance of a reservation not provided for by the treaty itself may be express or implied.

“2. A reservation may be accepted expressly:

“(a) in any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

“(b) by a formal notification of the acceptance of the reservation addressed to the depositary of the treaty, or if there is no depositary, to the reserving state and every other state entitled to become a party to the treaty.

“3. A reservation shall be regarded as having been accepted by a state if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

“4. An objection by a state which has not yet established its consent to be bound by the treaty shall have no effect if, after the expiry of two years from the date when it gave formal notice of its objection, it has still not established its own consent to be bound by the treaty.

“5. An objection to a reservation shall be formulated in writing and shall be notified:

“(a) in the case of a treaty for which there is no depositary, to the reserving state and to every other state party to the treaty or to which it is open to become a party, and

“(b) in other cases, to the depositary.”

*Article 18 was adopted.*

31. The CHAIRMAN said that articles 18 *bis* and 19 had already been adopted at the previous meeting; he therefore invited the Commission to consider articles 19 *bis* to 27 as redrafted by the Drafting Committee.

#### ARTICLE 19 *bis*.—THE RIGHTS AND OBLIGATIONS OF STATES PRIOR TO THE ENTRY INTO FORCE OF THE TREATY

32. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 19 *bis*:

“1. A state which takes part in the negotiation,

drawing up or adoption of a treaty or which has signed a treaty subject to ratification, acceptance or approval is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

“2. Pending the entry into force of a treaty and provided that such entry into force is not unduly delayed, the same obligation shall apply to the state which, by signature, ratification, accession, acceptance or approval has established its consent to be bound by the treaty.”

33. Mr. BARTOŠ expressed appreciation of the way in which the Drafting Committee and the special rapporteur had found suitable language to express the obligation of good faith to be observed between the signature and entry into force of a treaty.

*Article 19 bis was adopted.*

#### ARTICLE 20.—ENTRY INTO FORCE OF TREATIES

34. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 20, the title of which had now been shortened:

“1. A treaty enters into force in such manner and on such date as the treaty itself may prescribe.

“2. (a) Where a treaty, without specifying the date upon which it is to come into force, fixes a date by which ratification, acceptance, or approval is to take place, it shall come into force upon that date;

“(b) The same rule applies *mutatis mutandis* where a treaty, which is not subject to ratification, acceptance or approval, fixes a date by which signature is to take place.

“(c) However, where the treaty specifies that its entry into force is conditional upon a given number, or a given category, of states having signed, ratified, acceded to, accepted or approved the treaty and this has not yet occurred, the treaty shall not come into force until the condition shall have been fulfilled.

“3. In other cases, where a treaty does not specify the date of its entry into force, the date shall be determined by agreement between the states which took part in the adoption of the text.

“4. The rights and obligations contained in a treaty become effective for each party as from the date when the treaty enters into force with respect to that party, unless the treaty expressly provides otherwise.”

35. Mr. BARTOŠ, referring to paragraph 2 (a), said it should be explained in the commentary that unless two states had ratified, accepted or approved by the specified date, the treaty did not come into force, simply because the time-limit had expired. It was a juridical absurdity that a treaty should be in force without there being at least two parties between which it could apply.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2 (c) was intended to cover that point and governed both the preceding paragraphs.

*Article 20 was adopted.*

## ARTICLE 21.—PROVISIONAL ENTRY INTO FORCE

37. The CHAIRMAN said that the special rapporteur, at the request of the Drafting Committee, had prepared the following text for a new article 21, on provisional entry into force;<sup>3</sup> it would replace the special rapporteur's original article 21, on the legal effects of entry into force:

"A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the states concerned shall have agreed to terminate the provisional application of the treaty."

38. Mr. ROSENNE said that he did not wish to propose any change in the wording but would like to know whether he was correct in assuming that the second sentence covered the eventuality where the parties agreed to put the treaty into force provisionally pending the occurrence of a certain event and that if that event did not occur the treaty automatically ceased to be provisionally in force. Sometimes, where a formal agreement was made subject to ratification, an agreement in simplified form was concluded for the interim period to bring the former provisionally into force until it had been ratified or until it had become clear that it was not going to be ratified. Perhaps some explanation on that point would be given in the commentary.

39. Sir Humphrey WALDOCK, Special Rapporteur, said that an explanation was necessary in the commentary to indicate that that eventuality was covered, since the language of article 21 did not specifically cover the point.

40. Mr. BARTOŠ thanked the special rapporteur for preparing a text that took into account a practice followed by Italy and Yugoslavia to which both Mr. Ago and himself had had occasion to refer.<sup>4</sup> He agreed that some explanation was needed in the commentary to forestall the argument that there was something illogical in a treaty being brought into force provisionally and made subject to the exchange of instruments of ratification in order to have binding force.

*Article 21 was adopted.*

## ARTICLE 22.—THE REGISTRATION AND PUBLICATION OF TREATIES

41. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 22:

"1. The registration and publication of treaties entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

"2. Treaties entered into by any party to the

present articles, not a Member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

"3. The procedure for the registration and publication of treaties shall be governed by the regulations in force for the application of Article 102 of the Charter."

42. Mr. ROSENNE suggested that article 22 should also refer to the filing and recording of treaties.

43. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had given thought to that point and had concluded that it would suffice to speak of registration, despite the fact that under the United Nations regulations as adopted in General Assembly resolution 97 (I) and amended by resolution 482 (V) the Secretary-General was required to file and record treaties transmitted by non-member states. The general notion of registration covered that process and Mr. Lachs had put forward the view that the article as drafted might encourage the Secretary-General to "register" rather than "file" the treaties of non-member states.

44. Mr. ROSENNE pointed out that Article 102 of the Charter imposed an obligation on Member States to register their treaties with the Secretary-General and contained sanctions for non-compliance with that requirement. As it stood, article 22 was inconsistent with the regulations and attention to that fact must be drawn in the Commentary.

45. Mr. LACHS said that no problem would arise if non-member states were willing to comply with the regulations under the terms of a draft treaty of the kind under consideration. The only real difference between registration and filing was a technical one and in the draft it was desirable to propose a uniform rule for all states.

46. Mr. ROSENNE said that he was bound to reserve his position on paragraph 2, which was inconsistent with paragraph 1 since the sanctions laid down in Article 102 of the Charter could not be imposed on non-member states. The notion of registration was being used in an entirely different sense in those two paragraphs.

47. Mr. LACHS pointed out that the institution of registration was one and the same, though the legal consequences might be different for member and non-member states.

*Article 22 was adopted.*

## ARTICLE 24.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS NO DEPOSITARY

48. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 24:

"1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested states shall by mutual agreement correct the error either:

"(a) by having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

<sup>3</sup> 661st meeting, para. 2.

<sup>4</sup> 645th meeting, para. 79.

“(b) by executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

“(c) by executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

“2. The provisions of paragraph 1 shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

“3. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the original text as from the date the latter was adopted unless the parties shall otherwise determine.

“4. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.”

*Article 24 was adopted.*

#### ARTICLE 25.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS A DEPOSITARY

49. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 25:

“1. (a) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the states which participated in the adoption of the text and to the attention of any other states which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction.

“(b) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the states which are or may become parties to the treaty.

“2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the states mentioned in paragraph 1 (b) of the present article.

“3. The provisions of paragraph 1 shall likewise apply where two or more authentic texts of a treaty are not concordant, and a proposal is made that the wording of one of the texts should be corrected.

“4. If an objection is raised to a proposal to correct a text under the provisions of paragraphs 1 or 3 of the present article, the depositary shall notify the objection to all the states concerned together with any other replies received in response to the notifica-

tions mentioned in paragraphs 1 and 3. However, if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

“5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the states concerned shall otherwise decide.

“6. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.”

*Article 25 was adopted.*

#### ARTICLE 26.—THE DEPOSITARY OF MULTILATERAL TREATIES

50. The CHAIRMAN said that the following text of article 26 had already been approved at the 662nd meeting:

“1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the states which adopted it shall have otherwise determined, the depositary shall be:

“(a) in the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

“(b) in the case of a treaty drawn up at a conference convened by the states concerned, the state on whose territory the conference is convened.

“2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating states shall consult together concerning the nomination of another depositary.”

*Article 26 was adopted.*

#### ARTICLE 27.—THE FUNCTIONS OF A DEPOSITARY

51. The CHAIRMAN said the Drafting Committee proposed the following redraft of article 27:

“1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all states parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

“2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in the subsequent paragraphs of this article.

“3. The depositary shall have the duty:

“(a) to prepare any further texts in such additional languages as may be required either under the terms of the treaty of the rules in force in an international organization;

“(b) to prepare certified copies of the original text or texts and transmit such copies to the states mentioned in paragraph 1 ;

“(c) to receive in deposit all instruments and ratifications relating to the treaty and to execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument relating to the treaty ;

“(d) to furnish to the state concerned an acknowledgment in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the other states mentioned in paragraph 1 of the receipt of such instrument or notification.

“4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

“5. On a reservation having been formulated, the depositary shall have the duty :

“(a) to examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations and, if need be, to communicate on the point with the state which formulated the reservations ;

“(b) to communicate the text of any reservation and any notifications of its acceptance or objection to the interested states as prescribed in articles 17 and 18 of the present articles.

“6. On receiving a request from a state desiring to accede to a treaty under the provisions of article 7 *bis*, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

“7. Where a treaty is to come into force upon its signature by a specified number of states or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty :

“(a) promptly to inform all the states mentioned in paragraph 1 when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled ;

“(b) to draw up a *procès-verbal* of the entry into force of the treaty, if the provisions of the treaty so require.

“8. In the event of any difference arising between a state and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the state concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested states.”

52. Mr. ROSENNE suggested that, at the end of paragraph 8, the words “or the competent organ of the international organization concerned” should be added.

53. Sir Humphrey WALDOCK, Special Rapporteur, said he would accept that amendment.

*Article 27 as thus amended was adopted.*

#### ARTICLE 7 *bis*. — OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES

54. Sir Humphrey WALDOCK, Special Rapporteur, said that he had had some difficulty with the commentary on article 7 *bis*, which the Commission might or might not wish to alter in the light of its decision on article 7 at the previous meeting. The effect of that decision would be that, in the case of general multilateral treaties, participation would be open to every sovereign state unless a contrary intention was expressed. That did not necessarily mean that there were no cases of general multilateral treaties containing participation clauses, so that the problem of the admission of further states to participation in a treaty remained.

55. The object of article 7 *bis* had been to provide a procedure for participation which would not involve the operation of the unanimity rule. If only paragraph 1 of article 7 *bis* were retained, the unanimity rule would apply to all treaties, including general multilateral treaties containing clauses limiting participation. Admittedly, the difficulty would not arise in the majority of cases, where there was very wide participation, but in his opinion paragraphs 2 and 3 should not be deleted because of the decision taken by the Commission at the previous meeting.

56. Mr. BRIGGS observed that, in the light of the wording of article 7, which referred to sovereign states, article 7 *bis* would open participation to states which were not sovereign.

57. Mr. TUNKIN considered that, while Mr. Briggs' comment was pertinent, the matter might be remedied by simply deleting the word “sovereign” from article 7.

58. With regard to article 7 *bis*, he suggested that the words “general multilateral” should be deleted from the first sentence of paragraph 2.

59. Sir Humphrey WALDOCK, Special Rapporteur, said he did not consider Mr. Tunkin's solution satisfactory, because it did not take into account the case of plurilateral treaties, where the accession of additional states certainly required the unanimous concurrence of the existing parties.

60. One solution would be to retain paragraph 2 to cover cases where general multilateral treaties were open to all states unless a contrary intention was expressed in the treaty itself. Another solution might be to treat certain broad multilateral treaties on the same basis as general multilateral treaties.

61. If the Commission decided against retaining paragraphs 2 and 3, however, it would be necessary to draft a separate article to cover the case of treaties between small groups of states, where the accession of other states was governed by the unanimity rule.

62. The CHAIRMAN, speaking as a member of the Commission, noted that, since article 7 applied to general multilateral treaties other than those containing express participation clauses, a certain group of general

multilateral treaties still remained to be dealt with in article 7 *bis*.

63. Mr. TUNKIN said he doubted the desirability of retaining article 7 *bis*.

64. Mr. ELIAS suggested that the decision on article 7 *bis* should be deferred until the next meeting.

*It was so agreed.*

# DRAFT REPORT OF THE COMMISSION ON THE WORK OF ITS FOURTEENTH SESSION (*resumed from the previous meeting*)

## CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.101)

65. The CHAIRMAN invited the Commission to resume its consideration of the draft report, starting with Chapter I.

66. Mr. BRIGGS observed that it was customary in the Commission's reports to indicate in section I whether members had attended the session. It should therefore be recorded that Mr. Kanga had been absent throughout the session.

67. Mr. TUNKIN said that in some of the Commission's past reports mention had been made of the Drafting Committee and its work, of which the Sixth Committee of the General Assembly should be aware.

68. The CHAIRMAN said that the amendments suggested by members would be taken into account.

*Chapter I as thus amended was adopted.*

## CHAPTER II: LAW OF TREATIES

### INTRODUCTION (A/CN.4/L.101/Add.1) (*resumed from the previous meeting*)

69. The CHAIRMAN invited the Commission to resume its consideration of Chapter II of the draft report.

70. Mr. TUNKIN said that although the twelve paragraphs of the introduction to Chapter II had been adopted at the previous meeting, he would like to suggest three amendments. First, that it should be noted that the draft articles submitted by Mr. Brierly in his first report in 1950 had been in the form of a draft convention. It was only in 1956 that, at the suggestion of a later special rapporteur, Sir Gerald Fitzmaurice, the Commission had tacitly accepted, without any actual formal decision, the idea that the draft articles should be in the form of a code.

71. Secondly, that the presentation of the quotation in paragraph 6 from the Commission's 1956 report should be changed. That quotation set out the arguments in favour of a code but it was placed immediately after a reference to the Commission's 1959 report. In order to give a clearer picture of how the Commission's views had evolved over the years, it would be more appropriate to place that quotation earlier in the introduction; the chronological order would then make it clear that the arguments in question had been put forward in connexion with the Commission's tacit acceptance of 1956 and not

in 1959, when the Commission had not taken any decision on the choice between a code and a convention.

72. Thirdly, that in paragraph 7 the sentence: "...an expository code, however well formulated, cannot in the nature of things have the same authority or be so effective as a convention for consolidating the law..." should be amended. That sentence seemed to place on the same footing a code, which expressed only the views of the Commission, and a convention signed by states and binding upon them; a code could not be said to have "authority".

73. Sir Humphrey WALDOCK, Special Rapporteur, said that to meet Mr. Tunkin's first point, he would introduce a reference to the fact that Mr. Brierly's original draft articles had been in the form of a convention.

74. On the second point, however, he said that the passage from the 1956 report to which Mr. Tunkin had referred had been reproduced in the Commission's 1959 report. That report contained only the arguments in favour of a code and there was no doubt that in 1959 the Commission had been contemplating a code.

75. To meet Mr. Tunkin's third point, he suggested the deletion of the words "have the same authority or". The passage would then read "...an expository code cannot be so effective as a convention...".

76. Mr. TUNKIN said he would not press his second point.

*The introduction to Chapter II as thus amended was adopted.*

## COMMENTARY TO ARTICLE 1.—DEFINITIONS

77. The CHAIRMAN invited the Commission to consider the commentary to article 1.

78. Mr. BARTOŠ said the commentary to article 1 conflicted both with the daily practice of the United Nations and with the express provisions of article 1 and other articles of the General Assembly's regulations on the registration and publication of treaties. Those regulations did not distinguish between instruments on grounds of form; the General Assembly had taken the view that all international agreements constituted treaties. It was therefore quite out of keeping that the commentary should draw a distinction between "treaties *stricto sensu*" and agreements in simplified form. In his opinion, even agreements in simplified form were treaties *stricto sensu*.

### Paragraph (1)

79. Mr. AGO said the first sentence of the commentary was unsatisfactory; it was hardly appropriate to say that the definitions were "not intended to provide full definitions".

80. Mr. TUNKIN suggested the deletion of the first sentence; the second sentence was sufficient to express the desired meaning.

81. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed to the deletion of the first sentence.

*Paragraph (1) as thus amended was adopted.*

*Paragraph (2)*

82. Mr. TUNKIN proposed that in the second sentence the words "which is commonly subject to ratification" should be deleted.

83. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed to that amendment.

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

84. Mr. TUNKIN proposed that the words "much larger than that of the treaty or convention *stricto sensu*, i.e. the single formal instrument" should be omitted. It was by no means certain that agreements in simplified form were more numerous than formal instruments. Moreover, he agreed with Mr. Bartoš that the reference to treaties *stricto sensu* could give rise to controversy.

85. Mr. LACHS said that recent statistics suggested that approximately one-third of international agreements were in simplified form.

86. Mr. CASTRÉN said he saw no reason for using in the English text of paragraphs (3) and (4) the French expression "*accord en forme simplifiée*" instead of the English expression which the Commission had now accepted, "treaty in simplified form". In fact, to correspond to that English expression the French should be changed to "*traité en forme simplifiée*".

87. Mr. GROS said that in French it was preferable to retain the expression "*accord en forme simplifiée*", which was in general use.

88. Sir Humphrey WALDOCK, Special Rapporteur, suggested the use throughout of "treaty in simplified form" in English and "*accord en forme simplifiée*" in French. That would apply both to the articles and to the commentary.

89. He could agree to the deletion of the last portion of the second sentence of paragraph (3), as suggested by Mr. Tunkin.

90. Mr. AMADO said it seemed unnecessary to refer to Sir Hersch Lauterpacht by name.

91. Mr. BARTOŠ said that the reference to the report by Sir Hersch Lauterpacht should be placed in a footnote.

92. Sir Humphrey WALDOCK, Special Rapporteur, agreed.

93. Mr. GROS said that he would not object if the reference were given in the footnote, but the idea contained in the last sentence should be retained; it could be merged with the end of the second sentence so as to read:

"the number of such agreements ... is now very large and their use is moreover steadily increasing".

*It was so agreed.*

94. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt paragraph (3) as amended by Mr. Gros and with the changes accepted by the special rapporteur.

*Paragraph (3) as thus amended was adopted.*

*Paragraph (4)*

95. Mr. AGO proposed that, in both the passages in which it occurred, the expression "treaties *stricto sensu*" should be replaced by "formal treaties".

96. Mr. CADIEUX, while supporting Mr. Ago's proposal in principle, said he would prefer the expression "formal agreement", because it was closer to the corresponding French expression.

97. Mr. de LUNA proposed that the expression "code", which occurred twice, should be replaced by "convention".

98. Mr. BARTOŠ pointed out that the first sentence referred to the juridical differences between formal agreements on the one hand and treaties in simplified form on the other, with respect to their entry into force. In actual fact, in many countries, treaties in simplified form were subject to ratification.

99. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept the amendments proposed by Mr. Ago and Mr. de Luna.

*Paragraph (4) as thus amended was adopted.*

*Paragraph (5)*

100. Mr. VERDROSS proposed that in the first sentence the words "treaties in the narrower sense of the word" should be omitted.

101. Mr. BARTOŠ proposed that footnote 22 should be expanded to include a reference to article 1 of the General Assembly's regulations on the registration and publication of treaties.

102. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept the amendments proposed by Mr. Verdross and Mr. Bartoš.

*Paragraph (5) as thus amended was adopted.*

*Paragraph (6)*

103. Mr. TUNKIN suggested that the order of paragraphs (7) and (6) should be reversed; paragraph (7) referred to the Statute of the International Court of Justice and so should take precedence over the opinions of jurists, which were cited in paragraph (6).

104. Mr. LACHS supported Mr. Tunkin's suggestion.

105. Sir Humphrey WALDOCK, Special Rapporteur, said he preferred the existing order because paragraph (7), as it stood, provided a suitable ending: the effect was stronger if the argument was concluded with a reference to the Statute of the International Court of Justice. If the opinions of jurists were placed after paragraph (7), the effect would be weakened.

106. The CHAIRMAN said that, if there were no objections, he would consider that the Commission agreed to retain the existing order of the paragraphs.

*It was so agreed.*

107. Mr. TUNKIN said he saw no reason for singling out one British and two French jurists for special mention in paragraph (6). The names of writers should be mentioned, if at all, in footnotes.



108. Mr. GROS said that unless he was mistaken, the commentaries to the Commission's draft articles on the Law of the Sea contained numerous references to writers, which were of considerable value to readers.

109. The CHAIRMAN said that it was not usual for the Commission to refer to writers by name in the commentaries to articles adopted by the Commission itself.

110. Mr. LIANG, Secretary to the Commission, said that there was a great difference between reports by special rapporteurs and the Commission's own reports. In the reports of special rapporteurs, there was usually a wealth of references to writers: in the Commission's reports, such references were used very sparingly.

111. Mr. AMADO said that references to learned writers should be avoided in the Commission's reports; it should be taken for granted that the members of the Commission read the legal literature on the topics which the Commission discussed.

112. Sir Humphrey WALDOCK, Special Rapporteur, said that he would move the references to individual writers to the footnotes. He had referred to the two French writers because they had been mentioned in the Commission's previous reports on the same topic and to Lord McNair because he was the author of a well-known book on the law of treaties.

113. It would be a pity if the Commission adopted as an absolute rule that its reports would never cite learned writers. For the purposes of the draft under discussion, however, he noted the desire that such references should be used sparingly and should be placed in footnotes.

114. The CHAIRMAN said that the special rapporteur's understanding was correct: there was no intention to adopt any general rule on the subject and the approach suggested was suitable for the Commission's present purposes.

*Paragraph (6) as thus amended was adopted.*

#### *Paragraph (7)*

115. Mr. AMADO said that, in the fourth sentence, it was not appropriate to say that the International Court of Justice was directed to "apply" certain "elements".

116. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the sentence should be redrafted to read:

"Again in Article 38, paragraph (1), the Court is directed to apply, in reaching its decisions, 'international conventions'".

*Paragraph (7) as thus amended was adopted.*

#### *Paragraph (8)*

117. Mr. BARTOŠ said it should be made clear that the list mentioned of "other subjects of international law" was not exhaustive.

118. The opinion was gaining ground that groups of individuals could be subjects of international law, though that opinion had never been accepted by the Commission.

119. Mr. AGO said that, in French, the more usual term "*insurgés*" should be substituted for "*les collectivités en rébellion*".

120. The last sentence should be re-cast in more non-committal form. The theory that individuals could be subjects of international law had been put forward by some writers but was not recognized in practice.

121. Mr. LACHS said he thought that the wording of the penultimate sentence met Mr. Bartoš's second point.

122. The last sentence should be dropped altogether as views on that controversial issue were unlikely to be unanimous.

123. Mr. VERDROSS suggested that the expression "insurgent communities" should be rendered in French by the usual term "*insurgés reconnus comme belligérants*", seeing that not all insurgents were subjects of international law.

124. Mr. TUNKIN said he did not favour that suggestion because it raised the question of recognition. It would be sufficient if the word "communities" were deleted.

*It was so agreed.*

125. Mr. CADIEUX proposed that the last two sentences should be amalgamated by deleting the words "Whether individuals or corporations are or are not considered to be 'subjects of international law', they", and substituting the word "which".

126. Sir Humphrey WALDOCK, Special Rapporteur, said that he was prepared to drop the reference to the controversy as to whether individuals and corporations were or were not considered to be subjects of international law.

127. Mr. AGO said that the solution proposed by Mr. Cadieux was acceptable.

*Mr. Cadieux's amendment was adopted.*

*Paragraph (8) as thus amended was adopted.*

#### *Paragraph (9)*

128. Mr. TUNKIN proposed the deletion of the second and third sentences, which read:

"For example, two states may enter into a transaction concerning the sale or lease of diplomatic premises or the sale of commercial goods by an agreement concluded under the local law of one of them. In that case, even if the agreement has as its background the international relations between the two states under international law, the conclusion and application of the agreement itself is not governed by international law, and it is not a treaty for the purposes of the draft articles".

The example given was very controversial.

129. Sir Humphrey WALDOCK, Special Rapporteur, said that the passage had been inserted in deference to Mr. Bartoš's wish that an explanation should be given of the difference between agreements regulated by public international law and those regulated by private law.<sup>5</sup>

130. Mr. BARTOŠ said he was grateful but felt that some reference should be added to the fact that international agreements might be regulated by private international law.

<sup>5</sup> 655th meeting, paras. 59-62.

131. Mr. ROSENNE proposed the deletion of the second sentence and of the words "conclusion and" in the third sentence.

132. Mr. AGO considered that the last sentence at least should be dropped since it concerned a matter regulated by national law.

133. Mr. YASSEEN said that in most cases when there was a conflict of laws the dispute was settled by reference to national law and not to private international law, so that the statement in the commentary was correct.

134. Mr. BARTOŠ said he disagreed with Mr. Yasseen. He was firmly of the opinion that the submission of an instrument to private international law was not always necessarily linked to the municipal law of the states concerned. The modern tendency was definitely to apply the rules of private international law directly, particularly the so-called uniform rules.

*Mr. Tunkin's amendment was adopted.*

*Paragraph 9 as thus amended was adopted.*

#### *Paragraph (10)*

135. Mr. ROSENNE proposed the deletion of the words "as in the case of declarations under the optional clause of the Statute of the International Court", at the end of the sixth sentence; he would not wish that one particular interpretation out of the several possible ones should be thus endorsed by the Commission.

136. Mr. AGO said that the second sentence should be drafted in stronger terms so as to emphasize that the fact that they were verbal did not diminish the legal force of such agreements under international law.

137. Mr. BARTOŠ said that, as it stood, paragraph (10) did not conform with practice. The question was not whether an agreement had been expressed in writing but whether there was written evidence of an agreement even if it were an oral one. It was common practice for oral agreements to be confirmed by *notes verbales* or other similar documents which did not bear signatures; but the written document recognized by the party concerned was sufficient for the agreement in question to be registered as a treaty with the United Nations Secretariat.

138. The word "oral" should be substituted for the word "verbal" throughout the paragraph. The word "verbal" was badly chosen, because it applied equally to the terms employed in treaties in written form and was an expression which led to endless disputes. The Commission had intended to draw a distinction between treaties in written form and treaties concluded by oral agreement. A satisfactory term was therefore needed.

139. Sir Humphrey WALDOCK, Special Rapporteur, suggested that to meet Mr. Ago's point, the beginning of the second sentence could be amended to read "this is not to deny the legal force of all agreements under international law".

*It was so agreed.*

140. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the word "verbal" should be replaced by the word "oral".

141. He had no objection to the deletion proposed by Mr. Rosenne but the question had been discussed before and some members had seemed to want the declaration to be treated on that basis, but there was no need to make any reference to it.

*Mr. Rosenne's amendment was adopted.*

*Paragraph (10) as thus amended, was adopted.*

#### *Paragraph (11)*

142. Mr. AGO proposed the deletion of the word "invariable" in the second sentence.

*It was so agreed.*

143. Mr. BARTOŠ said that, although he was opposed to the institution of treaties in simplified form, he was prepared not to reject paragraph (11) outright, because its language was not too categorical. He should be considered as having abstained on it.

*Paragraph (11) as thus amended was adopted.*

#### *Paragraph (12)*

*Paragraph (12) was adopted without comment.*

#### *Paragraph (13)*

144. Mr. CASTRÉN, with regard to the statement in the first sentence, that "The remaining definitions do not require comment, with the exception of 'reservation'", said he considered that a further explanation was needed of the difference between accession, acceptance and approval "on the international plane", to use the words of the definition itself.

145. Sir Humphrey WALDOCK, Special Rapporteur, said that he would be reluctant to expand the paragraph, particularly as further explanations would appear in the commentary to subsequent articles.

146. Mr. BARTOŠ suggested that Mr. Castrén's point could be met by appropriate cross-references. In any event, the first sentence could be dropped altogether as being too categorical.

147. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the first sentence should be deleted and a new paragraph added stating that the remaining definitions did not appear to need comment and giving the references to the relevant paragraphs of the commentary in which they were mentioned. Paragraph (13) would then be confined to the question of reservations.

*It was so agreed.*

148. Mr. AGO observed that, in seeking to cover the various kinds of reservations, the special rapporteur had omitted to mention the most obvious one, namely, the reservation under which a state declared that it would not be bound by a certain provision of the treaty. The omission should be made good.

149. Sir Humphrey WALDOCK, Special Rapporteur, said he would prepare a suitable passage for insertion in the paragraph to cover Mr. Ago's point.

150. Mr. TUNKIN proposed the deletion of the last sentence reading: "It would be inadmissible to allow a 'reservation', otherwise not allowable, to be formulated in the guise of a declaration of understanding or interpretation or any similar declaration".

*Mr. Tunkin's amendment was adopted.  
Paragraph (13), as thus amended, was adopted.*

*Paragraph (14)*

151. Mr. BRIGGS proposed the substitution of the word "approved" for the word "ratified" in the second sentence. In the United States, for example, the Senate gave advice and consent to a treaty. The word "ratified" would therefore be inappropriate.

152. Sir Humphrey WALDOCK, Special Rapporteur, said that as the word "approved" had a technical connotation he would prefer the word "endorsed".

*It was so agreed.*

*Paragraph (14), as thus amended, was adopted.*

COMMENTARY TO ARTICLE 2. — SCOPE OF THE  
PRESENT ARTICLES

*Paragraph (1)*

153. Mr. LACHS said that the last sentence reading "A provision relating to multilateral treaties could hardly, for instance, have any application to 'exchanges of notes'", was not strictly accurate, since there were examples of exchanges of notes between more than two states. For instance, there had been a tripartite exchange of notes between Greece, the United Kingdom and the United States on post-war settlements, and he could quote other cases.

154. Sir Humphrey WALDOCK, Special Rapporteur, supported by Mr. BARTOŠ, suggested that the sentence should be deleted.

*It was so agreed.*

*Paragraph (1), as thus amended, was adopted.*

*Paragraph (2)*

155. Mr. TUNKIN suggested that, in the first sentence, the word "any" should be deleted, so as to emphasize that the Commission had no doubt that oral international agreements had legal force; that the second sentence, in which the Eastern Greenland case was specifically mentioned, should be deleted; and that in the third sentence the word "may" should be omitted, again so as to avoid any element of doubt.

156. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept Mr. Tunkin's suggestions. There was some controversy concerning the Ihlen Declaration in the Eastern Greenland case, which was regarded by some as being more in the nature of an undertaking; nothing would be lost by omitting the reference to that case.

*Paragraph (2), as thus amended, was adopted.*

**Reports of subsidiary bodies of the Commission**

157. The CHAIRMAN invited the Commission to consider the reports of the Committee which it had appointed at its 634th meeting to consider the Commission's future programme of work, and of the two Sub-Committees, one on the topic of state responsibility and the other on the succession of states and governments, which it had appointed at its 637th meeting.

REPORT OF THE COMMITTEE TO CONSIDER THE  
COMMISSION'S FUTURE PROGRAMME OF WORK

158. Mr. AMADO, Chairman of the Committee, said that all Committee members with the exception of Mr. Jiménez de Aréchaga, who had unfortunately already left Geneva, had attended the one meeting the Committee had held, a few days previously, at which unanimous agreement had quickly been reached on the recommendation that the Commission's programme of work should consist of the following seven topics: The law of treaties; state responsibility; the succession of states and governments; the question of special missions; the question of relations between states and inter-governmental organizations; the principles and rules of international law relating to the right of asylum; and the juridical régime of historic waters, including historic bays.

159. It had been the opinion of the Committee that the first three items would take at least ten years to complete.

160. Mr. BARTOŠ added that the Committee had agreed that the Commission should state in its report that, although certain other topics put forward by governments were of great interest and might usefully be codified, they could not be included in the programme of work owing to lack of time. He asked that that conclusion, which had been reached in the Committee, should be recorded in the Commission's report to the General Assembly.

161. The CHAIRMAN suggested that the Commission should endorse the Committee's recommendation and submit to the General Assembly a programme of work consisting of the seven items mentioned.

*It was so agreed.*

REPORT OF THE SUB-COMMITTEE ON THE SUCCESSION  
OF STATES AND GOVERNMENTS

162. Mr. LACHS, Chairman of the Sub-Committee, said that the Sub-Committee had held two meetings. At the first meeting, a general exchange of views had been held, and members had suggested a series of topics which might constitute the elements of a future report; the general approach to and the scope of the subject had also been discussed. At the second meeting, after a further exchange of views, it had been decided that it would be premature during the current session of the Commission to draw up a list of the constituent elements of the Sub-Committee's future work, and that further thought should be given to the subject, particularly to the important issues of approach and scope. Discussion had accordingly been limited to procedural matters.

163. In the light of the decision already taken by the Sub-Committee on State Responsibility to meet in the second week of January, the Sub-Committee on the Succession of States and Governments had decided to meet from 17 January 1963, in other words, to begin its work as soon as the Sub-Committee on State Responsibility had concluded its session. That arrangement would save time and money, particularly as the membership of the two Sub-Committees overlapped.

164. The Secretariat would meanwhile proceed with a series of preparatory studies, and submit a questionnaire to States Members of the United Nations, inviting them to submit essential information on the subject, derived from treaties, diplomatic correspondence, judicial decisions and arbitration. The Secretariat itself would prepare a paper on the problem of succession in relation to membership of the United Nations, a paper on the succession of states under multilateral law-making treaties of which the Secretary-General of the United Nations was the depositary, and a digest of the decisions of international tribunals on the succession of states. Members of the Sub-Committee had been asked to submit to the Secretariat papers outlining their views on the essential issues of scope and approach not later than 1 December 1962 for circulation to the other members of the Sub-Committee. In order to provide guidance for the Sub-Committee, the Chairman of the Sub-Committee would, on the basis of those papers of members, prepare a working paper summarizing their views in time for translation and circulation before the Sub-Committee's session in January 1963.

165. Between that session and the fifteenth session of the Commission, the Chairman would prepare a paper summarizing the various stages of the Sub-Committee's work, which would constitute a preliminary report for the Commission's approval. That implied, of course, that the item of state succession would be discussed at the Commission's fifteenth session, and that guidance would thus be provided for the special rapporteur who would be appointed to deal with the question.

#### REPORT OF THE SUB-COMMITTEE ON STATE RESPONSIBILITY

166. Mr. AGO, Chairman of the Sub-Committee, said that the Sub-Committee had held one meeting, at which it had been agreed that, in a study of the topic of state responsibility, it was necessary to separate the essential principles of responsibility from all the subjects with which it had been traditionally associated. The Sub-Committee could not go further than that so far as substance was concerned, but had reached agreement on procedure.

167. It had been decided to meet again on 7 January 1963 and that its session should last for at least one week, but not beyond 16 January. Possibly the plenary Sub-Committee would meet for a week, and a small group for a few days longer. Preliminary studies had already been submitted by Mr. Jiménez de Aréchaga, Mr. Paredes and Mr. Gobbi, observer for the Inter-American Juridical Committee. It had been thought desirable that each member should submit a written *exposé* giving his general views on the subject and, in particular, should submit proposals for "chapter headings" of topics to be discussed. Those preliminary *exposés* should be sent to the Secretariat in time for translation and circulation before the January 1963 session of the Sub-Committee. No specific programme of work was yet envisaged for the Secretariat, but when the preliminary *exposés* had been received and views on them exchanged, the Sub-Committee would be in a

position to decide what research should be requested from the Secretariat and from members, how it should proceed with its work and how it should report to the Commission on its progress.

168. The CHAIRMAN suggested that the reports of the subsidiary bodies of the Commission should be summarized in the Commission's report.

*It was so agreed.*

The meeting rose at 1.20 p.m.

#### 669th MEETING

Wednesday, 27 June 1962, at 9.30 a.m.

Chairman: Mr. Radhabinod PAL

#### Draft report of the Commission on the work of its fourteenth session (resumed from the previous meeting)

##### CHAPTER II. — LAW OF TREATIES (A/CN.4/L.101/ Add.1) (resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to resume its consideration of the draft report.

##### COMMENTARY TO ARTICLE 3. — CAPACITY TO BECOME A PARTY TO TREATIES

###### Paragraph (1)

*Paragraph (1) was adopted.*

###### Paragraph (2)

2. Mr. TUNKIN proposed first, that in accordance with the Commission's decision at the previous meeting, the term "insurgent community" used in the third sentence, should be replaced by "insurgent".

3. He proposed, secondly, the deletion of the last three sentences, reading:

"As to the Holy See, treaties entered into by the Papacy are normally entered into not in virtue of its territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that state. On the other hand, both in the Geneva Convention on the Law of the Sea, and the Vienna Convention, the Holy See appears in the list of 'States' parties to the Conventions. At any rate the Holy See possesses treaty-making capacity and is certainly comprised either within the term 'States' or within the term 'other subjects of international law'."

Those sentences were redundant in view of the statement in the immediately preceding sentence that the phrase "other subjects of international law" was intended to remove any doubt about the Holy See's capacity to conclude treaties.

4. Mr. BARTOŠ, supporting Mr. Tunkin's second proposal, said that by the Lateran agreement of 1929, the Vatican State had been established with a very small territory. Many states however, still preferred to consider the Papacy as a spiritual Power, as the Holy See. Regardless, however, of whether it was considered as the Vatican State or as the Holy See, all agreed that it

possessed international juridical personality and the capacity to conclude international treaties. It was therefore unnecessary to refer to those controversial issues seeing that there was no practical difference between states with different theoretical ideas.

5. Sir Humphrey WALDOCK, Special Rapporteur, said that he had taken the passage from the 1959 commentary,<sup>1</sup> and added the indication, supplied by the Secretariat, that at the Geneva Law of the Sea 1958 and Vienna Diplomatic Relations 1961 Conferences, the Holy See had appeared in the list of "states" parties to the Conventions.

6. However, he was prepared to accept both of Mr. Tunkin's amendments.

*Paragraph (2) as thus amended was adopted.*

#### *Paragraph (3)*

7. Mr. VERDROSS proposed that the term "federation" should be replaced throughout by "federal state" and the term "component states" by whatever term was finally adopted for the text of the articles.

*It was so agreed.*

8. Mr. CADIEUX proposed the deletion of the sentence: "Examples are the Swiss cantons and the states of the Soviet Union". The treaty-making capacity of the Swiss cantons was open to controversy.

*It was so agreed.*

*Paragraph (3) as thus amended was adopted.*

#### *Paragraph (4)*

*Paragraph (4) was adopted.*

COMMENTARY TO ARTICLE 4. — AUTHORITY TO NEGOTIATE, SIGN, RATIFY, ACCEDE TO OR ACCEPT A TREATY

#### *Paragraph (1)*

9. Mr. ROSENNE proposed that in the second sentence, the expression "being entitled to have some assurance" should be amended to read "being entitled to assurance", and that in the third sentence, the phrase "there is normally a right to call for some evidence of authority" should be amended to read "there is normally a right to call for evidence of authority".

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

#### *Paragraph (2)*

10. Mr. VERDROSS said that for states with a parliamentary system of government, it would not be correct to say that the Head of State possessed an "inherent" authority to act for the state. For in fact he could not act alone; he always needed the concurrence of the government or the parliament. All that could be said was that declarations by the Head of State with respect to other states were considered as authorized by the competent organs of the state in accordance with its municipal law.

11. Mr. BARTOŠ said that the word "assume" was inappropriate; it suggested that the assumption was

open to rebuttal. It was better to state straight out in so many words, as an affirmative note, that Heads of State, Heads of Government and Foreign Ministers were considered as possessing the necessary authority.

12. Sir Humphrey WALDOCK, Special Rapporteur, said he would drop the term "inherent" and redraft the phrase to state that the persons concerned were "considered", in virtue of their offices and functions, to possess the authority in question.

*Paragraph (2) as thus amended was adopted.*

#### *Paragraph (3)*

13. Mr. TUNKIN proposed that the first sentence of paragraph (3) should be reworded in the same way as the first sentence of paragraph (2).

14. Mr. ROSENNE proposed that the reference in the fourth sentence to the practice of establishing permanent diplomatic representatives should be replaced by a reference to the establishment of permanent missions; the sentence would then read:

"The practice of establishing Permanent Missions at the Headquarters of certain international organizations... and to invest the Permanent Representative..."

15. Mr. BARTOŠ, criticizing the phrase "to represent the state in matters concerning the work of the organization", said that in his opinion, the permanent representative was authorized to represent the state in its relations with the organization but not, for example, to negotiate with other states concerning the work of the organization.

16. Mr. LACHS, to meet the point raised by Mr. Bartoš, proposed the deletion of the words "in matters concerning the work of the organization".

17. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept the amendments proposed by Mr. Tunkin, Mr. Rosenne and Mr. Lachs.

*Paragraph (4) as thus amended was adopted.*

#### *Paragraphs (5) and (6)*

*Paragraph (5) was adopted.*

*Paragraph (6) was adopted.*

#### *Paragraph (7)*

18. Mr. TUNKIN proposed the deletion from the first sentence of the words "in the case of treaties in simplified form".

*It was so agreed.*

*Paragraph (7) as thus amended was adopted.*

19. Mr. de LUNA proposed that the end of the third sentence which read: "... wide full-powers which, without mentioning any particular treaty, confer on the Minister general authority to sign treaties or categories of treaties on behalf of the state" should be amended to read: "...wide full-powers which confer on the Minister authority to sign certain categories of treaties on behalf of the state". In the course of the discussion both he and Mr. Bartoš had agreed that, in international law, the general power of attorney of municipal law did not exist; so-called "general full-powers" were merely full-powers for the purpose of signing a specific group

<sup>1</sup> Yearbook of the International Law Commission 1959, Vol. II (United Nations publication, Sales No.: 59.V.1. Vol. II), p. 96.

of treaties, or the documents which might emerge from a particular conference.

20. Mr. ROSENNE proposed the deletion of the fifth sentence which read:

"It also appears that during regular sessions of the General Assembly the Permanent Representatives are sometimes given general full-powers with respect to agreements which may be concluded during the session (see Summary of the Practice of the Secretary-General (ST/LEG/7, paragraph 35))."

21. Sir Humphrey WALDOCK, Special Rapporteur, said he would accept the amendments proposed by Mr. de Luna and Mr. Rosenne.

*Paragraph (8) as thus amended was adopted.*

*Paragraph (9)*

*Paragraph (9) was adopted.*

#### COMMENTARY TO ARTICLE 5. — ADOPTION OF THE TEXT OF A TREATY

*Paragraph (1)*

22. Mr. BRIGGS proposed that, in the third sentence, the words "agreement to be bound by the text" should be replaced by "agreement to be bound by the provisions of the text".

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

*Paragraphs (2) and (3)*

*Paragraph (2) was adopted.*

*Paragraph (3) was adopted.*

*Paragraph (4)*

23. Mr. TUNKIN said that paragraph (4) dealt at excessive length with the question of the voting rule for the adoption of the draft rules of procedure of a conference. In fact, the Commission had decided to refer in article 5 to the two-thirds majority rule for the adoption of the text of the treaty itself.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that his intention had been merely to reflect the debate and to explain the considerations which had led the Commission to discard any distinction between conferences convened by an international organization and conferences convened by the states concerned.

25. The intention of the Commission had been to enact provisions concerning the voting rule both for the adoption of the text and for the adoption of procedural rules.

26. Mr. LIANG, Secretary to the Commission, suggested that Mr. Tunkin might be satisfied if the paragraph were shortened by the omission of the passage reading:

"...it is in theory possible that the organization should itself prescribe in advance the voting rule to govern the adoption of the text at the Conference. But it is believed to be the invariable practice to leave the decision as to the voting rule to be taken by the states themselves at the Conference. Thus, according to the Secretary of the Commission, the practice of the Secretariat of the United Nations, when the General Assembly convenes a conference, is, after consultation with the groups and interests mainly concerned...."

The first sentence would then read:

"As to the first question, the Commission recognized that, when a conference is convened by an international organization for the purpose of drawing up a treaty, the Secretariat prepares provisional or draft rules of procedure for the conference, including a suggested voting rule for adoption by the conference itself."

27. Sir Humphrey WALDOCK, Special Rapporteur, said he would accept that suggestion.

*Paragraph (4) as thus amended was adopted.*

*Paragraph (5)*

28. Mr. TUNKIN said that as drafted, paragraph (5) appeared to place undue emphasis on the majority required for the decision on the voting rule. That approach was reminiscent of the original draft of article 5 but was not consistent with the text finally adopted by the Commission.

29. In order to reflect the provisions of the new text, he proposed that the final portion of paragraph (5), commencing with the sentence, "The rule proposed in paragraph (a) of the present article is that a two-thirds majority should be necessary for the adoption of a text", should be moved to the beginning of paragraph (5).

*Paragraph (5) as thus amended was adopted.*

*Paragraph (6)*

*Paragraph (6) was adopted.*

*Paragraph (7)*

30. Mr. BARTOŠ observed that the phrase "small number of states" was unduly vague.

31. Mr. ROSENNE suggested its replacement by the expression used in article 18 *bis*, "small group of states".

*It was so agreed.*

*Paragraph (7) as thus amended was adopted.*

#### COMMENTARY TO ARTICLE 6. — AUTHENTICATION OF THE TEXT

*Paragraph (1)*

*Paragraph (1) was adopted.*

*Paragraph (2)*

32. Mr. AMADO, criticizing the opening words "Previous drafts and codes of the law of treaties...", said the so-called "codes" were merely drafts prepared by academic bodies.

33. Mr. ROSENNE suggested that the first sentence should open:

"Previous drafts on the law of treaties...".

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted.*

*Paragraph (4)*

34. Mr. ROSENNE proposed that the second sentence should contain a reference to articles 24 and 25, which contained the relevant provisions.

35. Sir Humphrey WALDOCK, Special Rapporteur, said he would insert the reference.

*Paragraph (4) as thus amended was adopted.*

COMMENTARY TO ARTICLE 8. — THE SIGNATURE OR  
INITIALLING OF THE TREATY

Paragraph (1)

36. Mr. TUNKIN proposed that, in the second sentence, the expression "a restricted number or group of states" should be replaced by the expression "a small group of states".

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

Paragraph (2)

37. Mr. ROSENNE proposed that, in the fifth sentence, the words "are not in possession of authority to sign the treaty" should be replaced by the words "may not feel able to sign the treaty"; there could be a subjective element on the part of the representative concerned.

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

Paragraph (3)

38. Mr. TUNKIN said the statement in the third sentence that initialling operated "only as an act authenticating the text" was too narrow; in many cases, especially of treaties in simplified form such as agreed minutes, initialling was equivalent to full signature. He accordingly proposed the substitution of the words "in most cases" for the word "only".

39. Mr. TSURUOKA supported Mr. Tunkin's view that the present text was too narrow.

40. Sir Humphrey WALDOCK, Special Rapporteur, said he could accept Mr. Tunkin's amendment; it would involve deleting the footnote which stated: "In rare cases, initialling by a Head of State, Head of Government or Foreign Minister has been accepted as a full signature, where the intention that it should be such was manifested at the time of initialling".

*Paragraph (3) as thus amended was adopted.*

41. Mr. ROSENNE pointed out that, like the commentary, the text of article 8 did not contain the element of flexibility which Mr. Tunkin was rightly requesting, hence it did not make any exception for treaties in simplified form.

42. That could be covered when the Commission resumed its consideration of the draft articles in the light of the comments of governments.

Paragraph (4)

43. Mr. AGO said that the use of colloquialisms such as "*faire quelque chose à l'égard du texte*" in the French text of the last two sentences of paragraph (4) was to be deprecated; more technical language was needed.

44. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the wording should be changed to "authenticate the text".

*It was so agreed.*

45. Mr. BARTOŠ drew attention to the practice of having the annexes to the treaty initialled by experts, while the text of the treaty itself was initialled by negotiators.

46. Mr. TUNKIN observed that any legal effect which such annexes might have was derived from the main instrument.

47. Mr. CADIEUX pointed out that the practice referred to by Mr. Bartoš was covered by the second sentence of paragraph (4) "Initialling is employed for various purposes".

*Paragraph (4) as thus amended was adopted.*

COMMENTARY TO ARTICLE 9. — LEGAL EFFECT OF  
A FULL SIGNATURE

Paragraphs (1), (2) and (3)

*Paragraphs (1), (2) and (3) were adopted without comment.*

Paragraph (4)

48. Mr. TUNKIN proposed that the quotation from Sir Hersch Lauterpacht's report given in the third sentence should be transferred to a footnote.

*It was so agreed.*

49. Mr. TUNKIN proposed the deletion of the eighth sentence, which read "But to state such a rule in the draft articles would be almost meaningless, because it would relate to a process which was entirely internal to the government concerned and it would make it impossible to ascertain whether the obligation had or had not been observed", and the amendment of the beginning of the next sentence, to read: "The Commission, however, hesitated to include such a rule...".

50. Sir Humphrey WALDOCK, Special Rapporteur, said that although the argument stated in the sentence it was proposed should be deleted had been heard often enough during the discussion, he was prepared to accept the amendments proposed by Mr. Tunkin.

51. Mr. AGO pointed out that the penultimate sentence should be in less categorical terms. The obligation on states was to submit the treaty to their respective constitutional authorities within a certain time-limit or, if that were not done, to give reasons.

52. Sir Humphrey WALDOCK, Special Rapporteur, said he would amend the wording.

*Paragraph (4) as thus amended was adopted.*

Paragraph (5)

*Paragraph (5) was adopted without comment.*

COMMENTARY TO ARTICLE 11. — ACCESSION

Paragraph (1)

53. Mr. TUNKIN proposed the deletion of the third sentence, which read: "Thus in modern practice a multi-lateral treaty often provides that it shall be open to signature by a limited category of states or within a prescribed time limit and also to accession by states which either were not entitled to sign the treaty or failed to do so within the time limit." Such cases did occur in modern practice, but the matter was controversial and should not be implicitly approved by the Commission.

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*



*Paragraph (2)*

54. Mr. TUNKIN, referring to the passage quoted from the report of Sir Hersch Lauterpacht, said that the Commission's reports should not contain quotations from individual authors.

55. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the quotation in fact came from the report submitted to the Commission by Sir Hersch Lauterpacht, in his capacity as special rapporteur. The observation was both well expressed and useful; it could be attributed to "a previous special rapporteur" instead of to Sir Hersch Lauterpacht by name.

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

56. Mr. ROSENNE asked that the appropriate references to the passages quoted in paragraph (3) should be added in a footnote.

*It was so agreed.*

57. Mr. TUNKIN proposed the deletion of the second sentence which read: "Accession is an act which is, by its very nature, final and not capable of being made subject to ratification so that an instrument of accession drawn up 'subject to ratification' cannot rank as an accession". The statement went too far: he was inclined to think that accession subject to ratification was very close to signature, if given subject to ratification.

58. He also doubted whether the statement in the sentence beginning with the words "Such an instrument is neither an accession..." was consistent with the terms of article 11 itself.

59. Sir Humphrey WALDOCK, Special Rapporteur, said it was clear from the Secretary-General's practice that accession "subject to ratification" was not treated as signature, and the other states were therefore not notified of the receipt of such an instrument. That point ought to be made known particularly to states with less experience of treaty making.

60. As the commentary indicated, the procedure of accession "subject to ratification" had originated in the time of the League of Nations which had neither encouraged nor discouraged it. Although some reference had been made to the point in his original draft, Mr. Tunkin was right in saying that there was nothing in article 11 on the matter, since the Commission had agreed that it should not be mentioned.

61. The CHAIRMAN said he doubted whether the point should be mentioned in the commentary if there was nothing about it in the article itself.

62. Mr. TUNKIN said that the purport of the sentence he wished to have deleted was that a note or some other instrument signifying accession "subject to ratification" was contrary to international law, which was by no means the case.

63. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that "accession" was defined in article 1 as an act whereby a state established its consent to be bound by a treaty; consequently, accession could not be subject to ratification.

64. Mr. BRIGGS and Mr. CADIEUX said they agreed with the special rapporteur.

65. Mr. ROSENNE suggested that Mr. Tunkin's point be met by the deletion of the second sentence and of the word "therefore" in the third sentence.

66. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have no objection to the deletion of the second sentence since the point at issue was covered in article 1 (d).

67. He was also willing to omit the antepenultimate sentence which read: "Such an instrument is neither an 'accession' nor a 'signature' but at most a notice of a probable future accession". The last two sentences, however, should remain so as to explain why the matter was not covered in the article itself.

*It was so agreed.*

*Paragraph (3) as thus amended was adopted.*

COMMENTARY TO ARTICLE 12. — ACCEPTANCE  
OR APPROVAL

*Paragraph (1)*

68. Mr. TUNKIN suggested that in the fourth sentence the expression "almost indistinguishable" should be toned down and the idea expressed in more cautious terms.

69. In the penultimate sentence, the opening phrase, "It is, perhaps, unfortunate from a scientific point of view that the same name should be given to different procedures", was hardly necessary.

70. Sir Humphrey WALDOCK, Special Rapporteur, said that the passage could be deleted.

*It was so agreed.*

71. Mr. BARTOŠ, agreeing with Mr. Tunkin's first suggestion, said that the institution of acceptance was new and that there was no call to pronounce either for or against it. It should be left to be settled by practice whether it was a necessary and desirable institution or not.

72. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the beginning of the sentence should be amended to read: "Accordingly, the same name was given to two different procedures". A clarification of that kind would serve a useful purpose because of the confusion that existed about the nature of acceptance.

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

*Paragraph (2)*

73. Mr. LIANG, Secretary to the Commission, said that the first half of the penultimate sentence, which read: "Admittedly the draftsmen of some modern multilateral treaties are not always very precise in their choice of procedures", should be deleted because of the criticism it implied.

*It was so agreed.*

74. Mr. BARTOŠ proposed the deletion of the last sentence because it did not accurately reflect practice. Acceptance was a method whereby a state gave final consent to be bound and it should be expressed in the form of a solemn declaration.

75. Mr. ROSENNE suggested that Mr. Bartoš's point would be met by the substitution of the word "procedure" for the word "form".

76. Mr. BARTOŠ supported that suggestion.

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

77. Mr. LACHS proposed the deletion of the word "parliamentary" in the penultimate sentence, for it was not necessarily always the legislative body which "approved" treaties. In some countries no precise constitutional provision existed for the purpose, but a certain procedure had been developed for the purpose.

78. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words "constitutional procedures or practices for approving treaties" might replace the words "constitutional procedure of parliamentary approval of treaties".

79. Mr. BARTOŠ observed that the ratification of bilateral technical treaties was often, in bilateral relations, subject to governmental approval, but as far as he was aware, that procedure was not followed in the treaty practice of international organizations. The current practice of international organizations was always to ask for formal ratification.

80. He also drew attention to the new practice of tacit approval. In the case of certain protocols of mixed commissions, whose validity, in accordance with the statutes establishing the commissions, was conditional on the approval of the governments concerned, there were provisions which laid down a time-limit for approval; if approval was neither expressly signified nor expressly refused within the specified time, once the time-limit had expired it was deemed to have been given tacitly, in the absence of notice to the contrary by the state concerned. He did not, however, insist on mention being made of that point, but thought it should be mentioned in the commentary.

81. Sir Humphrey WALDOCK, Special Rapporteur, said that the United Nations *Treaty Series* provided numerous examples of treaties concluded between states and international organizations which had been submitted for approval. He was nevertheless willing to delete the last sentence.

*Paragraph (3) as thus amended was adopted.*

COMMENTARY TO ARTICLE 13.—THE PROCEDURE OF RATIFICATION, ACCEPTANCE, ACCESSION AND APPROVAL

*Paragraph (1)*

82. Mr. VERDROSS, said the second part of the first sentence which read "and in practice the instrument is usually signed by the head of state" was true only of ratification and so should be deleted; an instrument of approval could be signed by a member of the government.

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

*Paragraph (2)*

83. Mr. TUNKIN proposed the deletion of the last two sentences, which read: "It is, of course, possible to imagine cases when the line between subscribing to a treaty subject to reservations and subscribing to parts only of the treaty might appear to be one of form rather than of substance. But juridically the two acts are different and reservations have their own special rules", because they were too speculative.

84. Sir Humphrey WALDOCK, Special Rapporteur, said he could agree to that deletion, though the point might very well come up for discussion.

85. Mr. LACHS, supporting Mr. Tunkin's amendment, said the paragraph was concerned with the procedure of ratification and not with the question of reservations.

*Mr. Tunkin's amendment was adopted.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

*Paragraph (3) was adopted without comment.*

*Paragraph (4)*

86. Mr. TUNKIN proposed that the words "appears to be strong authority for this way of looking at the matter" should be deleted from the last sentence so as to refer simply to the International Court's decision in the Right of Passage Case without drawing any conclusion from it.

*Mr. Tunkin's amendment was adopted.*

87. Mr. AGO proposed the substitution in the first sentence, for the words "is rendered legally effective" of the words "produces effects on the international plane".

88. The term "effective date" in the penultimate sentence seemed hardly appropriate: it was certainly not acceptable in the French version.

89. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Ago's points could be covered by appropriate drafting changes.

90. Mr. ROSENNE said he reserved his position on paragraph (4); he was not satisfied that the rule therein stated was a desirable one.

91. At a later stage in the Commission's work he might suggest, in the interests of progressive development, a general rule providing for a short time-lag between the date of the deposit of the instrument and the date when the instrument became effective.

*Paragraph (4) as thus amended was adopted.*

COMMENTARY TO ARTICLE 14.—ACCEPTANCE  
OR APPROVAL

*Paragraph (1) was adopted subject to review of the French text.*

*Paragraph (2)*

92. Mr. de LUNA said he disliked the words "*en gros*" (English, "in general terms") in the second sentence, as they had a rather commercial flavour and made for clumsy drafting in Spanish; he suggested that they could be deleted.

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

93. Mr. AGO asked whether the statement made in the second sentence which read "Formerly, when ratification was regarded as obligatory and a mere confirmation of the authority to sign, it was generally said to operate retrospectively and to make the treaty effective as from signature", was correct.

94. Sir Humphrey WALDOCK, Special Rapporteur, said that historically it was true to say that in former times ratification was confirmation of authority to sign. States had no discretion in the matter if full-powers had been issued.

95. Mr. GROS suggested that the words "and a mere" should be deleted. In fact ratification had been more than confirmation of the authority to sign; it had expressed the state's actual consent to be bound.

96. Mr. BARTOŠ said he disagreed; in former times ratification had been regarded as confirmation of the act executed by the plenipotentiary or agent.

97. Nowadays, in his opinion, the act of ratification was a legal act whereby a state gave positive expression to its will with regard to the binding force of the treaty.

98. Mr. LIANG, Secretary to the Commission, suggested that the beginning of the sentence should be changed, since it might convey the impression that ratification was not regarded as obligatory in modern times. It was not necessary in the commentary to touch upon the question of the obligatory or non-obligatory character of ratification, and it would be enough to say that in the past it had been considered as a confirmation of authority to sign.

99. Mr. BRIGGS said there was certainly some ambiguity in the sentence, seeing that, for the purposes of the draft, ratification was regarded as obligatory.

100. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the beginning of the sentence should be redrafted to read: "Formerly, ratification was regarded as confirming the act of signature".

*It was so agreed.*

*Paragraph (3) as thus amended was adopted.*

#### CHAPTER V. — OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.101/Add.4 and Corr. 2)

##### *I. — Co-operation with other bodies*

101. The CHAIRMAN announced that the Secretary had not yet been informed of the place and date of the forthcoming sessions of the Asian-African Legal Consultative Committee and the Inter-American Council of Jurists. The Commission should therefore authorize someone to appoint its observers to the next sessions of those bodies.

102. In reply to a question by Mr. TUNKIN, Mr. LIANG, Secretary to the Commission, said that he had sent a telegram of inquiry to the Secretary of the Asian-African Legal Consultative Committee two weeks previously and had now received a reply that neither the place nor the date of the next session had yet been decided.

103. Mr. EL-ERIAN suggested that the Chairman should be authorized to appoint observers to attend the sessions of both bodies.

*It was so agreed.*

##### *II. — Date and place of the next session*

104. The CHAIRMAN said that, at a private meeting on 1 June, the Commission had decided that its fifteenth session would be held from 6 May to 12 July 1963. The Commission should now decide on the items to be placed on the provisional agenda for that session.

105. Mr. TUNKIN said it was obvious that the law of treaties would be the main item on the agenda of the next session and that the subsidiary items would be state responsibility and the succession of states and governments, since the sub-committees established to deal with these two items would be submitting their reports to the session.

106. The Secretariat should bear in mind that it was unsatisfactory when members of the Commission did not receive the main report on the principal item on the agenda till two weeks after the opening of the session. At the present session, for example, it should not have taken six weeks to issue the special rapporteur's report on the law of treaties in the original language.

107. Mr. BRIGGS thought that the provisional agenda for the fifteenth session should consist of three main items: the law of treaties, the report of the sub-committee on state responsibility and the report of the sub-committee on the succession of states and governments. Since no special rapporteurs had yet been appointed for the two items last mentioned, it would be best to list them in the provisional agenda as the sub-committees' reports.

108. The CHAIRMAN noted that the Commission seemed to be agreed on the first three items. It had, however, also been suggested that two more items — special missions and relations between states and inter-governmental organizations — should be added to the list. It had further been suggested that no special rapporteur should yet be appointed for special missions, on which the Secretariat should submit a preliminary report, but that the Commission should appoint a special rapporteur for relations between states and inter-governmental organizations.

109. Mr. TUNKIN said that the Commission had agreed in principle that only one main item should be dealt with at each session. It seemed unnecessary to include two more items in the provisional agenda when the Commission would in any case have to consider the reports of the two sub-committees, in addition to its work on the law of treaties.

110. Mr. AGO said that, if a fourth main item was to be put on the agenda, a special rapporteur should be appointed for the question of special missions.

111. Mr. CADIEUX said that, while it might not be essential to include the two additional items in the provisional agenda, it would be wiser to appoint special rapporteurs for both, so that the Commission should have something to work on if it had time to spare.

112. The CHAIRMAN pointed out that it had been the Commission's practice always to keep one item in abeyance, in case it were unexpectedly prevented from continuing its work on the main item. The value of that practice had been proved in 1959, when the special rapporteur on consular intercourse and immunities had been unable to attend a large part of the session, and the Commission had filled in the time by discussing the law of treaties. That was why it had been suggested that a special rapporteur should be appointed for the topic of relations between states and inter-governmental organizations.

113. Mr. TUNKIN said that, while he agreed with Mr. Cadieux and the Chairman regarding the appointment of special rapporteurs, he did not consider it essential to include the questions of special missions and relations between states and inter-governmental organizations in the provisional agenda.

114. The CHAIRMAN said it had been suggested that Mr. El-Erian should be appointed special rapporteur on the topic of relations between states and inter-governmental organizations.

*It was so agreed.*

115. The CHAIRMAN asked whether the Commission wished to appoint special rapporteurs on state responsibility and the succession of states and governments.

116. Mr. TUNKIN thought that that decision could be deferred until the next session, when the reports of the sub-committees would be considered.

117. Mr. CADIEUX pointed out that, in the absence of special rapporteurs on the two subjects, the chairmen of the sub-committees concerned would have to assume many of the responsibilities of special rapporteurs, and that their position might be somewhat ambiguous from the material and financial point of view.

118. The CHAIRMAN said that the sub-committees had already been set up by a decision of the Commission. He suggested that the Commission should decide to appoint the special rapporteurs on those two subjects at its next session.

*It was so agreed.*

119. Mr. BRIGGS asked what were the implications of the last sentence in section II, which read: "In the circumstances, the first Monday in May was decided on as a most convenient opening date for the session...". The Commission had indicated a date that it had decided was the most convenient. Would that be brought to the attention of the General Assembly when it reconsidered its five-year plan of conferences, and by whom?

120. Mr. LIANG, Secretary to the Commission, replied that the decision referred to would be included in the Commission's report to the General Assembly, and considered by the Fifth Committee of the General Assembly. It would be taken into account again in the General Assembly's review of the five-year "pattern of conferences", of which the current five-year period ended in December. The Chairman of the Commission would no doubt be asked to explain in detail the considerations which had led to the Commission's decision.

121. Mr. ROSENNE said he assumed that the decisions taken by the Commission on Mr. El-Erian's appointment and on the question of special missions would also be recorded in the report.

122. A more serious matter was the absence from draft chapter V of any reference to members expressing dissatisfaction with the technical services provided by the European Office of the United Nations.

123. Mr. LIANG, Secretary to the Commission, referring to the question of special missions, said he understood that the paper which the Secretariat was asked to draft would merely be a survey of the question.

*III. — Representation at the seventeenth session of the General Assembly*

124. Mr. BRIGGS moved the adoption of section III.

*Section III was unanimously adopted.*

*Chapter V was adopted.*

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*resumed from the previous meeting*)

#### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

(*resumed from the previous meeting*)

ARTICLE 7. — PARTICIPATION IN A TREATY, and 7 *bis*.

— THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES (*resumed from the previous meeting*)

125. The CHAIRMAN said the special rapporteur had explained at the previous meeting that, in the light of the text of article 7 as adopted by the Commission at its 667th meeting, some residual cases still remained to be dealt with in paragraphs (2) and (3) of article 7 *bis*.<sup>2</sup>

126. Speaking as a member of the Commission, he said he agreed in substance with the special rapporteur. The adoption of Mr. Elias's proposal as amended by the addition to paragraph (1) of the words, "unless the treaty provides otherwise" had meant that certain cases were not dealt with by article 7 so that article 7 *bis* should be left in the form in which it had been submitted by the Drafting Committee.<sup>3</sup>

127. Mr. TUNKIN suggested that, in view of the new text of article 7, the opening proviso of paragraph 2 of article 7 *bis* could be omitted, since it virtually repeated the "unless" clause which had now been added to Mr. Elias' original proposal for article 7.

128. Mr. BRIGGS pointed out that the Commission had taken no decision on the observation he had made at the previous meeting that, in the light of the wording of article 7, article 7 *bis* would open participation to states which were not sovereign.<sup>4</sup>

129. Mr. BARTOŠ said that, while he had no objection to the retention of article 7 *bis*, he did have to such phrases as "or otherwise appears from the circumstances of the negotiations", in paragraph 2. Such

<sup>2</sup> 668th meeting, paras. 54-55, 59-61.

<sup>3</sup> 660th meeting, para. 51.

<sup>4</sup> 668th meeting, para. 56.

vagueness could give rise to endless disputes and hamper the application of the article.

130. Mr. TUNKIN said that his suggestion for omitting the opening proviso of paragraph 2 had been a little premature, in view of the provision in sub-paragraph 2 (*b*). The words “unless a contrary intention is expressed in the treaty” should be retained, but the words to which Mr. Bartoš had objected should be deleted.

131. Mr. BRIGGS suggested that both articles 7 and 7 *bis* should be referred back to the Drafting Committee, with the request to reconcile the two texts in the light of the discussion.

132. Mr. de LUNA, supporting Mr. Briggs’ suggestion, urged that in reconsidering article 7, the Drafting Committee should also take into account the question raised by Mr. Ago<sup>5</sup> and decide to include in the “unless” clause of paragraph 1 the words “or the rules in force in the international organization within which the treaty was concluded”.

133. The CHAIRMAN observed that the only suggestion in connexion with article 7 with which the Commission seemed to be prepared to deal was Mr. Tunkin’s suggestion for the deletion of the word “sovereign”.<sup>6</sup>

134. Sir Humphrey WALDOCK, Special Rapporteur, said he shared Mr. de Luna’s views. The absence of a provision along those lines could expose the Commission’s draft of article 7 to serious criticism; as Mr. Ago had pointed out, such an omission would completely disrupt the practice of the ILO in the matter of conventions concluded under its auspices. The position of international organizations had been safeguarded in other articles, and there was no reason to proceed differently in article 7.

135. Mr. TUNKIN pointed out that the Commission had already voted on article 7; the question of the wording of article 7 *bis* was quite a separate one.

136. Mr. ROSENNE said that the connexion between articles 7 and 7 *bis* was so close that they should be referred back to the Drafting Committee together for redrafting.

137. Mr. TUNKIN said he categorically opposed that view. A vote had already been taken on article 7 at the previous meeting and a two-thirds majority of the Commission would be required to reverse that decision.

138. The CHAIRMAN said he had supposed that Mr. Briggs’ suggestion involved only the deletion of the word “sovereign” from article 7. It appeared, however, that the actual substance of that article would be affected if it were referred back to the Drafting Committee.

139. Mr. AGO said that sub-paragraph 2 (*b*) of article 7 *bis* safeguarded the situation of treaties drawn up in, or under the auspices of, international organizations. That made it even more absurd to omit a similar

safeguard from article 7. He could see no reason for such strong opposition to a perfectly logical step.

140. Mr. LACHS said that, since the Commission had approved article 7 with the omission of the word “sovereign”, the question arose whether article 7 *bis* was necessary. The only case to which it really applied was the residual one of treaties which expressly stated that additional states were not admitted to participation.

141. He could not agree with Mr. Ago that the case of treaties concluded within international organizations should be dealt with in article 7, since that case represented the exception, whereas article 7 stated the rule.

142. Mr. AGO said that the question whether the treaty was or was not silent on the matter of participation was not the only issue. A large number of treaties, including all the International Labour Conventions and International Sanitary Conventions, were silent on the subject of participation, but were open only to states members of the organizations concerned, according to the rules of those organizations. If the Commission decided to adopt a provision stating that all states could participate in a treaty which was silent on the question of participation, it would be clearly acting in a manner at variance with the constitution and rules of certain international organizations. The particular features of such a large number of instruments should be taken into account.

143. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the addition suggested by Mr. de Luna and Mr. Ago would in no way affect the substance of article 7 as adopted by the Commission.

144. Mr. TUNKIN said that, although he still had considerable doubts on the matter, he would accept Mr. de Luna’s and Mr. Ago’s suggestions as an interim solution.

145. Mr. de LUNA stressed that his suggestion implied no change in his opinion on the universal character of general multilateral treaties. Nevertheless, sub-paragraph 2 (*b*) of article 7 *bis* conflicted with the principle that such treaties by their very nature should be open to all states; the Commission should take existing practice, however imperfect, into account. The addition he had suggested merely represented an extension of the compromise that he and Mr. Elias had agreed to in respect of article 7.

146. Mr. ROSENNE, expressing his appreciation of the spirit of conciliation shown by Mr. Tunkin in accepting Mr. de Luna’s and Mr. Ago’s suggestion, said he himself had abstained from voting on article 7 at the 667th meeting, not because he was opposed to the principle but because he found the drafting awkward; he would now however be able to support the article as amended.

147. Mr. TUNKIN said that he had accepted the new wording in order to expedite the Commission’s work, but still thought it contradictory for one and the same draft to contain a provision stating that general multilateral treaties, expressly defined as those dealing with

<sup>5</sup> 667th meeting, paras. 42 and 50.

<sup>6</sup> 668th meeting, para. 57.

matters of general interest to all states, were open to participation by all states, and another provision allowing for limitations to participation.

148. Mr. AGO thanked members for the effort they had made to reconcile opposing views and said that he would be able to vote in favour of article 7 as revised.

149. Mr. CADIEUX said that, while he would accept the compromise in a spirit of conciliation, he was not satisfied with it. In particular, he had serious doubts concerning the definition of general multilateral treaties, which were said to be of general interest to the community of nations. He could cite many examples of treaties concluded between a large number of Powers, which were of general interest, but which the parties had no intention of opening to all states.

150. The CHAIRMAN suggested that articles 7 and 7 *bis* should be referred back to the Drafting Committee for redrafting in the light of the agreement reached in the Commission.

*It was so agreed.*

The meeting rose at 1.5 p.m.

#### 670th MEETING

Thursday, 28 June 1962, at 10.30 a.m.

Chairman: Mr. Radhabinod PAL

#### Draft report of the Commission on the work of its fourteenth session (resumed from the previous meeting)

#### CHAPTER II.—LAW OF TREATIES (A/CN.4/L.101/Add.1) (resumed from the previous meeting)

1. The CHAIRMAN invited the Commission to resume its consideration of the draft report.

#### COMMENTARY TO ARTICLE 10.—RATIFICATION

##### Paragraph (1)

2. Mr. BARTOŠ noted that the commentary to article 10 used two different expressions to reflect the same idea: "ratification on the international plane" and "ratification in international law"; he suggested that the same expression should be used throughout.

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

##### Paragraph (2)

3. Mr. TUNKIN said he could not accept the first sentence. He doubted whether it was true to say that the modern institution of ratification in international law had developed "under the influence of France and the United States". The Commission, as an international body, should be careful not to make pronouncements of that type.

4. Mr. AMADO said the first sentence might have been unobjectionable in an academic treatise but was quite unsuitable in a report by the International Law Commission.

5. Mr. CADIEUX suggested that the words "under the influence of France and the United States" should be deleted.

*It was so agreed.*

6. Mr. BARTOŠ said that while the statement in the fourth sentence might be correct in the case of a great many countries, including Yugoslavia, in others treaty-making fell within the exclusive competence of the executive. He, therefore, proposed the insertion, after the words "ratification came, however, to be used", of some qualifying expression such as "in most cases".

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

##### Paragraph (3)

7. Mr. TUNKIN said there appeared to be some confusion in the first sentence between inter-governmental agreements not requiring ratification and agreements in simplified form.

8. Mr. ROSENNE suggested the deletion of the second sentence reading: "Indeed, recourse is sometimes had to these less formal types of agreement for the very purpose of avoiding the delay involved in complying with constitutional procedures". That sentence was open to misinterpretation.

*It was so agreed.*

9. Mr. BARTOŠ suggested that, in the French version of the second part of the first sentence, the word "généralement" should be replaced by "habituellement" which was closer to the English "usually".

10. He reiterated his opposition to the majority view in the Commission regarding the requirement, or non-requirement, of ratification for treaties in simplified form.

11. Sir Humphrey WALDOCK, Special Rapporteur, in the light of Mr. Tunkin's remark, suggested the deletion of the words "and intergovernmental agreements" from the first sentence, which would thus end with the words "amongst which were exchanges of notes".

*It was so agreed.*

*Paragraph (3) as thus amended was adopted.*

##### Paragraph (4)

12. Mr. ROSENNE observed that in the third sentence the term "interdepartmental agreements" was used, presumably for "inter-governmental agreements".

13. Mr. BARTOŠ said he did not approve of the notion that there could exist "inter-governmental" or "inter-departmental" agreements; government departments were merely organs of the state, and all treaties were treaties between states.

14. He also had reservations regarding the use of the words "impliedly excluded" in connexion with ratification. In his opinion, the general and absolute rule was that ratification was necessary.

15. Mr. LACHS said the language of the first sentence, which stated that the general result of the developments described in the previous paragraphs had been "to obscure the law", was unsatisfactory.

16. Mr. AMADO said that the intention was probably to say that it was difficult for states to ascertain the relevant rules of law because of the abundance of factual information to be considered.

17. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the word "obscure" be replaced by a word such as "complicate".

18. The CHAIRMAN proposed that the choice of a suitable word should be left to the special rapporteur.

*It was so agreed.*

*Paragraph (4) as thus amended was adopted.*

*Paragraph (5)*

19. Mr. BARTOŠ noted that the paragraph stated first the views of "some members" of the Commission and then the opinion of the majority. It would have been more appropriate to state the views of the majority before those of the minority.

20. Mr. LIANG, Secretary to the Commission, agreed that if it had been a question of stating the opinion of the majority and that of the minority, the more appropriate order would have been that indicated by Mr. Bartoš.

21. He did not recollect, however, that any vote had been taken on the point dealt with in paragraph (5). In past reports of the Commission, care had always been taken not to refer to a majority view and a minority view when no vote had actually been taken.

22. Mr. ROSENNE said that four or five members, including himself, had expressly stated their dissent and that the Commission had adopted the article on that understanding. It would therefore be accurate to describe him as holding the minority view, even though no formal vote had been taken.

23. Sir Humphrey WALDOCK, Special Rapporteur, suggested that, in order to overcome the difficulty, the expression in the fifth sentence, "The majority of the Commission, however, took the view", should be replaced by: "The view which prevailed, however, was...". A corresponding adjustment would be made wherever the term "majority" was used in the subsequent sentences.

*It was so agreed.*

*Paragraph (5) as thus amended was adopted.*

*Paragraph (6)*

*Paragraph (6) was adopted without comment.*

*Paragraph (7)*

24. Mr. ROSENNE suggested that, in the second sentence, the term "delegates" should be replaced by "representatives".

*Paragraph (7) as thus amended was adopted.*

*Paragraph (8)*

*Paragraph (8) was adopted without comment.*

COMMENTARY TO ARTICLE 24.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS NO DEPOSITARY

*Paragraphs (1), (2) and (3)*

25. Mr. ROSENNE said he found a general difficulty in articles 24 and 25 over the use of the term "authentic texts" in two separate senses. It would be better to say "two or more authentic language versions" when that was what was meant, for instance in the fifth line and elsewhere. The commentary appeared to diverge a little from the language of the article, but he would not press the point.

26. Mr. LACHS noted that paragraphs (1), (2) and (3) all contained references to "Hackworth's Digest of International Law"; he suggested that they should be dropped, in accordance with the Commission's earlier decision.

27. Mr. GROS suggested that the references to Hackworth should be moved to footnotes, but that the substantive statements should be retained in the commentary.

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

*Paragraph (2)*

28. Mr. ROSENNE proposed the deletion from the fourth sentence of the words "there is a dispute and" which appeared before "it becomes", so that the sentence would then read "In that case it becomes a problem..."

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

*Paragraph (3) as already amended was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted without comment.*

*Paragraph (5)*

29. Mr. BARTOŠ said that the question which arose in modern practice was not, as described in the first sentence, that of "correcting not the authentic text itself but versions of it prepared in other languages; in other words of correcting errors of translation". The difficulty arose when there was a lack of concordance of texts in several languages in cases where each text was authentic, not where there was just one original text of which the others were merely translations. The various language versions of the texts of treaties were just so many different originals of texts drafted simultaneously which had to agree with each other and not with a single original basic text. The problem was not that of correcting errors of translation, but that of bringing into line two or more equally authentic texts drafted in different languages.

30. Mr. BRIGGS said that he had some difficulty in understanding the meaning of the first sentence; the five official versions of the Charter were all equally authentic.

31. Mr. LIANG, Secretary to the Commission, said that the case referred to in paragraph (5) was that of



translations of a single authentic text into languages other than that in which the authentic text had been drawn up. That situation did not arise in regard to treaties drawn up under the auspices of the United Nations: in the case of those treaties, the Chinese, English, French, Russian and Spanish texts were all equally authentic. Of course, in practice, the original was usually drafted in one language, or in two languages, and there was then a process of translation; however, when the text of the treaty was adopted in final form, none of the texts was deemed to be a translation.

32. Mr. ROSENNE proposed that the first sentence of paragraph (5) should be deleted and replaced by a passage reading: "The procedure for the correction of errors is also applicable to cases of lack of concordance of the authentic texts in different languages, where that lack of concordance arises from errors of translation made before the adoption of the original text."

33. Mr. TUNKIN suggested the omission of the words "of translation" after the word "errors" in Mr. Rosenne's amendment. In some cases it would be difficult to ascertain whether the error was one of translation or not.

34. Mr. ROSENNE said he would accept that suggestion.

*Mr. Rosenne's amendment was adopted.*

*Paragraph (5) as thus amended was adopted.*

COMMENTARY TO ARTICLE 25.—THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS A DEPOSITARY

*Paragraph (1)*

35. Mr. LACHS said it was not appropriate to say that the process of obtaining agreement to the correction of the text was "complicated" by the number of states. He suggested that the word "complicated" should be replaced by the word "affected".

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

*Paragraph (2)*

36. Mr. LIANG, Secretary to the Commission, pointed out that the words "amend" and "amendment" in the phrases "the proposal to correct or amend the text" and "to make the correction or amendment" were not appropriately used, because the question of amendment of substance did not arise under article 25.

37. Sir Humphrey WALDOCK, Special Rapporteur, suggested that in the first sentence the words "or amend" and in the second sentence the words "or amendment" should be deleted.

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

38. Mr. LACHS proposed that, in the first sentence, the words "the amendment of a text" should be replaced by the words "the correction of a text".

39. Mr. ROSENNE proposed that, in the same sentence, the word "dispute" should be replaced by the word "difference".

*It was so agreed.*

*Paragraph (3) as thus amended was adopted.*

*Paragraph (4)*

*Paragraph (4) was adopted without comment.*

COMMENTARY TO ARTICLE 26.—THE DEPOSITARY OF MULTILATERAL TREATIES

*Paragraph (1)*

40. Mr. TUNKIN proposed the deletion of the second sentence, which read: "For a depositary is really a necessity for the smooth working of a multilateral treaty with a large number of states and is a great convenience even for a treaty drawn up between very few"; such a statement was elementary and therefore unnecessary.

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

*Paragraph (2)*

41. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words "the Commission thought it desirable, *ex abundante cautela*..." should be replaced by the simpler language: "the Commission thought it prudent...".

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

COMMENTARY TO ARTICLE 27.—THE FUNCTIONS OF A DEPOSITARY

*Paragraph (1)*

*Paragraph (1) was adopted without comment.*

*Paragraph (2)*

42. Mr. EL-ERIAN proposed, for the sake of consistency, that the word "state" should precede the words "international organization" in the first sentence.

*It was so agreed.*

43. Sir Humphrey WALDOCK, Special Rapporteur, said that the reason for transposing the order had been that it was more common for an international organization to act as a depositary. However, he had no objection to the amendment.

*Paragraph (2) as thus amended was adopted.*

*Paragraphs (3) and (4)*

44. Mr. TUNKIN proposed the deletion of the words "is not a mere post-box, but" in both paragraphs.

*It was so agreed.*

*Paragraphs (3) and (4) as thus amended were adopted.*

*Paragraph (5)*

*Paragraph (5) was adopted without comment.*

*Paragraph (6)*

45. Mr. LACHS said that the first sentence should be simplified, for the depositary's duty to notify the interested states was an absolute one and existed irrespective of whether the entry into force of the treaty depended upon a specific number of signatures, ratifications, etc.

46. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the sentence should be amended to read "Paragraph 7 deals with the depositary's duty to notify the interested states when the conditions for the entry into force of the treaty have been fulfilled."

*It was so agreed.*

*Paragraph (6) as thus amended was adopted.*

*Paragraph (7)*

47. Mr. LIANG, Secretary to the Commission, suggested that the word "final" should be substituted for the word "binding" so as to conform with the wording of paragraph (6).

48. The words "general body" at the end of the paragraph might be too widely interpreted; it would be sufficient to refer to the "states interested".

*It was so agreed.*

49. Mr. BARTOŠ said that the paragraph should indicate, so as to be consistent with the text of the article, that the consultation in question should be made either on the initiative of the depositary itself or at the request of the interested state.

50. Mention should also be made of the point that a state might not wish to have a difference made public. In that case, particularly if an amicable settlement was reached between the state concerned and the depositary, it was in the general interest that the question should not be raised by a general notification.

51. The same solution was to be recommended in the case where the state concerned withdrew its request before the notification was made.

52. Sir Humphrey WALDOCK, Special Rapporteur, said he would insert appropriate wording to cover the two points made by Mr. Bartoš.

*It was so agreed.*

53. Mr. LACHS said that the word "determinations", whether qualified or not, was unsuitable. The depositary was not called upon to determine anything but to state a fact.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that the passage stated, correctly, that the depositary "is not invested with competence". That was precisely the point he had been asked to make.

*Paragraph (7) as thus amended was adopted.*

#### CHAPTER V.—OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSIONS (*resumed from the previous meeting*)

##### *Section III*

55. The CHAIRMAN invited the Commission to consider the draft of section III (A/CN.4/L.101/Add.5) of the report, concerning summary records and translation facilities, which would be included in chapter V (A/CN.4/L.101/Add.4).

56. Mr. BRIGGS said that the first sentence should refer to "documentation" as well as to summary records and translations.

57. At the end of the second paragraph the word "inadequacies" should be added after the word "these".

58. Mr. TUNKIN said that the difficulties which the Commission was experiencing were primarily due to the fact that not even part of the special rapporteur's report (A/CN.4/144) had been reproduced for circulation to members before the opening of the session.

59. Mr. ELIAS proposed the substitution of the words "relating to the production of documents" for the

words "governing documentation" in the first sentence as amended by Mr. Briggs.

60. Mr. BRIGGS said he could accept that amendment.

*Mr. Briggs' amendment was adopted.*

61. Mr. ROSENNE pointed out that the title of the section would need to be changed accordingly.

62. Mr. LACHS, Rapporteur, said it was the problem of documentation that had been the main difficulty and he had been careful to draft the section in such a way as to reflect no criticism on the members of the Legal Division working for the Commission.

63. Mr. BARTOŠ said that the reference to "technical inadequacies" was not enough: the Commission had suffered from inadequate services.

64. Mr. CADIEUX agreed that the Commission should draw attention to the fact it had not had the benefit of the services to which it was entitled; it should, however, be careful in its choice of language so as not to attribute blame or responsibility wrongly.

65. The CHAIRMAN pointed out that the Commission was complaining of inadequate facilities; it was not criticizing the competence of the staff.

66. Sir Humphrey WALDOCK, Special Rapporteur, said he had been late in submitting his report but, even so, it had not been reproduced in English as quickly as might have been expected, nor had the Secretariat followed his suggestion that it should be circulated to members in parts.

67. The report he would have to produce for the following session would be in two parts and as it was likely to be lengthy, he hoped that at least the first part could be circulated in advance of the session.

68. Mr. TUNKIN said it might be desirable to mention that, whenever necessary, reports by special rapporteurs should be sent to members by airmail before the opening of the session.

69. Sir Humphrey WALDOCK, Special Rapporteur, asked whether there were any rules at Headquarters against the circulation of reports in parts.

70. Mr. LIANG, Secretary to the Commission, said that the Secretariat would look into the matter and do its utmost to see that the Commission's wishes were carried out.

71. Mr. AMADO said he wished to express his appreciation of the work of the members of the Legal Division, who had always given proof of great legal competence and diligence.

72. Mr. LIANG, Secretary to the Commission, said that, in fairness to the technical services of the European Office, it should be made clear that the Commission was drawing attention to inadequacies which had manifested themselves at the current session for the first time. In previous years, the Commission had praised the services placed at its disposal.

73. The CHAIRMAN said it would be clear that the Commission was referring only to the situation at the current session.

74. Mr. LACHS, Rapporteur, said that "technical inadequacies" meant shortages of staff.

75. Mr. GROS, noting that the provisional summary records in French were still three weeks in arrears, said that as far as the French text of Section III was concerned, he would like it to refer to the "*inadaptation des moyens techniques*".

76. Mr. ROSENNE asked that the issue of both volumes of the *Yearbook* should be expedited and that the Secretariat should revert to its former custom of including an index, which the Commission, in its recommendation of 1956, had described as "indispensable".<sup>1</sup> The fact that the English version of the 1961 *Yearbook* was not yet, he believed, available<sup>2</sup> would cause difficulties for governments preparing for the forthcoming conference on consular relations.

77. He also suggested that in the Secretary-General's proposals for allocating items to committees of the General Assembly, section III of chapter V of the Commission's report should be referred to the Fifth Committee.

78. Mr. BARTOŠ urged that the Chairman and other members who were to attend the meetings of the Sixth Committee at the next session of the General Assembly should explain why the International Law Commission's work at its fourteenth session had been so hampered.

79. Mr. AGO, on the question of the summary records, said that many of the difficulties arose because reports of statements were drafted on the basis of the interpretation. Another difficulty was that some of the *précis*-writers, though otherwise excellent, did not possess the special legal qualifications required for a full understanding of the arguments developed in the Commission and sometimes inevitably failed to grasp the sense of what had been said. The Commission should state in section III that staff with special legal qualifications should be chosen for the work.

80. Mr. BARTOŠ said that it was not for the Commission to interfere in the internal organization of the Secretariat. The fault did not necessarily lie with the *précis*-writers and the technical services but might be the result of the orders they had been given to keep the records short, with the consequence that legal arguments were sometimes unduly curtailed. He had studied the problem very closely and had come to the conclusion that the trouble was due to the organizational arrangements and not to any individual shortcomings or negligence on the part of the staff.

81. Mr. TUNKIN said that he was bound in fairness to state that he had always found the records in English very good and had no complaints, but he recognized that there might be a problem in connexion with the statements of French-speaking members. Perhaps, as Mr. Bartoš had suggested, it was the organization which was at fault.

<sup>1</sup> *Yearbook of the International Law Commission 1956*, Vol. II (United Nations publication, Sales No.: 1956.V.3, Vol. II), p. 301.

<sup>2</sup> Vol. I of the 1961 *Yearbook* was issued in French on 12 February 1962, and in English and Spanish on 27 April 1962; Vol. II was issued in English on 17 September 1962 and in French on 17 October 1962.

82. Mr. GROS said that the defect of the system was that French statements were not noted in French. The ideal solution would be to have French and English *précis*-writers working alongside and recording statements in the original languages. In that way the speakers' original words would be reproduced, instead of being distorted.

83. Mr. LIANG, Secretary to the Commission, said that the Sixth Committee could propose that section III of Chapter V should be referred to the Fifth Committee or to any other appropriate organ of the United Nations.

84. Mr. CADIEUX said the Commission should formulate its wishes very precisely; he would be interested to hear the Secretary's views as to the most effective way of achieving the Commission's object.

85. Mr. LIANG, Secretary to the Commission, said that many of the problems under discussion would be dealt with by the Office of Conference Services in conjunction with the European Office and in accordance with the existing regulations. Any suggested changes in those regulations would have to be referred to the Fifth Committee, such as the question of providing longer summary records or changing the system of preparing summary records.

86. Mr. LACHS, Rapporteur, proposed that the words "and that in future it will have proper services at its disposal" should be added at the end of the second paragraph of section III so as to reflect more accurately the views put forward.

87. The record of the discussion would indicate that no criticism had been implied of the staff of the Legal Division.

*It was so agreed.*

*Section III as thus amended was adopted.*

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*resumed from the previous meeting*)

#### DRAFT ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE (*resumed from the previous meeting*)

ARTICLE 7.—PARTICIPATION IN A TREATY, and 7 *bis*.  
—THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES (*resumed from the previous meeting*)

88. The CHAIRMAN said the Drafting Committee proposed the following redrafts of articles 7 and 7 *bis*, which had been revised in the light of the discussion at the previous meeting:

#### "Article 7. — Participation in a treaty

"1. In the case of a general multilateral treaty, every state may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.

"2. In all other cases, every state may become a party to the treaty:

- "(a) which took part in the adoption of its text, or
- "(b) to which the treaty is expressly made open by its terms, or

“(c) which, although it did not participate in the adoption of the text, was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.

“*Article 7 bis. — The opening of a treaty to the participation of additional states*

“1. A multilateral treaty may be opened to the participation of states other than those to which it was originally open :

“(a) in the case of a treaty drawn up at an international conference convened by the states concerned, by the subsequent consent of two-thirds of the states which drew up the treaty, provided that, if the treaty is already in force and ... years have elapsed since the date of its adoption, the consent only of two-thirds of the parties to the treaty shall be necessary ;

“(b) in the case of a treaty drawn up either in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

“2. Participation in a treaty concluded between a small group of states may be opened to states other than those mentioned in article 7 by the subsequent agreement of all the states which adopted the treaty ; provided that, if the treaty is already in force and ... years have elapsed since the date of its adoption, the agreement only of the parties to the treaty shall be necessary.

“3. (a) When the Depositary of a general multilateral treaty receives a formal request from a state desiring to be admitted to participation in the treaty under the provisions of paragraphs 1 and 2 of this article, the Depositary :

“(i) in a case falling under sub-paragraph 1 (a), shall communicate the request to the states whose consent to such participation is specified in that sub-paragraph as being material ;

“(ii) in a case falling under sub-paragraph 1 (b), shall bring the request, as soon as possible, before the competent organ of the organization in question.

“(b) The consent of a state to which a request has been communicated under sub-paragraph 3 (a) (i) shall be presumed after the expiry of twelve months from the date of the communication, if it has not notified the Depositary of its objection to the request.

“4. When a state is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more states, an objecting state may, if it thinks fit, notify the state in question that the treaty shall not come into force between the two states.”

89. Sir Humphrey WALDOCK, Special Rapporteur, explained that the wording of paragraph 1 of article 7 had been brought into line with that used in other

articles. Thus, the expressions “may become a party” and “the established rules of an international organization” had been used because they appeared in other articles.

90. In article 7 *bis*, the question of multilateral treaties had been transferred to paragraph 1 and the word “general” had been deleted, since the provisions of the former paragraph 2 applied to all multilateral treaties, with the exception of treaties concluded between a restricted group of states. The structure of the articles on participation had thus been brought more or less into line with that of the articles on reservations.

91. The provisions of the new paragraph 2 of article 7 *bis* were confined to treaties between restricted groups of states, where the participation of other states was subject to the unanimous consent of the existing parties.

92. Whether the principle of the articles was accepted or not, their new structure was more coherent than it had been before.

93. Mr. BRIGGS asked that a passage should be inserted in the relevant paragraph of the report to read :

“For the reasons given by him at the 648th and 667th meetings, Mr. Briggs did not accept the provisions of article 7”.

94. Sir Humphrey WALDOCK said that, as special rapporteur, he had been obliged to give the articles the most appropriate structure in compliance with the Commission's decision.

95. As a member of the Commission, however, he did not consider that, at the existing stage of practice in the matter and in view of the large number of treaties concluded under the auspices of the United Nations, the presumption contained in paragraph 1 of article 7 was justified. He could not support the article in its new form, because he considered that in controversial cases the decision should remain in the hands of a collegiate body, such as the General Assembly of the United Nations ; otherwise, the depositary of a multilateral treaty would be placed in a very difficult and delicate position. He was convinced that the existing United Nations procedure was more effective than that which would result from the provisions of article 7, and wished to make it quite clear that his objection was motivated by considerations of principle only.

96. Mr. TUNKIN said he hoped there would not be another lengthy discussion on the two articles. Although he was not fully satisfied with the final texts, he was prepared to accept them.

97. Mr. GROS said that, since there was a majority and a minority view on the question, members should be allowed to state their disagreement with the new rule. He fully endorsed the views expressed by Mr. Briggs and Sir Humphrey Waldock, and wished to stress that, as now worded, article 7 bypassed the real problem by completely disregarding the question of recognition of states.

98. Mr. CADIEUX said he wished to associate himself with those members who had expressed objection to the

new article 7. He had already had occasion to give the reason for his objection in detail.

99. Mr. TSURUOKA said that he too endorsed the views expressed by Mr. Briggs, Sir Humphrey Waldock, Mr. Gros and Mr. Cadieux.

100. The CHAIRMAN called for a vote on the new text of article 7.

*Article 7 was adopted by 12 votes to 5.*

101. Mr. BARTOŠ said that, although he had been out of the room when the vote was taken he was in favour of the new text of article 7.

102. Mr. CASTRÉN said there was an error in paragraph 3 (a) of article 7 *bis* where the reference to paragraph 2 was unnecessary, since no mention of the cases referred to in paragraph 2 was made in the remainder of paragraph 3.

103. Sir Humphrey WALDOCK, Special Rapporteur, said that the provisions of paragraph 3 did in fact cover both paragraphs 1 and 2, but paragraph 3 (a) contained an error, in that the words "general multilateral" had been inadvertently allowed to remain. The error should be corrected.

104. Mr. ROSENNE suggested that Mr. Castrén's point might be met by inserting the words "and paragraph 2" after the words "under sub-paragraph 1 (a)" in sub-paragraph 3 (a) (i).

*It was so agreed.*

105. The CHAIRMAN called for a vote on article 7 *bis*, as thus amended by the special rapporteur and Mr. Rosenne.

*Article 7 bis, as thus amended, was adopted by 16 votes to 1 with 1 abstention.*

The meeting rose at 12.45 p.m.

## 671st MEETING

Thursday, 28 June 1962, at 4 p.m.

Chairman: Mr. Radhabinod PAL

### Draft report of the Commission on the work of its fourteenth session (resumed from the previous meeting)

#### CHAPTER III.—FUTURE WORK IN THE FIELD OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW (A/CN.4/L.101/Add.2)

1. The CHAIRMAN invited the Commission to consider chapter III of the draft report; the paragraphs were not numbered.

#### *Introductory portion*

*The introductory portion was adopted without comment*

#### *Section I*

##### *Law of treaties*

2. Mr. de LUNA said that some reference should be made to the fact that, at the current session, the Commission had dealt with the conclusion of treaties.

3. Mr. AMADO said he disliked the first sentence, which stated: "The General Assembly recommendation regarding this topic did not give rise to any difficulty." It would be better to omit it altogether and go straight to the subject matter of the paragraph.

4. Mr. VERDROSS said the report should also mention that, at subsequent sessions, the Commission would deal with aspects of the law of treaties other than the conclusion of treaties.

5. Mr. LIANG, Secretary to the Commission, said that that question was dealt with in chapter IV, on the future work of the Commission.

6. Mr. BARTOŠ said he supported Mr. Amado's suggestion regarding the first sentence, as well as the suggestions of Mr. de Luna and Mr. Verdross to include a brief reference to the facts of the situation.

7. Mr. LACHS, Rapporteur, said he could accept all those suggestions; the draft would be amended accordingly.

*The sub-section on the law of treaties, as thus amended, was adopted.*

#### *State responsibility*

8. Mr. CADIEUX said that, although the English text of the first sentence, which constituted the first paragraph, "The Commission duly discussed this topic", did not correspond with the French original, which stated that the Commission had discussed the topic "thoroughly", it was a more prudent statement. The Commission could hardly claim to have had a thorough discussion of the topic of state responsibility.

9. The next seven paragraphs showed a lack of balance in the recital of the arguments on the topic of the treatment of aliens. Five long paragraphs were devoted to the arguments in favour of dissociating the topic of state responsibility from that of the treatment of aliens, but only two short paragraphs to the arguments of those who held that the treatment of aliens was an important topic which deserved priority, and that the law on the treatment of aliens was a mine of information on the subject of state responsibility.

10. He hoped the rapporteur would redraft those paragraphs so as to restore the balance.

11. The last two paragraphs, the sixteenth and seventeenth, should be brought into line not only with each other, but also with the decisions adopted by the Commission.

12. In the last paragraph, he noted the expression "State responsibility *per se*". That seemed to him a novel expression, and he would be glad to have an explanation of its meaning.

13. Mr. GROS, referring to Mr. Cadieux's last remark, said the best solution might be to delete the words "the state responsibility *per se*, that is," so that the opening words of the last paragraph would read: "The Commission approved a suggestion that the sub-committee should confine its future discussions to the general aspects of state responsibility..."

14. Mr. BARTOŠ said he agreed with Mr. Cadieux that the first paragraph might give the impression that the Commission had discussed thoroughly the substance of the question of state responsibility whereas in fact it had done little more than discuss the approach to the topic.

15. Mr. BRIGGS said he supported the views of Mr. Cadieux concerning the necessity of keeping a proper balance in the exposition of the different views put forward by members of the Commission.

16. In the third paragraph, he proposed that the passage reading: "the reports of the preceding special rapporteur, who is no longer a member of the Commission, having been prepared without any guidance from the Commission, reflected exclusively his personal views; the reports (it was said) could not in any case serve as a basis for the Commission's work," should be amended to read: "The reports of the preceding special rapporteur, who is no longer a member of the Commission, could not serve as a basis for the Commission's work...". That amendment would eliminate the criticism of the work of the former special rapporteur.

17. Mr. ROSENNE, with regard to the reference in the thirteenth paragraph to the methods of work of the Institute of International Law, which the Commission had not adopted, said the inclusion of that reference made it necessary to state the reasons why the Commission had decided not to adopt the same methods of work as the Institute.

18. Mr. AGO suggested that the first paragraph should be redrafted to read "The Commission devoted a number of days to the preliminary study of this topic".

19. In the second paragraph, the words "the specific points" should be replaced by the words "the matters".

20. He too agreed with Mr. Cadieux on the need to restore the balance in the recital of the various views expressed in the Commission.

21. He supported Mr. Briggs' proposal for the deletion of the passage in the third paragraph, which might be considered discourteous to a former member of the Commission.

22. In the fourth paragraph, the first two sentences should be shortened to read: "Other members pointed out that state responsibility was an extremely complex subject and covered such a large part of international law...".

23. Lastly, in the first sentence of the sixth paragraph, the passage reading "the treatment of aliens was not the only problem of international responsibility..." should be amended to read: "...responsibility for injury to aliens was not the only problem of international responsibility...". A similar change would have to be made at other points in the draft.

24. Mr. TUNKIN said he was puzzled by the sentence in the seventh paragraph which read, "The treatment of aliens should not be dealt with merely from the point of view of breaches of international law".

25. In the tenth paragraph there was a reference to a suggestion that "the Commission ought to appoint

several rapporteurs, each of whom would study a particular aspect" of state responsibility. He did not recall any suggestion to that effect having been made in the Commission.

26. Nor did he recall that the Commission had ever given the directive indicated in the last paragraph "that the sub-committee should confine its future discussions to state responsibility *per se*, that is, to the general aspects of state responsibility as the consequence of the violation of the rules of international law".

27. The passage in question should be replaced by language similar to that used in the second sentence of the sixth paragraph of the next portion of the chapter, dealing with succession of states and governments, which read:

"The task of the sub-committee was to submit to the Commission a preliminary report containing suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation".

28. Mr. CASTRÉN proposed that in the French text of the fourth paragraph the word "*extrêmement*" before the word "*douteux*" should be deleted; the French would correspond more closely to the English wording "hardly possible", which was to be preferred.

29. Mr. BRIGGS said he supported Mr. Tunkin's remarks regarding the seventh and the last paragraphs.

30. The CHAIRMAN said that it was for the sub-committee to define the scope of the topic of state responsibility, and that no directives had been given to it by the Commission itself.

31. Mr. LACHS, Rapporteur, said that he would gladly meet the wishes of Mr. Cadieux and Mr. Briggs, if he were given some indication of the arguments which it was desired to include.

32. He was also prepared to amend the sentence in the seventh paragraph which had been criticised by Mr. Tunkin.

33. As to Mr. Rosenne's point regarding the thirteenth paragraph, it might be better to drop the reference to the Institute of International Law rather than attempt to give an account of its methods of work and of the reasons why they had not been adopted by the Commission.

34. The last paragraph could be amended as requested by Mr. Tunkin and Mr. Briggs.

35. Mr. CADIEUX, in reply to the rapporteur, said that the main arguments put forward in the Commission in support of a study of the topic of the treatment of aliens had been, first, the urgency of considering the question of damages to aliens and, secondly, the importance of the subject for new countries which wished to encourage the movement of persons and capital.

36. Mr. LACHS, Rapporteur, said that he would add two paragraphs to deal with those arguments.

37. Mr. AGO suggested that the sentence criticized by Mr. Tunkin in the seventh paragraph should be amended, subject to the approval of the rapporteur, to read:

"The question of the treatment of aliens should not be dealt with solely from the point of view of the responsibility for possible breaches of the rules of international law governing the matter; it was necessary first to establish what were the substantive rules on that matter."

38. The CHAIRMAN said that, if there were no objection, he would consider that the Commission adopted the sub-section on state responsibility with the changes accepted by the general rapporteur.

*The sub-section in state responsibility, as thus amended, was adopted.*

#### *Succession of states and governments*

39. Mr. AMADO said that the drafting of the first sentence in the second paragraph was not satisfactory, particularly the passage: "though they were not so pessimistic as to believe that it would be impossible..."

40. Mr. LACHS, Rapporteur, suggested as an alternative wording "though they were ready to admit that it would be possible".

*It was so agreed.*

41. Mr. ROSENNE said that the fourth paragraph should mention the conclusion reached by the sub-committee on the succession of states and governments that it would be premature at that stage to take a decision as to whether or not the succession of states and the succession of governments should be treated as two separate topics.

42. Mr. LACHS, Rapporteur, said he would insert an appropriate sentence to that effect.

*The sub-section on succession of states and governments, as thus amended, was adopted.*

#### *Section II.—The Commission's future programme of work*

43. Mr. TUNKIN said that the first paragraph should be amended, so as not to convey the erroneous impression that some members disagreed as to the need to review the programme of work. There had been no disagreement on that point at all, though opinions might have differed about the content of the programme.

44. The first sentence of the fifth paragraph should be amended to state that many of the topics proposed by governments deserved study. As drafted, the sentence seemed to question the utility of the topics put forward.

45. Mr. de LUNA, referring to the third sentence in the fifth paragraph, said the report should not be too precise about how long the work on certain topics would take.

46. Mr. CASTRÉN, supporting Mr. Tunkin's criticism of the first sentence in the fifth paragraph, said many of the topics proposed by governments could be usefully codified.

47. The last sentence in the fifth paragraph should be deleted as repetitious.

48. Mr. BRIGGS thought it would be sufficient to say that "some" of the topics proposed by governments could be usefully codified.

49. Mr. ROSENNE said he was afraid that such a statement might be taken amiss: it would be wiser to pass no judgment on the utility of the topics suggested by governments.

50. Mr. LACHS, Rapporteur, said he would redraft the sentence on the lines suggested by Mr. Tunkin.

51. Mr. VERDROSS suggested that the first sentence of the last paragraph should be deleted and the beginning of the second sentence amended accordingly so as to state that, in order to expedite its work the Commission had established two sub-committees, etc.

52. Mr. BRIGGS said that it was the second sentence rather than that should be deleted, because the decision to set up two sub-committees had nothing to do with expediting the Commission's work and would, in fact, delay for a year the appointment of special rapporteurs.

53. Mr. ROSENNE felt that the report should mention the decision to set up two sub-committees, which were to meet before the next session.

54. Possibly also, in conformity with United Nations practice, it should mention that the Commission had had before it a statement by the Secretariat of the financial implications of the appointment of the two sub-committees.

55. Mr. LIANG, Secretary to the Commission, said there was no need to mention the fact that the Commission had had before it a statement of financial implications; that question would, in any event, come up before the Sixth Committee.

56. He agreed with Mr. Rosenne that the decision to establish two sub-committees should be mentioned in the report. As views might differ on the reasons for that decision, the sentence might perhaps be drafted as a simple statement of fact.

57. Mr. EL-ERIAN said he disagreed with Mr. Briggs and Mr. Verdross; the last paragraph should stand as it was because the Commission's methods of work had been criticised in the Sixth Committee. Future criticism might be forestalled by saying that the Commission had again considered how it could improve its methods of work and its decision to establish two sub-committees would perhaps discourage further suggestions that it should be split into two sub-divisions.

58. Mr. GROS considered that the last paragraph should be recast as a plain statement of the fact that the Commission had established two sub-committees; that would indicate to the Sixth Committee that it was anxious to improve its methods of work. Any impression that the situation had been unsatisfactory in the past would be quite erroneous and should be avoided.

59. Mr. LACHS, Rapporteur, said that, having attended the Sixth Committee for many years, he knew the kind of criticism to which the Commission had been subjected and, therefore, believed that some paragraph of the kind under discussion was necessary. However, he agreed that the drafting could be improved and suggested that the first sentence should be replaced by a sentence reading:



"The Commission has, as previously, improved its methods of work with the object of expediting, as far as possible, the study of topics already on its programme."

That sentence would show that the process of improvement was a continuous one.

60. Mr. AMADO said he saw no necessity to link current discussions about ways of improving methods of work with what had happened in the past. He did not favour the new text proposed by the rapporteur.

61. Mr. CADIEUX said that the last paragraph should be drafted in terms which would avoid any reflection on the Commission's past methods of work.

62. Mr. AGO said he agreed with Mr. Cadieux: excellent work had been accomplished in the past. Still, that did not mean that methods of work could not be further improved. It would suffice simply to indicate that the Commission had decided to set up two sub-committees.

63. Mr. EL-ERIAN emphasized that the Sixth Committee had never questioned the quality of the Commission's work, only its methods. Perhaps the text suggested by the rapporteur might be modified so as to indicate that, as at previous sessions, the Commission had considered how it could improve its work.

64. Mr. BARTOŠ said that, although he had not attended the last session of the General Assembly, he had carefully perused the records of the Sixth Committee and had also been informed by members of the Yugoslav delegation of what had taken place. He had learnt that doubts had again been expressed in the Sixth Committee as to whether the Commission was doing everything possible to improve its work. Any such suggestion should be firmly refuted; in his opinion, the Commission had cause for pride in its past achievements. Nevertheless, the report should mention that methods of work had been discussed and that two sub-committees had been set up with a view to achieving more in the time at the Commission's disposal. Every member was keenly aware of the problem, and that should be clearly reflected in the report.

65. In addition, the situation should be explained orally by the Chairman to the Sixth Committee, which had not fully realised that the process of codifying international law demanded the most meticulous work and a great deal of time; the Commission was not an automatic machine for the mass production of articles. The Sixth Committee should also have explained to it the difficulties with which the Commission had to contend and the unsatisfactory technical organization which interfered with the smooth running of its work.

66. Mr. TABIBI said he agreed with Mr. El-Erian that the Sixth Committee had never questioned the quality of the Commission's work but was only anxious that it should be carried out with greater speed. The last paragraph should be retained and some mention made of the fact that one of the reasons for establishing the sub-committees was to give guidance to the future special rapporteurs.

67. Mention should also be made of the fact that a special rapporteur on special missions had been appointed.

68. Mr. ROSENNE said that in his opinion reference should be made to the Commission's methods of work, but not to the question of improvements. The last paragraph could accordingly be reworded to read: "The Commission had continued to keep under review its method of work with the object of expediting, as far as possible, the study of topics already on its programme".

69. The substance of the second sentence should be transferred to chapter IV. In that way the establishment of the sub-committees would not be linked with the question of methods of improving the Commission's work.

70. Mr. TUNKIN said that Mr. Rosenne's proposal was acceptable: alternatively a plain statement of the facts, as suggested by Mr. Gros, might be enough.

71. As a former Chairman of the Commission who had attended the Sixth Committee, he was bound to say that he had not gained the impression that the Sixth Committee was dissatisfied with the Commission's methods of work.

72. The CHAIRMAN suggested that the last paragraph should be replaced by a statement mentioning simply the establishment of the two sub-committees.

*It was so agreed.*

*Section II, as thus amended, was adopted.*

*Chapter III, as amended, was adopted.*

#### CHAPTER IV. — ORGANIZATION OF THE WORK OF THE NEXT SESSION (A/CN.4/L.101/Add.3)

73. The CHAIRMAN invited the Commission to consider chapter IV of the draft report, the title of which had now been changed from "Planning of Future Work of the Commission" to "Organization of the Work of the Next Session"; again the paragraphs were not numbered.

74. Mr. BRIGGS said he disliked the words "State responsibility *per se*" in the second paragraph of section II.

75. Mr. TUNKIN said he thought it would be unwise for the Commission to put on record anything so rigid as decision (2) in the second paragraph of section II; the sentence should be redrafted.

76. In decision (3) in the same section, he thought that the word "reports" did not accurately describe what the members of the Sub-Committee had been asked to prepare. The same applied to decision (3) in the third paragraph of section III.

77. Mr. AGO, Chairman of the Sub-Committee on State Responsibility, suggested that decision (2) in section II might open with the words "Its debates will be mainly devoted to...", while in decision (3) in the same section, the word "*exposés*" might be more accurate than "reports".

78. He noticed that no reference was made in the first paragraph of section II to the paper on state responsibility prepared by Mr. Gobbi, the observer for the Inter-

American Juridical Committee; he asked whether it was not customary to refer in the Commission's reports to papers submitted by observers.

79. Mr. LIANG, Secretary to the Commission, said that the question, which was a constitutional one, had never arisen before. When he had acted as observer for the Commission to various inter-governmental bodies, his papers had been unofficial.

80. Mr. BRIGGS suggested that decision (2) in section II should read: "Its debates will be confined to the general aspects of state responsibility".

81. Mr. AGO said he could accept that wording.

82. Mr. TUNKIN said he had some doubts concerning that formulation. The Commission had instructed the Sub-Committees to limit their proposals to the questions of scope and approach. It would consequently be inadvisable to give the impression that a substantive discussion would take place in the Sub-Committee.

83. Mr. AGO pointed out that the Sub-Committee had agreed that its approach to the subject should relate to the general aspects of state responsibility.

84. Mr. TUNKIN said he would not press his point.

85. Mr. LACHS, Rapporteur, observed that the Sub-Committee on State Responsibility was said to have met in "private session", while the Sub-Committee on the Succession of States and Governments was said to have held "two closed meetings". The same terminology should be used in both cases, and he suggested that the words "private meeting" could be used.

86. Mr. ROSENNE thought that reference should be made to the fact that the Secretariat had been requested to prepare a paper on certain aspects of the law of treaties as discussed in the General Assembly.

87. He also thought that, from a constitutional point of view, since certain working papers were mentioned in the Commission's report, they should be circulated to all members of the Commission, and not only to members of the Sub-Committees.

88. Mr. TUNKIN said that, in his view, the working papers should not be circulated to all members of the Commission since they contained informal suggestions only, and other members of the Sub-Committees who would prepare similar papers might be inhibited by the thought that their papers would be circulated to all members.

89. He drew attention to the fact that, according to sections II and III as drafted, the papers on the succession of states and governments were to be submitted by 31 October 1962, while the time-limit for papers on state responsibility was 1 December 1962. He suggested that the date should be 1 December 1962 in both cases.

90. The CHAIRMAN said that the suggestions made by members would be taken into account in the final text of the report.

*Chapter IV as thus amended was adopted.*

The meeting rose at 5.45 p.m.

## 672nd MEETING

*Friday, 29 June 1962, at 9.30 a.m.*

*Chairman: Mr. Radhabinod PAL*

**Law of treaties (A/CN.4/144 and Add.1)** (item 1 of the agenda) (*resumed from the 670th meeting and concluded*)

1. The CHAIRMAN invited the Commission to conclude its discussion of item 1 of the agenda, the law of treaties. No decision had yet been taken on article 7 *ter*.

ARTICLE 7 *ter*. — THE PROCEDURE FOR PARTICIPATING IN A TREATY (*resumed from the 660th meeting*)

2. Sir Humphrey WALDOCK, Special Rapporteur, suggested that, in the light of the structure which the Commission had decided to give to article 7 and 7 *bis*, article 7 *ter* might now be omitted.

*It was so agreed.*

ARTICLE 18 *bis*. — THE EFFECT OF RESERVATIONS

3. Mr. BRIGGS asked that in the report a footnote on the following lines should be inserted in connexion with article 18 *bis*:

"For the reasons given in the summary records of the 637th, 651st, 652nd, 656th and 667th meetings, Mr. Briggs could not accept the provisions of article 18 *bis*."

*It was so agreed.*

ARTICLE 20. — ENTRY INTO FORCE OF TREATIES

4. Sir Humphrey WALDOCK, Special Rapporteur, said that although article 20 had been adopted at the 668th meeting, the words "if the instruments have been exchanged or deposited by that date" should still be added at the end of paragraph 2 (*a*). A passage explaining that phrase had actually been included in the commentary to the article.

*It was so agreed.*

5. Sir Humphrey WALDOCK, Special Rapporteur, asked the Commission's authority to make any minor editorial changes that might be necessary as regards the titles of the chapters and, particularly, the place of article 19 *bis* (The rights and obligations of states prior to the entry into force of the treaty) which he thought should be inserted before the articles concerning reservations.

*It was so agreed.*

**Draft report of the Commission on the work of its fourteenth session** (*resumed from the previous meeting*)

CHAPTER II. — LAW OF TREATIES (A/CN.4/L.101/Add. 1) (*resumed from the 670th meeting*)

6. The CHAIRMAN invited the Commission to resume its consideration of the commentaries to the draft articles.

COMMENTARIES TO ARTICLES 7. — PARTICIPATION IN A TREATY, and 7 *bis*. — THE OPENING OF A TREATY TO THE PARTICIPATION OF ADDITIONAL STATES

*Paragraph (1)*

*Paragraph (1) was adopted without comment.*

*Paragraph (2)*

7. Mr. TUNKIN proposed that, in the first sentence, the words "having regard to the emergence of many new states" should be deleted. The problem of participation in general multilateral treaties was of importance in connexion with other matters as well.

8. He also proposed that, in the third sentence, the concluding words, "independently of the will of the states which actually drew up the treaty", should be deleted.

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

9. Mr. TUNKIN proposed that the opening words, "The Commission did not feel justified . . .", should be replaced by the words "The majority of the Commission did not feel justified".

10. Mr. YASSEEN said that, if the commentary was to mention a majority view, it should also mention a minority view that the principle that general multilateral treaties should be open was a *jus cogens* rule of international law.

11. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the opening words of paragraph (3) should read "Other members of the Commission did not feel . . .". The opinion of those members would then be contrasted with that of the members referred to in the third and subsequent sentences of paragraph (2).

*Paragraph (3) as thus amended was adopted.*

*Paragraph (4)*

12. Mr. CASTRÉN suggested that, in the third sentence, the words "and, in effect, only excludes controversial cases" should be omitted.

13. Sir Humphrey WALDOCK, Special Rapporteur, explained that the sentence in question reflected the views of Mr. Gros and certain other members of the Commission and should therefore be retained in a form satisfactory to them. At the beginning of the sentence, however, the words "they considered" should be inserted, so that it would then read "This form, they considered . . .".

*Paragraph (4) as thus amended was adopted.*

*Paragraph (5)*

*Paragraph (5) was adopted without comment.*

*Paragraph (6)*

14. Mr. GROS observed that the expression "the Commission" was used in connexion with views which were held by only a majority of its members; however, in a conciliatory spirit, he would not press for any amendment.

*Paragraph (6) was adopted.*

*Paragraphs (7), (8) and (9)*

*Paragraphs (7), (8) and (9) were adopted without comment.*

*Paragraph (10)*

15. Mr. CASTRÉN proposed that, in the penultimate sentence, the words "indeed it is believed" should be amended to read: "indeed, it is known".

16. Sir Humphrey WALDOCK, Special Rapporteur, said that at the end of the paragraph he had inadvertently omitted any reference to non-members of the United Nations, though he had mentioned them in his original report. He asked if he could be permitted to include a phrase to the effect that it would be possible to find some means of associating any non-members with such a resolution.

*It was so agreed.*

*Paragraph (10) as thus amended was adopted.*

COMMENTARY TO ARTICLES 17, FORMULATION OF RESERVATIONS, 18, ACCEPTANCE OF AND OBJECTION TO RESERVATIONS, and 18 *bis*, THE EFFECT OF RESERVATIONS

*Paragraph (1)*

17. Mr. LACHS proposed that the fourth sentence, which read "Accordingly, it has not been thought necessary to frame rules concerning reservations to bilateral treaties", should be deleted. The theoretical question whether the notion of reservations applied to bilateral treaties was a controversial one.

*It was so agreed.*

18. Mr. ROSENNE proposed that, in the last sentence, the words "the other" before the word "objects" should be amended to "another".

*It was so agreed.*

*Paragraph (1) as thus amended was adopted.*

*Paragraph (2)*

19. Mr. ROSENNE suggested that the full title, the Convention on the Prevention and Punishment of the Crime of Genocide, should be given both in paragraph (2) and throughout the report.

20. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the full title was rather cumbersome; in any case it was given in the footnote. Perhaps Mr. Rosenne would be satisfied if, in the passage under discussion, and elsewhere in the report where appropriate, the full title were given when the Genocide Convention was mentioned for the first time and the shorter title "Genocide Convention" used thereafter.

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

*Paragraph (3)*

21. Mr. TUNKIN said that the "traditional" doctrine referred to in paragraph (3) had never been generally accepted; in fact, even the states which had advocated it in the past had departed from it in practice. An example was the very substantial reservations by the United Kingdom to the Briand-Kellogg Pact of 1928,<sup>1</sup> reservations to which the Soviet Union had objected without result.

22. He suggested that the expression "traditional doctrine" should be replaced by the words "League of Nations practice".

23. Mr. GROS suggested, in order to meet at least partly Mr. Tunkin's point, that the word "traditional"

<sup>1</sup> *British White Papers*, Cmd. 3109, p. 25 and Cmd. 3153, p. 10. See also 653rd meeting, para. 21.

in the first line should be deleted and that in the fourth line, the passage incorporating the term "traditional" should be placed within quotation marks, to show that the term was taken from the Court's advisory opinion.

*It was so agreed.*

24. Mr. ROSENNE said that the quotation from the Court's reply to the questions put to it by the General Assembly should be preceded by the full text of the introductory phrase used by the Court in the operative clause of the advisory opinion, to the effect that its opinion had been given in relation to the Convention on the Prevention and Punishment of the Crime of Genocide. That would also correspond accurately with the question put to the Court.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne's point was already met by the sentence immediately following the quotations: "In giving these replies to the General Assembly's questions the Court emphasized that they were strictly limited to the Genocide Convention".

26. Mr. BRIGGS pointed out that the Court had relied heavily on the distinction between a treaty in which there was a web of mutual rights and obligations, and a treaty like the Genocide Convention in which all states parties joined for a common purpose; in the case of the latter type of treaty, reservations did not affect that common purpose. Perhaps that idea could be mentioned in the commentary.

27. Sir Humphrey WALDOCK, Special Rapporteur, said that the idea was already expressed in paragraph (4) (c). He would, however, re-examine the Court's opinion in order to bring the summary closer to the original text, if necessary.

*Paragraph (3) as thus amended was adopted.*

#### *Paragraph (4)*

28. Mr. TUNKIN observed that paragraph (4) was intended to interpret the Court's opinion in relation to the decision taken by the Commission; it could, however, give rise to controversy.

29. For example, the statement in sub-paragraph (b), according to which the traditional concept that no reservation was valid unless it had been accepted by all the contracting parties was "of undisputed value", might give the impression that the unanimity rule concerning the admissibility of reservations to a treaty was still in force as a rule of modern international law, or at least that it had been in force at the time of the Court's opinion; it might also give the impression that the Commission intended to set out exceptions to the unanimity rule. In fact, the unanimity rule had never existed as a rule of international law; it had merely constituted a practice of the League of Nations.

30. Sub-paragraph (d) conflicted with the decisions adopted by the Commission in regard to article 18 *bis* and should be deleted.

31. He did not think it advisable to offer, in that fashion, a particular interpretation of the Court's opinion, of which other interpretations were possible,

and urged that at least the more controversial parts of the paragraph should be dropped.

32. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the statement by the Court summarized in sub-paragraph (b) was qualified by the statement summarized in sub-paragraph (e), to the effect that the principle of the integrity of the convention "does not appear to have been transformed into a rule of law".

33. He thought that the paragraph should be retained intact, so as not to give the impression that the Commission was ignoring the Court's advisory opinion.

34. Mr. CADIEUX advocated the retention of paragraph (4), which was a fair summary of the advisory opinion of the International Court of Justice.

35. Mr. BRIGGS also supported the retention of the paragraph; the interpretation given by the special rapporteur was an accurate and balanced presentation of the Court's opinion.

36. Mr. GROS said that it would be difficult to deny, in the case of an advisory opinion which had been so widely commented upon, that the summary in paragraph (4) was fair and accurate.

37. At the end of each of the five sub-paragraphs (a) to (e), the reference should be given in brackets to the appropriate page of the Reports of the International Court of Justice; that would show that the special rapporteur had given a fair interpretation of the Court's opinion. It could, of course, be added that certain writers did not agree with the Court's ruling, but any reference to that fact would cause some surprise, particularly in the International Court of Justice. In any case, it was not necessary to include any such reference, since the Commission itself went much further than the Court by advocating greater flexibility in the rules governing reservations.

38. Mr. de LUNA suggested that, since sub-paragraph (e) qualified the statement contained in sub-paragraph (b), it might be appropriate to place it after that sub-paragraph.

39. Mr. TUNKIN said that, if the majority of the Commission were prepared to accept paragraph (4), he would not press for its amendment, provided his views were noted in the summary record of the meeting.

*Paragraph (4) was adopted.*

#### *Paragraph (5)*

40. Sir Humphrey WALDOCK, Special Rapporteur, suggested the deletion from the penultimate sentence of the word "traditional" before "doctrine".

*Paragraph (5) as thus amended was adopted.*

#### *Paragraph (6)*

41. Mr. ROSENNE suggested that at the end of the second sentence the word "could" should be replaced by "should".

42. He further suggested that, in the first sentence of the second part of the paragraph, the words "still applies" should be replaced by "still applied".

*It was so agreed.*

*Paragraph (6) as thus amended was adopted.*

*Paragraph (7)*

43. Mr. YASSEEN suggested that, in the third sentence, the word "more", before the words "flexible system", should be omitted.

*It was so agreed.*

44. Mr. de LUNA said he doubted whether it was true to say, as was done in the last sentence, that opinion being divided in the United Nations, "no general conclusion could be arrived at concerning the legal principles applicable to reservations"; the majority of member states had expressed themselves against the principle of the integrity of treaties. He proposed that the passage beginning "no general conclusion" should be deleted.

*It was so agreed.*

45. Sir Humphrey WALDOCK, Special Rapporteur, said that while he did not object to the proposed deletion, he must point out that no resolution had been adopted by the Assembly on the legal principles involved, so that it was difficult to say what majority there was against the principle of the integrity of treaties. Some groups of states held intermediate positions.

*Paragraph (7) as thus amended was adopted.*

*Paragraph (8)*

46. Mr. TUNKIN said the expression "it seems likely that" in the last sentence, weakened the reference to the United Nations practice of considering a reserving state to be a party to the convention. The statement was already limited by the words "in practice".

47. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the words "it seems likely that under the present system" should be deleted.

*It was so agreed.*

*Paragraph (8) as thus amended was adopted.*

*Paragraph (9)*

48. Mr. LACHS said the main issue with regard to the reservation to the constituent instrument of the Inter-Governmental Maritime Consultative Organization had been not its conformity with the old rule, but its retroactive application, which had shown that the artificial line of demarcation previously adopted by the General Assembly was impracticable.

49. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that, in fact, the General Assembly had reaffirmed its previous directive to the Secretary-General concerning his depositary functions.

50. Mr. LACHS said he would not press his point.

*Paragraph (9) was adopted.*

*Paragraph (10)*

51. Mr. ROSENNE suggested that the words "and of objections to those reservations" should be added at the end of the third sentence so as to reflect the Commission's debate on that point.

52. He also suggested that the last part of the fourth sentence should read "...and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty".

*It was so agreed.*

*Paragraph (10) as thus amended was adopted.*

*Paragraph (11)*

53. Mr. CADIEUX asked that the drafting of the third sentence, which was hardly intelligible, should be improved.

54. Mr. de LUNA said that in his opinion the reference in the second sentence to a reservation incompatible with the objects of a treaty was a reference to a subjective judgment.

55. Sir Humphrey WALDOCK, Special Rapporteur, said he would try to improve the drafting of the third sentence.

56. In reply to Mr. de Luna, he said that the second sentence did not represent the Commission's views, but referred to a hypothesis on which the argument of a minority had been based.

*Paragraph (11) was adopted.*

*Paragraph (12)*

57. Mr. CASTRÉN suggested that, in the first sentence, the adjective "general", qualifying "multilateral treaties", should be deleted, since the Commission had finally decided that its draft would deal with all multilateral treaties.

58. Sir Humphrey WALDOCK, Special Rapporteur, said he preferred that the adjective should be retained, since it helped to show how the Commission had reached its conclusion on the system it had adopted. The term general multilateral treaties had been used until quite a late stage in the debates, so that the reference in paragraph (12) was necessary for a faithful record of the discussions.

59. Mr. CASTRÉN said he agreed with the special rapporteur. He suggested, however, that the inverted commas round the word "integrity" in the penultimate sentence should be deleted.

*It was so agreed.*

60. Mr. TUNKIN suggested that the eighth sentence, which quoted what the Commission had said in 1951, should be deleted, as it was out of place in the paragraph.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that the inclusion of the sentence was really a matter of presentation. The argument against the flexible system of reservations had been used by a number of publicists, including Sir Gerald Fitzmaurice; it would be seen, however, that that argument was subsequently refuted in the commentary.

62. Mr. CADIEUX said he could see arguments for both the deletion and the retention of the sentence and had no strong feelings on the matter, which was, as the special rapporteur had said, really one of presentation.

63. Mr. AMADO said that the sentence should be retained, since it formed part of the special rapporteur's argument in favour of reservations as a means of promoting a greater measure of universality in the application of the treaty. The danger lay in cases where a group of states might break the unity of a treaty by their reservations.

64. From the historical point of view, moreover, it was useful to include the quotation from the Commission's 1951 report, which reflected the general surprise of jurists at the advisory opinion of the International Court of Justice on reservations to the Genocide Convention. In 1951, there had been extremely strong emotional feelings on the subject of the crime of genocide, and the Court's decision had caused indignation in certain circles; since then, however, the deep and mature wisdom of the Court in delivering an advisory opinion which promoted the universality of treaties had become more widely recognized.

65. Mr. TUNKIN said he would not press his point.

*Paragraph (12) as thus amended was adopted.*

*Paragraph (13)*

*Paragraph (13) was adopted without comment.*

*Paragraph (14)*

66. Mr. TUNKIN said there was a discrepancy between the reference to "general multilateral treaties" in the first sentence, and the text of article 18 *bis*. Now that the article referred to multilateral treaties and treaties concluded by a restricted group of states, the word "general" in the first sentence of the commentary might be deleted.

67. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the history of the decision on the matter was given in the last two sentences of the paragraphs.

*Paragraph (14) was adopted.*

*Paragraph (15)*

*Paragraph (15) was adopted without comment.*

*Paragraph (16)*

68. Mr. ROSENNE asked whether the word "not" in the sixth sentence should not read "now".

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the sentence was correct as it stood; a statement of reservation made during the negotiation and recorded in the *procès-verbaux* had not been included in the list of ways of formulating reservations. The Commission's decision that reservations should be formulated in clear and specific terms represented an improvement over the existing practice. Perhaps a slight rewording of the sixth sentence would make the position clearer.

70. Mr. LACHS said he doubted whether there was any need to include the penultimate sentence, which read: "There is some authority for the opposite view", since the Commission had taken a decision on the manner in which reservations should be formulated.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that in drafting the sentence he had in mind the method followed in the Harvard Research draft. If, however, there was no necessity to refer to the opposite view, then the last sentence should also be deleted.

*It was so agreed.*

*Paragraph (16) as thus amended was adopted.*

*Paragraphs (17) to (19)*

*Paragraphs (17) to (19) were adopted without comment.*

*Paragraph (20)*

72. Mr. ROSENNE suggested that the phrase "in the absence of compulsory jurisdiction", in the fourth sentence, should be brought into line with the broader wording which the Commission had accepted for the fourth sentence of paragraph (10).

*It was so agreed.*

*Paragraph (20) as thus amended was adopted.*

*Paragraph (21)*

73. Mr. CASTRÉN said that the last clause in the second sentence did not accurately reflect the provision of paragraph 2 (b) of article 18 *bis*, since the word "insist" did not imply the automatic effect of the objection; it should be amended to read "... unless the objecting state should express a contrary intention".

*It was so agreed.*

74. Mr. LACHS said he thought the words "less illogical" hardly appropriate in the last sentence.

75. Sir Humphrey WALDOCK, Special Rapporteur, said he would redraft the sentence.

*Paragraph (21) as thus amended was adopted.*

*Paragraph (22)*

76. Mr. ROSENNE suggested that the words "the commentary on" should be inserted before the words "these three articles" in the first sentence.

*It was so agreed.*

*Paragraph (22) as thus amended was adopted.*

*Paragraph (23)*

77. Mr. ROSENNE suggested that the words "commentary on these" should be inserted before the words "three articles" in the first sentence.

78. Mr. BARTOŠ observed that a number of the objections raised to the IMCO Convention had not been true reservations but declarations of the views of the states on the future policy of the organization, made at the time of accession or ratification, in the hope that articles 1 and 2 of the Convention would not be applied to the letter. Such declarations had been made by a number of countries, including Norway, Sweden and Yugoslavia, and that form of objection had been accepted in the interests of the universality of the Convention.

79. It therefore seemed dangerous to refer, in the second sentence, to India's "reservation" to the IMCO Convention, since the declarations, which had had the same intention as India's so-called reservation, had been accepted. In view of the character of the declarations made in connexion with that Convention and of the solution which had been reached, rather on a basis of expediency than of principle, it was better to use very moderate language when dealing with the subject in the commentary.

80. Sir Humphrey WALDOCK, Special Rapporteur, said that the so-called Indian reservation had been challenged by France and the Federal Republic of Germany. However, Mr. Bartoš's point might be met by amending the wording to "an alleged 'reservation'".

81. Mr. BARTOŠ pointed out that, after the Indian "reservation" had been challenged, other countries which had also intended to formulate reservations had made declarations instead.

82. He agreed, however, with the special rapporteur's proposed amendment.

*It was so agreed.*

83. Mr. EL-ERIAN asked that a footnote should be appended to the second sentence indicating where the Secretary-General's report was to be found.

84. Mr. LIANG, Secretary to the Commission, asked whether the word "integrity" in the last line should not be followed by the word "rule".

85. Sir Humphrey WALDOCK, Special Rapporteur, replied that he thought "integrity of the instrument" would be better.

*It was so agreed.*

*Paragraph (23) as thus amended was adopted.*

#### COMMENTARY ON ARTICLE 18 *ter*: THE LEGAL EFFECT OF RESERVATIONS

*The commentary on article 18 ter was adopted without comment.*

#### COMMENTARY ON ARTICLE 19

86. Mr. de LUNA said the commentary should mention the fact that the Commission was aware of some authority against the principle, recognized in the article, of the admissibility of unilateral withdrawal of reservations. It should be stated that the Commission had taken the existence of that authority into account, but had considered that the advantages of the integrity of the treaty outweighed the disadvantages of unilateral withdrawal of reservations.

87. Sir Humphrey WALDOCK, Special Rapporteur, said he would add a passage along the lines suggested by Mr. de Luna.

*It was so agreed.*

88. Mr. LACHS said the words "derogation from the treaty" in the second sentence seemed rather too strong.

89. Sir Humphrey WALDOCK, Special Rapporteur, suggested that "modification of the treaty" might be more suitable.

*It was so agreed.*

*The commentary on article 19 as thus amended was adopted.*

#### COMMENTARY ON ARTICLE 4 *bis*: NEGOTIATION AND DRAWING UP OF A TREATY

90. Mr. BARTOŠ said the word "hesitated", in the first sentence, was inappropriate; it would be better to say that opinion in the Commission was divided on the subject. Far from being hesitant, the views expressed had been very decided but sharply divided.

91. Mr. AGO suggested that the commentary should open with some such wording as "Although recognizing that the contents of the article were more descriptive than normative, the Commission decided to retain the article...".

*It was so agreed.*

*The commentary on article 4 bis as thus amended was adopted.*

92. Sir Humphrey WALDOCK, Special Rapporteur, said he thought that the substance of the article should be retained but that it might be amalgamated with article 5. He would make a proposal accordingly at the next session.

#### COMMENTARY ON ARTICLE 20: ENTRY INTO FORCE OF TREATIES

*The commentary on article 20 was adopted without comment.*

#### COMMENTARY ON ARTICLE 21: PROVISIONAL ENTRY INTO FORCE

##### Paragraph (1)

*Paragraph (1) was adopted without comment.*

##### Paragraph (2)

93. Mr. ROSENNE suggested that the words "or upon it becoming clear that the treaty is not going to be ratified or approved by the one or other party" should be added at the end of the first sentence. The word "but" at the beginning of the next sentence should be omitted.

*It was so agreed.*

*Paragraph (2) as thus amended was adopted.*

#### COMMENTARY ON ARTICLE 22: THE REGISTRATION AND PUBLICATION OF TREATIES

##### Paragraph (1)

*Paragraph (1) was adopted without comment.*

##### Paragraph (2)

94. Mr. ROSENNE observed that the words: "In the practice of the Secretariat" at the beginning of the third sentence should be replaced by "In the regulations for the registration of treaties".

*Paragraph (2) as thus amended was adopted.*

##### Paragraph (3)

95. Sir Humphrey WALDOCK, Special Rapporteur, said he had suggested that the General Assembly's regulations should be attached as an annex to the Commission's report because it was inconvenient to have to look for them in the original General Assembly resolutions.<sup>2</sup>

96. Mr. LIANG, Secretary to the Commission, said that while he agreed with the special rapporteur, he was obliged to draw attention to General Assembly resolution 1272 (XIII) on control and limitation of documentation. One of the rules laid down in that resolution was that the contents of existing documents should not be reproduced in other United Nations publications.

97. Sir Humphrey WALDOCK, Special Rapporteur, supported by Mr. CADIEUX, said that in that case the Commission should express a wish to have the regulations annexed to its report, for easier consultation.

*It was so agreed.*

*Paragraph (3) was adopted.*

<sup>2</sup> The full text of the regulations will be found in *United Nations Treaty Series*, Vol. 76, p. XXII.



98. The CHAIRMAN put the draft report as a whole to the vote.

*The draft report as a whole, as amended, was unanimously adopted subject to drafting changes.*

99. Mr. TUNKIN said that his affirmative vote for the adoption of the report should not be interpreted to mean that he had abandoned the reservations he had expressed concerning certain articles and passages in the commentary.

100. Mr. GROS said that that reservation held good for all members.

101. The CHAIRMAN said that acceptance of the report meant that members were agreed that it was a correct and faithful account of the proceedings. Objections registered by individual members to certain articles in the draft on the law of treaties naturally remained unaffected.

#### Closure of the session

102. The CHAIRMAN said that the discussions during the session had been marked by good will and mutual understanding which indicated a determination on the part of members to work together effectively. In an age when national and international life demanded an unprecedented degree of rational co-ordination, any common effort required not only intellectual interest but spiritual qualities, including humility and the willingness to consider and respect the views of others.

103. It had been with some apprehension that he had taken over the Chair from its previous occupant, Mr. Tunkin, who possessed special qualities for the task. Although conscious of his own inadequacy, he

had accepted the responsibility knowing that he could rely on the Commission's co-operation. If the session had yielded anything that could contribute to the development of international law, the credit should go to the resolution manifested by each one of the members to work towards what was practicable at the time. The Commission had been fortunate in its special rapporteur, Sir Humphrey Waldock, who possessed a remarkable gift for penetrating deeply into the subject and for expounding the essential issues, however complex, with clarity. He thanked each member of the Drafting Committee individually for his work in re-examining the draft articles prepared by the special rapporteur in the light of the Commission's discussions. He also thanked the rapporteur, Mr. Lachs, for his careful preparation of the Commission's draft report. He paid special tribute to Mr. Amado's extensive knowledge, experience and wisdom and to the incisive intellect of Mr. Verdross. Indeed, the deliberations had been marked by outstanding contributions from all members. It had been particularly encouraging to observe the quality of the new and younger members of the Commission. In conclusion he thanked the Secretary, who had exercised a beneficial influence on the conduct of the work, as well as his staff.

104. ALL MEMBERS OF THE COMMISSION PRESENT paid a tribute to the Chairman for the manner in which he had presided over the session; they also thanked the special rapporteur and the officers of the Commission.

105. The CHAIRMAN declared the Commission's fourteenth session closed.

The meeting rose at 12.15 p.m.

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