

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1963

Volume I

*Summary records
of the fifteenth session*

6 May—12 July 1963

UNITED NATIONS



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INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by the members of the Commission and such editorial changes as were considered necessary.

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents.

The documents before the Commission at its fifteenth session are reproduced in volume II of this *Yearbook*, which also contains a list of other documents referred to.

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MEMBERS OF THE COMMISSION

Mr. Roberto Ago, Italy	Mr. Antonio de Luna, Spain
Mr. Gilberto Amado, Brazil	Mr. Luís Padilla Nervo, Mexico
Mr. Milan Bartoš, Yugoslavia	Mr. Radhabinod Pal, India
Mr. Herbert W. Briggs, United States of America	Mr. Angel M. Paredes, Ecuador
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Mr. Victor Kanga, Cameroon	Sir Humphrey Waldock, United Kingdom of Great Britain and Northern Ireland
Mr. Manfred Lachs, Poland	Mr. Mustafa Kamil Yasseen, Iraq
Mr. Liu Chieh, China	

Observers

For the Inter-American Juridical Committee: Mr. Caicedo Castilla
For the Asian-African Legal Consultative Committee: Mr. Thambia

Officers

Chairman: Mr. Eduardo Jiménez de Aréchaga *Second Vice-Chairman:* Mr. Senjin Tsuruoka
First Vice-Chairman: Mr. Milan Bartoš *Rapporteur:* Sir Humphrey Waldock

Mr. Yuen-Li Lian, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

[Document A/CN.4/153]
[5 February 1963]

The Commission adopted the following agenda at its 673rd meeting, held on 6 May 1963:

1. Law of treaties
2. Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII))
3. State responsibility: report of the Sub-Committee
4. Succession of States and governments: report of the Sub-Committee
5. Special missions
6. Relations between States and intergovernmental organizations
7. Co-operation with other bodies
8. Date and place of the sixteenth session
9. Other business

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIFTEENTH SESSION

Held at Geneva, from 6 May to 12 July, 1963

673rd MEETING

Monday, 6 May 1963, at 3 p.m.

Chairman: Mr. Radhabinod PAL

Later: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Opening of the Session

1. The CHAIRMAN, after declaring open the Commission's fifteenth session, drew attention to the statement (A/C.6/L.497) he had made at the 734th meeting of the Sixth Committee of the General Assembly when presenting the report on the work of the fourteenth session. The Committee had paid a tribute to the Commission's work and in particular to that of its Special Rapporteur, Sir Humphrey Waldock.

2. In the course of the Committee's discussion he had indicated that international law must be largely the creation, not of professors, but of statesmen capable of judging where the focal points of tension lay and where adjustments must be made to take account of far-reaching political, economic and social developments.

3. In reply to some cursory observations made by members of the Sixth Committee, he had pointed out that a number of the questions dealt with by the Commission or included in its future programme of work were controversial, but that they must not be evaded on that score if the rule of law was to be substituted for the blind play of force in the conduct of world affairs. He had recognized, however, that in examining drafts prepared by the Commission, governments had to weigh their duty to respect a norm framed by an international body against another and perhaps higher obligation — that of assessing the practical consequences of action which might affect millions of their own nationals — and had to be vigilant lest any proposed norm diverged too far from political reality. The efficacy of any system of law must depend on its power to persuade as much as on its power to exact obedience.

4. He had reminded the Committee that in times of rapid and radical change there could be no absolute rules of international law, even among those designated as "generally accepted", nor was established custom immune from the forces of change. Adjustments were always necessary to fit new circumstances. Unfortunately, no international legislative machinery had yet been set up to effect the requisite continuous process of adaptation and if rules which had become intolerable could not be revised in time, they might provoke outright defiance. In the meantime, therefore, a grave responsibility lay

upon them all to ensure that international law reflected contemporary needs and did not lose touch with reality.

5. As would be seen from paragraph 16 of the Sixth Committee's report (A/5287), many of its members had commented on the beneficial effect on the Commission's work of the increase in membership, thanks to which existing legal systems were now better represented. The Committee had fully endorsed the hope expressed in paragraph 85 of the Commission's report concerning the facilities placed at its disposal.

6. In conclusion, he drew attention to the reference in the last paragraph of his statement to the spirit in which the Commission's deliberations were conducted.

Election of Officers

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

8. Mr. AGO proposed Mr. Jiménez de Aréchaga, who was well known to the Commission both for his talents as a lawyer and for his virtues as a colleague.

9. Mr. AMADO seconded the proposal.

10. Mr. TUNKIN, Mr. de LUNA, Mr. PADILLA NERVO and Mr. PAREDES supported the proposal.

Mr. Jiménez de Aréchaga was unanimously elected Chairman and took the chair.

11. The CHAIRMAN thanked the Commission for having elected him and expressed his deep appreciation to those members whose self-denying support of his nomination had led to that honour being conferred upon him. It was his intention to preside over the work of the Commission in the manner in which that task had been performed by the last three chairmen, under whom he had had the honour to serve since his election to the Commission.

12. He called for nominations for the office of First Vice-Chairman.

13. Mr. EL-ERIAN proposed Mr. Bartoš, who had made such an outstanding contribution to the work of the Commission since his election in 1956.

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

Mr. Bartoš was unanimously elected First Vice-Chairman.

15. Mr. BARTOŠ thanked the members for the honour they had done him, and congratulated the Chairman on his election.

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

17. Mr. BRIGGS, after associating himself with the congratulations extended to the Chairman and First Vice-Chairman on their election, proposed Mr. Tsuruoka, the distinguished Japanese jurist who had made such a valuable contribution to the work of the Commission.

18. Mr. AGO seconded and Mr. VERDROSS, Mr. AMADO, Mr. EL ERIAN, Mr. TABIBI and Mr. YASSEEN supported the proposal.

Mr. Tsuruoka was unanimously elected Second Vice-Chairman.

19. Mr. TSURUOKA thanked the members for the honour they had done him, and congratulated the Chairman and the First Vice-Chairman on their election.

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

21. Mr. GROS, after congratulating Mr. Jiménez de Aréchaga, Mr. Bartoš and Mr. Tsuruoka on their election, proposed Sir Humphrey Waldock, who had already amply demonstrated his merits as Special Rapporteur for the Law of Treaties.

Sir Humphrey Waldock was unanimously elected Rapporteur.

22. Sir Humphrey WALDOCK thanked the members for having elected him Rapporteur. The Commission was to be congratulated on its choice of a Chairman, First Vice-Chairman and Second Vice-Chairman and, as Rapporteur, he was particularly gratified at the prospect of co-operating with such able officers.

Adoption of the Agenda

23. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/153); its adoption did not necessarily mean that the Commission would follow strictly the order in which the items were set out.

The provisional agenda (A/CN.4/153) was adopted.

Resolution of the United Nations Conference on Consular Relations

24. The CHAIRMAN said that the United Nations Conference on Diplomatic Relations, held at Vienna from 4 March to 24 April 1963, had adopted a resolution paying a tribute to the Commission's work, which had been the basis of the Conference's deliberations; the text of the resolution would be found in document A/CN.4/158.

25. Mr. BARTOŠ said that as a participant in the Vienna Conference, he wished to lay special stress on the part played by Mr. Zourek, a former member of the Commission and an expert on consular relations, who had presented the Commission's draft to the Conference with authority, wisdom and expertise. His explanations

of the Commission's intentions had frequently induced participants in the Conference to accept unchanged the text proposed by the Commission when for practical reasons they had wished to amend it. A considerable share of the commendations bestowed on the commission was due to Mr. Zourek, since his contribution to the success of the draft submitted to the Conference had been so great.

26. Mr. de LUNA, endorsing Mr. Bartoš's observations, proposed that the Commission should express its gratitude to Mr. Zourek.

27. Sir Humphrey WALDOCK suggested that a message should be sent to Mr. Zourek, who, when a member of the Commission, had been its Special Rapporteur for Consular Relations, and who had so ably acted as expert to the Vienna Conference of 1963.

28. Mr. YASSEEN supported the suggestion.

29. Mr. ROSENNE, also supporting the suggestion, further proposed that the resolution adopted by the Vienna Conference should be brought to the knowledge of all former members of the Commission. The International Law Commission was, of course, a collective body, but the tribute which had been paid to its work was really intended for all those who had been members of the Commission when it had worked on the topic of Consular Relations.

30. The CHAIRMAN said that, if there were no further speakers on the subject, he would consider that the Commission agreed that a suitable note should be sent to Mr. Zourek, and that the Secretariat should send copies of the Vienna Conference resolution to all former members of the International Law Commission who had attended the various sessions at which the topic of Consular Relations had been discussed.

It was so agreed.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

31. Sir Humphrey WALDOCK, Special Rapporteur, drawing attention to his second report on the Law of Treaties (A/CN.4/156 and addenda), said it dealt with the essential validity, duration and termination of treaties. The documents so far distributed comprised three sections: section I (General provisions), section II (Principles governing the essential validity of treaties) and section III (The duration, termination and obsolescence of treaties).

32. He suggested that the Commission should leave aside for the time being section I (General provisions) consisting of article 1 (Definitions), article 2 (The presumption in favour of the validity of a treaty), article 3 (Procedural restrictions upon the exercise of a right to avoid or denounce a treaty) and article 4 (Loss of a right to avoid or denounce a treaty through waiver or preclusion), because those general provisions could be more easily dealt with, and more readily understood, after the Commission had considered the questions of substance dealt with in sections II and III.

33. Mr. TUNKIN said that the Special Rapporteur's proposal was very sound. It would indeed be difficult to discuss the general provisions of section I before the provisions contained in sections II and III.

34. The CHAIRMAN said that, if there were no further comments on that point, he would consider that the Commission agreed to begin at its next meeting the discussion of section II (articles 5 to 14).

It was so agreed.

The meeting rose at 4.15 p.m.

674th MEETING

Tuesday, 7 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

SECTION II

(Principles governing the essential validity of treaties)

ARTICLE 5 (CONSTITUTIONAL LIMITATIONS ON THE TREATY-MAKING POWER)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 5 in section II of his second report (A/CN.4/156).

2. Sir Humphrey WALDOCK, Special Rapporteur, recalled that at its previous meeting the Commission had agreed to begin consideration of the draft articles in his second report with section II (Principles governing the essential validity of treaties (A/CN.4/156), because it could not deal adequately with the general principles stated in section I until it knew what was going to be the substance of section II and of section III (The duration, termination and obsolescence of treaties).

3. He had also prepared a section IV, dealing with the procedural aspects of essential validity, which would be circulated shortly and consideration of which, like that of section I, would have to await the Commission's decisions on the main problems of substance dealt with in sections II and III. The Commission had therefore acted wisely in deciding to concentrate at that stage on the solution of those difficult problems of substance. Naturally, in any decision that might be taken, a member would be able to reserve his attitude regarding sections I and IV.

4. Article 5, the first article in section II, dealt with the important problem of constitutional limitations on the treaty-making power. He had set out at length in the commentary to article 5 his reasons for drafting that article in the form in which it appeared in the report.

5. He must point out that, owing to a typographical error, the three last lines of paragraph 1 of article 5 had been made to appear as the concluding portion of sub-paragraph (b); in fact, the words "the effect of such provisions . . . this article" constituted the concluding portion of the main clause of paragraph 1, and should therefore not have been indented.

6. Mr. VERDROSS, after congratulating the Special Rapporteur on his report, said that he himself did not accept the view which had previously prevailed and had been accepted by the first Special Rapporteur and the Commission in 1951, that in deciding a treaty's validity, all constitutional provisions which limited treaty-making capacity must be taken into consideration. On the face of it, the United Nations Charter seemed to support that view, since the phrase "in accordance with their respective constitutional processes" was used for ratification by signatory States in Article 43, paragraph 3, and Article 110, paragraph 1. It was, however, clear from international practice that even countries whose constitution made no provision for treaties in simplified form did conclude such treaties every day and that such treaties were recognized by all States as valid.

7. He accepted the Special Rapporteur's proposals in substance; the only problem was that raised by paragraph 4. Were there any cases where a treaty concluded by an organ endowed with constitutional authority to do so — head of State, government or minister — was not valid because the organ in question had acted *ultra vires*? It might happen that a head of State visiting another country might, without the approval of his government or his parliament, sign a treaty with the State in which he was staying, embodying a provision by which the instrument became valid immediately. The validity of such a treaty was doubtful. Unless, however, the competent organs — government or parliament — expressed their dissent immediately they learned of the treaty, they implicitly endorsed it. No reference was made in paragraph 4 to that hypothetical case, which, obviously, could occur only under a parliamentary system under which the head of State could never conclude a treaty on his own authority. It would not apply in a presidential system, where the head of State was also the head of the government. A State which signed a treaty with the United States, for example, could not be expected to know whether a treaty concluded by the President was in fact a treaty or an executive agreement; that was a doubtful case, and its interpretation was a matter for the United States alone.

8. Mr. de LUNA, commending the Special Rapporteur's second report, said that in a remarkable endeavour to settle the question of the international effects of constitutional limitations he had prudently avoided the shoals of doctrinal hair-splitting and crude realism. Outlining the development of the question from Locke and Montesquieu, who had originated the confusion between the "external" power and the executive power, to the French Revolution, when an attempt had been made to put an end to the power of the absolute monarchy in matters of foreign policy, he said it had then passed on to the democratic stage, when the head

of State was still responsible for foreign policy, but under parliamentary control.

9. The Special Rapporteur had clearly explained the conflicting theories. It was best to be realistic and to examine the facts of international law in order to construct the appropriate scientific framework. The history of foreign-policy-making showed that all constitutions had been successfully breached by the holder of the "external" power by resort to some appropriate pretext in the light of the situation at the time. The case-law of the United States Supreme Court clearly showed that when article II, section 2 of the Constitution had to be applied, acts performed by government agents, far from being stigmatized as breaches of the Constitution, had been christened "executive agreements". For instance, an international act as important as the Protocol by which Spain had promised to cede Cuba and Puerto Rico to the United States had been concluded in the form of an executive agreement, not a treaty.

10. Other States had been led to introduce that system in a more direct form — that of agreements in simplified form, which merely meant that constitutional provisions were disregarded. Ratification had been changed to acceptance and then to approval — notions politically essential to the executive, to enable it to maintain that it had confined itself to "approving" a treaty.

11. In modern times, acts of the executive power relating to external affairs were never subject to *a priori* control. He himself now believed that the most effective political control, especially with existing methods of foreign policy, was that exercised *a posteriori*. The time was past when the Weimar Constitution could envisage a system under which four months could elapse between the date when the executive contemplated declaring war and the date of the actual declaration. It might of course be asked what would happen if the head of a State A declared war on his own initiative against State B or attacked it without a declaration of war. Would the declaration be internationally valid or not? As it had been made *ultra vires*, it would have no effect in international law, so that it was not inconceivable that State C, allied to State A, might consider State B, which was defending itself, an aggressor, since State B had known that the act performed by the head of State A had been null and void.

12. He accepted in principle the text for article 5 proposed by the Special Rapporteur. With regard to paragraph 4, however, it should be emphasized that it was the effective constitution, the established practice and not the formal constitution, which other States must take into account.

13. Mr. TUNKIN, after congratulating the Special Rapporteur on his able and instructive report, suggested that he should start by giving the Commission a general account of the structure of his proposed draft articles as a whole. It would then have a clear picture of the subject and be in a better position to plan its work on the Law of Treaties.

14. With regard to article 5, he would confine his remarks at that stage to one general observation. The text as

formulated by the Special Rapporteur was generally acceptable. However, it was appropriate to recall the terms of resolution 1505 (XV) on "Future work in the field of codification and progressive development of international law", adopted by the General Assembly on 12 December 1960, which stated that it was necessary "to reconsider the Commission's programme of work in the light of recent developments in international law". Viewed in that light, he had some doubts as to whether article 5, in its present form, was adequate and whether it sufficiently reflected those recent developments.

15. In his commentary on article 5, the Special Rapporteur had indicated three possible approaches to the problem of constitutional limitations on the treaty-making power. In fact, whichever of those three approaches was adopted, the conclusion must be that, if the full powers were in order, or if the action were taken by the head of State or government and there were no discernible constitutional limitations, the action would be valid and the treaty would be binding on the State concerned.

16. In paragraph 16 of his commentary, the Special Rapporteur had stated that the provisions of the article were based on "the principle that a State is bound by the acts of its agents done within the scope of their *ostensible* authority under international law". However, the question would still arise whether, in the light of contemporary international law, there should exist some international limitations on the treaty-making competence of the State organs enumerated in article 4 of Part I. Personally, he believed that such limitations did exist and that it was not sufficient to state the rule as set out in article 5.

17. An example was the principle of self-determination of peoples, which now constituted a principle of general international law, confirmed and developed in many important international instruments. In accordance with that principle, for instance, the political fate of a people should be decided by the people itself. If, therefore, a treaty dealt with the very existence of a State as a separate entity, he believed that there should be, indeed that there already were, some international limitations. For the treaty to be considered valid, it was not sufficient that the full powers should be in order or that the treaty should be signed by the head of State or head of government and that the constitution in question should not specifically refer to the matter at issue. The principle of self-determination required that there should be some expression of the will of the people concerned, because their political future was at stake in the treaty. The question was closely connected with article 5, and some solution to it must be found.

18. Mr. CASTREN said that the Special Rapporteur deserved commendation for his second report, which was even more concise and clear than the first; he had settled the question satisfactorily by relying on international case-law and the practice of States, but proposing innovations where needed.

19. Article 5 was certainly one of the most important in the draft. The Special Rapporteur's proposals seemed well balanced, and the Commission, which had already

the previous year made its choice between the two systems at issue, could accept them. If a representative of a State or of one of its organs was on the face of it authorized to bind that State by declarations or acts, the other party, if it was acting in good faith, must have the right to require that the validity of treaties resulting from such acts should not be disputed on the ground that the representative or organ in question had acted *ultra vires*. That was the main rule, which should nevertheless be mitigated along the lines indicated by the Special Rapporteur.

20. The suggestions made by Mr. Verdross and Mr. Tunkin might perhaps be considered, but he would give his views on that later.

21. Mr. CADIEUX congratulated the Special Rapporteur on his report and thanked the Secretariat for making the text available in two languages well before the beginning of the session.

22. The draft had three great virtues. First, it was extremely practical, being specifically designed to ease the Commission's work. Secondly, it was well balanced, since it avoided extremes in favour of common-sense solutions. Thirdly, although the Special Rapporteur had respected the precedents, he had had the courage to propose innovations suited to the requirements of law and contemporary society.

23. He had no objection to article 5, only a few reservations on points of detail. His own country's constitution was so complex that there were always some provisions it could invoke if it wished to elude its obligations. But the rule of law should be fostered and governments encouraged to act with prudence, to accept the responsibilities for their decisions and to refrain from trying to shift them onto their partners in international negotiations or onto the international community.

24. Mr. AGO said he was firmly convinced that only international law could lay down the conditions for the conclusion of a treaty that was valid internationally. With regard to the nature of the alleged *renvoi* of international law to internal constitutional law and the value of the limitations placed by constitutional law on the capacity of the organ designated by the constitution to express the will of the State, he accepted entirely, in principle, the view adopted by the Special Rapporteur. The Special Rapporteur had made a most conclusive analysis of the practice of States, but with regard to theoretical principles, which must come first in a question of that kind, the point of departure had to be that international law referred to constitutional law only in order to ascertain what organ was competent to express the will of the State. Everything that related to the previous process of formation of the will of the State, which was to be expressed by that organ, was of no concern to international law.

25. What were the alleged rules of municipal constitutional law which could limit the capacity to express the will of the State with which the organ designated as competent was endowed? The rule contemplated by the Special Rapporteur in the second sentence of paragraph 1 was not a true limitation. On the contrary:

the treaty had to be already validly concluded before the second stage could be reached — that of determining what rules of internal law were required for the international act to produce its effects within the State and its legal order.

26. Consequently, there was only one kind of rules which must be taken into consideration, namely, rules which imposed limitations whereby, for example, a head of State could not ratify unless authorized to do so by an act of parliament. In order to comply with those rules, the head of State must make certain that he possessed the necessary authority before ratifying, but it was not for international law to ascertain whether or not he had been granted that authority. There were both theoretical and practical reasons for that. Constitutions often drew a distinction between treaties for which the head of State needed authority and treaties for which he did not need any special authorization. How could so delicate a question of interpretation as that of deciding into which of the two categories a given treaty fell be raised at the international level? The head of State might in some cases assume responsibility for ratifying because the matter was urgent, because he was certain of obtaining the necessary authority later, and because he considered that the interest of the State was at stake. It was for his own State to decide whether he had done right or not; it was not for the other State to judge.

27. From the point of view of drafting, the text was rather lengthy and could be simplified. With that reservation paragraphs 1 and 2 seemed more or less satisfactory. He had some doubts about paragraph 3 (b): a signature which did not entail the validity and entry into force of an instrument was not the final act expressing the will of the State, and its effects were of very little importance.

28. With regard to paragraph 4, an attempt to reach a compromise could very well diminish the value of the whole article. A choice must be made between the two principles: either the principle he had just expounded, or the principle that all constitutional limitations were of concern to international law. If the former principle was right, it was no longer a question of whether a State was aware or not aware of the provisions of the constitutional law of the co-contracting State or whether there had been good or bad faith in the application of that law: those questions were outside the scope of international law.

29. Mr. ROSENNE commended the Special Rapporteur for his extremely enlightening report, and especially for his commentary on the draft articles, which described the various approaches and the Special Rapporteur's own doubts and hesitations.

30. He associated himself with Mr. Tunkin's preliminary remarks: an outline of the whole subject, and particularly of section IV, would be of great value, as there must be some connexion between the substantive provisions of sections II and III and the procedures that the Special Rapporteur would suggest in section IV.

31. With regard to article 5, he was in general agreement with the Special Rapporteur's approach. He found

particularly convincing the explanations given in paragraphs 13 and 14 of the commentary. It was appropriate to stress the effect of modern methods of communication on governmental practice regarding the treaty-making process; for they affected the day-to-day handling of the problem, and that should be reflected in the Commission's conclusions.

32. At its previous session the Commission had adopted twenty-nine articles on the conclusion, entry into force and registration of treaties and he had some doubts as to whether the provisions of article 5, as now proposed, were fully integrated with those articles, which formed Part I of the draft.¹ He was not at all certain that they followed logically from those articles, and not merely from article 4 of Part I, which was expressly mentioned in paragraph 2 (b).

33. He would not go so far as to say, with Mr. Ago, that international law made the *renvoi* to domestic law for certain purposes. He did, however, agree that the rules on the point at issue were to be found in international law and in international law alone. The point of departure was to be found in the concept of the ostensible authority to conclude a treaty, as it was embodied in article 4 of Part I. That presumption was necessary for the practical rules of international law. The articles now being drafted could be considerably simplified if the concept appeared for the first time in article 5 instead of in article 6. Additional support for that suggestion was provided by the fact that paragraph 13 of the commentary on article 5 specifically referred to the concept of ostensible authority.

34. With regard to the actual provisions of article 5, he doubted whether paragraph 1 was necessary. The article could begin by referring to the concept of ostensible authority as fully set out in article 4 of Part I. Furthermore, paragraph 1 was possibly not consistent with paragraph 2 of article 1 of Part I, which stated that: "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..."

35. He wondered whether the provision contained in paragraph 3 (b), though correct as to substance, was fully in conformity with article 11 of Part I, or necessary.

36. He had been a little surprised to find the Depositary introduced in paragraph 4 (a) when no mention had been made of it in paragraph 21 of the commentary, and, more important still, he doubted whether the Depositary would be capable of discharging the functions conferred upon it in that paragraph and whether they were compatible with those set out in article 29 of Part I.

37. Without attempting at that stage to offer a solution, he should perhaps draw attention to the fact that paragraph 4 raised problems which might be somewhat different for bilateral treaties and multilateral treaties.

38. Paragraph 7 of the commentary referred to certain practical aspects, but it was not exhaustive. For instance, an issue that might arise in connexion with a *casus*

foederis was whether a bilateral treaty concluded under a treaty-making procedure selected by a government in the exercise of its "political judgement", to use the Special Rapporteur's well-chosen phrase, could be implemented without some form of parliamentary consent relating, in fact, to quite different aspects of the relations between the executive and the legislative organs. The matter was certainly not of prime importance but was closely connected with contemporary diplomatic practice. It would be compatible with the general line adopted in Part I of the draft to impose upon both negotiating States some responsibility for satisfying themselves that the proposed treaty could be implemented. That was something which did not always depend on purely legal considerations or ones which could be codified.

39. Article 5 dealt with internal constitutional limitations on the treaty-making power. Mr. Tunkin had raised an important point in asking whether international law itself did not also impose certain limitations which could similarly affect the validity of a treaty. He (Mr. Rosenne) doubted if that subject was strictly relevant to article 5, but it was, he thought, properly within the scope of article 13.

40. He thanked the Secretariat for its memorandum (A/CN.4/154) on the General Assembly's resolutions concerning the law of treaties, which had been prepared in compliance with the request he had made at the previous session. The memorandum admirably fulfilled the purpose he had had in mind.

41. Mr. YASSEEN, complimenting the Special Rapporteur on a remarkable piece of work, said he had set out with exemplary objectiveness the different views that had been expressed on a question which was still the subject of controversy.

42. Article 5 was an attempt at a compromise between two principles, that of the stability of treaties and that of the conformity of international law with the democratic principles of treaty-making. The Special Rapporteur, starting from the first of those two principles, had done what he could to preserve the second.

43. It was perhaps better, however, in dealing with such a delicate problem, not to take the theory of ostensible authority as a starting-point. An organ acting on behalf of a State must genuinely possess authority to bind it by treaty, in accordance with the fundamental rules which expressed that State's sovereign will. It was therefore necessary to take account of each State's constitutional provisions concerning the treaty-making power, and to that end international law referred to each State's internal law.

44. He saw no reason to contest that practice, for it was not the only case where international law referred to municipal law. The same thing happened with regard to the law governing nationality: municipal law governed the acquisition and loss of nationality, and international law took account of the relevant decisions of municipal law. If the international community was to be sure that an organ genuinely had authority to make a declaration on behalf of a State, it must refer to that State's constitutional rules.

¹ See *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, pp. 4 ff.

45. The difficulties to which the application of that principle would give rise had been exaggerated. Since the present trend in municipal law was to require the court to take cognizance *ex officio* of the law of another State, applicable under a rule on conflict, a State could *a fortiori* take cognizance of another State's constitutional law. While it was true that constitutional law was not always set out in writing, a State could always, before concluding a treaty, call in a legal expert for information not only on the written constitution, but also on the legal practices of the other country.

46. It was not a question of incorporating constitutional rules — which remained rules of municipal law — in international law; it was enough to refer to them. To preserve the stability of treaties they must not be satisfied with apparent stability; they must be very exacting and make sure that the agent or organ acting in the name of a State really did represent that State in accordance with its laws and practices. Besides respecting the democratic principles of treaty-making, that practice would do much to ensure the real stability of treaties.

47. Mr. AMADO said he associated himself with the very pertinent observations which had already been put forward during the discussion; the points raised by previous speakers covered the questions he himself had intended to raise.

48. Relations between municipal and international law had become more flexible, and international law had developed to a noteworthy extent.

49. With regard to the authority of the negotiating organ, paragraph 4 raised considerable difficulties. It was desirable to have a general view of the whole problem before the articles were formulated, and on that point he agreed with the comments of Mr. Tunkin and Mr. Rosenne.

50. With regard to the drafting, though it was still too early to propose amendments to the text of the article, he must point out that the French text of paragraph 2 (b) did not render accurately the English expression "on its face".

51. Mr. ELIAS said that in his lucid second report the Special Rapporteur had adopted a flexible and progressive approach that gave proof of his determination that the Commission should fulfil its dual role of codifying and promoting the development of international law. Clearly he had taken account of a number of comments made during the previous session and had also been bolder about admitting that there was some interaction between internal constitutional provisions and international law and practice.

52. It would certainly be helpful if he could give some information about the contents of the section to be devoted to procedural requirements in regard to the avoidance, denunciation or suspension of a treaty, since it was closely related to the section under discussion.

53. The question whether conformity with internal constitutional requirements was relevant in determining the essential validity of treaties was an extremely important one and would need careful thought. It was

an issue which could arise if the International Court of Justice were required to pronounce on the validity of a particular treaty.

54. Despite the skill with which the Special Rapporteur had handled an extremely complex subject, article 5 should be recast in a simpler form more suited to an international convention.

55. With regard to paragraph 4 (a), he questioned whether it would be appropriate to go so far as to stipulate that a multilateral treaty would be vitiated if a representative of one of the negotiating States were aware that the representative of another lacked the constitutional authority to establish his State's consent to be bound by the treaty, but had not made that fact known to the others at the material time.

56. Mr. BARTOŠ thanked the Special Rapporteur for having presented the theoretical and practical aspects of the problem with such clarity. However, despite the care with which he had weighed his every word, the question of the precedence of international law over municipal law, and of the relations between them, still involved some confusion concerning the theory to be adopted for determining what organs were competent to represent a State and the practical consequences of that theory.

57. Was it necessary, as Mr. Ago contended, to refer to a State's constitutional law or practice merely to ascertain what organ possessed the authority to represent it? History did not seem to confirm that view. The principles on which the law of civilized nations was based raised questions such as that of the competence of organs or of individuals to represent a State. The cases to be considered were those in which one party had taken advantage of acts he knew to be beyond the competence of the other party's representative. Could it be held that certain treaties which had been imposed by psychological or other duress were truly valid — that, for example, the signature of President Benès had been valid when he signed without the constitutional authority to do so? It seemed very difficult to say that all that was needed to settle the matter was to verify the competence of the organs concerned.

58. But the question of constitutionality involved that of the limitation of international acts; that was a very awkward question, because it involved taking account of democratic principles on the one hand and, on the other hand, of the possibility of determining the constitutional validity of an act in some other way. Various solutions of that problem had been put forward. United States law, for example, differentiated between treaties proper and what were called "executive agreements".

59. The three theories which needed to be considered were set out in the report, and all of them were open to objection; it was the task of members of the Commission to adopt a single, definitive solution.

60. Paragraph 4 raised a number of delicate questions which lent themselves to a variety of interpretations. What criterion was to be applied, for example, to determine good or bad faith? Today, a State could easily

ascertain the provisions of another State's written constitution and even its other constitutional rules, but there could be doubt as to the facts known personally by the negotiators. Similarly, it was difficult to rule on the validity of a treaty or the possibility of voiding it, or on the time-limit to which the right to contest the validity of an international act was subject.

61. With regard to paragraph 4 (b), while he approved of the principle that ratification could be voided when a representative had acted *ultra vires*, that principle was fraught with danger from the standpoint of the security of international relations, and he urged the Commission to postpone its decision for a week, in order to think the matter over while continuing a fruitful discussion.

62. He must enter a reservation regarding paragraph 2 (a), because the previous year he had been one of the minority who had been unable to accept the text concerning non-ratification of treaties in simplified form, and he would also have to make reservations on other articles which were closely linked with article 4 of Part I. What was at stake was not only the primacy of international law, but also the need to provide greater security in international relations and to establish the validity of international acts on a firmer basis.

The meeting rose at 12.55 p.m.

675th MEETING

Wednesday, 8 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

ARTICLE 5 (CONSTITUTIONAL LIMITATIONS ON THE TREATY-MAKING POWER) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 5 in section II of the Special Rapporteur's second report (A/CN.4/156).

2. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Tunkin's request at the previous meeting for information about the content of section IV of his second report, which would be circulated in about a week's time, said that of its four articles, the first would deal with the procedural authority to annul, denounce or terminate a treaty. The second would be concerned with the procedure in cases when there was an express or implied right to do any of those things in the treaty itself. The third, article 25, which might be more controversial, would contain his suggestions as to procedure when the right to annul, denounce or terminate a treaty arose by operation of law, as for example in the case of breach of the treaty or in application of the principle of *rebus sic stantibus*. The prob-

lem of procedure had been given great prominence by the authorities and one of the important issues to consider was whether there should be some form of procedural check on the exercise of those rights. He had deliberately dealt with the procedural aspect in a separate set of articles, and although they had an obvious bearing on some of the general problems that arose in sections II and III, he believed that the substance of the latter could be discussed in advance. The fourth, article 26, would be a short one dealing with the problem of the severance of treaty provisions.

3. Section V, which was not yet complete, would deal with the effects of the avoidance, denunciation or suspension of a treaty. It would contain some of the points covered in Sir Gerald Fitzmaurice's second report,¹ though in some respects his own draft articles differed substantially from his predecessor's. He had not yet been able to complete section V because of having to put it aside on receiving a communication from the Secretariat about the General Assembly's request, in its resolution 1766 (XVII), that the Commission study further the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. He had felt bound to give that matter some preliminary thought in case he were asked to prepare something on the subject at short notice.

4. Mr. VERDROSS said he thought that the first three paragraphs of article 5 might be accepted in substance by all members of the Commission if the language were simplified in some places; that could be left to the Drafting Committee. Only paragraph 4 was to some extent controversial; the proposed text might well be replaced by the following:

"(a) Paragraphs 2 and 3 shall not apply if the organ of a Contracting State or the organs of the Contracting States having authority to conclude international treaties is or are aware, or ought to be aware, that the treaty cannot be concluded definitively without the consent of another organ or of other organs of the States concerned.

"(b) Nevertheless, such a treaty shall be valid internationally if the other organ (organs) competent to give its (their) consent to an international treaty does not (do not) react immediately after a treaty concluded without its (their) consent has come to its (their) notice."

5. In both the modern theory and the modern practice of international law a clear distinction was drawn, in the concluding international treaties, between the formation of the will of the State, which was governed by municipal law, and the declaration of that will vis-à-vis other States, the determination of the organ possessing authority to make that declaration being governed by both municipal and international law. The Commission itself had stated that rule in its 1962 draft.²

¹ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No.: 1957.V.5, vol. II), pp. 16-70.

² *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, pp. 4 ff.

6. The difficulty arose from the fact that the distinction between the formation of a State's will and the declaration of that will vis-à-vis other States was always based on the assumption that the organ concerned was declaring the true will of the State, in accordance with the basic principle of good faith. If the declaration was manifestly not in good faith, the treaty was obviously not valid. An important limitation should apply where the competent organ gave its consent subsequently, for in that case the problem no longer existed. When that was so, there was no need to go so far as paragraph 4. If the organs competent to give their consent to an international treaty did not react immediately after a treaty concluded without their consent had come to their notice, it could be assumed on grounds of the stability of international relations that they tacitly approved. In such cases it was for each State to say whether or not it approved an instrument concluded in such circumstances. He was therefore submitting his amendment as a basis for discussion; he would not object to adding to it paragraph 4, subparagraph (b) (i), which was sufficiently explicit.

7. Mr. BRIGGS said that it was difficult to reach any final conclusion on the articles in section II without knowing what would be the contents of section IV, which had not yet been issued.

8. On the whole article 5, which had been so skilfully drafted by the Special Rapporteur, appeared to be acceptable. Some members, however, had expressed misgivings about paragraph 4 because it introduced a principle contrary to that of ostensible authority embodied in the earlier part of the article, and in his opinion that paragraph should be jettisoned. Mr. Verdross' text was not a satisfactory alternative. Paragraph 3 (b) should also be dropped.

9. He wished to suggest, though not as a formal amendment, an alternative text, largely inspired by the first part of article 5, reading:

“Whenever the constitution of a State subjects the entry into force or the binding effect of a treaty to prior constitutional approval by an organ of that State, the signature or the deposit of an instrument of ratification, acceptance, approval or accession in disregard of such constitutional requirements by a representative possessing ostensible authority under the rules laid down in article 4 of Part I may be withdrawn only with the consent of other parties to the treaty.”

10. Mr. TABIBI said that the subject matter of article 5 was of great complexity and had given rise to widely differing views. For example, each of the three previous special rapporteurs on the law of treaties had based his proposals on a different doctrine. An article concerning the constitutional limitations on the treaty-making power should nevertheless be included in the draft.

11. Though he agreed in general with the Special Rapporteur's approach, the text as it stood was not wholly acceptable because it impaired the constitutional authority of the State in favour of international law. One

of his main objections to the text was that under paragraph 4, the representative of a State lacking the proper constitutional authority could establish its consent to be bound by a treaty even if a contracting party or parties or the Depositary were aware of that defect. It would be extremely prejudicial, particularly to small, weak and inexperienced States which, more than any, needed the protection of international law, if, on their behalf, a representative lacking authority could conclude a treaty regarded as valid in international law, which endangered their political and economic interests.

12. It was, of course, difficult to make international law subject to internal constitutional limitations but, as Mr. Tunkin had rightly emphasized at the previous meeting, the right of political and economic self-determination must at all costs be safeguarded. That right was set out in article 1 of the draft Covenant on Civil and Political Rights, which had already been adopted by the Third Committee of the General Assembly and must be respected in any article dealing with constitutional limitations on the treaty-making power.

13. Given the difficulty of devising a provision that would protect the interests of the State under international law and preserve the stability of treaties concluded in good faith, perhaps it would be advisable to appoint a small working group which, after reviewing the Special Rapporteur's proposal and those of his predecessors, and taking account of the views expressed during the discussion, would prepare a new text to meet modern needs.

14. Mr. GROS said that article 5 admittedly gave rise to difficulties and that it might not perhaps be possible to settle its final form immediately, but he was not so pessimistic about it as some members of the Commission. The difficulty arose from the fact that the article touched on problems of the theory of law—in particular the relations between international and constitutional law; it was also connected with the practical consequences of the draft, should the article establish a rule of law in a matter that was still disputed.

15. Article 5, as conceived by the Special Rapporteur, dealt with treaties improperly concluded or ratified by reason of the fact that the representation of one of the parties had been only ostensibly valid. There were now so many general, multilateral and bilateral treaties that it was doubtful whether, juridically and in practice, any other rule could be followed than that of trust in appearances, for obvious reasons connected with the maintenance of good international relations in accordance with the principle of non-intervention in the domestic affairs of States and for convenience in negotiation; the opposite rule would mean verifying not only that the powers of all negotiators were in order, but also that they were “constitutional”.

16. The line taken by the Special Rapporteur was consistent with international practice, as shown in his commentary on article 5 and in his excellent work on article 4. Most of the difficulties liable to be encountered in the case covered by article 5 would be removed by the subsequent conduct of States, as the Special Rapporteur had shown in article 4. It was essential

for the stability of legal relations that if a State whose representative had not possessed full powers did not react, but applied the treaty for a certain period, it should not be able to go back on its word. That rule had been twice confirmed by the International Court of Justice. It was a good rule of international law, for it took account of an interest of major importance; that of the security of relations between States. Admittedly, there could be exceptions, and no text could rule out exceptional cases, but the Commission should draw up rules based on the usual practice — that was to say, on cases in which States had negotiated with every appearance of proper representation — and the principle of trust in what appeared to be in order must be laid down.

17. With regard to the general problem of negotiation between States, although recent trends in international law showed some change, their general direction followed the line taken by the Special Rapporteur, which he himself adopted. All States, whether new or old, were concerned to maintain confidence between negotiators, to avoid intervention in the internal politics of other States, and to ensure stability of the results of negotiations.

18. He accepted, therefore, the general theme of article 5, namely paragraphs 2 and 3 (a), and would propose the deletion of paragraph 4, which upset the balance of the article by laying down a contrary rule based solely on exceptional cases which had attracted much criticism. On that point, he did not think that he was in disagreement with the Special Rapporteur, who had faithfully covered all the problems involved, though with shades of opinion reflecting his personal position which were clearly discernible in the commentary.

19. Moreover, paragraph 4 was based on purely subjective criteria, since it referred to the concepts "manifest" and "good faith". Although he was not among those who considered that the concept of what was reasonable should be eliminated from international law and although that criterion was constantly applied in examining any matter in dispute, he could not help being struck by the complications that would result from applying paragraph 4 (a) in an international community which did not recognize any common authority or compulsory jurisdiction; paragraph 4 should accordingly be rejected, for the Commission should draw up rules that were as clear and simple as possible for an international community of 110 States.

20. The text proposed by Mr. Verdross would be excellent if there were some recognized court to apply it; in the absence of such a court it could only be a source of complications.

21. Article 5 could, he thought, be simplified by deleting paragraphs 1, 3 (b) and 4, but retaining the Special Rapporteur's excellent commentary on all the problems raised by the article.

22. Mr. TSURUOKA, commending the Special Rapporteur's draft, said he endorsed the general idea underlying the wording of article 5, though he was not convinced that paragraphs 3 (b) and 4 were necessary, and if

paragraph 4 were retained, the drafting would have to be improved.

23. The Special Rapporteur's main concern had been to ensure the stability of legal relations in the international community and for that purpose he had accordingly come down on the side of internationalism. His concern was undoubtedly legitimate, seeing that such stability was essential for the maintenance of peace and the prosperity of mankind. If a country was to be well protected legally so long as it conformed to the existing rules of international law and acted in good faith and with normal prudence, it was quite natural to choose the internationalist system, which was more effective than constitutionalism in ensuring such protection. Under the internationalist system a country need have no fear of any commitment entered into by a contracting party endowed with ostensible authority subsequently proving invalid.

24. A further consideration was that the substantial increase in the number of independent States, while in itself desirable, did not make investigation into the constitutions of States any easier. And not only the newly created States but some of the older States had new constitutions, as witness the case of Japan. There was, therefore, all the more reason for basing article 5 on the internationalist rather than on the constitutionalist theory.

25. Internationalism also had the merit of satisfying the sense of equity, which was the very foundation of the legal system. If a State committed any constitutional irregularity in concluding a treaty, it alone should suffer the consequences, without damaging the other contracting party or the international community.

26. As other speakers had pointed out, internationalism was now the prevailing trend in the practice of States, and the precedents quoted in the report could be interpreted as confirming that fact. States which invoked constitutional irregularities to demand that an agreement be set aside were probably conscious of the weakness of such arguments, since they often supported them by legal arguments of greater weight. If the Commission opted for internationalism, it would only be making a codification along the lines of what was practised in many countries; hence the draft, which followed that system, was likely to be accepted by very many countries. He was not averse *a priori* to making concessions to constitutionalism, but they should be as slight as possible, for he was afraid that might lead to abuse and threaten the stability of the legal order, especially since the State alone had the right to interpret its own constitution.

27. Nor did he feel that internationalism was contrary to democracy, as some asserted, and deprived the legislature of effective control over the executive. Indeed, if internationalism became well established as a system, the legislature would have more control over the executive and that could lead to promoting democratic institutions.

28. Mr. PAREDES said he associated himself with the tributes paid to the work of the Special Rapporteur, but he had some doubts about article 5.

29. Article 5 formed part of the section dealing with the principles governing the essential validity of treaties; consequently, he did not understand why it omitted all reference to the capacity of the State. In his opinion, the capacity of the State to enter into a treaty was an essential question which preceded that of the capacity of the representatives who signed on its behalf.

30. In any act performed in the name of a collective legal entity, two persons or subjects of rights could be distinguished; first, the legal entity which possessed the right; second, the agent or individual called upon to exercise the right. It was necessary to consider separately the capacity of both of those persons under international law. By way of analogy, it would be surprising if a civil code were to deal only with the powers of an attorney and omit all reference to those of his principal. Consequently, in the matter of essential validity, it was necessary to consider not only the question of the power of the President or head of the Executive to sign a treaty on behalf of the State, but also the capacity of the State itself to enter into a treaty, a question which arose, for example, in connexion with mandates and trust territories with limited powers to contract.

31. The provisions of article 5 did not make a clear distinction between the head of a State and the official who negotiated a treaty on his behalf. In that context it was really necessary to distinguish three persons: the legal person, which was the State, the head of the Executive and the negotiator. In the conclusion of a treaty, it was therefore possible for an act *ultra vires* to be committed either by the head of a State who concluded the treaty or by the negotiator. The latter case would occur if the negotiator did not have full or sufficient powers to sign the treaty, the former if the head of State acted contrary to the will of the people or its authorized representatives or failed to comply with all the constitutional requirements.

32. Democracy required that the people affected by a treaty should have an opportunity to express their opinion before the treaty came into full effect. As article 5 was drafted, there was a danger of the personality of the State being confused, in international law, with that of the head of State. And that was all the more serious because, under authoritarian regimes, the head of the State frequently ignored all constitutional limitations and concluded treaties which reflected his own will and not that of his people.

33. In his own country, Ecuador, no treaty could be ratified without the advice and consent of the Legislature. As in many other countries, the Legislature was the authorized representative of the people's will. Hence, he could not accept the view that a strong Executive could enter into treaties behind the back of the Legislature and that such acts were valid.

34. Nor did he believe that it was at all difficult to ascertain the constitutional provisions in force in another State, for purposes of determining whether a treaty was valid. In private law, a party to a contract concerning matters of much less importance than affairs of State would invariably take steps to confirm the capacity of the other party, and the powers of his agent or repre-

sentative. It therefore appeared even more natural to take the same precautions in matters of great importance such as those which were the subject of negotiations between States. So, just as the negotiators were required to produce their full powers, he thought that the Executive should be required to produce documentary evidence of its authority to act in the matter. At conferences between numerous States, such evidence should be submitted to a committee which would be called upon to pronounce on the treaty-making power.

35. There was, moreover, serious danger in drawing a distinction between the international validity and the internal validity of a treaty. For example, a loan agreement might be entered into by a head of State, without consulting the competent constitutional organs. If it was desired to obtain repayment of the loan and a claim was brought before the courts of the State concerned, it would inevitably be rejected; the courts would say that the loan agreement was void and had no effect in municipal law. In such circumstances, the agreement would be totally ineffective. That example clearly showed that it was necessary to take constitutional limitations on the treaty-making power into account. Those limitations might be manifest and clear without any profound legal study being needed to ascertain them. But if the position was not clearly defined, it would be advisable to require the negotiator to produce documentary evidence of the kind he had mentioned.

36. Mr. de LUNA observed that the overwhelming majority of the Commission had expressed the view that a treaty concluded *ultra vires* in breach of formal constitutional rules was valid.

37. Some feared that such an attitude might further an anti-democratic trend; he did not think their fears were justified. That objection might have been valid fifty years ago, when many States had an authoritarian régime; but now there were some constitutions that were democratic and others that were not. The question was whether international law did or did not take into account a constitution which might or might not be democratic. Although the advance of democracy should be promoted by all means, he did not think that would be achieved by sowing confusion and insecurity in international life. The solution he advocated seemed to him to be in conformity with the nature of the "external" power. It might be asked whether it was more consonant with democratic principles to grant a right of international representation to a head of State, who might have been elected by direct suffrage by the people as a whole, or to require the head of State, if a treaty was to be valid internationally, to take into account the will of representatives who would often have been elected by indirect suffrage. For foreign policy to be genuinely democratic, logic would require the application of direct democracy or continual recourse to the technique of plebiscites for all important acts, which would so complicate matters as to be quite absurd.

38. Moreover, the principle on which the Special Rapporteur's proposal was based was that of ostensible authority, a principle which also applied in internal law: an official whose appointment was void could

nevertheless perform acts which were ostensibly authorized so far as those affected by them were concerned. Similarly, in international law, a State was not expected to make sure that another State's institutions were genuinely democratic.

39. Again, there was a reassuring general principle of interpretation: always interpret so as to avoid, as far as possible, involving the international responsibility of a State. That principle was of the utmost importance, for even in internal law, it was difficult to know, in view of the distinctions which constitutions made between treaties, whether a treaty was or was not of a political nature and could be concluded without the consent of some particular organ. In deciding how a treaty should be classified, a State would be interfering in the affairs of another State: how could it be expected to know something that could only be known definitely through a decision of a constitutional court?

40. Yet again, a number of *de jure* governments had begun as *de facto*, that was to say anti-constitutional governments. It was therefore impossible to intervene in the internal classification of treaties once an originally anti-constitutional regime had been recognized. In point of fact, no constitution was valid from the purely formal standpoint. When the law was applied, it reflected yesterday's, not today's, political and social situation. The Napoleonic Code was still applied, but interpretations of case-law had changed nearly all its articles. What had to be taken into account was not the formal situation, but what actually happened.

41. He therefore supported the view that treaties concluded *ultra vires* were valid. If the majority thought that exceptions should be made, he would support the proposal put forward by Mr. Verdross, but limiting the exceptions to treaties which could decide the existence of a State.

42. Mr. AGO said he approved the distinction so clearly drawn by Mr. Verdross, and to which he himself had also referred, between the declaration of will by a State, which was a matter of international law, and the process leading to the creation of that will, which was entirely a matter of internal law.

43. In reply to Mr. Rosenne, he explained that in using the word *renvoi* the previous day, when speaking of the reference made by international law to internal constitutional law, what he had wished to convey was not at all any idea of incorporation, but only that international law regarded as a State's valid will that which was expressed by the organ designated by internal constitutional law as being competent to declare it.

44. There was no doubt regarding the declaration of will, but with regard to the process of the creation of a State's will, the issue was whether international law should take into account the constitutional rules which governed the process or should be content with the declaration and adopt the attitude that the will declared by the competent organ was not open to question by other States. The difficulties arose in practice through the fact that in modern times certain organs of the State, which in the past had been competent not only

to declare the State's will, but also to form it, now had competence only for the declaration, the formation being essentially within the competence of other organs.

45. The Commission should choose between two systems and not try to work out a compromise which could easily amount to a legal contradiction. If the Commission acknowledged, as international practice had done hitherto, that constitutional law had no other function in the matter than to designate the organ competent to declare the will of the State, it was acknowledging that, even if the head of State ratified a treaty without the prior authority of Parliament, the treaty was valid, whatever consequences might ensue for the State concerned. If, on the other hand, it adopted the contrary system, it must weigh the consequences of an innovation whereby, in international law, not only would a certain will have to be expressed by the organ which the constitution declared competent to express it, but that will would have to have been correctly formed by the organ which the constitution declared competent to form it, so that all the internal constitutional rules would be respected. If that view prevailed, then to be logical, no absurd distinction should be made between written constitutional rules and customary rules, or between rules which were easily known and rules which were not.

46. Some took the view that all the constitutional rules which related to the formation of the State's will should be taken into account, that if a head of State ratified a treaty without prior parliamentary authority the treaty should be deemed invalid, but that if parliament subsequently gave its authority, then the treaty was valid. However, it might legitimately be asked when, in that case, a treaty did become valid. If all the constitutional rules governing the formation of the State's will had to be taken into account, there was no doubt; in the case envisaged, the head of State had declared a non-existent will and therefore his declaration was void. When parliament took up the matter, either the head of State had to make a second declaration of will, or his first declaration would become valid only as from the time when parliamentary authority was given. To accept a different view on that point meant recognizing that it was the declaration of will which bound the State, and bound it from the moment when the will was manifested, and that the process of formation of that will in the internal legal order was of no concern for international law. In reality, the system which would take account of all the constitutional rules governing the formation of treaties did not reflect the present state of international law.

47. Reference had been made to "good faith". He did not see what "good faith" had to do with the matter; whose "good faith" was meant? Was it that of the organ authorized to conclude a treaty, that of the head of State, or that of the other State?

48. From the practical standpoint, the idea that a State could interfere in a constitutional dispute between the various organs of another State should be avoided.

49. In reply to Mr. Paredes, he observed that, if a State doubted whether the organs constitutionally authorized to declare the will of another State were truly representative of the people's will, it could always refrain

from negotiating a treaty with that State. To take any other course would be to introduce grave uncertainties into international life.

50. It must also be remembered that, as Mr. Tabibi had pointed out, the new States were jealous of their constitutions and their sovereignty, and would not allow a third State to make conditions on such a subject.

51. As for the cases mentioned by Mr. Bartoš, he was convinced that they were cases in which there was a defect of consent; the constitutional rules might have been observed, but the will had been vitiated by violence.

52. At the previous meeting, Mr. Yasseen had spoken of the necessity — which should become clearer with each day that passed — of knowing the constitutional rules of other States. He had referred to the case of a court which was required to know the law of other countries and to apply it. Mr. Yasseen's great experience in private international law might have led him to see there an analogy which did not really exist. It was true that in private international law it was increasingly acknowledged that it was the national judge's duty to know the relevant foreign law, but there was no judge in the question which the Commission was considering, and the Commission should emphasise in the clearest terms that a State was sovereign and that no State had any right to set itself up as a judge of the observance of constitutional law and requirements by the organs of another State. While a knowledge of foreign constitutional systems might still be easily acquired for the purpose of bilateral treaties, the complications that would arise if the same principle were applied in the case of multilateral treaties could readily be imagined. Furthermore, who would be competent to decide whether the constitutional rules had been observed? Would ratification be regarded as valid by some States and not by others?

53. He therefore agreed with those who wished to delete paragraph 4, and was not even prepared to accept a formula as flexible as that proposed by Mr. Verdross. It was a question of principle; they must choose between two systems. Either consent was valid or it was not, and in the latter case it would not become valid merely because of lack of knowledge of the internal constitutional rules of a State by the co-contracting State.

54. The limitation which Mr. Verdross proposed in his paragraph 4 (b) was also questionable; how much certainty would be left if the validity of a treaty were made to depend on the possible reaction of some constitutional organ? Moreover, who would say if that reaction itself was legitimate or not? Would it be necessary to wait until the question of its legitimacy under internal constitutional law had been decided by the highest competent court?

55. With regard to paragraph 2 (b), he felt that the use of the word "appears", which implied ostensible competence, was inappropriate; in point of fact, the competence of the organ concerned to declare the will of the State was certain. It was unquestionable that the instrument had been executed in proper form; what was in question was whether the representative who had executed it had acted with authority to do so.

56. With regard to the title of article 5, he feared it might be interpreted as referring to the State's capacity to conclude treaties. It would be better to use some such wording as: "Constitutional limitations on the treaty powers of certain organs of the State".

57. Mr. PAL said that, with regard to the question under discussion, he had at first inclined towards the views of the late Professor Briery. With some doctrinal qualifications, he had followed that eminent writer's approach, because it had seemed to him to proceed logically from the concept of state personality. The Special Rapporteur, however, by his penetrating exposition, had converted him to his own views and he was now prepared to accept in substance the provisions of article 5.

58. He would refrain at that stage from entering into a discussion of doctrinal principles, reserving his right to do so later if necessary. Some of the remarks which had been made so far during the discussion had the appearance of great lucidity, but in reality introduced a further element of complexity. There was an understandable inclination to use such convenient expressions as "the formation of the will" and "the process of the declaration of the will", but difficulties arose as soon as an attempt was made to determine how and when the will was formed. An even more difficult question was that of determining how to ascertain that the will had been formed by the competent organ concerned.

59. The notion of the personality of the State implied that every act of a State must be performed by a constitutional organ. The difficulties implicit in that situation would not be overcome by stating that international law dealt with the declaration of will and not with the formation of will.

60. Leaving those doctrinal considerations aside for the time being, he wished to make some general remarks concerning the drafting of the article. First, when referring to constitutional limitations, it appeared to place the emphasis on written constitutional provisions. It would be necessary to adjust the drafting so as also to cover unwritten constitutional limitations. Another point to be borne in mind was that, in certain countries, it was not the constitution itself that laid down the limitations, but an act of the legislature, itself acting by virtue of its constitutional powers; the provisions should be amended to cover that situation.

61. Secondly, paragraph 2 described the effect of constitutional limitations only with regard to the contracting party whose constitution was in question. Nothing was said on the position of the other party to the treaty. The article should not be confined to a statement of the effect on the State whose constitution was in question, but should also deal with how the limitations would affect the treaty itself and the position of the other party to it. It was necessary, among other things, to determine whether the question of capacity could be raised not only by the contracting party concerned, but also by the other party to the treaty.

62. With regard to paragraph 4, he believed that the amendment proposed by Mr. Verdross, far from im-

proving the original text, would create even greater difficulties. The requirement that a State should be "aware" of a certain situation was, to his mind, less inappropriate than that a specified organ of the State should be aware of the situation, particularly when specification brought in the same difficult constitutional question. Since, however, he agreed with those representatives who favoured the complete deletion of paragraph 4, he would refrain from elaborating further on the problems raised by that paragraph.

63. Lastly, as a matter of drafting he did not favour the use, in paragraph 2, of the expression "in disregard of relevant provisions". That expression seemed to suggest deliberate omission or negligence; the intention was, in fact, to refer to an act which was simply at variance with the constitutional provisions in question.

The meeting rose at 12.55 p.m.

676th MEETING

Thursday, 9 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

ARTICLE 5 (CONSTITUTIONAL LIMITATIONS ON THE TREATY-MAKING POWER) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 5 in section II in the Special Rapporteur's second report (A/CN.4/156).
2. Mr. ROSENNE said that the Commission should formulate as tersely as possible a rule that was workable and that eschewed theory; it would thereby meet a need which was real, but the importance of which should not be exaggerated. It was essential that its proposed rule should restrict as much as possible the scope for subjective determination on the part of the interested States.
3. Personally he was prepared to accept the Special Rapporteur's internationalist approach, which did not involve any digression into either the monist or the dualist theories of the relationship between international law and municipal law. The effect of the rules under discussion would be limited to the international plane; the Commission was working on the international and not on the domestic level.
4. He has three general preliminary comments to make on the matter dealt with in article 5. First, the concept of ostensible authority could be included in article 5 as well as in article 6, where it appeared for the first time in the Special Rapporteur's draft articles. That concept needed some further clarification, however. His first impression had been that it must be construed in the light of the provisions of article 4, paragraph 1, of Part I, adopted by the Commission at its previous session, and that the reference was only to the Head of State, the Head of Government and the Minister for Foreign Affairs. Under general international law, those three dignitaries were regarded as ostensibly authorized to bind the State on the international plane. On further examination, however, he had come to the conclusion that the term "ostensible authority" could go further and cover any duly authorized person; however, the authority and full powers of any such person must necessarily emanate from one of the three dignitaries he had mentioned.
5. In the light of those remarks, he felt that the Special Rapporteur and the Drafting Committee might consider whether a definition of the term "ostensible authority" should not be introduced into article 1, paragraph 1 (e), of Part I; at all events, the commentary to that article, which referred to the "competent authority", should be clarified.
6. His second comment related to the term "constitutional limitations". He shared the doubts expressed by certain members, especially Mr. de Luna and Mr. Pal, regarding the scope of the term "constitutional" and thought that it needed clarification. It should be made clear that the term covered not only constitutional law, but also constitutional practice and possibly also other provisions of public law which had the character of notoriety. The question was connected with the matter of full powers and their examination, and he wished to refer in that connexion to the discussion which had taken place on article 10 (Treaties subject to ratification) at the Commission's 646th meeting;¹ on the subject of the notoriety of constitutional provisions, he would refer to the explanations given in his book by Lord McNair.²
7. He thought, therefore, that the words "constitutional limitations" could be retained in article 5, but that an element of flexibility should be introduced by means of an explanation in the commentary. The whole matter should be reconsidered when the draft articles as a whole were re-examined by the Commission in two or three years' time in the light of the comments of governments.
8. Thirdly, he wished to reserve his position regarding the expression "essential validity", which might be a theoretical requirement more appropriate to a code. The meaning given to that expression was by no means uniform. Sir Gerald Fitzmaurice, in his second report, had defined it as denoting "validity in point of substance, having regard to the requirements of contractual jurisprudence".³ That definition could be contrasted with the terms of article 3, paragraph 3, of the draft articles which the Commission had adopted at its eleventh session: "Validity in its substantial aspect denotes those intrinsic qualities relating to the treaty-making capacity of the parties, to the reality of the consent given by them, and to the nature of the object of the

¹ *Yearbook of the International Law Commission, 1962*, vol. 1.

² *The Law of Treaties*, 1961, pp. 61 ff.

³ *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), p. 109.

treaty...”⁴ In his second report (A/CN.4/156, para. 3), the Special Rapporteur had defined the term “essential validity” in slightly different terms.

9. From the point of view of jurisprudence, the term “essential validity” was of undoubted value. However, he did not believe that the concept had its place in a draft convention, for the purposes of which the validity of a treaty was to be taken as a comprehensive and unitary notion. Validity should be treated in a less sophisticated manner; its various facets could be isolated for purposes of academic treatment, but the real problem in a given case was that of determining whether consent to a treaty had really been given.

10. For those reasons, he reserved his position regarding the use of the term “essential”, although he would not press at that stage for its deletion. He would not doubt have an opportunity of reverting to his doubts in the matter when the Commission discussed other parts of the draft.

11. Referring to the substance of article 5, he said that there were two categories of treaties. The first comprised treaties which entered into force upon signature alone; the position regarding them was covered by a combination of the provisions of paragraph 2 (a) and 3 (a) proposed by the Special Rapporteur. The second comprised treaties in respect of which a period of time elapsed between the authentication of the text and the entry into force for a given State; an adequate solution for those treaties was provided by a combination of the provisions of paragraph 2 (b) and paragraph 4 (b) (i). However, in formulating the rule in the matter, he thought that article 5 would gain in clarity if a distinction were made between bilateral and multilateral treaties. In that connexion, paragraph 10 of the commentary on draft article 11 of the late Sir Hersch Lauterpacht’s first report⁵ and paragraph 2 of the commentary on articles 3 and 4 adopted by the Commission at its eleventh session⁶ could profitably be studied.

12. Lastly, on the question of conduct as a cure for any vitiating factor, he agreed with Mr. Gros that the point was amply covered by article 4 of the Special Rapporteur’s second report, which the Commission had not yet considered. He was therefore prepared to accept the solution embodied in paragraph 4 (b) (ii) of article 5, though that paragraph might not be necessary after article 4 had been adopted.

13. From the point of view of drafting, paragraphs 1, 3 (b) and 4 (a) could well be omitted; in the case of paragraph 4 (a), that applied both to the Special Rapporteur’s text and to the formula proposed by Mr. Verdross.

14. With regard to the question of terminology, he was somewhat troubled by the use of the terms “conclude” and “enter into” a treaty in different parts of the draft

articles. The first of those terms was used in draft articles 1 and 3 of Part I, while the second was used in article 25 of Part I and also in Article 102 of the United Nations Charter. It was desirable that the meaning of those terms should be clarified and the language, as far as possible, made uniform, in order to avoid any difference of interpretation with regard to them.

15. He thought that the Commission was approaching a solution along the lines of the internationalist approach advocated not only by the Special Rapporteur, but by many other members, and that the article could be referred to the Drafting Committee.

16. Mr. TUNKIN said that the complicated nature of the question under discussion justified the attention devoted to it by the Commission. He agreed with Mr. Gros that the question was closely connected with that of the relationship between international law and municipal law and also with the problem of the juridical nature of treaties.

17. In article 1 (a) of Part I adopted by the Commission at its previous session the term “treaty” had been defined as meaning any international agreement in written form concluded between two or more States or other subjects of international law and governed by international law.

18. As he saw it, a treaty was the expression of the coordinated wills of States, and the will of a State was expressed through its competent organs. Article 4 of Part I indicated two kinds of organ that could be used for that purpose. The first kind were organs which were *ipso facto* considered as empowered to represent the State in all spheres of international relations: the head of State, the head of Government and the Minister for Foreign Affairs. The second were organs which could be authorized to represent the State for the purposes of a particular transaction or a particular set of transactions.

19. The overriding consideration, however, was that States were sovereign and that a State could therefore limit the competence of any of its organs, including those which international law considered as having power to represent the State in all spheres of international activity. In that connexion, he preferred to speak of limitations under municipal law rather than of “constitutional limitations”. The distinction between constitutional law and ordinary law was material only in the internal sphere; so far as international law was concerned, it was without significance whether a limitation was laid down by the constitution or by an ordinary provision of the municipal law of the State concerned.

20. By virtue of the sovereignty of the State, it was therefore possible for municipal law to limit the competence of even the head of State, head of Government or Minister for Foreign Affairs. It was thus possible for one of those dignitaries to lack competence to perform any particular act connected with the treaty-making process. If the dignitary concerned were to perform such an act *ultra vires*, the will of the State would not have been expressed and no agreement would have been concluded.

⁴ *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, vol. II), p. 97.

⁵ *Yearbook of the International Law Commission, 1953*, vol. II (United Nations publication, Sales No.: 59.V.4, vol. II), p. 146.

⁶ *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No.: 59.V.1, vol. II), p. 97.

21. With regard to the relationship between international law and municipal law, he agreed with Mr. Ago that the only rule laid down by international law was that the three dignitaries whom he had mentioned had power to represent the State. Beyond that, it was for each State to decide who represented it and also to lay down any limitations on the competent organs. The content of municipal law in that respect was therefore of primary interest to international law. He agreed with Mr. Ago that it was not a matter of incorporating the provisions of municipal law in international law; it was rather a question of international law taking cognizance of the situation as determined by municipal law.

22. His conclusion was that he could accept the general principle that certain state organs possessed the necessary competence to bind the State. And for that purpose it was not admissible to seek to verify in each instance that the organ concerned was acting in accordance with the constitution. Ordinarily, of course, the question would not arise; but if there were certain visible limitations, international law must reckon with them.

23. As he had said at the previous meeting, he found the provisions of article 5 generally acceptable, but he agreed with Mr. Rosenne that paragraph 1 could be dispensed with. The introduction of that paragraph unnecessarily complicated an already complicated set of provisions.

24. Paragraph 2 embodied the principle that the organ of the State which acted in the international sphere was accepted in principle as being authorized to act as such.

25. With regard to paragraph 3, he thought that the concluding words of sub-paragraph (b) dealt with a procedural matter. The question whether the notice referred to was to be given to the Depositary or to the other party or parties to the treaty seemed to him to belong in section IV, which was to deal with procedural matters; that point was of no importance, however.

26. With regard to paragraph 4, he hesitated to accept the new text proposed by Mr. Verdross, though it could be referred to the Drafting Committee for consideration; on the whole, the text proposed by the Special Rapporteur was clearer. However, the reference to article 4 of Part II must be taken as provisional, since that article had not yet been approved.

27. Lastly, he urged the Special Rapporteur and the members of the Commission to consider the question he had raised at the previous meeting, namely, that of the international limitations on the competence of state organs, with particular reference to the principle of self-determination of peoples. The Commission would have to consider that point in due course.

28. Mr. EL-ERIAN said that the Special Rapporteur's second report, like its predecessor, was a balanced and scholarly document which provided the Commission with an excellent working basis for its deliberations. He was glad to note that in drafting the articles the Special Rapporteur had taken into account the remarks made at the Commission's previous session on the subject of length.

29. On the question of drafting, he agreed with Mr. Elias that the Commission should not lose sight of the fact that the articles were to take the form of a convention and not of a code; it was therefore necessary to avoid the statutory style and to draft the articles in a form suitable to a convention.

30. With regard to article 5, he could not help being struck by the fact that the four successive special rapporteurs on the law of treaties, although representing one and the same legal system, had adopted four different approaches to the question of constitutional limitations on the treaty-making power. The late Professor Brierly had favoured the incorporation of constitutional limitations in international law. The late Sir H. Lauterpacht had adopted the doctrine of qualified incorporation. Sir Gerald Fitzmaurice has adopted the doctrine of the supremacy of international rules for the conclusion of treaties. The present special rapporteur appeared to adopt the approach of qualified supremacy of international rules.

31. The Special Rapporteur had rightly warned the Commission, in paragraph 1 of his commentary on article 5, that the subject was one on which opinion had been sharply divided, and that international jurisprudence on the subject was neither extensive nor very conclusive. One of the most recent articles published on the law of treaties stated, on the subject of constitutional limitations on the treaty-making power, that:

"The practice of States provides no certain guide. The doctrines of writers range over a wide spectrum from flat denial of the validity of unconstitutionally made treaties to the contention that international law gives the head (or the highest executive organ) of every State plenary power to bind the State."⁷

32. Nor was state practice any more conclusive. As was observed in the comment on article 21 of the Harvard draft:

"Turning from an examination of the doctrine to the practice, it may be stated that generally States have denied the binding force of treaties concluded in violation of their own constitutions, although they have sometimes insisted upon execution of those which had been ratified by the other parties in violation of their constitutions."⁸

In view of that situation, the Commission, as pointed out by Mr. Bartoš, faced a great responsibility when working out a formula for article 5.

33. Article 5 dealt not with the formal, but with the essential validity of treaties. It was essential to give effect to democratic principles in treaty-making. In its development over the past century, the law of treaties had gone a long way in that direction. The first manifestation had been the requirement of ratification, which the Commission had embodied in paragraph 1 of article 12 of Part I, adopted at its previous session.

⁷ Lissitzyn, O. J., "Efforts to codify or restate the law of treaties", *Columbia Law Review*, vol. 62, No. 7, November 1962, p. 1184.

⁸ *American Journal of International Law*, 1935, vol. 27, supplement, part III, p. 1002.

34. A further step in that direction had been the requirement of registration, which had been prescribed in the Covenant of the League of Nations and the Charter of the United Nations as a means of discouraging secret diplomacy and restricting the power to invoke treaties the contents of which were not revealed.

35. The third step should be the adoption of the constitutional approach to the question of the authority to bind a State. That approach required that the rule to be adopted should be placed on a legal basis, as pointed out by the late Professor Brierly.

36. There were two principles involved: the first was that of the security of treaties and of the stability of international transactions; the second was that of constitutional requirements, and consideration should be given not only to internal constitutional requirements, but also to international constitutional limitations, such as those relating to the right of self-determination and sovereign equality, as pointed out by Mr. Tunkin at the previous meeting.

37. He did not agree with Mr. Ago that the Commission was faced with a choice between those two principles, but considered rather that it should endeavour to reconcile the two.

38. The provisions of article 5 were closely connected with those of articles 12 and 13. With regard to article 12, he commended the Special Rapporteur for departing from the traditional view that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. The time had come to draw up the rules deriving from the prohibition of threat or use of force in Article 2, paragraph 4, of the United Nations Charter.

39. With regard to article 13, which dealt with treaties void for illegality, he noted that its provisions specified as illegal only those treaties which involved the use or threat of force in contravention of the principles of the United Nations Charter or acts which constituted crimes under international law. In fact, other imperative principles were embodied in the Charter and the time had come to elaborate them as a part of the international legal order. The freedom to conclude treaties, which had formerly been taken as the starting point of international relations, had undergone a fundamental change, and the time had come for the International Law Commission to draw a distinction between *jus cogens* rules and declaratory rules. The former, being part of the *ordre public*, could not be disregarded by the provisions of any special treaty. The matter was an extremely important one and should receive the attention of the Commission in connexion with articles 12 and 13 and other articles of the draft. The final drafting of article 5 must, of course, await the determination of the scope of that article in relation to articles 12 and 13.

40. The question under discussion was that of essential validity and not of formal validity. It was therefore the lack of competence from the substantive point of view, not from the procedural point of view, that was the issue. For example, many constitutions contained a provision prohibiting the extradition of political

offenders; a treaty concluded in disregard of such a prohibition could hardly be considered as binding in international law on succeeding governments of the State concerned, as would be the case if the approach adopted were that of the unconditional supremacy of international rules relating to the conclusion of treaties.

41. With regard to the consequences of constitutional limitations, there were two kinds of constitution. Some were silent on the subject; others specified that a treaty concluded in defiance of constitutional limitations was null and void. The national courts of a country having a constitution of the latter kind would normally refuse to give effect to an unconstitutional treaty. Clearly, it was undesirable that the Commission should adopt a rule which might invite violation of international law at a time when the interdependence and interconnexion between international law and municipal law were constantly increasing.

42. Like Mr. Ago, he did not favour undue analogy to rules of municipal law in international law. International law had developed its own jurisprudence and there was no need to indulge in drawing analogies to private law, which did not take into proper account the different nature of international relations. However, since the end of the second world war, a number of constitutions had been enacted which incorporated principles of international law, the first being that of France, which specified that national sovereignty could be limited by international law. The constitution of Yugoslavia expressly prohibited the use of force in international relations. A similar process had been at work in the case of human rights; human rights provisions had appeared in national constitutions as a result of the adoption by the United Nations of the Universal Declaration of Human Rights. That interaction of international law and municipal law showed that the two were not separate, but closely interrelated.

43. For the foregoing reasons, although he found the solution adopted by the Special Rapporteur generally acceptable, he would have preferred a change in the starting point of article 5.

44. In conclusion, he drew special attention to the provisions of Article 103 of the United Nations Charter, which clearly established the supremacy of the provisions of the Charter over those of any other international agreement subscribed to by States Members of the United Nations. It was important to remember that in regard to the same problem, the Covenant of the League of Nations had merely recommended States Members of the League to revise treaties that were incompatible with the Covenant. The Charter of the United Nations had thus been clearly established as the supreme law and as the basis of the international legal order. Therein lay the fundamental difference between contemporary international law and traditional international law.

45. The CHAIRMAN, speaking as a member of the Commission, said he had found the illuminating comments made during the discussion particularly helpful.

46. The Special Rapporteur had explained in his commentary on article 5 that his intention was to apply the same rule to two different kinds of constitutional limitations, those affecting the formation of a treaty or the treaty-making power proper, and those affecting its implementation; it was accordingly appropriate for them to be dealt with in a single provision, although from the theoretical point of view the two were different.

47. The solution proposed by the Special Rapporteur regarding the second category of constitutional limitations presented no difficulty because there could be no doubt, as he had stated emphatically in the commentary, that they could not be invoked by a State as a ground for denying the validity of treaty obligations it had assumed. The Commission had made a stipulation to that effect in article 13 of the Declaration on Rights and Duties of States,⁹ and the principle ought to be stated more clearly in the text of article 5 itself.

48. Turning to the controversial problem of whether unconstitutional treaties were valid in international law, he said that the Special Rapporteur had been confronted with two conflicting doctrines, that of Sir Hersch Lauterpacht, according to which a treaty was voidable if entered into in disregard of the limitations of the State's constitutional law and practice, and that of Sir Gerald Fitzmaurice, according to which a treaty was valid even when there had been a failure to observe the correct constitutional processes. The present Special Rapporteur had adopted an intermediate position in the articles he had put forward and in them he had wisely refrained from expressing himself in a way that would commit the Commission to a particular doctrine and expose it to facile criticism. The theoretical controversy was probably largely academic and of no great practical significance. The Special Rapporteur had selected the two most important cases in which it was clear beyond doubt that, whatever doctrinal position was taken, constitutional defects could not be invoked against the international validity of a treaty; first, the principle of *préclusion* dealt with in article 4, and second, the situation in which, although there might be defects in the internal constitutional processes, the international procedures of signature or ratification had been properly complied with.

49. The Special Rapporteur had skilfully linked article 5 with articles 4 and 12 of Part I of the draft. Article 4 had laid down that any representatives of a State other than Heads of State, Heads of Government, or Foreign Ministers should be required to produce full powers or to furnish evidence of his authority to execute an instrument of ratification, and article 12 had laid down that a treaty in simplified form did not require ratification unless ratification was specified in a provision of the treaty or in the full powers. The Special Rapporteur proposed to decide that if the process of signature or of ratification had been followed according to the procedures established in Part I, then the State should not be able to deny the validity of those international acts, despite any constitutional defects which might

lie behind them. In other words, to determine that it was not possible to pierce the facade of the accredited agent of the State, for the purposes of determining whether the State would be constitutionally bound by his action. On the other hand, under article 5, as drafted by the Special Rapporteur, a State would be entitled to invoke its constitutional provisions requiring prior parliamentary approval and ratification to contest the validity of a treaty, if the requisite international procedures had not been strictly observed, as, for example, in the case of a signature *ad referendum* being taken by mistake or lack of care as final. Thus, the onus of calling attention on the international level to constitutional requirements was placed squarely on the interested State where it properly belonged, since that State was the best judge.

50. In his opinion, a provision on those lines would not run counter to Sir Hersch Lauterpacht's view, in so far as he had quoted with approval Lord McNair's conclusion that . . . "if one Party produces an instrument, complete and regular on the face of it . . . though in fact constitutionally defective, the other Party . . . is entitled to assume that the instrument is in order. . . ." ¹⁰

51. Since other Contracting Parties had to rely on credentials or evidence of authority, any signatory or ratifying State subsequently claiming that they had been issued in violation of its constitution would have to bear the consequences even of acts committed by its agents *ultra vires*. That had been designated by the Special Rapporteur as the principle of ostensible authority and was known in Roman law systems as the theory of appearance. The principle was even more necessary in international law, to safeguard the principle of non-intervention in the domestic affairs of States and the security of treaties, especially general multilateral treaties to which other States might accede at some later stage after the text had been established.

52. The arguments in favour of deleting paragraph 4 had been persuasive. The case of a representative signing a treaty in simplified form without sufficient authority and of the other Party, while aware of that fact, not calling for his full powers as it would be entitled to do under article 4 of Part I, was adequately provided for in article 6 of Part II, under which a treaty so concluded could be repudiated.

53. The only other loophole which might perhaps require the retention of paragraph 4 was the possibility of a Head of State, Head of Government or Foreign Minister exceeding his powers, since he was not required to furnish evidence of his authority; but that danger was probably not a serious one. It was for each State to circumscribe the abuse of authority by such persons by other methods of political control. Moreover, in view of the special position that such persons traditionally enjoyed in international relations, it would be difficult under international law to impose *ex officio* restrictions on their capacity to sign international agreements.

54. Mr. YASSEEN said that if the Commission failed to give due weight to constitutional, or rather internal

⁹ Yearbook of the International Law Commission, 1949, Part II, p. 286.

¹⁰ Yearbook of the International Law Commission, 1953, vol. II (United Nations publication, Sales No.: 59.V.4, vol. II), p. 143.

requirements, any conclusions it came to would be valid only if there were a positive international rule which explicitly recognized certain organs as absolutely and unconditionally authorized to conclude treaties. But many authorities disputed the existence of any such rule and their adversaries had not produced conclusive evidence to refute them.

55. Article 4 of Part I of the draft did not prejudge the constitutional validity of a treaty, but dealt merely with evidence of authority to negotiate; it assumed that certain organs possessed such authority within, of course, the limitations of the State's constitution. That was a mere assumption, and there was nothing to show that it could not be controverted. Practice varied widely. In any dispute on constitutional invalidity between States one party usually relied on the constitutionalist approach, the other on the internationalist.

56. An article which stated that anti-constitutional treaties were null and void but provided for corrections and exceptions to cover subsequent explicit or tacit confirmation would be consistent with democratic principles and not inconsistent with positive law. Nor should the fact be overlooked that it would be possible to invoke the principle of the responsibility of the State found to be at fault.

57. Mention had been made of the moral and material difficulty of ascertaining the constitutional requirements of a State with regard to the conclusion of treaties. He had put forward the analogy with private international law for the purpose of disputing the existence of a material difficulty, but he did not claim that the duty of a national court to take cognizance *ex officio* of the law of another State applicable under the rule governing a dispute was identical with the duty of a State to know the constitutional law of another State with which it wished to conclude a treaty. Analogy was not identity. There was undoubtedly a new tendency in municipal law to make it increasingly incumbent on the courts to take cognizance of foreign law *ex officio*. If a national court could thus be found, *a fortiori* a State should, with the assistance of its legal advisers, be capable of ascertaining the constitutional law of another State.

58. With regard to the alleged moral difficulty, it had been maintained that to investigate the constitutional law of another State would be tantamount to intervening in its domestic affairs. It was rather hard to maintain that argument, for a treaty was not of concern to one party only; its validity was an indivisible whole and concerned both parties, and it was only logical that one party should try to make certain that the other was not admitting any ground for invalidity.

59. There had also been talk of courtesy to the Head of State — an argument which did not hold water. A treaty was the most solemn instrument that existed in international law and often involved vital interests. As a matter of course considerations of courtesy must yield to the interests of States.

60. He was afraid that Professor Brierly had been right in his opinion that States would not accept any other rule than that which he had stated, namely, that a treaty should in principle be valid constitutionally.

61. Mr. PESSOU observed that article 5 dealt with the relatively infrequent cases of defective ratification. In practice, the president of a republic gave the agents of the State full powers, which they must produce before signing. Ostensible authority had been mentioned in that connexion, but on no good grounds.

62. Article 53 of the title concerning treaties and international agreements of the model constitution of the fourteen States of the African and Malagasy Union provided that the President of the Republic negotiated and ratified treaties and international agreements; article 54 provided that treaties of peace, treaties or agreements relating to international organizations and treaties involving amendment of the municipal law of a State could only be ratified by means of a law — in other words, after action by the national assembly or legislature.

63. Mr. Ago had said that reference must be made to constitutional law in order to ascertain the competent organs, but had added that matters must not be pressed too far, so as to avoid giving the impression of interfering in the domestic affairs of States. He endorsed that view and believed, too, that no compromise was possible between the two conflicting theses. If the view was accepted that international agreements of any importance were submitted to the national assembly, the Head of State obviously could not commit himself unless he had made certain beforehand of the assembly's consent.

64. Some members, in their eagerness for progress and in the belief that they were defending democratic principles, wished to incorporate constitutional law in international law; but in fact they would thereby defeat their own purpose.

65. To lay undue weight on article 5 might give the impression that it was an attempt to bypass the rules governing the validity of international agreements. The Commission should revert to the usual and moral rule. The State was not only a material, but also a spiritual entity, and it could not be conceived that a Head of State would wilfully endeavour to deceive another State by such methods.

66. Mr. CASTREN said that he had become convinced during the discussion that the best solution, scientifically and logically, would be to adopt the internationalist approach in its entirety, and so delete paragraph 3 (b) and paragraph 4 or else adopt the concise formulation for draft article 5 proposed by Mr. Briggs.

67. In any event, it would be better to make some concession to the constitutionalist approach, as the Special Rapporteur had done in his report, since some members of the Commission favoured it, and several States supported it. Article 5 could be re-drafted on the lines suggested by Mr. Ago, without any change in the substance.

68. Mr. AMADO remarked that no set of rules could cover all the cases that were liable to arise in practice. Exceptional cases might be settled peaceably by negotiation and arbitration, and it was there that the International Court of Justice would play its part. As

Mr. Gros had observed at the previous meeting, States should be willing to run some sort of risk. The Commission had considered every aspect of the matter and was ready to take a decision. To improve the substance of the Special Rapporteur's draft did not seem possible; the Drafting Committee could be trusted to make any necessary improvement in the form.

69. Mr. VERDROSS, replying to the comments on his proposal which Mr. Ago had made at the previous meeting, said that according to Mr. Ago, the Commission should choose between the view that international law must take account of all provisions of internal law concerning the conclusion of treaties, and the contrary view that all declarations made by representatives possessing authority to make such declarations vis-à-vis other States were valid.

70. His answer to that was that there were many States in which the law recognized a principle without also recognizing all the conclusions that logically followed from it. If the present practice in international law was to accept the declaration of a State's will without seeking to verify whether that will had really been formed, that was, as Mr. Gros had said, because the law placed trust in declarations made by an organ empowered to make them. That presumption failed, however, if it was notorious or manifest that the declaration was not in accordance with the truth because the will did not yet exist. It was solely in order to cover that admittedly exceptional case that he had put forward his amendment. To make his idea clear, he proposed that sub-paragraph (a) of his amendment should be replaced by the following:

“Paragraphs 2 and 3 shall not apply if it is notorious or manifest that the organ of a Contracting State or the organs of the Contracting States having authority to conclude international treaties has or have definitively concluded treaties without the consent of another organ or of other organs of the States concerned.”

71. On a second point, Mr. Ago had expressed the view that his (Mr. Verdross's) proposal would lead to the conclusion that a declaration manifestly contrary to the truth was void and consequently could not be completed by any subsequent act. In his view, however, there were cases in which an act initially considered to be void could subsequently be completed by successive acts and validated retrospectively.

72. If the majority of the Commission decided to delete paragraph 4, he asked that the points he had just made should be noted in the commentary.

73. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said the preponderant weight of opinion in the Commission was clearly, if perhaps unexpectedly, in favour of the international rather than the constitutional approach. It had been helpful to have a further explanation from Mr. Ago as to what he had meant when he had said that international law made a *renvoi* to constitutional law in the context of article 5, for the purpose of determining the organs competent to exercise the treaty-making power.

Those explanations seemed necessary, because the moment the concept of *renvoi*, even in that limited form, was introduced, all the difficulties attached to the constitutional approach arose. The root of those difficulties was precisely the fact that, if reference were made to constitutional law, the constitutions of so many countries failed to give clear indications as to the organs competent to enter into particular treaties.

74. The practice of concluding treaties in simplified form had fundamentally altered treaty-making procedures and in many countries had created considerable uncertainty as to the application of constitutional provisions requiring the submission of treaties to approval by parliaments. The uncertainty was well brought out by the State Department's memorandum quoted in the volume of the United Nations Legislative Series on *Laws and Practices concerning the Conclusion of Treaties*.¹¹ It was clear from that memorandum that political judgment played an important part in determining the procedure to be followed in the case of such treaties. In his view, it was not a question of *renvoi* at all. What international law did was to refer to the constitutional laws and practices of States only for the purpose of deducing from them general rules of *international* law as to the organs competent to declare the consent of States to treaties. It was those general rules which were incorporated in article 4 of Part I, approved at the previous session of the Commission.

75. Mr. de Luna had illustrated the kind of difficulties that might arise in adopting the constitutional approach, when he had pointed out that the validity of a treaty might not be challenged until a considerable interval of time had elapsed and a government found it inconvenient to perform the obligations assumed, or that the decision of a constitutional court might be necessary to determine the constitutionality of a treaty. He could have gone even further; for sometimes the constitutionality of a treaty might be brought in question only in the process of private litigation in the courts.

76. In drafting article 5 he had adopted as the fundamental principle the supremacy of the international rules concerning the authority of state organs to enter into treaties. Paragraph 4 admittedly departed from that principle in certain exceptional cases, and he had inserted it only as a possible basis for reconciling what he had expected to be a wider divergence of opinion in the Commission. He had done so reluctantly because it detracted from the simplicity and clarity of the general principle; moreover, it introduced a subjective element. He had explained in paragraph 21 of the commentary his reasons for inserting paragraph 4, and it was to be remembered that the exception in regard to a “manifest” failure to observe constitutional requirements had the support of eminent authorities — Lord McNair, Charles de Visscher, and apparently the UNESCO committee of which Professor Guggenheim had been rapporteur. If he could now express his personal opinion he would say that the arguments adduced during the discussion in support of the deletion of paragraph 4 seemed to him

¹¹ United Nations publication, Sales No.: 1952.V.4, section 80.

cogent. Nevertheless, consideration ought to be given to the doubts expressed by Mr. Tunkin and others about the wisdom of omitting it altogether, and perhaps the best course, before taking a final decision in the matter, would be to request the Drafting Committee to see whether, in the light of the comments made in the Commission, a new text could be prepared reconciling the various points of view.

77. Most of the drafting suggestions seemed to be acceptable and he agreed that, once a decision on the fundamental principle had been reached, paragraph 1, which was introductory in character, could be dispensed with. Paragraphs 2 and 3 (a) could probably be amalgamated and simplified, perhaps on the lines suggested by Mr. Briggs and Mr. El-Erian. He did not attach great importance to paragraph 3 (b), but it might serve to allay the misgivings of the few members who were uneasy about taking the international standpoint too rigidly.

78. Certain important issues connected with possible international limitations on the treaty-making power, the right of self-determination and *jus cogens*, which had been touched upon during the discussion, should perhaps be taken up in connexion with later articles. He sympathized with the concern expressed by certain members about the need to protect the interests of smaller and newly independent States, but believed that the protection of their sovereignty would be best achieved by article 5 as it was taking shape.

79. The CHAIRMAN suggested that the Commission might request the Drafting Committee to prepare a new text of article 5 in the light of the discussion and the formal amendments already submitted. That would give further time for reflection and thus satisfy Mr. Bartoš, and should also be acceptable to Mr. Tabibi, who had suggested that a small working group be set up to consider the article.

80. Mr. BARTOŠ said that in that case he could agree to article 5 being referred to the Drafting Committee before the Commission had taken a position on the substance, though it was not, of course, the proper function of the Drafting Committee to do so. The Drafting Committee could not settle questions of substance. In his opinion it could, as an exception, give the plenary Commission its opinion on questions of substance if specially instructed to do so in respect of a particular article. He wished it to be understood that he was making a statement of principle.

81. Mr. TABIBI said that he had no objection to the article being referred to the Drafting Committee, but he thought that the authors of any amendments submitted during the discussion should be invited to attend its meetings.

82. Mr. CADIEUX said there seemed to be some confusion as to what the Commission intended to do. It was fairly clear that the opinions expressed during the discussion all tended in one direction and if the Drafting Committee was to be asked to word those opinions more clearly, that was one solution. On the other hand, if a negotiating committee was to be appointed to re-

open the discussion on the formula which had prevailed, that was another solution and it was important that members should know precisely what the final decision was.

83. Mr. AMADO said he fully understood Mr. Bartoš's view. The Drafting Committee should confine itself to drafting — putting into words what had been agreed. It had no right to go into the substance, or even to change a single word which might affect the substance. But if the Drafting Committee went further than that, the Commission was there to restrain it. He asked Mr. Bartoš to be satisfied with simply referring the text to the Drafting Committee.

84. Mr. AGO recalled that in previous years the Drafting Committee had, at the beginning of the session, to some extent acted as a working group, thereby enabling the Commission to resume its discussion on a simplified text.

85. If, as Mr. Tabibi proposed, the Commission decided to include in the Drafting Committee all members who had put forward proposals on a particular point, it would have to be continually changing the Committee's membership and that would have serious drawbacks. It would be wiser to keep to a practice that had given satisfaction in the past.

86. Mr. GROS said the experience of past years showed that the authors of amendments need have no fear that the Drafting Committee would not pay enough attention to their proposals if they were not present. To change the Committee's membership might make it more cumbersome to no purpose.

87. The CHAIRMAN suggested that, in the light of Mr. Gros' remarks and since the procedure followed at the previous session had proved satisfactory, article 5 should be referred to the Drafting Committee.

It was so agreed.

The meeting rose at 1 p.m.

677th MEETING

Friday, 10 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Appointment of the Drafting Committee

1. The CHAIRMAN proposed the appointment of a Drafting Committee consisting of Mr. Ago, Mr. Briggs, Mr. El-Erian, Mr. Gros, Mr. Padilla Nervo, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, the Special and General Rapporteur, and Mr. Bartoš, the First Vice-Chairman.

The proposal was adopted.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

(resumed from the previous meeting)

2. The CHAIRMAN invited the Special Rapporteur to introduce article 6, in section II of his second report.

ARTICLE 6 (PARTICULAR RESTRICTIONS UPON THE AUTHORITY OF REPRESENTATIVES)

3. Sir Humphrey WALDOCK, Special Rapporteur, said that article 6, which dealt with the authority of a particular agent, was designed to cover two different cases: the first when the agent lacked the necessary authority required under article 4 of Part I or the specific authority with regard to a particular treaty, and the second when his ostensible authority was limited by specific instructions from the State he represented. There were not many instances of such cases in state practice, but they did occur, and his general reasons for submitting the article would be found in the commentary.

4. Mr. BRIGGS questioned whether article 6 was needed at all. It seemed to exemplify what Mr. Lissitzyn, in an article mentioned by Mr. El-Erian at the previous meeting, had described as the Commission's tendency to dot the i's unnecessarily. The same criticism could with justice be made against articles 5 and 10 of Part I, which had been inserted in order to complete the general structure of that portion of the draft, but in fact added little to it.

5. Stripped of the provisos in sub-paragraphs (a) and (b), paragraph 1 of article 6 stated no more than what was implicit in the entire draft, that an unauthorized agent could not bind his State. The provision contained in paragraph 2 (b) also seemed redundant. As clearly indicated in the commentary, its purpose was to stipulate that the acts of an agent disclosing a restriction on his authority were not binding on his State. But surely in such a case the other party or parties would not proceed with the negotiations.

6. As he read it, paragraph 2 (a) was concerned with restrictions on the actual, as distinct from the ostensible, authority of the agent. On that matter Mr. Amado had made some penetrating observations at the previous meeting and Mr. Verdross had usefully brought out the differences between the formation of what was called the will of the State and its expression on the international plane.

7. The formulation of the will of the State was desirably the outcome of some kind of democratic process that had nothing whatever to do with its expression internationally, which had to be accepted by other States in good faith. The presumption in favour of the authority of Heads of State, Heads of Government and Foreign Ministers implicit in paragraph 1 of article 4 of Part I, was in his view not rebuttable. Similarly, he assumed that a like presumption was being established in article 6, paragraph 2 (a), that a representative possessing ostensible authority acted in good faith in the name of his State, but that if his actual authority was limited

by secret instructions, if they remained undisclosed the State could not evade the obligations which he had assumed in its name. Perhaps some attempt should be made to distinguish between ostensible and actual authority, but he still needed to be convinced that it was really necessary.

8. Mr. TABIBI considered that in order to protect the security of international transactions and the interests of States a provision on the lines of article 6 was necessary. The Treaty Section of the United Nations Office of Legal Affairs was familiar with the kind of problems which scrutiny of full powers from numerous countries could entail.

9. He pointed out that the word "restrictions" used in the title was not adequate, as it failed to cover the lack of authority dealt with in the body of the article.

10. Mr. CASTREN thought it unnecessary to retain article 6; some parts of it, at least, could be dropped. If the Commission decided to retain the substance of the article, the expression "ostensible authority", already criticized in connexion with article 5, should be abandoned; it would be better to speak simply of "authority" and make a more precise reference to paragraphs 1 and 2 of article 4 of Part I.

11. Mr. PAREDES said that the inference to be drawn from the way in which article 6 had been drafted was that the Head of State was identified with the State itself, a wholly untenable thesis which entirely overlooked the cardinal principle, valid in both municipal and international law, that only the will of the people democratically expressed through an elected assembly was effective. Failure to recognize and uphold that principle in international law, or to subject the authority of a Head of State who assumed perhaps far-reaching international obligations on behalf of his country to proper democratic control, might jeopardize the very survival of a nation or threaten its vital interests. There could be no justification for the view that international law was concerned solely with the ostensible authority of the representative of the State and not with the effective expression of its people's will.

12. He was unable to understand why the Special Rapporteur had refrained from dealing with the capacity of States and from distinguishing between the three entities that might be involved in the treaty-making process — namely, the State, the head of the executive and the negotiator.

13. The theory of ostensible authority opened the way for the great Powers to impose their will on the weak. And the weak nations, which stood most in need of protection from the law in order to survive, found themselves deprived of the benefit of the precautions they had taken to ensure their security and protect their institutions.

14. Mr. VERDROSS suggested that the word "ostensible" should be deleted from paragraphs 1 and 2, in view of the language of article 4 of Part I.

15. Mr. ROSENNE said that, although he appreciated the reasons which had prompted the Special Rapporteur

to propose a provision of the kind contained in article 6, he shared some of Mr. Briggs' doubts as to whether it was really necessary, particularly where paragraph 1 was concerned. The content of that paragraph was to some extent already covered by article 4 of Part I and the commentary on it, and perhaps came within the scope of article 4 of Part II. He had not fully decided in his own mind whether it was either desirable or necessary to go behind the full powers duly presented in compliance with the requirements laid down in article 4 of Part I and, like Mr. Verdross, was uncertain what precise distinction could be drawn between ostensible and specific authority. That distinction, which the Special Rapporteur had sought to bring out in paragraph 1, did not seem to be altogether in harmony with the provisions of article 4 of Part I.

16. Mr. de LUNA said that Mr. Amado had been right in saying that reality prevailed over legal theory. From the theoretical point of view, Mr. Briggs and the other members who thought that article 6 should be deleted were quite right. In theory, if a representative had no ostensible authority to bind the State, or if, having such ostensible authority, he received instructions from the State which restricted his authority and the restrictions were known to the other party, then any treaty he concluded was obviously void; and that being so article 6 was redundant.

17. But in practice, the facts did not always bow to such legal logic. Mr. Cordell Hull, the former United States Secretary of State, described in volume II of his *Memoirs* how he had succeeded in persuading the Danish Minister in Washington to sign a treaty on 9 April 1941 by which Denmark had ceded military control of Greenland to the United States. Yet, the United States Government had been perfectly aware that the Danish Government had not authorized the cession. In accordance with the legal logic upon which Mr. Briggs had relied, that treaty should have been void *ab initio*. But although the Danish Government had disavowed its Minister, a lengthy dispute had ensued, of such general interest that Hackworth, in volume V of his *Digest*, and the Danish author Ross, in his textbook of international law,¹ had discussed all the problems involved, stressing that the United States could not have pleaded the "ostensible authority" theory or the theory of the certainty of legal transactions propounded in Prof. Max Huber's arbitral award in the *Rio Martin* case (1924)² and accepted by the International Court of Justice in the *Eastern Greenland*³ and *Free Zones* cases.⁴ In view of those precedents, the essence of article 6 should be retained, although in simplified form.

18. Mr. TSURUOKA said that article 6 should be deleted and the idea it contained should be expressed in the commentary on previous articles dealing with similar aspects of the matter.

¹ Ross, A., *Textbook of International Law*, London, 1947, Longmans, Green & Co., p. 204.

² *United Nations Reports of International Arbitral Awards*, vol. II, p. 724.

³ *P.C.I.J.*, Series A/B, No. 53, pp. 56-71 and p. 91.

⁴ *Ibid.*, No. 46, p. 170.

19. Referring to paragraph 1, he said that the case of a representative who, not being authorized to bind a State under article 4 of Part I, could not consequently bind that State by his mere signature, was an obvious consequence of, and therefore covered by, that article. It was, therefore, unnecessary to devote another article to that particular case. In the circumstances contemplated in paragraph 1, a State could repudiate the instrument signed by its representative only when the other contracting State, having received the full powers of that representative, was aware that he had exceeded the authority they gave him. That case should be dealt with in the commentary on article 4 of Part I.

20. Paragraph 2 was a repetition or application of the case dealt with in article 5; there again, the commentary on that article would be the right context for the idea.

21. As to the need to ensure the protection of so-called weaker countries in negotiation, he thought the distinction between stronger and weaker countries could not be so easily drawn. The strength of a country's negotiating position depended largely on the subject-matter of the negotiations.

22. Mr. AGO said that some of the provisions of article 6 seemed to him hardly necessary and, besides, the article was probably not in its correct context in Part II, which dealt with the validity of treaties, for most of the points it raised were dealt with in Part I.

23. He agreed with Mr. Verdross that the expression "ostensible authority" in paragraph 1 should be changed, as it raised difficulties. Furthermore, the paragraph referred only to cases in which a representative did not possess ostensible authority under the terms of article 4, paragraph 4, of Part I, which was very broadly drafted. Consequently, there would be very few cases to which article 6 would apply.

24. The idea expressed in paragraph 2 (a), on the other hand, should be retained, because it dealt with a case which was not covered by article 4 of Part I, and which might well arise. However, as the provision expressly referred to restrictions on authority, he thought that article 4, paragraph 4, of Part I, which dealt with full powers, should be supplemented by a reference to the possibility of subsequent restrictions even where a representative had received full powers, and by specifying that such restrictions were not binding on the other party unless they had been brought to its notice.

25. Paragraph 2 (b) provided that a State whose representative had signed an instrument in contravention of his instructions might repudiate that instrument. That conclusion was justified, but surely it would be better to require greater guarantees for the full powers than to allow acts binding States to be subsequently repudiated; such a procedure was a "disease" in international relations and should be avoided as far as possible.

26. The Drafting Committee should therefore review article 6, paragraph 2, in close connexion with article 4 of Part I.

27. Mr. YASSEEN said that the examples given by Mr. de Luna showed that the cases covered by article 6

were not purely theoretical. The article dealt not merely with the conditions governing the competence of the representative of a State, but also with the validity of the instrument he signed. It was therefore fully justified and its provisions were, on the whole, logical and not inconsistent with any basic principle of law. Within the limits of constitutional requirements, a representative might have greater or lesser authority to act in the conclusion of a treaty. He might conceivably infringe his government's instructions, although acting in conformity with the constitution. Article 6 should therefore be retained, subject to improvements in drafting.

28. Mr. EL-ERIAN said that no final decision could be taken on article 6 until the Commission had examined the Drafting Committee's new formulation of article 5. Personally, he was in favour of retaining article 6, which supplemented the more general provisions contained in article 5 and dealt with the special case in which representatives either lacked authority or acted *ultra vires*.

29. Another reason for including a provision on that subject was in order to elicit the views of governments.

30. Mr. ELIAS said that article 6 was closely related to article 5, and the substance of paragraph 2 should be retained in order to cover cases in which representatives exceeded or disregarded their authority. Admittedly the requirements as to credentials set out in article 4 of Part I did deal with the problem to some extent, but some provision was necessary to cover the possibility of secret instructions being at variance with credentials.

31. He too was uncertain about the precise distinction between ostensible and specific authority and wondered whether the content of paragraph 1 might not be embodied in the commentary on article 4.

32. Mr. CADIEUX said that article 6 raised a valid point, which the Commission should deal with. The difficulty was that the article touched on matters already dealt with in article 4 of Part I and article 5 of Part II, but that was mainly a drafting problem. The Commission should certainly concern itself with the point; depending upon the weight it wished to give to it, the Commission might deal with the point in a separate article or refer to it either in article 4 of Part I and article 5 of Part II, or in the commentary.

33. Mr. AMADO said that the situation contemplated in article 6 was too theoretical and should probably not be the subject of an article. True, the Special Rapporteur had reviewed all the aspects of the problem and all the hypotheses relating to it. In practice, however, States were manifestly very vigilant about their interests. Article 6 was therefore too explicit. In any case, it was unnecessary to cite Roman law; international law was of very recent origin.

34. The CHAIRMAN, speaking as a member of the Commission, said that the provisions contained in article 6 represented necessary safeguards and had their place in the general structure of the draft, though their purpose could perhaps be achieved in some other way, possibly by amplifying article 4 of Part I. Broadly speaking, the Commission was devising a formal system

under which the validity of a treaty would be determined by the presentation of full powers or other evidence of authority in due form, and therefore some protection against deliberate abuse by a State agent was necessary. There could be instances where one of the parties might enter into an agreement with the other while aware that its representative was not duly authorized, and that possibility was afforded by article 4, paragraph 4 (b), of Part I.

35. He agreed with Mr. Cadieux that article 6 should be examined by the Drafting Committee in conjunction with article 5, paragraph 4, with a view to deciding whether paragraph 2 need be retained in some form.

36. Mr. LIANG, Secretary to the Commission, said that he would offer a few remarks on article 6, particularly as Mr. Tabibi had drawn attention to certain treaty-making procedures under United Nations auspices.

37. He thought that the provisions of article 6 served a useful purpose; they constituted a necessary and useful application of a doctrine — the so-called "private law analogies doctrine" — which was based on "the general principles of law recognized by civilized nations" within the meaning of article 38, paragraph 1 (c), of the Statute of the International Court of Justice.

38. The situation envisaged in article 6 was one which should be dealt with; no draft on the law of treaties would be complete without a reference to it.

39. On the question whether it was desirable to connect the contents of article 6 with the question of validity, he said that the matters dealt with in the article were connected more with the question of the binding character of the acts of agents of the State than with that of validity. By way of analogy he mentioned that, in private law, the validity of a contract depended on such matters as the legality of the object, the reality of consent and the question of capacity. Article 6 did not deal with any of those questions, which were the essence of an agreement. The matters with which it did deal were analogous to those known to private lawyers as questions of agency in the common law and *mandatum* in Roman law. The problem had to do with the effects of representation in international law — a problem on which Professor Sereni had delivered an interesting course of lectures at The Hague Academy of International Law.⁵

40. The situation envisaged in article 6 was connected with the conditions in which a State became a party to a treaty and the extent to which the treaty became binding on it; the article was not concerned with validity as such. In that connexion, a distinction should be drawn between the concept of validity and that of the binding effect of a treaty: the two concepts were different, although the draft articles did not appear to draw a clear distinction between them.

41. It had been suggested by some members that the provisions of article 6 would be better placed in article 4 of Part I and he had been informally asked whether

⁵ Sereni, A. P., "La représentation en droit international", in Academy of International Law, The Hague, *Recueil des Cours*, vol. 73, 1948, II, pp. 73-166.

it was still possible for the Commission to amend Part I, which it had adopted at its previous session. In fact, it was quite possible for the Commission to take the point into consideration when it re-examined Part I at its next session in the light of comments by governments. At that stage, the Commission would consider the question of the connexion between article 4 of Part I and article 6 of Part II.

42. As to the realities of the problem, the practice had been aptly described by Mr. Amado. Personally he felt that the provisions of article 6 would be useful in a general sense. In practice, however, only one situation to which they applied could arise, namely, that in which a State became a party to a treaty by mere signature. Where ratification was necessary, there were sufficient safeguards, and not only in existing international law; those safeguards were indicated in the draft articles already adopted by the International Law Commission. The case was not a very common one, but if a head of State or a plenipotentiary signed a treaty which bound the State without any further formality, then the provisions of article 6 would be very useful.

43. To sum up, he considered that article 6 would be useful, but that it should not be connected with the question of validity.

44. Mr. BARTOŠ said that it was only about paragraph 2 that he had any doubts. He paid a tribute to the uncommon frankness always shown by the Special Rapporteur in his draft articles concerning international negotiations. In his country, as elsewhere, the representatives of the State often had two sets of instructions, open and secret, and it was the margin between the two which left the negotiator some latitude to "bargain". The instructions in fact constituted only the basis of the relationship in law between the principal and the agent. They did not concern the other party to the negotiations. If the validity of international relations were made to depend on the instructions received by the negotiator from his government, it was to be feared that some instruments, concluded by parties possibly acting in good faith, might be called in question. That solution would be dangerous for international relations.

45. While he still believed in the need to ratify all treaties — unlike the majority of the Commission, which had accepted the principle that treaties in simplified form need not be ratified — he was opposed to the idea that results achieved by the conclusion of treaties should be called in question again because the negotiator had disobeyed his instructions. If a representative possessed "ostensible authority", or rather specific authority to negotiate, he could hardly be disbelieved, even if his instructions had been communicated to the other party. States were not irrational, but it must also be presumed that their negotiators did not lack good sense, honesty and a sense of responsibility. In his opinion, therefore, paragraph 2 was not justified. He considered that the paragraph was not acceptable and that it was unnecessary for the Drafting Committee to reconsider the matter. He proposed that paragraph 2 be deleted by the Commission before the article was referred to the Drafting Committee.

46. With regard to paragraph 1 (b), he entered his usual reservation, which followed from his opposition to treaties in simplified form not subject to ratification.

47. Mr. VERDROSS said he agreed with Mr. Ago that the cases for which provision was made in paragraph 1, where a representative acted in a manner not authorized either under article 4 of Part I or under special powers, were very rare. He had, however, certain practical cases in mind. The Austrian Constitution, for example, contemplated treaties of three categories, those concluded by the President of the Republic, those concluded by the Government, and those concluded by a Minister. If a Minister concluded a treaty within the scope of his authority, the treaty was valid, but if he exceeded his authority, a case contemplated in paragraph 1 arose, and the need for paragraph 1 was thus demonstrated.

48. Mr. de LUNA, reverting to the illustration he had quoted from the memoirs of Cordell Hull, said he should mention that the Danish Minister in Washington had acted in keeping with his patriotic duty, for the Danish Government had not then been in exile in London, but captives of the Nazis in Copenhagen. It was a clear case of quasi contract of *negotiorum gestio*.

49. With regard to article 6, he endorsed Mr. Liang's remark concerning the principles of private law. The doctrine in question was the broad doctrine of *falsus procurator*, where there was not merely usurpation, but also an act *ultra vires*; it was not possible, however, to transpose all the demands of the *falsus procurator* doctrine into international law by analogy.

50. Like Mr. Bartoš, he was surprised that the idea of obliging States to disclose secret instructions should be entertained. If a State did so, it would have no negotiating margin, for the other State would know exactly how far it was prepared to go.

51. Mr. TUNKIN said that, although paragraph 1 seemed at first sight redundant, it might prove to have some use, and he was therefore inclined to agree with Mr. El-Erian that it should be retained.

52. Article 4 of Part I indicated the requirements regarding full powers, and its provisions would cover the whole matter if no additional problems arose. Life, however, was much richer than any legal rule, and the specific situations dealt with in articles 5 and 6 needed to be covered.

53. Mr. Ago had suggested that the provisions of article 6 should be placed closer to article 4 of Part I. He had not been convinced by Mr. Ago's arguments which, if accepted, would apply equally well to article 5. In fact, the situations dealt with in articles 5 and 6 were close to those covered by article 4 of Part I, but they nevertheless constituted separate problems.

54. With regard to paragraph 2 of article 6, there was a similarity between the situation envisaged there and that contemplated in article 5, paragraph 3, which provided that, where a representative had acted *ultra vires* and the treaty had not yet entered into force, the State concerned could rectify the situation. A similar approach could perhaps be adopted as in article 6, paragraph 2.

Say, for example, an ambassador who had instructions to deposit the instrument of ratification of a treaty, and at the same time to make a reservation regarding one or several of its articles, failed to make the reservation, but the treaty had not yet come into force; his government, as soon as it became aware of the omission, could remedy the situation by arranging for the ambassador to make the reservation as instructed. The situations dealt with in article 5, paragraph 3, and in article 6, paragraph 2, thus appeared to be analogous.

55. The provisions of article 6 should be considered in the light of those of article 5. Article 6 should be retained for the time being and the Drafting Committee should be instructed to make the necessary changes in the text to take account of the observations made by members of the Commission.

56. Mr. YASSEEN said that the article referred to the possible restrictions on the representative's authority and not to instructions concerning the course or trend of the negotiations. For example, the representative might have been authorized to sign an agreement definitively, and then his government, after reflection, might have judged it preferable to authorize him to sign *ad referendum* only. Or again, the negotiators might have been told to discuss two questions and the representative authorized to give his government's definitive opinion on both, and then his government might have decided that its position on one of them could be reserved.

57. He believed, therefore, that the article did not concern the instructions on the course of the negotiations which every representative received and could not divulge. The article was concerned only with the instructions relating to possible limitation of the representative's authority. To that extent it was both logical and useful.

58. Restrictions embodied in instructions should be without effect if they were not known to the other party. A State could not claim that it had instructed its representative not to sign definitively, when the powers communicated to the other party were clear and showed that the negotiator was in fact authorized to do so.

59. Mr. TSURUOKA said he still thought that article 6 should be deleted. If the Commission decided to retain it, however, its wording, which was not entirely felicitous, should be amended.

60. Paragraph 1 made no reference to one party's knowledge of the instructions given by the other party to its representative, whereas paragraph 2 made such a reference; if the provisions were construed *a contrario* the resulting situation would be confused. A State could repudiate something done by its representative on the ground that he had failed to respect the instructions restricting his authority only if that fact had been communicated to the other party. In such a case, a new instrument of full powers should be produced to the other party, to replace the original instrument.

61. Mr. AGO said that some of the terms used in the draft of article 6 had given him the impression that it dealt with a question of authority rather than validity.

62. After the explanations given by the Special Rapporteur, he was willing to consent to the retention of the article, but if the Commission wished it to refer, not to the question of authority, which was covered by article 4 of Part I, but to the question of validity, then that fact should be stated more clearly, and the reference in paragraph 1 to article 4 of Part I should be deleted. There might be cases where, in the circumstances covered by article 4 in its broad sense, a representative possessed the necessary authority in general, but was not specifically authorized to conclude a particular treaty.

63. Paragraph 2, in particular, should be slightly amended. The clause "the instructions shall only be effective to limit his authority if they are made known to the other interested States" referred to the authority of the State's representative and not to the validity of the instrument concluded in breach of the instructions. It should be made to refer to the validity, because, in fact, the instructions in question restricted the representative's authority whether the other party had notice of them or not. It was the validity of the instrument concluded contrary to those instructions which was not impaired if the instructions were not brought to the knowledge of the other State. It was paragraph 2 which had made him believe that the Special Rapporteur had been thinking mainly of the question of full powers. If in reality it was validity of the instrument that was meant, then amendment of paragraph 2 on the lines he had suggested would render the article more understandable and, above all, more appropriate.

64. Sir Humphrey WALDOCK, Special Rapporteur, noted that several members wished to delete article 6. Attention had been drawn to the argument, put forward occasionally by writers, that the Commission had a propensity to go into too much detail. He was not impressed by that argument and felt that if a point required consideration, the Commission should not omit it from its draft merely out of fear of being accused of indulging in excessive detail.

65. Some confusion had perhaps been created because the provisions of article 6 had been expressed largely in terms of authority rather than in terms of validity. In fact, those provisions touched on essential validity and he agreed that the article should be re-drafted to take that point into account and also to eliminate the notion of repudiation.

66. Paragraph 1 dealt with a total lack of authority on the part of the person who signed the treaty. Cases of that type were rare. The case mentioned by Mr. de Luna of the taking over by the United States of America of the military control of Greenland in April 1941 was a case of the total absence of authority rather than of secret authority to sign a treaty; however, the case was a very special one of a war-time government under the control of the enemy, and an exceptional case of that type would hardly justify a provision being included in the draft. The same was true of such rather rare historical incidents as that of the British Government's disavowal of an agreement between a British Political

Agent in the Persian Gulf and a Persian Minister, which the British Government afterwards said had been concluded without any authority whatsoever.⁶

67. There was now, however, rather more possibility of the provisions of paragraph 1 being useful, since the adoption of article 4, paragraph 4 (b), of Part I, which stated that "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." It was now not at all uncommon for a Minister for Economic Affairs, a Minister of Health or a Minister of Civil Aviation to negotiate and sign treaties; only fifty years ago such a situation would have been impossible. In view, therefore, of the large number of authorities which now concluded treaties, it was not at all unlikely that a case might occur of a treaty being signed without any authority at all.

68. With regard to paragraph 2, he agreed with the explanations given by Mr. Tunkin and Mr. Yasseen. The reference was not to secret instructions regarding the substance of the negotiations, but to limitations upon the authority to conclude a treaty. What he had had in mind was the possible omission by a representative to enter a reservation which he had been instructed to make at the time of signing a treaty. It was a feature of contemporary international practice that agreements were entered into quickly and that instructions were given, cancelled and altered by cable or airmail, with the consequent possibility of misunderstanding. It was therefore desirable to cover the situation which could arise as a result of such misunderstandings.

69. In conclusion, he concurred with the suggestion that the Drafting Committee should be invited to produce a new draft of article 6, together with a new draft of article 5, and to make the provisions of both articles consistent with article 4 of Part I.

70. The CHAIRMAN suggested that article 6 should be referred to the Drafting Committee for study, in the light of the comments of members, in connexion with other articles of the draft and of the articles of Part I.

It was so agreed.

The meeting rose at 12.40 p.m.

⁶ Adamiyat, F., *Bahrain Islands*, New York, 1955, F. A. Praeger, pp. 106 ff.

678th MEETING

Monday, 13 May 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 7 in section II of his second report (A/CN.4/156).

ARTICLE 7 (FRAUD INDUCING CONSENT TO A TREATY)

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 7, said that his hesitation in proposing an article on the question of fraud inducing consent to a treaty had really been far greater than appeared from the commentary. He now felt that he had attributed too much importance to the fact that an article on the subject had been included both in the Harvard draft and in the drafts prepared by his two predecessors, Sir H. Lauterpacht and Sir G. Fitzmaurice.

3. The possibility of fraud in connexion with treaties did exist, but there had been no case precisely on the question of fraud inducing consent to a treaty.

4. If the Commission felt disinclined to put an article on fraud before governments at all, the matter could be covered by the provisions on the subject of error, since the error of one of the parties could be induced by fraud on the part of the other. The argument in favour of a separate provision on fraud was, of course, that when fraud occurred it struck at the root of a treaty in a way somewhat different from error; it destroyed the whole basis of confidence between the parties.

5. The first question to be decided by the Commission, therefore, was whether it desired to have a separate article on fraud or not.

6. Mr. TSURUOKA said that, though usually in favour of simplicity, he was in favour of including a provision, if not an article, dealing with fraud, for modern international law attached great importance to the notion of good faith.

7. With regard to the formulation of an appropriate clause, previous special rapporteurs had drafted provisions leaving it to the courts to determine whether the instrument allegedly vitiated by fraud was void. That was as it should be, but in the present stage of development of international law it might not be a practical solution, for in most cases a dispute could not be brought before an international tribunal without a *compromis*; in view of that consideration it was provided in article 7 that a State could plead fraud in negotiations with the fraudulent party. Two conflicting interests were involved, however: the need to ensure the protection of the aggrieved State and the obligation to maintain the stability of the system of law, which required no less protection. If the draft was to leave invoking of the ground of fraud *prima facie* to the aggrieved party, then clearly the concept of fraud would have to be defined in a precise and restrictive manner, so as to prevent any abuse.

8. The Commission should also decide what effects were produced by an instrument vitiated by fraud — in other words, whether such an instrument was void *in toto* or only in part. The simpler solution was probably to allow the ground of fraud to have effect only if fraud vitiated such instruments *in toto*; for, especially in the case of multilateral treaties, the other solution might produce an effect not unlike that of a reservation to a multilateral treaty — a thorny and controversial matter. In such cases it would be preferable for the instrument to be regarded as wholly void.

9. It was not easy to see the grounds for the distinction drawn in article 7, paragraph 1, between the cases covered by sub-paragraph (a) and those covered by sub-paragraph (b); loss or damage might equally well ensue in the cases covered by sub-paragraph (a). It should be observed that in paragraph 2 (a) the notion expressed in the words "or without regard to whether they are true or false" might be relevant if the existence of fraud was to be decided by a court; but if the aggrieved State was allowed to decide that fraud had occurred, the provision would be open to abuse because the notion of fraud was a subjective one. He had similar doubts about paragraph 2 (b); the limitation implicit in the words "material facts" might be inadequate.

10. Mr. YASSEEN said that the need to base the draft on practice did not mean that the problem of fraud should be ignored. States were not all equally experienced in diplomacy and the art of negotiation, nor were they all equally able to call on advisers. It should therefore be expressly laid down that any error due to fraud vitiated consent; the absence of a provision of that kind might possibly encourage fraud or increase distrust in international relations.

11. Article 7 gave a precise definition of fraud and also solved the controversial problem of non-disclosure. Fraud by non-disclosure, though rare, was not impossible. The treaty negotiated might relate to a part of the territory of a State. The other State might know something about that part of the territory which was not known to its partner; for instance, the existence of certain resources there. That situation was not impossible in theory, or even in practice, if the State having such knowledge was a former colonial Power, protector or mandate-holder, which might have its own sources of information about the part of the territory in question. If that State did not disclose its knowledge, its conduct would certainly be blameworthy. Paragraph 2 (b) was well drafted and — despite Mr. Tsuruoka's fears — was not open to abuse, for the provision was qualified: not all forms of non-disclosure were regarded as fraud, only non-disclosure where there was a moral duty not to remain silent. On the whole, therefore, article 7 was satisfactory.

12. Mr. TABIBI said he favoured the inclusion of an article on the subject of fraud. Where fraud induced consent to a treaty, it undermined the reality of the treaty; it rendered the treaty voidable, as in the case of any contractual relationship. The inclusion of provisions on the subject would stress the need for moral rules to govern the conduct of States in the same way as that of individuals.

13. He had noted the statement in the commentary that the only instance mentioned in the books as one where the matter of fraud had been discussed at all was the 1842 treaty which had fixed the boundary between the north-eastern United States and Canada. While it might be true that not many cases were actually on record, the fact remained that cases of fraud did occur, though they might not be recorded. Generally, the fraud was committed by a country with more experience of treaty-making, at the expense of a country

with less experience. With the increasing maturity of States, cases of that type were more likely to occur in the future and it was necessary to make provision for them. That it would be wise to do so was shown by the inclusion on the agenda for the seventeenth session of the General Assembly of the "Question of boundaries between Venezuela and the territory of British Guiana". One of the parties had contended that the arbitral tribunal which had settled that dispute some sixty years ago had been misled with regard to material facts.

14. He therefore believed that, for the protection of small countries and of the new countries of such regions as Latin America, Africa and Asia, an article such as article 7 was necessary. It would be better to include the article and find that there were few if any cases to which it applied, than to omit the article and fail to give the protection that might be needed.

15. With regard to the drafting, while he supported the general tenor of article 7, he thought that the definition of fraud contained in paragraph 2 should be placed at the beginning of the article; it would be better to begin by defining the concept and then to enunciate its effects.

16. He considered paragraph 1 (c) and paragraph 3 unnecessary. The danger of the appearance of some new element of fraud not covered by the definition was a point that must not be overlooked.

17. Mr. GROS said he was convinced that article 7 was unnecessary. Since it was not possible to cite a real case of fraud in international law, the discussion on the point was purely theoretical, and he was not prepared to affirm that a rule on fraud existed in positive law.

18. There seemed to be no justification for transferring to international law a case of defect in consent in private law. The Special Rapporteur himself, who in his great impartiality had proposed the article in question, had made it clear that he did not favour it. It would indeed be hazardous to take rules applicable to contracts between private persons and apply them to treaties between States which, as the Commission's discussions in 1962 had shown, were not the same as ordinary contracts. That would be taking a first step towards an international law theory of "vitiated consent" in the conclusion of treaties — a theory which was not necessary.

19. Fraud within the meaning of article 7 would enable the injured State to declare a treaty void *ab initio* by a unilateral decision. Such a declaration was possible in the case of civil and commercial obligations, but with how many safeguards, including the decision of the court, and how many conditions to be satisfied in the definition of cases of fraud! Few cases of the kind were to be found in any country's case-law, for fraud was very difficult to prove in connexion with an obligation in private law; that applied *a fortiori* in the case of a treaty.

20. Even in the hypothetical case suggested by the Special Rapporteur — that of an underground stream

whose existence had not been disclosed to one of two States negotiating an agreement for the mutual exploitation and use of water resources — what was involved was not so much fraud as the incompetence and negligence of one of the parties, which had not acted with prudence which the Special Rapporteur regarded as the first requirement in any negotiations. It was open to any State to hold the necessary consultations and to find out what the other party was trying to conceal. In reality, the cases of fraud which could be imagined remained academic instances, whereas article 7 might impugn the negotiator's good faith. The International Court had said that error could not be pleaded if it could have been avoided (Commentary, p. 39), and that could also apply to fraud.

21. If the question of fraud was to be dealt with, it could be considered during the discussion on articles 8 and 9, for some errors might be in the nature of fraud, and certain systems of private law spoke of "fraudulent mistake", which meant mistake induced by fraud. Moreover, the Special Rapporteur referred to such fraud in his article, so that it would be possible to deal with the subject without giving it unnecessary emphasis.

22. In matters of detail, it was easy to show the insuperable difficulties involved in any attempt to draft precise provisions on fraud. In paragraph 2 (a), for example, the phrase "in the knowledge that they are false" involved an inquiry into the intention. Was it the intention of the State or of its representative that must be established? Could the "knowledge" be subjective or must it be determined whether it was objectively established? As to the idea expressed by the words "without regard", it was difficult to prove a negative state of mind. Similarly, the expression "material fact" in paragraph 2 (b) raised the difficulty of deciding what was and what was not material. Finally, the fraud must have been "determining" — i.e., it must have caused the treaty to be concluded.

23. He therefore reserved his general position on the value of a theory of defects in consent in international law. He considered that both the difficulties involved in defining the object of article 7, and international practice, showed that it was unnecessary to set out, in a convention on treaties, a rule on fraud that would be purely theoretical. Where there was so-called "vitiation of consent", in reality a rule of international law had been broken, as would be shown by the problems of errors and duress, and that rule was not based on the idea of vitiation of consent.

24. Mr. ELIAS said he shared the Special Rapporteur's hesitation over the inclusion of article 7.

25. After examining the explanations contained in the commentaries on articles 8 and 9, he had reached the conclusion that, because of the special nature of the problem of fraud, it could best be dealt with in article 8 or article 9, rather than in a separate article.

26. He had been much impressed, both by the fact that there had not been a single arbitral or judicial decision in which the issue of fraud as such had been judged, and by the statement in the commentary on

article 7: "Clearly, cases in which governments resort to deliberate fraud in order to obtain the conclusion of a treaty are not likely to occur, while cases of fraudulent misrepresentation of material facts would in any event be largely covered by the provisions of the next article concerning the effects of error." That articles 8 and 9 could cover the point was also indicated by the statement in paragraph 10 of the commentary on article 9, that "The position of a party which has been led into error by the fault of the other party would seem to be similar to that of a party induced to enter into a treaty by fraud." He therefore considered that, while there might be some need to cover the question of fraudulent misrepresentation, it was not appropriate to devote a whole article to that question.

27. The remarks made by Mr. Gros about the case of two States negotiating a treaty for the mutual exploitation of water resources had reminded him of some recent negotiations concerning the river Niger, in which he had participated. A hydrological survey had been made by experts supplied by the United Nations, and he thought that in cases of that kind it was unlikely that the existence of an underground stream would remain unknown to one of the parties until the treaty had been concluded. In fact, it was difficult to find any specific instance in which a treaty had had to be abrogated because of the non-disclosure of material facts or because of fraudulent misrepresentation vitiating consent.

28. It was stated in the second paragraph of the commentary on article 7 that "Fraud, when it does occur, strikes at the root of a treaty, as of a contract, in a rather different way from innocent misrepresentation and error; it destroys the basis of mutual confidence between the parties as well as nullifying the consent of the defrauded party." In fact, a very similar statement could be made with regard to error in substance, and decisions by national courts could be cited in support of the statement that the legal effects of error and of fraud were the same.

29. Apart from those arguments of substance, there were also arguments of form for not including a separate article on fraud. The provisions of article 7, paragraph 1, were very similar to those of article 8, paragraph 2, and of article 9, paragraph 2. From the point of view of drafting, it would be appropriate to combine the contents of articles 7, 8 and 9 in a single provision condensing all the ideas contained in those articles. When the Commission came to consider articles 7, 8 and 9 in detail he would put forward more specific suggestions for combining those articles and retaining a reference to the question of fraud vitiating consent.

30. Mr. BARTOŠ paid a tribute to the Special Rapporteur's objective approach and complimented him on his clear statement.

31. With regard to the principle of article 7, he thought that the general rule of law *fraus omnia corrumpit*, from which the idea that fraud vitiated consent was derived, could also apply in international law. He did not accept Mr. Gros's proposition that the only issue was the greater or lesser skill of diplomats. When he

had studied the question in its theoretical aspects for the purposes of the third volume of his treaties on international law, he had found many applications of the *fraus omnia corrumpit* rule in what were called *ex aequo et bono* decisions delivered by international arbitral tribunals. In modern theory, the typical case of fraud was that in which one party was under a misapprehension and the other party was aware of the misapprehension but did nothing to remove it. There was thus no difference between active fraud and passive fraud. The concept of fair dealing should be introduced into international relations, and it was natural and reasonable to transfer the notion of good faith from internal law to international law.

32. Still, while he approved the principle, he had some reservations with regard to the approach. In the first place, it was true that the concept of fraud was not sufficiently well defined in the present draft of article 7, but it was equally true that fraud was difficult not only to define but also to establish in any particular case in public relations. To begin with, the answer to the question "What is fraud?" differed according to the nature of the clause in respect of which fraud was alleged — according to whether the clause related to substance or to a subsidiary point. It had been asked whether a treaty vitiated by fraud should be voided *ab initio* wholly or in part; but if it was voided in part, there arose the problem of the general balance of what remained of the treaty. In the particular case where the injured party had begun to implement the treaty before discovering the fraud, did the choice lie only between the solutions contemplated in article 7, paragraph 1? Another possible solution might be to rectify the treaty for the future, without denouncing it, and to make provision for indemnification for the past.

33. A further question was whether there had been fraud in the acts only, or also in the intention. That question was connected with prospects fraudulently held out by a party, which had not only influenced but even determined the formation of the will of another party (misrepresentation of prospects). In such cases, after it had been shown that the prospects were not as represented, the fraud resulted in situations very like those considered to justify application of the *rebus sic stantibus* clause. There were cases in which fraud was akin to other defects in consent; but there were also cases of fraud *stricto sensu*, which came within the scope of the rule *fraus omnia corrumpit*, even in treaties governed by public international law. In his view, the Commission should not concern itself with the question of proof; the substantive rules should be kept distinct from the rules governing proof. It was for the court to produce the proof by applying the substantive rules laid down for that purpose. The Commission was not at present concerned with the law of procedure before international courts.

34. Again, did the problem of fraud as a determining cause of invalidity of a treaty take the same form for multilateral treaties as for bilateral treaties? Of course, the possibility of bad faith in international relations could be taken into account; but the case was hardly likely to arise in multilateral treaties of general interest

concluded under the auspices of the United Nations or of other international organizations. It had been argued that, in the case of the treaties relating to the international control of narcotic drugs, the reticence of some representatives on technical details could amount to veritable deceit. Nevertheless, he thought that the Commission should confine itself to bilateral treaties and to multilateral treaties which were not of general interest. The question of jurisdiction was quite separate and should not be considered in that context.

35. In general, the ideas set out in article 7 were necessary and useful in a set of rules on treaties, though certain points needed to be rectified; he was sure the Commission could rely on its Special Rapporteur to do that.

36. Mr. CASTREN said it was debatable whether there was any real need to include an article dealing with fraud, since in practice hardly any cases arose in which fraud was pleaded as a ground for challenging the validity of a treaty, denouncing a treaty or claiming damages. On the other hand, the commentary by the Special Rapporteur and the examples quoted by a number of members had made it clear that such cases were not inconceivable, and that it would therefore be advisable to include some specific provisions relating to fraud. Actually, no new ground would be broken, since references to fraud appeared in all textbooks on international law.

37. Article 7 was generally acceptable. It was more condensed than the corresponding provision drafted by the previous Special Rapporteur, and in that respect was an improvement. The definition given in paragraph 2 was satisfactory; though some of the expressions it used might be open to different interpretations, it was not easy to find less ambiguous terms.

38. In the English text of paragraph 2 (a), the words "a material" should be inserted before the word "fact" to correspond to the wording of sub-paragraph (b), while the French text should be brought into line with the English by adding the words "*sur un fait important*" after the words "*représentations fausses*". It might be advisable also, as Mr. Tabibi had suggested, to reverse the order of paragraphs 1 and 2.

39. He would be interested to hear the replies to the questions raised by Mr. Tsuruoka, particularly with regard to paragraph 1 (a). There were some other problems to be decided as well, but he was confident that the Special Rapporteur and the Drafting Committee would be able to prepare a text acceptable to the majority of the Commission's members.

40. Mr. TUNKIN said he associated himself with the majority view that article 7 should be retained.

41. From the theoretical point of view fraud must vitiate the validity of a treaty, because it destroyed the very foundation on which it was built, namely, mutual agreement between States. Mr. Gros's arguments to the contrary had not convinced him. The history of international relations showed that fraud had been used by some States, especially as an instrument of colonial or other aggressive policy. Perhaps instances should not be sought in the literature on the subject, because the

authorities might be disinclined to discuss shameful acts belonging to the past. But one example was the finding of the Nuremberg Tribunal that the Nazi Government had been guilty of fraud in concluding the 1938 Munich Agreement in that, whereas the apparent object of the Agreement was to regulate the so-called problem of the German minorities in Czechoslovakia, that government had never intended to fulfil the provisions of the agreement, and had regarded it merely as a step towards the complete annexation of Czechoslovakia.

42. An earlier instance of fraud was the Italo-Abyssinian Treaty of Friendship of 1889,¹ when the Italian delegation had practised a deception by drawing up texts in Italian and Amharic which did not agree. The provision in the Amharic text about the Emperor making use of the Italian Government's services for the conduct of foreign relations was permissive in form, whereas in the Italian text it was mandatory and on the strength of that provision the Italian Government had proclaimed a protectorate over Ethiopia shortly after the signing of the treaty. The Emperor had rejected that interpretation of the Treaty, basing himself on the Amharic text, and in consequence Italy had made war on Abyssinia in 1895.

43. Those two examples of fraud were obviously of far greater significance than the Webster-Ashburton Treaty² mentioned by the Special Rapporteur in his commentary, and he wondered whether the terms of article 7 as it stood, and in particular those of paragraph 2 (a), were comprehensive enough to cover such cases. Mr. Bartoš appeared to share that doubt.

44. He had no firm view on whether the provisions concerning fraud should or should not be incorporated in the same article or articles as those dealing with error, but perhaps that matter could be left to the Drafting Committee.

45. He agreed with Mr. Bartoš that the settlement of disputes as to whether or not there had been fraud inducing consent to a treaty was a separate problem that should not be dealt with in the present draft.

46. Mr. AGO recognized that there was a great temptation to transfer to international law the principles of private law relating to unreality of consent. But there were wide differences between the practical situations to which private law and international law applied, and he therefore shared the doubts expressed by the Special Rapporteur.

47. With regard to fraud, the Commission should confine itself strictly to that concept, which was clear, and which related to serious cases. The more or less inaccurate representations of fact which could be made in any negotiations, private or international, were not really cases of fraud. If they were, there would be many contracts and treaties which would not be valid. Even in private law, fraud was rarely pleaded; and in negotiations between States, as opposed to individuals, the idea of fraud was somewhat academic. Moreover, although some possibilities of fraud on points of geography might

have arisen in former centuries, they were now becoming more and more difficult to imagine. The only example quoted by the Special Rapporteur belonged to a past era.

48. The two examples quoted by Mr. Tunkin could not be regarded as genuine cases of fraud. It might be true that Germany had negotiated at Munich without any intention of complying with the agreement concluded; but the agreement had not been vitiated by fraud: the proof of that was precisely that Germany by its subsequent actions had broken the agreement, which was legally valid.

49. In the case of the treaty of Ucciali of 1889 between Italy and Abyssinia, there had been a discrepancy between two texts in different languages. But neither of the parties had been able to claim that its consent had been vitiated by fraud; in reality, as the discrepancy related to an essential point, there had been no consent; hence, it could not have been vitiated by fraud or in any other way.

50. The application of the *rebus sic stantibus* clause, to which Mr. Bartoš had referred by analogy, was also an entirely different case from fraud. That clause applied to valid treaties at the time of whose conclusion there had been no defect in consent.

51. In fact, the only case in which fraud was conceivable would be one in which a State misrepresented certain facts to another State and obtained its consent to a treaty on the basis of that misrepresentation; and even so the matter in question would have to be a very serious one. In negotiating a treaty of economic aid, for instance, the beneficiary State rarely explained every aspect of its situation accurately, but that did not mean that there was fraud.

52. It was the Commission's duty to safeguard the sanctity of treaties. It should not provide pretexts and excuses for the non-fulfilment of treaty obligations. The theory of defects in consent could be extremely dangerous and might open the way for abuses. In private law a contract was voided by the court. But in international law it was the State concerned which declared that it was not bound by a treaty; and history showed that States were more inclined to use fraudulent ingenuity in evading treaty obligations which no longer suited them than in concluding a treaty.

53. The words "or fraud" in article 9, paragraph 1, of the Special Rapporteur's draft reintroduced the question of possible fraud. He therefore suggested that the Commission should take no decision on article 7 until it had considered articles 8 and 9.

54. Mr. AMADO said he had hoped that all the members of the Commission would readily agree to the deletion of article 7; but it had proved otherwise. Nevertheless, it was obvious from the first three paragraphs of the commentary on article 7 that the article was unnecessary. The Commission should not give the impression that it was drafting conventions dealing with purely theoretical cases which would never arise in practice. No general definition of fraud could be given, since there were only particular cases involving all the psychological subtleties of intention.

¹ *British and Foreign State Papers*, vol. LXXXI, p. 733.

² *Ibid.*, vol. XXX, p. 360.

55. He did not wish to be dogmatic, but he was in favour of deleting the article, which would strike a discordant note in the Commission's work.

56. Mr. ROSENNE said he assumed from the discussion that there was general assent to the proposition underlying article 7, and that the real problem was to be sure that the parties had really given their consent to the treaty. As Sir Gerald Fitzmaurice had put it in article 4, paragraph 2, in his first report, "For the obligation to exist, the consent must be true consent."³

57. The question confronting the Commission was whether the insertion of an article on fraud was desirable, and in considering the matter he was guided by three main considerations. First, international lawyers must exercise the greatest caution in transferring to the international plane analogies from municipal law; secondly, if international law was to perform its real function of upholding peace between nations it must, as far as possible, eschew formulations which, for their application in concrete cases, required pejorative assertions; and thirdly, its rules must be capable of practical application.

58. He could not agree with previous speakers that questions of substance must be kept distinct from questions of procedure, for in international law and relations, there was a real identity between the substantive rules and the procedure for their application. For example, article 7 raised important problems of imputability and proof, especially of psychological factors such as knowledge and intention. For example, to whom was the making of false statements or representations of fact to be ascribed; was it to the negotiators or to those from whom their instructions had emanated? He had had personal experience of the kind of difficulty to which that problem could give rise when he was asked to interpret the intention behind an agreement he had himself negotiated and signed. He has been unable to give a satisfactory answer to that question; while he might have been able to recollect his own intentions, that was of secondary importance since he had had no knowledge of the psychological reasons that had prompted his government's instructions.

59. He feared that a provision framed in such emphatic terms as that contained in paragraph 2 (a) would either remain a dead letter, and possibly bring the Commission's work into disrepute, or would render the conduct of international negotiations impossible. The only way to achieve the object in view was to devise a provision containing an objective criterion to determine when fraud was present.

60. Broadly speaking, he agreed with the views expressed by Mr. Elias and Mr. Ago and suggested that the Commission should forthwith take up articles 8 and 9 and discuss them in conjunction with article 7. He also sympathized with the position taken by the Special Rapporteur.

61. In conclusion, he asked whether the term "*dol*" used in the French text accurately rendered the sense of the word "fraud".

³ *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No.: 1956.V.3, vol. II), p. 108.

62. Mr. VERDROSS agreed with Mr. Gros and Mr. Ago that true instances of fraud were very rare, since all States could protect themselves against deceit by calling upon the services of experts. Nor was there any doubt that certain general principles of law applied in international relations, one of them being, precisely, *fraus omnia corrumpit*. The statement by the International Court of Justice regarding error in the *Temple* case⁴ recognized that general principles of law could be applied to international relations; the same applied to fraud.

63. The objection that in private law it was the court which decided and that there was no such authority in international law showed up a deplorable weakness in the latter—the lack of compulsory jurisdiction. That objection might be validly made in regard to all the articles, but it did not mean that the principle did not exist.

64. It had also been stated that where there was fraud, the other contracting party was led into error and that, consequently, the case of fraud was identical with that of error. But fraud was the means, whereas error was the consequence; the two should be kept separate.

65. He was not opposed to the suggestion that the substance of article 7 should be combined with that of articles 8 and 9, but it was important that fraud should be covered in one way or another.

The meeting rose at 5.55 p.m.

⁴ *I.C.J. Reports, 1962*, p. 26.

679th MEETING

Tuesday, 14 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 7 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 7 (FRAUD INDUCING CONSENT TO A TREATY) (*continued*)

2. Mr. EL-ERIAN said he was surprised that the question of including article 7 should have led to controversy. After listening carefully to the arguments for and against, he was convinced that the article should be retained. During the discussion on article 6, in reply to the argument that the Commission was inclined to go into too much detail, the Special Rapporteur had rightly said that if a point needed to be covered the Commission should not omit it from the draft merely for fear of being accused of going into excessive detail. Personally, he thought that no draft on the law of treaties would be complete without a provision on fraud, which was

one of the most serious causes of vitiation of consent to a legal transaction.

3. The Special Rapporteur's manner of dealing with the question in article 7 was generally acceptable, in that his formulation took a middle course between two extreme positions: the complete omission of any definition of fraud and an over-elaborate definition which might prove too rigid.

4. He noted that article 7 did not make a treaty voidable if obtained by fraud, but made it void. Article 25 of Part II, however, provided elaborate machinery for the annulment of treaty obligations under a right arising by operation of law. Article 31 (fraud) of the Harvard Research draft convention on the law of treaties did not contain any definition of fraud but did specify that, pending a decision by a competent international tribunal or authority, a party which sought a declaration that a treaty was void could provisionally suspend performance of its obligations under the treaty.¹

5. In a matter like fraud the Commission should not be unduly concerned about the possibility of arbitrary action by a government. The charge that a fraud had been committed in connexion with the conclusion of a treaty was a very serious charge indeed and one which no government would lightly bring against another government. He had not been impressed by the argument that fraud depended on certain subjective elements which were difficult to prove; there was some subjective element in almost any legal concept.

6. It had been suggested that it was difficult to attach a charge of fraud to a State. He saw no reason why such a charge could not be brought against a State when the United Nations Charter itself, in Article 6, provided for the expulsion of a Member of the United Nations for persistent violation of the principles of the Charter. Under the Charter, a State could be charged with aggression. If such grave charges as aggression and persistent violation of the Charter could be brought against a State, there was nothing inappropriate in providing for the possibility of a charge of fraud.

7. It had been argued that, because fraud resulted in error, the Commission could dispense with article 7 and rely on the elaborate provisions on error contained in articles 8 and 9. In fact, the concept of error covered a much wider field than fraud; moreover, an error produced by fraud was a much more serious matter than an error which did not arise from the deliberate action of the other party.

8. But although fraud as a concept should be distinguished from error, Mr. Elias' suggestion that articles 7, 8 and 9 should be combined could be referred to the Drafting Committee.

9. Mr. TUNKIN, replying to the remarks made by Mr. Ago at the previous meeting, said he fully agreed that concepts drawn from internal law should not be transferred, by analogy, to international law. International law and municipal law were two different systems; nonetheless, international law was a form of

law and was therefore bound to have some elements in common even with municipal law. It would be a mistake to discard a rule of international law merely on the ground that it resembled a rule of municipal law to some extent.

10. There could be no doubt that the problem of fraud was a very real one in international relations. Mr. Rosenne had asked the question, whose fraud? But there was no necessity to delve into theoretical questions about whether the State constituted a reality or a legal fiction, or whether a State could be said to act and to incur responsibility or liability. Questions of that kind could be raised in connexion with each and every one of the articles being discussed by the Commission. The Commission had to work on the basis of realities. In the article under discussion, any reference to fraud meant a fraud committed by the State itself, though of course a State only acted through its appropriate authorities.

11. At the previous meeting, Mr. Gros had said that the retention of article 7 would be tantamount to casting doubt on the good faith of the negotiators of a treaty. But the law very often contemplated the possibility of improper action by an individual or, in the case of public international law, by a State. It was quite common for a legal norm to state that, if a certain wrongful act were committed, certain consequences would follow. Mr. El-Erian had already pointed out that international law contained rules stating the consequences of such violations of international law as aggression, which were much more serious than fraud. It was a regrettable fact that violations of international law did sometimes occur and provision should be made for their consequences.

12. At the previous meeting he had quoted two examples of fraud in international relations, but they had been contested by Mr. Ago. Although he had listened with attention to Mr. Ago's remarks, he did not feel that his two examples could be so easily dismissed, provided they were not approached with a preconceived notion of fraud based on private law analogies.

13. Considering fraud as it occurred in international relations and bearing in mind the basic principles of international law, there could be no doubt that the Munich Agreement of September 1938, leaving aside other aspects of that agreement, had been obtained by fraud. False statements had been made during the negotiations regarding the intentions of one of the parties. The intention of a party was a fact and false statements with regard to a party's real intentions therefore constituted fraud since, in the words of the Special Rapporteur, the false statements were made "for the purpose of procuring the consent of a State to be found by the terms of a treaty".

14. The other example which he had quoted, that of the Italo-Abyssinian Treaty of 2 May 1889, had been equally appropriate. The fact was that there had been two different texts of that treaty. Had the difference been due to a mere mistake, the question would have been one of error, but historical evidence showed that a wilful deception had been practised and the case was therefore clearly one of fraud.

¹ *American Journal of International Law*, 1935, vol. 29, Supplement, Part III, p. 1144.

15. Fraud was a separate phenomenon which called for separate treatment, though from the point of view of drafting, the Drafting Committee could consider Mr. Elias' suggestion that articles 7, 8 and 9 should be combined.

16. Mr. GROS said he must make it clear that when he had referred to skill in negotiation, he had of course meant only skill exercised fairly. No-one would think of arguing that it was right to deceive a negotiating partner, and there was complete agreement on the principle *fraus omnia corrumpit*. But that maxim stated a general principle applicable to international relations as a whole, whereas fraud was something quite special, which it was proposed to recognize in the case of treaties only. There were many other general principles, but the Commission was not examining each of them in turn in order to see how it applied to the law of treaties and to devote a special article to it in the draft convention. A breach of good faith should naturally be punished, but no-one proposed making that an article of the law of treaties, for the generality of the principle implied the generality of its applications.

17. It was said that the difficulty of providing proof and the lack of a competent court were external problems that could be solved in due course; but then surely the same applied to the principle *fraus omnia corrumpit*. If it could be proved before a court that one party had deceived the other and induced it to enter into a treaty by that means, the court would undoubtedly declare the treaty invalid. The members of the Commission in fact differed only on the question whether a special kind of misrepresentation relating to treaties should be recognized as fraud in a special legal category, sanctionable by absolute nullity on the mere declaration of a State.

18. He therefore agreed with other members that it would be wise to consider article 7 in conjunction with article 9. The reference to "fraud" already included in article 9, paragraph 1, was probably sufficient. The Commission could always explain the different points of view in the commentary without drafting a special provision on the subject.

19. Mr. PAL proposed that articles 7 to 11 and article 25 should be dealt with together.

20. The fact that recorded cases of fraud appeared to be rather scarce was perhaps a comfort, but it was an argument of limited value with regard to the question whether or not to make provision for fraud in the draft articles. Personally, he was more impressed by the difficulty of establishing fraud — a difficulty which existed even in municipal law.

21. In view, too, of the present state of international law and international relations, article 7 might well create a new subject of tension which it would be almost impossible to relieve. One party would allege that its consent to a treaty had been obtained by fraud and the other party would deny the allegation. There would be no solution to the problem, and no end to the assertions and counter-assertions of the parties.

22. The position would be different if article 7 were taken in conjunction with article 25, the provisions of

which constituted an effort to bring the subject to the level of national systems of law. Under article 25, it would not be left to the parties to decide whether fraud existed or not, but to some independent tribunal. The question of determining whether fraud had been committed was a difficult one; but it should not in any event be left to be determined by one of the parties to the dispute. It was hardly given to man to avoid the error of pretending to a capacity for self-transcendence and of thinking that his decision was in no way influenced by any effort to hide and obscure the taint of interest or passion. He therefore believed that, without the safeguards contained in article 25, article 7 would create a new field of discord in international relations and he would oppose its inclusion in the draft without the provisions of article 25.

23. It was very relevant to that aspect of the question that there were few recorded cases of fraud inducing consent to a treaty. If, therefore, up to the present time, the question of fraud had not led to any international tension, it was undesirable to introduce it now, only to create a new source of tension of dangerous potentiality in international relations.

24. Apart from the reasons given by Mr. Ago, an additional difficulty arose from the fact that the provisions of article 7 purported to apply also to multilateral treaties. Those provisions would nullify the consent given by a party to a multilateral treaty if that consent had been obtained as a result of a fraud by only one other party to the multilateral treaty. It was true that the effects of the nullification as formulated were confined to the defrauded party, but the difficulties might not stop there in the case of a multilateral treaty. In view of the difficulties which would probably result, he was disinclined to introduce the mischief of fraud at all. Further, the repudiation of a treaty would not stand on the same footing as that of a contract: the former would give rise to much more complex problems. In the meantime historical forces might have pressed on far beyond the *status quo*, perhaps towards higher forms of human community.

25. Mr. BARTOŠ said he quite understood that Mr. Gros was opposed to the idea of taking fraud into consideration as an element vitiating consent to treaties, on the theory of the freedom of skilful negotiators. He himself maintained his own view. He did not think it was a matter of invoking *faute* in the general sense by one of the parties, as Mr. Gros had suggested. On the contrary, it was a matter of fraud definitely established — of *dolus*, fraud or *fraus*, terms which meant a specific *faute* with specific consequences. The maxim *fraus omnia corrumpit* has a specific meaning in the law of treaties; if a party's consent was based on unawareness that a fact or idea had been misrepresented and such unawareness or mistake was noticed or exploited by the other party in order to obtain consent, then there had been deceit or fraud, and in that case it was not permissible to depart from the theory of *fraus omnia corrumpit* and adopt a theory of general *faute*.

26. He had already advocated greater precision in the concept of fraud as a determining cause of invalidation

of treaties through vitiation of consent and entered reservations as to the exact formulation of the rules that should be adopted for defining the concept of fraud, in order to draw the necessary inferences from the recognition of that principle and to fix the penalties. He agreed with Mr. Pal that fraud was difficult to determine in the case of multilateral treaties; fraud must be individualized and its recognition confined to bilateral treaties applying directly to the subject-matter, and it was with those that the Commission should concern itself.

27. He did not agree with the view that fraud was a general concept and the theory of *fraus omnia corrumpit* a general principle, and that being generally of a mandatory nature such principles should not be embodied in the draft articles. On the contrary, recognizing that general principles were applicable *ipso jure* in public international law (article 38, paragraph 1 (c) of the statute of the International Court of Justice) he thought that a distinction must be made between the general principles of law as a whole and those of them which should be applied to the case in point. The latter should be specified in the text and adapted as required by the institutions of the law of treaties.

28. Mr. PADILLA NERVO said he would not discuss the desirability of treating fraud as a factor invalidating consent to a treaty, but would confine his remarks to the desirability of including an article devoted exclusively to fraud inducing consent to a treaty.

29. The Commission was not preparing a code but a draft convention, and was at present discussing a section of part II which dealt with "principles governing the essential validity of treaties". In considering essential validity, it was important to determine the effects of lack of consent, and consent could be vitiated by fraud, error or duress. Where fraud had induced a party to consent to a treaty, the effects, as stated in paragraph 1, sub-paragraphs (a), (b) and (c) of article 7 were similar to those of error, stated in article 8, paragraph 2, and article 9, paragraph 2, as already pointed out by Mr. Elias.

30. In answering the question whether a definition of fraud should be included, either in a separate article or in article 9, the deciding factors should be practical utility and the prospects of securing the approval of governments at a conference of plenipotentiaries. Another point was whether it was possible to formulate a definition that was sufficiently complete and offered non-subjective criteria of evidence.

31. It should also be considered whether it was in the interests of a State to claim that a treaty was invalid on the grounds that its consent had been obtained by fraud. To that question a decisive answer would appear to have been given by the Special Rapporteur in the first sentence of his commentary to article 7: "There does not appear to be any recorded instance of a State claiming to annul or denounce a treaty on the ground that it had been induced to enter into the treaty by the fraud of the other party".

32. It was agreed by all that *fraus omnia corrumpit*, but like Mr. Pal, he felt that it would not be advisable

to make separate provision for the case of fraud, because such a provision would not help international relations.

33. Sir Gerald Fitzmaurice, in his third report, had made separate provision for the case of fraud and misrepresentation in his draft article 13,² which laid down that fraud must relate "to a material particular" and must have "induced, or contributed to inducing, the other party to conclude or participate in the treaty, in such a way that that party would not otherwise have done so...". Under the definition adopted by the present Special Rapporteur fraud was the deliberate misrepresentation of facts "for the purpose of procuring the consent of a State to be bound by the terms of a treaty". It was always difficult to prove an intention, but in international relations there was the additional difficulty that the effectiveness of a treaty and its successful implementation depended on the respect of the parties for their pledged word; there could be no question of a treaty being executed by coercion.

34. Sir Gerald Fitzmaurice, in his third report, had included an article 12³ on the subject of the effects of "error and lack of *consensus ad idem*", paragraph 2 of which provided that an error, in addition to being a material one "in some essential particular affecting the basis of the treaty" must possess certain characteristics, such as that of being "an error of fact and not of law". Paragraph 3 of the article then went on:

"Although, as provided in paragraph 1 (c) above, an error made by one party only is not a ground of invalidity unless induced by the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence of the other yet, if the treaty is a plurilateral or multilateral one, an error made by a party which did not take part in the original conclusion of the treaty, affecting the fundamental basis of its own subsequent participation, will constitute a ground on which the invalidity of that participation may be claimed, provided the error in other respects conforms to the conditions of paragraph 2 above."

35. There was no doubt in his own mind as to the close connexion between the provisions of article 7 on fraud and those of articles 8 and 9 on error, and he therefore urged that no decision should be taken on article 7 at that stage; the question of the possible inclusion of a provision on fraud, and the difficult problem of formulating a complete and effective definition, should be settled when the Commission took a decision on articles 8 and 9.

36. Mr. GROS considered that a theory of nullity of treaties on the ground of defective consent was unnecessary in international law. The question had no great practical implications if the same result could be achieved by a different juridical approach, which was precisely the case, but it was worth examining because a principle was involved. A treaty was quite different from a contract, and one should not automatically transfer to international law concepts recognized in private law, that was to say in a society organized round an authority

² *Yearbook of the International Law Commission, 1958, Vol. II* (United Nations publication, Sales No.: 58, V.1, Vol., II), pp. 25-26.

³ *Ibid.*, p. 25.

recognized by everyone and enforced by the courts. International law, having no common authority and no compulsory jurisdiction, was more flexible, and should remain so.

37. In paragraph 5 of his commentary on articles 8 and 9 the Special Rapporteur emphasized, in connexion with error, the need to settle each case in the light of its circumstances. Although in two cases the International Court of Justice had taken a position which could be cited in support of Mr. Bartoš' argument, it had used very cautious terms. In the case concerning *Sovereignty over certain Frontier Land* (Belgium - Netherlands) it had stated that: "The only question is whether a mistake, such as would vitiate the Convention, has been established by convincing evidence."⁴ And in the Case concerning the Temple of Preah Vihear it had stated that "the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given".⁵ Thus the Court believed that there was a connection between error and evidence, and between error and substantive conditions to be verified.

38. Moreover, there was an inconsistency in the draft of article 7 submitted to the Commission; for after stating the possibility of declaring that fraud nullified consent to be bound by a treaty, it mentioned the possibility of affirming the treaty. In fact it recognized that there was no absolute nullity. It was significant that the word "nullity" was not found in the relevant cases. In the *Legal Status of Eastern Greenland* case, the Permanent Court of International Justice had decided that the steps taken by the Norwegian Government had been "unlawful and invalid".⁶ Elsewhere, case-law relied on the notion of an instrument which could not be invoked against another State. In the absence of a common authority and of a compulsory jurisdiction, the principle that a State could not rely on its fraudulent transaction could achieve the same result as a theory of nullity.

39. Mr. TSURUOKA said that the concept of fraud was undoubtedly important. The general principle that fraud affected the reality of consent, which was recognized in the law of many countries, was implicit in international law. The question was simply whether it was worth mentioning, in view of the rarity of cases of fraud and the difficulty of defining the scope of the question precisely. No member of the Commission insisted on the inclusion of an article dealing specifically with fraud, but many thought that fraud should be mentioned somewhere in the draft articles.

40. The Commission should find a compromise between codification *simpliciter* and the progressive development of law. A defrauded State should be protected and justice be safeguarded no doubt, but at the same time any wrongful application of the principle should be avoided.

41. The Commission should therefore choose one of two possible approaches. Either it could decide that

fraud could be pleaded only before an international court; the difficulty then would be to win acceptance of that solution by a majority of States. Such a solution would certainly protect the defrauded State, for, as Mr. Gros had said, a State which considered itself defrauded and whose complaint was well founded would convince the court. It might perhaps also forestall reckless charges of fraud, and thus make for harmony in international relations. Or, despite the almost total lack of precedents, the Commission might try to develop the law, by defining fraud, determining its effects in law, and deciding how the principle should be applied in practice. It would then be faced with the difficulty of finding objective criteria in a domain ruled principally by subjective criteria.

42. The Drafting Committee should try to define the limits of the concept of fraud; if that proved too hard, then the only alternative, however difficult, would be to fall back on the idea of an international court exclusively competent to rule on cases in which consent to a treaty was alleged to have been induced by fraud.

43. Mr. AGO said he agreed with Mr. Tunkin that there were certain principles which were valid in any system of law. What he had meant to say at the previous meeting was that the same principles might operate differently in different circumstances and that international relations were a very different matter from relations between private persons.

44. One of the difficulties raised by the notion of fraud was linguistic. The French word "*dol*" did not perhaps mean exactly the same thing as the English word "fraud". Moreover, the Latin words *fraus* and *dolus* had different meanings. In *dol*, jurists placed the emphasis on intention. The concept of *dol* applied not only to contracts, but also to unlawful acts. In the case of an offence, the fraudulent intention was not the same thing as *faute* or negligence. There could be no *dol* without deliberately pursued intention. In the conclusion of a treaty, there was *dol* only if one party deliberately induced the other party to acknowledge as true something that was false and at the same time material to the formation of consent to the treaty. Such a situation, though not impossible in international relations, was much rarer than in relations between individuals, because States had certain safeguards which individuals lacked.

45. The cases which had been cited could not be presented as examples of consent procured by fraud. In the case of the Italo-Abyssinian Treaty of 1889, as he had already pointed out, there had been two texts which differed. Was the difference due to a misunderstanding or had it been introduced intentionally? The question was of no importance in that context, since in any case it could not be said that consent had been induced by fraud, for the lack of concordance between the texts had resulted in absence of consent.

46. If the Commission wished to prepare a complete draft convention and include in it a theory of defects in consent, then it should deal with the question of fraud. But he warned his colleagues against the danger of opening the door too wide to the ingenuity of States seeking to evade treaty obligations. In fact, fraud was

⁴ *I.C.J. Reports*, 1959, p. 222.

⁵ *Idem*, 1961, p. 30.

⁶ *P.C.I.J.*, Series A/B, No. 53, p. 75.

more likely to be pleaded to secure the voidance of a treaty than to secure a partner's consent to a new treaty.

47. The best approach would probably be to draft a single article dealing with whatever factors might vitiate consent; in that way the subject would not receive too much prominence in the draft.

48. Mr. YASSEEN said the rule that fraud vitiated consent existed in international law because it was a general principle of law. It was accepted in every system of national law. A State could not argue that fraud did not invalidate consent to a treaty. The principle was part of positive international law, in accordance with Article 38 of the Statute of the International Court of Justice, which treated the general principles of law as an autonomous source of international law.

49. The controversy on *laesio* could be cited in support of that argument. It was generally maintained that in international law *laesio* was not recognized as vitiating consent. And in attempting to fill that gap, some writers had invoked the general principles of law to show that *laesio* vitiated consent to the conclusion of a treaty. But it had been replied that there was a rule of international law which laid down that *laesio* was not recognized as vitiating consent to treaties. It was true that that argument could hardly be invoked in the case of fraud, for it could not be said that there was a rule of international law to the effect that fraud did not vitiate consent to a treaty.

50. As to the question whether an article on fraud should appear in a convention on the law of treaties, he thought that such an important matter should certainly not be disregarded; otherwise, the draft might give the impression that the Commission did not believe that fraud invalidated consent.

51. Some speakers had referred to the difficulty of proving fraud in the absence of a court. The institutions of international life had obviously not progressed as far as national institutions, but means of settling international disputes did exist. In his statement immediately after his appointment the Secretary-General had said: "We live in an imperfect world, and have to accept imperfect solutions, which become more acceptable as we learn to live with them and as time passes by."⁷

52. He was still convinced that article 7 should be retained. Even though solutions as satisfactory as those existing in national law were impossible, that was no reason for abandoning the principle.

53. Sir Humphrey WALDOCK, Special Rapporteur, summarizing the discussion, said that a few members were evidently opposed to the inclusion of an article on fraud and Mr. Gros had voiced objections that went beyond the issue of whether fraud was in fact attributable to States. Most members, however, including himself, could not subscribe to the view that the question of the reality of consent did not have any place in treaties between States and was a matter which lay outside the scope of the draft articles.

54. The majority view seemed to be that some provision concerning fraud was necessary; the question to be decided was exactly how much emphasis it should be given. Some members had suggested that the matter could be dealt with among the causes of error covered by article 9, while others favoured a separate article on the subject.

55. Clearly some definition of fraud was needed, but the one he had attempted to incorporate in article 7 might be wider than that commonly accepted in continental systems of law. It followed fairly closely the concept of fraud in English law, which comprised the deliberate intent to deceive, mentioned by Mr. Ago as an essential element in the definition, but also went further to include reckless mistakes intended to obtain the consent of the other party without regard to whether the statements were true or false; if such statements were found to be untrue, they fell within the law of deceit.

56. After reflecting on the discussion, he had come to the conclusion that that particular aspect of the doctrine of fraud, which was specially relevant to commercial transactions, had perhaps little place in the context of relations between States, and having heard something of the continental concept of "*dol*" he had come round to the view that a comparatively narrow definition was advisable. A narrow definition would at the same time serve to obviate the dangers of abuse whereby States would seek to invoke fraud as a mere pretext to free themselves from obligations deriving from treaties which had proved less advantageous than originally expected. It was also desirable in order to maintain a clear distinction between fraud and other elements vitiating consent, such as coercion.

57. Certain other issues, such as proof of fraud and by what procedures it should be determined, as well as the question of severance, though highly relevant, might perhaps be left aside until the Commission took up section IV of his report. He had deliberately dealt with substance and procedure separately, since whatever view was taken of those other matters, it was necessary to formulate the law relating to the substance of the question.

58. With regard to some of the points raised, in particular by Mr. Tsuruoka, on the remedies proposed in article 7, he had provided for an element of choice in paragraph 1. In his own view the differences between the formulations in paragraph 1 (a) on the one hand, and in paragraphs 1 (b) and 1 (c) on the other, were not of prime importance.

59. His personal opinion was that the best solution would be to follow Mr. Elias' suggestion and deal with the question of fraud in article 9, adopting a strict definition of the kind advocated by Mr. Ago. For the time being, article 7 could be referred to the Drafting Committee for consideration after the Commission had dealt with the two following articles; it would then be in a position to harmonize the Commission's views on all those three articles.

60. The CHAIRMAN said he believed that the division of opinion in the Commission was more apparent than

⁷ *Official Records of the General Assembly, seventeenth session, plenary meetings, 1182nd meeting, para. 23.*

real and accordingly suggested that article 7 be referred to the Drafting Committee for consideration in the light of the discussion on articles 8 and 9. That would leave the Drafting Committee some discretion as to how the question of fraud was to be handled, but the Commission's final decision in the matter would be reserved.

It was so agreed.

61. The CHAIRMAN invited the Commission to consider articles 8 and 9 together.

ARTICLE 8 (MUTUAL ERROR RESPECTING
THE SUBSTANCE OF A TREATY)

ARTICLE 9 (ERROR BY ONE PARTY ONLY RESPECTING
THE SUBSTANCE OF A TREATY)

62. Sir Humphrey WALDOCK, Special Rapporteur, introducing the articles, said that article 8 dealt with the case in which both Parties had been in error and article 9 with the case in which one of them had suffered from an error induced by acts, statements or omissions by the other, whether through fraud, innocent misrepresentation or negligence. The position of the Parties was different in the two cases and he had accordingly dealt with them in separate articles. Another reason for so doing, apart from drafting considerations, was that the provision contained in article 8, paragraph 3, was inapplicable to article 9. The Commission would have to decide whether or not it wished to maintain the distinction between mutual and unilateral error; if not, the two articles could be combined.

63. Mr. PAREDES said he held to the view that international law had been greatly influenced in its formation and development by the principles of private law, which had stimulated and guided it within the limits imposed, of course, by the differences between those two branches of law arising from the subjects they governed. That was more clearly evident as soon as the primitive concept of sovereignty began to be replaced by the principle of the interdependence of nations; it was the only way of understanding many of the ideas embodied in the United Nations Charter, including, of course, the concept of State responsibility. Consequently, he was not afraid to seek clarification of international law in the principles of internal law.

64. On the other hand, in view of the great value of Mr. Tsuruoka's opinions, he had felt alarm and anxiety on hearing him say that in international affairs only the formal and external aspect of treaties was important, not the intrinsic content. He himself believed the opposite: the outward appearance was the form taken by the substance and realization, or by the object in view.

65. With regard to fraud in international relations it had been said that there were very few recorded cases and that it was difficult for one party to deceive the other because they both had adequate means of ascertaining the truth: technical experts, maps of all kinds, explorers, etc. Such statements were understandable if historical events in Europe alone were considered, without taking the other continents into account; but

on a comprehensive view of history it would be found that in the last third of the previous century a great number of treaties had been concluded by flagrantly fraudulent means: those establishing protectorates and concessions in Africa and Asia. The statement that it was easy to obtain information about the land, which was true of Europe, was not true of the immense and tangled rain-forests and steep terrains of other parts of the world; there the conquerors and the conquered people were not on equal footing.

66. The Special Rapporteur had made an admirable synthesis of the contemporary doctrine of error in articles 8 and 9. Error was one of the factors that could vitiate consent, since consent depended on knowledge of the subject-matter and the object of the agreement, and the free decision to conclude it. If one of those elements was lacking, neither consent nor the treaty resulting from it existed.

67. He had no objections to the drafting of articles 8 and 9, but in order to make the idea more precise and the provision more effective, he suggested that in article 8, paragraph 1 (c), a sentence should be added to the effect that "This circumstance shall be presumed to exist when the error prevents implementation of all or part of the provisions of the Treaty."

68. In spite of what had been said he saw no justification for the different consequences ascribed to mutual error in article 8 and error by one party only in article 9, under which the other parties must have contributed to causing the error. Whatever course the proceedings had taken, the error, since it remained one of the elements of consent, invalidated the treaty. The intervention of the other party in inducing error corresponded to the element of fraud, which was being studied separately.

69. Mr. VERDROSS said he had some doubt about the problem of error of law referred to in article 8. International law was so complex that a rule as rigid as rules of national law could not be accepted. For example, two States had held that League of Nations mandates had lapsed with the League's disappearance; but the International Court of Justice had later given a contrary judgement. The two States in question could, however, hardly be said to have committed an inexcusable error of law. Judge Anzilotti's opinion in the *Eastern Greenland* case had been cited in support of the idea of inexcusable error of law; but in holding that a government could not be ignorant of the legitimate consequences following upon an extension of sovereignty, Judge Anzilotti had been speaking only about the particular case then before the Court. That opinion could not form the basis for a general rule that an error of law was never excusable.

70. Mr. ROSENNE said that, in articles 8 and 9, the Special Rapporteur had accomplished a piece of codification and had been guided by practical considerations. He (Mr. Rosenne) shared the doubts expressed by Mr. Verdross regarding the exclusion of error of law from the scope of the draft. He suggested that paragraph 1 (a) of article 8 be dropped, since in any case the point was adequately covered by paragraph 1 (b).

71. After hearing Mr. Verdross' interpretation of Judge Anzilotti's opinion in the *Eastern Greenland* case he wished to add that in the *Temple* case (preliminary objections) the International Court of Justice had not rejected *a priori* an argument based on an alleged error of law, but had disposed of the contentions on different grounds altogether. Its pronouncement that "Furthermore the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given"⁸ should appear in the commentary alongside the passage from the judgement on the Merits reproduced by the Special Rapporteur at the end of paragraph 3 in his combined commentary on articles 8 and 9.

72. In order to bring paragraph 3 (a) of article 8 into closer conformity with the language used by the International Court in the *Temple* case, the words "by the exercise of due diligence" should be deleted. That requirement was borrowed from municipal law but, was difficult to apply even on the domestic plane and added little to the text.

73. He had some misgivings about the purport of paragraph 3 of article 9, as he doubted whether it was appropriate to speak of error being invoked by a State acceding to a treaty when the error would have been made at the stage of negotiation. He also enquired whether it was international that only accession, and not acceptance and approval, had been mentioned in that provision.

74. Recalling a discussion on terminology which had taken place at the previous session (657th meeting paras 70-72), he suggested using different words for "mistake" denoting errors of substance as in articles 8, 9 and 10, and "error", denoting the types of error or omission which were the subject of articles 26 and 27 of Part I and article 10 of Part II. He assumed that all the official languages of the United Nations and other important languages possessed two equivalent words.

75. He was not fully convinced of the need for two separate articles on the matters under consideration, but that could be regarded as a drafting point and left to the Drafting Committee.

The meeting rose at 1 p.m.

⁸ *I.C.J. Reports*, 1961, p. 30.

680th MEETING

Wednesday, 15 May 1963, at 10 a.m.

Chairman: Mr Eduardo JIMÉNEZ de ARÉCHAGA

INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN said that he had received a communication from the Inter-American Juridical Committee stating that Mr. Caicedo Castilla had been nominated to attend the Commission's fifteenth session as an observer.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

(resumed from the previous meeting)

2. The CHAIRMAN invited the Commission to continue consideration of articles 8 and 9 in section II of the Special Rapporteur's second report (A.CN.4/156).

ARTICLE 8 (MUTUAL ERROR RESPECTING THE SUBSTANCE OF A TREATY) (continued)

ARTICLE 9 (ERROR BY ONE PARTY ONLY RESPECTING THE SUBSTANCE OF A TREATY) (continued)

3. Mr. BRIGGS said he was not greatly concerned at the fact that paragraph 3 (a) of article 8 largely nullified paragraph 1, as he preferred paragraph 3 (a).

4. The provision contained in paragraph 2 (a) was too extreme since it established a unilateral right to denounce a treaty when none existed in contemporary international law.

5. With those points in mind and in order to bring article 8 more into harmony with the case-law referred to in the commentary, he suggested that it be redrafted on the following lines:

"1. Where a treaty has been entered into by the parties under a mutual error respecting the substance of the treaty, no party shall be entitled to invoke an error as invalidating its consent to be bound where

- (a) the party in question contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of the possibility of the error; or
- (b) the party in question has so conducted itself as to bring the case within the provisions of article 4 of this Part.

"2. However, if

- (a) the error was one of fact and not law;
- (b) the error related to a fact or state of facts assumed by the parties to exist at the time that the treaty was entered into;
- (c) the assumed existence of such fact or state of facts was material in inducing the consent of the States concerned to be bound by the terms of the treaty;

then in any such case the party in question may, by mutual agreement with the other party or parties concerned, either (i) denounce the treaty as from such date as may be decided, or (ii) confirm its consent to be bound by the treaty subject to any modifications that may be decided upon in order to take account of the error."

6. The Drafting Committee should perhaps give some thought to the wording of the last part of paragraph 2 in the Special Rapporteur's draft; it should be made clear that it was not the treaty that was to be affirmed,

it being already in force, but the parties consent to be bound.

7. There was some force in the argument advanced by Mr. Paredes at the previous meeting, but his amendment to paragraph 1 (c) was misplaced: impossibility of performance could not be treated in the same provision as error.

8. If the general structure he had suggested for article 8 was acceptable, it could probably be expanded to incorporate the substance of article 9.

9. Mr. CASTRÉN said that article 8 was, on the whole, satisfactory. He accepted the rule stated in paragraph 1 which specified the circumstances in which a party had a right to be released from commitments entered into on the basis of error; sub-paragraph (c) should, however, be formulated more clearly.

10. Under paragraph 2 (b), a treaty entered into by the parties under a mutual error could only be denounced or amended by mutual agreement with all the parties concerned. That was a perfectly correct proposition so far as amendments were concerned, but it was hard to see why the Special Rapporteur did not admit unilateral denunciation in such a case; he had not given his reasons in the commentary. Surely the fact that the error was mutual was not sufficient.

11. Paragraph 3, which reflected the decision of the International Court of Justice in the *Temple of Preah Vihear* case,¹ could with advantage be simplified, particularly sub-paragraph (a). Also, the cases covered by sub-paragraph (b), which referred to article 4, and particularly its sub-paragraph (c), were partly dealt with in article 8, paragraph 3 (a).

12. With regard to article 9, he had some doubts concerning paragraph 3, which recognized the right of a State acceding to a treaty to plead error in order to be released from its obligations. Actually, errors generally occurred during the negotiation or conclusion of a treaty, and paragraph 1 of article 9 dealt with the case in which the error had been induced by the attitude of the other party. But could the States which had drafted the text of a treaty be said also to have deceived States which had not participated in its conclusion, but had acceded to it subsequently? In practice, it seemed that no acceding State had ever pleaded error as a ground for denouncing a treaty. At any rate, error in that case was not mutual, and the rules stated in article 8 were therefore not applicable. In his commentary the Special Rapporteur said that he had followed the previous rapporteur on that point. He (Mr. Castren) had searched in vain in Sir Gerald Fitzmaurice's report for a passage stating that the case of an acceding State could be treated on a par with that of a State induced to conclude a treaty by an error. He therefore proposed that paragraph 3 of article 9 should be deleted.

13. Mr. ELIAS said that, for reasons very similar to those which had prompted Mr. Briggs' suggestion, he proposed that articles 8 and 9 be combined to read:

“ Mistake (including fraud) affecting the essential validity of Treaties

“ 1. (a) Where parties have entered into a treaty under a mutual mistake as to the substance of the treaty, any party may treat the mistake as invalidating *ab initio* its consent to be bound by the treaty, unless the parties afterwards mutually agree to affirm it subject to such conditions or modifications as may be decided upon.

“(b) Where a State accedes to a treaty in the conclusion of which it did not take part, it shall be entitled to treat a mistake upon which it was based as invalidating *ab initio* its consent to be bound by the treaty.

“ 2. A party to a treaty vitiated by mutual mistake shall not, however, be entitled to resile from the treaty if

“(a) it has contributed by its own conduct to the mistake, or could have avoided it, or if the circumstances were such as to put it on notice of the possibility of the mistake, or

“(b) it has so conducted itself as to bring the case within the provisions of Article 4 of this Part.

“ 3. Where only one or some of the parties to a treaty has or have entered into it under a mistake induced by the innocent misrepresentation, fraud or negligence of the other party or parties, then, subject to the payment of adequate reparation by the guilty party or parties, the innocent party or parties shall be entitled to treat the mistake as invalidating the treaty *ab initio*, unless it has so conducted itself as to bring the case within the provisions of Article 4 of this Part.

“ 4. For the purpose of this Article, the mistake must be such as related to a fact or state of facts assumed by the parties to exist at the time that the treaty was entered into, and the assumed existence of such fact or state of facts was material in inducing the consent of the States concerned to be bound by the terms of the treaty.”

14. He had reproduced the substance of paragraph 3 of article 9 in paragraph 1 (b), since the Special Rapporteur, in paragraph 11 of his commentary on that article, had made it clear that he was following Sir Gerald Fitzmaurice in assimilating the special case of a State being led to accede through a mistake to a case of a mutual error.

15. Paragraph 2 of his proposal contained the exceptions to the rule stated in paragraph 1, which was based on a selection of certain elements in paragraphs 1 and 2 of the original article 8.

16. Paragraph 3 dealt with mistakes by one party only.

17. In paragraph 4 he had embodied the principle stated by the Special Rapporteur in paragraph 1 (c) of article 8, but had made it applicable, as he believed was correct, to both mutual and unilateral mistakes.

¹ *I.C.J. Reports*, 1962, p. 26.

18. If it were decided to include some definition of fraud in the draft, it could be incorporated as a separate sub-paragraph of paragraph 4 of his text.
19. The CHAIRMAN, speaking as a member of the Commission, said he subscribed to the view that the provisions under discussion, which related to defects in consent, formed part of the general principles of international law recognized by civilized nations. However, as only those elements of private municipal law that were common to all civilized nations could be transferred to international law, the present rules would have to be built up from the lowest common denominators of the main legal systems of the world. It was by that kind of process that the Special Rapporteur had come round to the view that the narrower concept of fraud prevailing in continental systems of law should be adopted in preference to the English concept.
20. On the other hand, the concept of error in continental civil law was perhaps wider than in common law systems. Mr. Paredes' surprise at the Special Rapporteur's drawing a distinction between mutual and unilateral error was understandable, as the distinction did not exist in continental systems, under which it was not necessary for both parties to be in error for the contract to be voided. If, under the Common law, error by one party alone could only be accepted as a ground for invalidating consent when it had been caused by fraud, then presumably in the search for the lowest common denominator the Commission could go no further in its work of codification.
21. His own impression was that the conditions which, under article 8, paragraph 1, had to be fulfilled before error could be invoked as a ground for invalidating a treaty were too close to those obtaining in English private law. The Drafting Committee should devise a more general rule, perhaps seeking inspiration in the continental principle that the error must have been of a kind which had determined consent.
22. In paragraph 2 (a) of article 8, as in article 7, the Special Rapporteur had placed too much emphasis on unilateral action, and that was likely to prove unacceptable to most members of the Commission because of the element of insecurity it might introduce. The general view probably was that defects in consent could only invalidate the treaty when their existence was recognized by agreement between the parties or declared by third-party determination; he did not wish to enter into the question of international jurisdiction at that stage.
23. He supported Mr. Rosenne's amendment deleting the words "by the exercise of due diligence" in paragraph 3 (a), as to follow more closely the wording of the International Court in the *Temple of Preah Vihear* case.
24. Perhaps paragraph 3 (b) of article 8 was redundant and no such express reference to article 4 was needed.
25. Mr. TUNKIN said that Mr. Elias's suggestions for combining articles 8 and 9 should be of assistance to the Drafting Committee, but he doubted whether the problem of fraud could also be covered in the same article.
26. Paragraph 1 of article 9 raised the question whether a distinction ought to be made between its application to multilateral treaties and to bilateral treaties, as the situation would clearly be different in the two cases.
27. He questioned whether there was any justification for the restrictions imposed in paragraph 1 on the grounds for invoking error to invalidate consent, which might in practice prove more advantageous to what had been aptly described as the more experienced States. International rules should not be modelled too closely on the internal law of States, seeing that the situations they were designed to regulate must be of a different character.
28. Mr. AGO said he agreed with Mr. Tunkin. The idea that error could vitiate consent only if it was somehow attributable to the other party seemed to him unduly restrictive. If an error was intentionally induced by the other party, that was, in practice, the case referred to by article 7, i.e. fraud; but in the case of an error in the true sense of the word, it mattered little whether it had been caused unintentionally by the other party or was due to other circumstances, so long as the error had been the deciding reason for consent and consent was thus vitiated. The two cases — fraud and error — should be differentiated, and a single article should deal with both mutual error and error by one party only.
29. The Drafting Committee should now be able to settle the problem, since the members of the Commission were agreed on the substance.
30. Mr. EL-ERIAN said he approved of the approach adopted by the Special Rapporteur in articles 8 and 9, which he had rightly based on the International Court's decision in the *Temple of Preah Vihear* case.
31. Reference had been made to general principles of law and the view advanced that any rules common to the legal systems of nations should be regarded as rules of international law. He certainly could not endorse that interpretation of article 38, paragraph 1 (c), of the Statute of the International Court of Justice; the greatest caution was called for in drawing analogies from municipal law. That provision was intended to refer to general principles recognized in the different systems of law.
32. Mr. PAL said that the existence of error, whether mutual or unilateral, surely meant that there had been no consensus of view between the parties and consequently no real *consensus ad idem*. Nevertheless, in his country, where the rules were derived from English law, a distinction was made, as to the consequences, between mutual and unilateral error. *Caveat emptor* was a general rule of the law of contract.
33. A case not covered in the draft was that in which one of the parties, while aware that the other was in error, took advantage of the error and accepted the treaty. That case presumably fell within the scope of the provision concerning error induced by misrepresentation in article 9, paragraph 1. Incidentally, there seemed to be no need to qualify misrepresentation as "innocent", since it had been distinguished from fraud.
34. He agreed that the application of article 8, paragraph 1 (a), should be confined to errors of fact. For

purposes of international law, a mistake over the internal law of one of the parties would be an error of fact and not of law, and the basic principle *ignorantia juris haud excusat* was hardly pertinent in respect of international law as it stood at present.

35. It would be appropriate to deal with the problem of fraud in article 9, because if two of its essential features, the intent to procure consent and the achievement of that purpose, were present, its effect was to bring about error in the mind of the consenting party.

36. Mr. PAREDES asked that his amendment to article 8, paragraph 1 be referred to the Drafting Committee, as the speakers who had mentioned it seemed to approve of its contents even though they did not think it should be inserted where he had suggested. The Drafting Committee could choose the appropriate place for its insertion.

37. In accordance with his previous statement, which has been endorsed by several members of the Commission, he emphasized that error by the parties, whether mutual or by only one of them, when as serious as was assumed in the text of the articles under discussion, vitiated the treaty *ab initio*; for as there was no correct understanding of the object or subject-matter of the agreement, there was no consent by the parties and consequently no agreement, which was the basis of the validity of a treaty. Malicious deceit or concealment used by one party to induce another to give its consent came within the realm of fraud and should be studied separately.

38. He was firmly convinced that, if it was to be perfected and to make progress, international law must recognize and enter into the informative spirit of internal law which, being more highly developed, was an adequate guide for juridical principles.

39. Mr. CASTRÉN observed that if the concept of error was widened too much it would come within the scope of the doctrine of *rebus sic stantibus*, which should be considered separately. Consequently, errors of law could hardly be taken into consideration as well.

40. Mr. BARTOŠ said that the Commission's draft should take defective consent into account. It was error that was the essential ground for nullity, even in cases of misrepresentation, for the error was induced by fraud. But on the other hand, as a counterpart to the guarantee given to the party in error, it was necessary to safeguard the security of international relations. Having regard to the stability of contractual relations, all errors could not be regarded as reasons for invalidation. Moreover, they were not so regarded either in Roman law or in comparative private law. Certain conditions were always imposed for recognition of the effects of error.

41. To be recognized as a ground for invalidation the error must be "excusable". It might be conceded that an error which would normally not be excusable, was excusable for a party acting in good faith if caused by the actions of the other party. It must be recognized that in principle an error could not be presumed to be excusable. The burden of proof was on the party con-

cerned, which must show that there had been not only no bad faith on its part, but also no negligence.

42. At that point the question of the "judge" arose. It was obvious that a treaty was not automatically invalidated, even if the error produced its effects *ex tunc*. A State could not regard itself as being released from its treaty obligations by its own decision without applying to an established Court, to which it must submit its claim that the treaty was void. That condition was necessary, for otherwise the State itself would be the judge in its own cause, which was not admissible in law. But difficulties arose, for in view of the provisions of Article 36 of the Statute of the International Court of Justice, it would be quite illusory to provide for compulsory jurisdiction in the Convention. Nevertheless, he was convinced that it would be desirable to prevent a State from being the judge in its own cause, which meant in fact being the judge of the other party.

43. Admittedly, many cases of error deserved to be taken into consideration in international law. But, as Mr. Ago had said, it should be borne in mind that States were too much inclined to seek grounds for evading their obligations. It was the duty of the Commission to devise rules that would prevent the possibility of abuse on the pretext of an error, which could always be found. To have effect, the error should not only be excusable, but also sufficiently serious; in other words it must cause more harm to the party concerned than to international relations. That idea should be expressed in the draft.

44. With regard to the lapsing of claims for voiding a treaty, in other words the time within which the claim must be brought, the necessary limitations were laid down in article 4. In that connexion he reminded the Commission that he maintained his reservation on the provisions of article 4 concerning treaties in simplified form.

45. The Commission should adopt more precise provisions on the question of error, with the necessary safeguards against abuses.

46. Mr. YASSEEN said it was necessary to make sure that consent was unambiguous and not vitiated by error. To be successfully pleaded, error must be a decisive factor and, whether it was the result of an intentional act or of negligence, any such error should be regarded as vitiating consent. He could agree to articles 8 and 9 being combined, but he still thought that fraud was a separate question, which should be dealt with in a separate article.

47. The whole theory of defective consent was based on general principles of law. Those principles had given rise to many theories. Without wishing to go into details, he supported the view taken by many authorities, and in particular by Mr. Verdross, that in order to qualify as a general principle of law, a principle must be directly derived from the concept of justice and accepted by nearly all civilized nations or the great majority of them.

48. Two implied conditions were also necessary. First, as to applicability: it must be possible to apply the principle in the international order; there must be an environment similar to that in which it was applied

in internal law. Thus the crimes of theft and rape, for instance, were not covered by rules of international law, although they were recognized as crimes by the laws of all the States in the world. Secondly, as to adaptation: the principle must be adapted to the international order; the analogy with relations in the domestic life of a nation did not rule out certain differences, or the need for some adaptation of the principle it was intended to apply in the international order. Such adaptation seemed essential; hence the difficulty of the Commission's task.

49. Mr. VERDROSS explained that in his definition of the general principles of law, referred to by Mr. Yasseen, an essential element was their applicability in international law. He added that in the fifth edition of his treatise,² at present printing, the expression "civilized nations" was no longer used, because its use was no longer justified. That expression must now be understood to include all Members of the United Nations.

50. Mr. TSURUOKA said that the Commission should beware of drafting the provisions on error in such a way that a State might unilaterally void a treaty, wholly or in part, on the pretext that it had committed an error. Precisely because the consensus of opinion seemed to be in favour of broadening the concept of error, some limitations to prevent abuses were necessary.

51. Mr. BARTOŠ said he agreed with Mr. Yasseen that the general principles introduced into international law had grown up in the practice of civilized nations or, in other words, in municipal law. But it was comparative law which showed whether a principle or an institution was accepted by nearly all civilized nations. It was thus that a general principle was established as a universal principle and became a source of international law. It was for international case-law to decide whether a principle was universally accepted and adopted as a general principle of international law.

52. He could not however, agree with Mr. Yasseen about the principles he had cited as being confined to municipal law, which would not be applicable in international law. Theft and rape were crimes in the eyes of all nations and were accordingly crimes in international law; any diplomat who committed such acts would certainly be declared *persona non grata*, and if the case were heard under international law the decision would be that the receiving State was justified in considering those acts as serious offences.

53. Mr. AMADO said that he invariably approached the subjects under discussion from the point of view of pure international law. Bilateral treaties had gradually yielded to multilateral treaties, and the concept of error, so important in contracts, lost much of its weight in the case of agreements drawn up by conferences attended by a large number of States.

54. Mr. Verdross's idea that the general principles of law must conform with justice showed once again how deplorable was the absence of judicial authority in inter-

national law, which was still developing and had not yet evolved to the same extent as municipal law.

55. He shared Mr. Tsuruoka's apprehensions. He believed, too, that error, in order to be admissible as a plea, must affect the substance of the treaty. Consequently, the language used by the Special Rapporteur in the last sentence of paragraph 4 of his commentary on articles 8 and 9 — which reflected the International Court's decision in the *Mavrommatis Concessions* case³ — should also be used in the body of the text.

56. In addition, the error must exist in fact, for the state of international law was such that there could, unfortunately, be no inquiry into the parties' intentions. The parties' intentions, which were a key factor in private law, could not carry equal weight in international law.

57. He would prefer to see articles 7, 8 and 9 combined, but as many members did not agree with that view, he would not press it.

58. Mr. TUNKIN said that his views on the general problem of the principles of international law differed from those expressed by Mr. Yasseen and Mr. Verdross, but he would not elaborate them at that stage, as the problem was not under discussion. He had explained his theory in a recent book entitled "Theoretical Questions of International Law".⁴

59. Sir Humphrey WALDOCK, Special Rapporteur, said that the first point he would like to take up in connexion with articles 8 and 9 was whether a distinction should be made between bilateral and multilateral treaties, because some Members had shown an inclination to draw that distinction in discussing other articles. Personally, he was disinclined to draw such a distinction because the possibility of an error vitiating consent could arise for a small multilateral treaty very much in the same way as for a bilateral treaty, and any attempt to draw a distinction among multilateral treaties would lead to difficulties of definition of which the Commission had had experience in drafting its first Report. The very fact that it was extremely unlikely that an error would be alleged in the case of a general multilateral treaty suggested that it was not necessary to differentiate between bilateral and multilateral treaties.

60. The main question in connexion with the two articles was whether the distinction between mutual error and error by one party only should be retained. That distinction was made in the common law legal systems, where it reflected a genuine difference in the position of the parties. If one party had been led into the error by the fault of the other party, there was not complete equality in their positions with respect to the error and there was a case for treating unilateral error differently from multilateral error, as was done in articles 8 and 9. However, after hearing the views of other members as to the different rules applied in continental systems, he was prepared to agree that, for purposes of international law, the distinction between the two kinds of error should not be made. Clearly that

³ *P.C.I.J.*, Series A, No. 11.

⁴ *Voprosy teorii mezhdynarodnogo prava*, Moscow, 1962, Gurizdat.

² Verdross, A. von, *Völkerrecht*, Vienna, Springer, 1959.

question must be definitely settled by the Commission before the articles could usefully be referred to the Drafting Committee.

61. Another point was whether article 7, concerning fraud, should be merged with articles 8 and 9. He noted that even members who, like Mr. Elias, advocated that course, still wished to have a separate paragraph on fraud, and there appeared to be general agreement not to drop the distinction between error induced by fraud and error of other kinds. The distinction should be maintained because, although where fraud induced consent it led to an error of some kind, it would not necessarily be the type of error required for purposes of annulment on grounds of error alone; for in cases of fraud the conditions of error would be less strict.

62. With regard to the definition of error and to the exclusion of errors of law by paragraph 1 (a) of article 8, it had rightly been pointed out by Mr. Pal that the "law" mentioned in the context was exclusively international law. Municipal law was fact for purposes of international law and mere errors of municipal law were not therefore errors of law for the purposes of article 8.

63. Mr. Verdross and certain other members, however, had objected to stress being laid on the exclusion of errors of law. Admittedly, the distinction between errors of law and errors of fact was not always a very easy one to make. Even in municipal law, it often happened that a question of right depended on facts as well as law. Since, like Mr. Bartoš and Mr. Amado, he would not like to leave the door wide open to pretexts for the evasion of obligations under a treaty, he was inclined to adopt a somewhat strict position on the question of errors of law, in line with what appeared to be the approach to pleas of error adopted by the Permanent Court of International Justice in the *Eastern Greenland* case⁵ and by the International Court of Justice in the *Temple* case.⁶ It might be true, as Mr. Verdross had pointed out, that Judge Anzilotti in the *Greenland* case had made his observations concerning error with reference to the particular case. But in that case Judge Anzilotti and the majority of the Court had shown no disposition to listen to a plea of error as to rights; while in its judgement both on the Preliminary Objections and on the Merits the Court; in the *Temple* case, had dealt very strictly with pleas of error. Consequently while he was prepared to accept the deletion of paragraph 1 (a) of article 8, he wished to retain paragraph 1 (b) with its indication that the error must relate "to a fact or state of facts".

64. He noted the criticism by some members of the expression "was material in inducing the consent", used in paragraph 1 (c). His intention in that passage had been to reflect the ruling by the Permanent Court of International Justice in the *Mavrommatis Concessions* case.⁷ He had used the classic English expression "was material" but if that expression was not considered satisfactory by other members, he would be prepared to use such language as "was a condition".

65. With regard to paragraph 3 (a), his intention had been to reflect the ruling of the International Court of Justice in the *Temple* case. He had ventured to add, between the word "could" and the words "have avoided" the additional words "by the exercise of due diligence". Those words, he felt, would be necessary for purposes of a codification, although they had not been used by the Court. While perhaps not necessary in the context of the Court's decision in the particular case, it seemed necessary in a codification to qualify the Court's phrase in some way, unless the Commission was in effect to negative altogether the relevance of error in the law of treaties; for it might be possible to argue that any error could have been avoided by the party concerned. The insertion of some such phrase as "by the exercise of due diligence" therefore seemed necessary.

66. As to the proposals for the redrafting of articles 8 and 9 made by Mr. Briggs and Mr. Elias, he could not comment on them in detail until he had seen them in writing. Both appeared to contain valuable ideas and would no doubt be of assistance to the Drafting Committee.

67. With regard to paragraph 2 (a) of article 8, the words "the party in question may regard the error as nullifying *ab initio* its consent..." should be construed as meaning "the party in question may invoke...".

68. Articles 8 and 9 should be considered in conjunction with the other draft articles of Part II, particularly article 2 (The presumption in favour of the validity of a treaty) and article 3 (Procedural restrictions on the exercise of a right to avoid or denounce a treaty). Some degree of strictness in the matter was desirable so as to provide safeguards against possible abuse of the recognition of fraud and error as factors vitiating consent.

69. It could be left to the Drafting Committee to decide whether the provisions on fraud should constitute a separate article or merely a separate paragraph of a consolidated article.

70. Mr. YASSEEN said that he still questioned the distinction made in the draft between error of fact and error of law. Admittedly, the Permanent Court of International Justice had tended to regard municipal law as a fact; but what was the status of regional international law? If, for example, a Latin-American country concluded a treaty with an Asian country and the latter committed an error with regard to Latin-American international law, should that error be regarded as an error of law? Ignorance of the law was no excuse, but an Asian country could hardly be expected to know Latin-American law.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that the question was an interesting and difficult one. He supposed Mr. Yasseen had in mind an error regarding such a matter as the Latin-American practice of asylum. The International Court had held there existed a regional international law, and it might be either customary law or treaty law. In principle, it would seem that matters of regional international law were questions of international law rather than questions of fact.

⁵ P.C.I.J., Series A/B, No. 53, pp. 77 and 91.

⁶ I.C.J. Reports, 1962, p. 26.

⁷ P.C.I.J., Series A, No. 11.

72. Mr. CASTRÉN said that, in the hypothetical case mentioned by Mr. Yasseen, general international law would alone be applicable.

73. Mr. YASSEEN said he was not convinced. The Latin-American country might argue, for example, that the right of asylum, which it recognized was also recognized in Asia, whereas the Asian country might suppose that that right did not exist in Latin America. The resulting misunderstanding would certainly raise the question whether an error of fact or an error of law was involved.

74. Mr. TUNKIN said that the point could be covered by deleting paragraph 1 (a) of article 8, as suggested by Mr. Rosenne. The provisions on error would not then be confined to errors of fact.

75. Sir Humphrey WALDOCK, Special Rapporteur, said he was prepared to delete paragraph 1 (a) of article 8, so as not to exclude the possibility that an error of law might in some circumstances be relevant. However, under the terms of paragraph 1 (b), it would be made clear that the error must relate to "a fact or state of facts". It would be going too far to contemplate a general rule allowing all errors of law as vitiating consent.

76. Mr. ROSENNE agreed that the deletion of paragraph 1 (a) and the retention of paragraph 1 (b) would go a long way towards covering the point that had been raised.

77. As he recalled it, the International Court of Justice had held in several cases that the existence of a purely regional rule of international law had to be proved. The Court thus seemed to view such rules as questions of fact rather than of general international law.

78. He also recalled that, with regard to the question of reservations, the opinion in some Latin-American countries was that the Latin-America system of reservations was part of general international law, while in others it was regarded as a peculiarly Latin-American system whose acceptance by the international community was desirable. It was hard to say whether an error arising out of that difference of opinion would be an error of fact or an error of law.

79. The CHAIRMAN suggested that the point raised by Mr. Yasseen should be referred to the Drafting Committee for consideration in connexion with the definition of error.

80. If there were no objection, he would consider that the Committee agreed to refer articles 8 and 9 to the Drafting Committee on the understanding that the distinction between mutual error and error by one party only would be dropped. The Committee would take the comments of members into consideration and would decide whether the question of fraud should form the subject of a whole article or be dealt with in a separate paragraph,

It was so agreed.

ARTICLE 10 (ERRORS IN EXPRESSION OF THE AGREEMENT)

81. The CHAIRMAN invited the Special Rapporteur to introduce article 10.

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the purpose of article 10 was mainly to draw attention to the fact that articles 26 and 27 of Part I dealt with the problem of errors in expression of the agreement, and that such errors did not invalidate consent.

83. Mr. VERDROSS proposed the deletion of article 10. As articles 8 and 9 specified the cases in which error would have legal effects, they implied those in which it would not; to revert to the matter in the next article was unnecessary.

84. Mr. TABIBI said that it would be useful to retain article 10, because sometimes an error of expression could strike at the very root of a treaty. In fact, in a bilateral treaty, one party could exploit an error of expression in such a way as to perpetrate an actual fraud; an example was provided by the 1889 Treaty between Abyssinia and Italy already mentioned by Mr. Tunkin.

85. The fact that, in treaties drawn up under United Nations auspices, five official languages were used, raised a number of problems. Quite apart from the question of concordance, for countries like his own there was a serious problem in that all five were foreign languages. For example, during the extensive discussions at the First Conference on the Law of the Sea in 1958 on the subject of access to the sea for landlocked countries, it had become clear that the term "access" was construed by English jurists less broadly than he himself had understood it at the time.

86. He suggested that article 10 should be considered by the Drafting Committee jointly with articles 7, 8 and 9.

87. Mr. CASTRÉN supported Mr. Verdross's proposal that article 10 should be deleted. The Commission could hardly include in Part II an article which repeated something already stated in Part I.

88. Mr. ELIAS also considered article 10 unnecessary. Three situations could arise in connexion with errors in expression. The first was that in which both parties agreed that such an error had been made: it was adequately covered by articles 26 and 27 of Part I. The second was that in which the parties did not agree and the error affected a material point: essentially, it was then a question of a mistake, which would be covered by the provisions of articles 8 and 9. The third situation was that in which the parties did not agree, but the error did not go to the root of the treaty: that would be a matter of interpretation and could be left to the judge or arbitrator. Article 10 was consequently unnecessary since all the points that could arise were already covered by other articles.

89. Mr. ROSENNE pointed out that, in the case of the First Conference on the Law of the Sea mentioned by Mr. Tabibi, if there had been an error, it went much further than a mere error of expression.

90. Articles 26, paragraph 3, and 27, paragraph 5, of Part I, laid down that where an error in a treaty had to

be corrected, "the corrected text shall replace the original text as from the date the latter was adopted, unless the parties shall otherwise determine". Article 10, paragraph 1, of Part II explained the juridical meaning of "shall replace", and thus completed articles 26 and 27 of Part I by indicating the juridical consequences of correction. That could be specially important for bilateral treaties drawn up in two languages.

91. He suggested that the Drafting Committee should consider whether the purpose of article 10, paragraph 1, was best served by means of a provision in section II or by means of a passage in the commentary on articles 26 and 27.

92. Mr. AGO said that in the case cited by Mr. Tabibi the error introduced by the use of the word "access" in different senses by the different parties would have vitiated consent. The case would therefore have been one of those covered by articles 8 and 9. In article 10, on the other hand, the Special Rapporteur had dealt with the case in which there was consent and agreement was complete, but the expression of that agreement was defective. He could think of cases of that kind which had actually occurred when the governments of two adjacent countries had agreed that a certain village should be under the sovereignty of one of them; they had expressed the agreement by reference to a meridian or parallel and had later realized that they differed in their understanding of its position with reference to the village in question. Thus there had been agreement as to the essential fact that the village was to be placed under the sovereignty of one of them and not the other, but the agreement had been badly expressed by the reference to a meridian. When the error had been discovered, the two States had corrected it immediately. Hence no problem of defect in consent had been involved.

93. Like Mr. Rosenne, he was not sure that articles 26 and 27 of Part I entirely covered the point. Article 10 met a real need, but it might be out of place among the articles concerning vitiation of consent.

94. Mr. BARTOŠ said he agreed with Mr. Ago so far as genuine errors in expression were concerned. But when the error was due to non-concordance of equally authentic texts in different languages, the case was much less clear and differed from that envisaged by the Special Rapporteur. The question of the non-concordance of expressions in different languages had already been met with in Part I of the draft on the Law of Treaties, since the will of the contracting parties was presumed to be well established and there was no question of vitiation of consent.

95. Mr. BRIGGS said he supported the proposal to delete article 10. He was opposed to the insertion in the draft articles of any provision to the effect that a party had the unilateral right to denounce a treaty. If, therefore, the unilateral right stated in paragraph 2 (a) of article 8 and in paragraph 2 (a) of article 9 were omitted, there would be no need to retain article 10.

96. Mr. TABIBI said that, after hearing the views of other members, he would no longer press for the retention of article 10.

97. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that, if the articles of Part I and of the present Part were to be taken together, it could be argued that articles 26 and 27 of Part I largely covered the point dealt with in article 10. Both those articles were essentially procedural and in article 10 the Commission was dealing with the substantive aspect of the matter, even if the conclusion was the negative one that an error of expression did not affect the reality of consent. It might not be very appropriate to try to cover the point by an addition to articles 26 and 27 of Part I. Furthermore it was always dangerous to assume that anyone reading or interpreting the draft articles would view them in the same light as members of the Commission who had discussed them from the beginning. It therefore seemed useful to include article 10 with its cross-reference to articles 26 and 27 of Part I. He did not feel that to deal with the matter merely by means of a commentary would be adequate.

98. The CHAIRMAN suggested that article 10 should be referred to the Drafting Committee for consideration in the light of its drafting of articles 7, 8 and 9 and of the discussion which had taken place in the Commission. The Drafting Committee would report to the Commission on the question whether article 10 should be retained as such or its contents expressed by means of a modification of articles 26 and 27 of Part I, or even in the commentary on those articles.

It was so agreed.

The meeting rose at 12.55 p.m.

681st MEETING

Thursday, 16 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ DE ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider article 11 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 11 (PERSONAL COERCION OF REPRESENTATIVES OF STATES OR OF MEMBERS OF STATE ORGANS)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the problem of personal coercion could arise jointly with the problem envisaged in article 12: the illegal use or threat of force. In principle, however, the two forms of coercion were distinct, and examples could be given of coercion of representatives without any actual use or threat of force against the State itself. For reasons of clarity, it was therefore wise to deal with the two subjects separately.

3. There was a misprint in paragraph 1 (a) of article 11, where the words "or again" should be deleted. With

regard to the drafting, in order to take into account the comments made by members during the discussion of articles 7, 8 and 9, he proposed to amend the expression in paragraph 1 (a) "the State in question shall be entitled . . . to declare that the coercion nullifies . . ." so as to state the right of the State to invoke coercion as nullifying the act in question.

4. It was also his understanding that many members would prefer that paragraphs 1 (b) and 1 (c), which stated the right of the aggrieved State to a certain choice of how to deal with the matter after the discovery of coercion, should be dropped. The Drafting Committee could then simplify paragraph 1 considerably.

5. With regard to paragraph 2, members appeared to consider that the provision for estoppel in article 4 of Part II was sufficient; and the question of ratification could be dealt with by means of a clause stating the exceptions to paragraph 1.

6. He suggested that points of drafting should be left on one side for the time being and that the Commission should concentrate on the question whether the principle of article 11 was acceptable.

7. Mr. PAREDES, referring to his remarks at the previous meeting concerning general principles of law, explained that he had not maintained that rules of internal law should be applied integrally and without change in international law: he had only said that international law could, and should, have recourse to the principles of internal law in formulating its own rules. The differences between the subjects to which the two systems of law applied and the different activities they governed should not be forgotten. It was by the principles of internal law, not its rules, that international law should be guided. Consequently, he did not agree that any importance attached to the fact that certain rules existed in most national systems of law.

8. Articles 11 and 12 dealt with vitiation of consent through force used against a person to compel him to give his consent. The only difference was that article 11 referred to the use of force against the physical person of the negotiator and article 12 to its use against the collective person called the State. But the result was the same in both cases: nullity of the treaty *ab initio*. The general theory was correct, and on that the Special Rapporteur should be highly commended, but some slight amendments were needed.

9. Paragraph 1 of article 11 began: "If coercion, actual or threatened, physical or mental, *with respect to their persons or to matters of personal concern*, has been employed against individual representatives . . ."; he did not find the restriction acceptable, because there could be coercion which alarmed the victim and deprived him of personal liberty, though it did not relate to "matters of personal concern" to him: it might relate to the noblest concerns such as defence of his country. If his country was threatened with invasion or his city with bombardment or similar damage, the negotiator would feel as much or more alarmed as if his person or property had been attacked. And the general threat might include attacks against his private property. It would therefore

be preferable to use the words "coercion . . . so serious as to be liable to impair or destroy the reality of consent".

10. Paragraph 2 (a) of article 11 provided that the rule of nullification *ab initio* should not apply where "a treaty, which is subject to ratification, acceptance or approval, has been signed by a representative under coercion but, after covering the coercion, the State proceeds to ratify, accept or approve the treaty;". But it did not add, as was essential, that before any such acts of acceptance, all coercion must have ceased. He himself believed that as the act performed by the intimidated representative was null and void, it could not be subsequently validated in any way.

11. Mr. de LUNA said that some provision should be drafted which would prevent the treaty from being declared non-existent in accordance with paragraph 1 (a); the fact that the State against whose representative coercion had been employed was entitled under paragraph 1 (c) to approve the treaty, and under paragraph 2 to ratify it, implied that the treaty existed. While, therefore, he did not wish to expatiate on the well-known distinction between the non-existence, the nullity and the voidability of legal instruments, he would suggest that paragraph 1 (a) be redrafted to read:

"(a) to declare that the said instrument is void *ab initio*; or".

12. Mr. PESSOU said he had been intending to make a similar comment. Paragraph 1 seemed to assume the co-existence of two rules, the absolute nullity of the treaty, under sub-paragraph (a), and its voidability under sub-paragraphs (b) and (c).

13. Article 11, and more particularly paragraph 1, prompted a number of other reflexions. First, as from what time should the discovery of the event which vitiated consent be dated? Secondly, paragraph 1 (a) almost gave the impression of a sanction against the representative on whom coercion had been practised. Thirdly, in paragraph 1 (c), which at least had the merit of leaving ample latitude to the injured State, the eventuality contemplated was psychologically very improbable.

14. It might be possible to redraft articles 11, 12 and 13 in such a way as to inter-relate their provisions more satisfactorily.

15. Mr. TABIBI said that article 11 was very important, but should be placed, together with article 12, immediately after article 7 instead of after articles 8 and 9. The problem of coercion was closer to fraud than to error.

16. He very much doubted the advisability of including the provisions of paragraph 2 (a). It was hardly appropriate to suggest that the illegal use of force could be condoned. It would be dangerous to encourage such an idea.

17. Sir Humphrey WALDOCK, Special Rapporteur, said there was no suggestion that the States concerned would give their approval to the illegal act of coercion. He did not attach any great importance to paragraph 2 (a) but thought it covered the somewhat remote possibility

of the aggrieved State finding it in its interest not to denounce the treaty altogether, but to ratify it after obtaining some adjustment, which might be more satisfactory than complete annulment of the treaty.

18. Mr. BARTOŠ said he was convinced that there was a close connexion between the two kinds of coercion referred to in articles 11 and 12. For example, physical or mental coercion exercised on the person of a State's representative might well be used at the same time as threats against the State itself. In reality, a State's representatives were intermediaries who very often suffered the consequences of another country's general policy towards their own country.

19. With regard to paragraph 2 (a), if the treaty had been ratified, but in the circumstances referred to in article 12, then it was difficult to regard such ratification as valid in all cases. Hence articles 11 and 12 should at least be supplemented by a mention of *renvoi* and of the possibility of both kinds of situation envisaged in the articles occurring simultaneously.

20. Again, the discovery of coercion raised no great difficulties, but it might perhaps be desirable also to take account of the time when the threat ceased, which was obviously much more difficult to determine. He thought the decisive moment should be really established and that it was only after the threats had ceased that the acts of the injured State would be regarded as ratifying the treaty. That observation also applied to articles 12 and 13.

21. In his view articles 11, 12 and 13 were closely inter-related, but they regulated three different cases and different grounds for nullity, which should be dealt with in separate provisions.

22. Mr. ELIAS said he found articles 11 and 12 generally acceptable, subject to the amendments announced by the Special Rapporteur. He wished, however, to draw attention to a number of points.

23. First, in article 11, paragraph 1, he was concerned about the interpretation to be placed on the expression "with respect to their persons or to matters of personal concern". It was explained in paragraph 3 of the commentary that "This phrase is intended to confine the coercion covered by this article to coercion of the individual as distinct from the State, and yet to be broad enough to include such forms of coercion of the individual as threats directed against his family or dependants". In fact, the words were not precise enough to convey the intended meaning. The corresponding provision in Sir Gerald Fitzmaurice's third report read "Duress or coercion against the persons mentioned in paragraph 1 includes duress or coercion, actual or threatened, against their relatives or dependants, but not against their property".¹ It should be made clear whether the intention was to exclude property or not.

24. The commentary on article 12 set out adequately the reasons why the Special Rapporteur had followed Sir Hersch Lauterpacht rather than Sir Gerald Fitz-

maurice in deciding to include an article on the subject of coercion against the State. In that commentary, the Special Rapporteur emphasized that coercion against the State constituted a violation of the United Nations Charter, and for a modern draft, the Charter was the proper criterion.

25. Three exceptions should be considered. The first, mentioned by Lord McNair², was concerted international action by the United Nations to enforce treaty obligations on recalcitrant members. The second exception was armistice agreements and peace settlements, mentioned in paragraph 7 of the commentary on article 12. The third was economic and financial treaties, in respect of which the door could not be left open too widely for the plea that a State had entered into them under the influence of necessity.

26. He agreed that the subject matter of articles 11 and 12 should be kept separate.

27. Mr. TUNKIN agreed that the two types of coercion dealt with in articles 11 and 12 should be kept separate. The use of force, or threat of force, constituted a very grave violation of Article 2, paragraph 4, of the United Nations Charter, and might even constitute a breach of the peace or a threat to the peace. Coercion against a representative was also a serious breach of international law, though of a different order.

28. His main comment, however, concerned the approach to articles 11 and 12. Both articles provided that the injured State was entitled to declare that coercion nullified the treaty *ab initio*, and that the injured State could choose a different course of action. The alternative courses of action mentioned in paragraphs 1 (b), 1 (c) and 2 of both articles amounted to an acceptance by the injured State of the situation created by means of coercion.

29. Thus the approach adopted in articles 11 and 12 was to deal with grave breaches of international law in the same manner as with error. Those breaches, however, were on an altogether different plane. Contemporary international law not only permitted, but indeed dictated a different approach to the problem of coercion against a negotiator or against a State. It was no longer possible to take the view that coercion was a matter of concern only to the parties to the transaction; both forms of coercion dealt with in articles 11 and 12 were matters of general concern. Therefore, although the consequences of an error in the conclusion of a treaty could be decided by the parties themselves, in the situations envisaged in articles 11 and 12, any State, whether a party to the treaty or not, should be able to raise the issue.

30. The approach which he recommended was based on such fundamental principles of international law as the prohibition of the use or threat of force, and the principle of peaceful coexistence.

31. He had, at that stage, no specific proposal to make regarding the formulation of articles 11 and 12. Perhaps the most appropriate course would be to confine the provisions of those articles to a statement that a treaty

¹ *Yearbook of the International Law Commission, 1958, Vol. II* (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 26.

² McNair, *The Law of Treaties*, 1961, pp. 209-210.

obtained by means of coercion was null and void *ab initio*. Such a statement would be based on the justified assumption that, under contemporary international law, an instrument obtained by such illicit means must be considered as non-existent. If any action were taken at a subsequent stage to give life to the invalid instrument, such action would constitute the conclusion of a new agreement. The signature given under coercion would not have created any legal instrument. Moreover, the responsibility of the State which had committed the acts of coercion would be involved.

32. Mr. ROSENNE said that on the whole he agreed with the comments made by Mr. Bartoš. He also agreed with these speakers who had stressed that articles 11, 12 and 13 dealt with different subjects.

33. He commended the Special Rapporteur for his decision to drop sub-paragraphs (b) and (c) from paragraph 1, but suggested that the possibility of election should be mentioned in the commentary. In that connexion, he recalled the decision taken by the Commission at its previous session with regard to articles 18 to 20 of Part I on the subject of reservations, when it had been made clear that a State was not obliged to draw the ultimate conclusions from its objection to a reservation.³

34. It was difficult to discuss article 11 without discussing article 12 as well, although the two articles dealt with different situations. He felt a great deal of sympathy with Mr. Tunkin's views on both those articles, especially article 12, the approach to which should be different from the approach to the question of error. The matters dealt with in articles 11 and 12 were not of concern to the parties only. However, the Commission was engaged in codifying the law of treaties, not rules for the pacific settlement of disputes. That question was dealt with in Chapter VI of the Charter; Chapter VII contained the articles on "Action with respect to threats to the peace, breaches of the peace, and acts of aggression", and any State was entitled to invoke those provisions in appropriate cases. Those provisions of the Charter, and even more the practices evolved by the United Nations since 1945, enabled international organs to deal adequately with the kind of situation envisaged by Mr. Tunkin. To take the classic example of the methods used to obtain the signatures of the President and Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, mentioned in paragraph 1 of the commentary to article 11, there could be no doubt that under the United Nations Charter, action of that kind would be a matter of major concern to the whole international community. The Charter provided machinery to deal with such cases, if necessary speedily.

35. Thus, while there was considerable force in Mr. Tunkin's statements regarding article 12, he thought that in codifying the law of treaties, the Commission should be careful to remain within the scope of the subject and to avoid entering into other subjects, such

as action with respect to threats to the peace under Chapter VII of the Charter, and the international responsibility of States. If the Commission were thus to broaden the scope of its work, it would be difficult, if not impossible, for it to complete its task on the law of treaties.

36. Mr. AGO complimented the Special Rapporteur on having provided the Commission with an excellent basis for the discussion of such a delicate matter. He (Mr. Ago) had not yet formed an opinion on the question whether articles 11 and 12 should be kept separate or not. However, the two subjects were different, though closely linked; the Commission would certainly have to revert later to the question how the provisions covering them were to be arranged.

37. Mr. Tunkin and Mr. Rosenne had spoken about the relationship between articles 11 and 12 and the preceding articles, which dealt with fraud and error. The Commission was concerned with the effects of fraud, error and coercion on the validity of treaties. Fraud and error affected only the validity of the instrument, whereas coercion might entail both the nullity of the instrument and other consequences involving the international responsibility of States. In the circumstances, the Commission should confine itself to the effect on a treaty's validity; but it could not ignore the fact that there were other consequences too. He therefore agreed with Mr. Tunkin that in the draft the analogy between the different cases, and especially between articles 11 and 12, seemed rather strained.

38. In substance, the scope of article 11 was restricted to coercion, actual or threatened, with respect to the person of the representative of a State or to matters of personal concern to him, whereas coercion of a representative by threats to his State was dealt with in article 12, although the Special Rapporteur had cited in his commentary on article 11 the example of the third-degree methods employed against the President and Foreign Minister of Czechoslovakia, which had involved a mixture of personal pressure on the individuals and threats against the State. He thought that the line of demarcation between the two kinds of coercion should be shifted slightly: on one side there should be coercion of representatives (whether by suggesting danger to their persons or to their country) and on the other, coercion by the use of force against a State. That could be done by merely dropping the words "with respect to their persons or to matters of personal concern" from paragraph 1.

39. With regard to the choice open to the aggrieved State, he would willingly agree to Mr. Tunkin's suggestion that that State should be free to declare the instrument void *ab initio*. Any possibility of denouncing or affirming the treaty should be ruled out, for either action would imply its initial validity. The word "approve" in paragraph 1 (c) meant that a State could conclude another valid treaty with the same content, but it would in any case be free to do that and there was no need to say so expressly in the article. The meaning could not be that an agreement vitiated by coercion was rendered valid by approval. The Commission was

³ *Official Records* of the General Assembly, seventeenth session, Supplement No. 9, p. 24, commentary to article 20.

considering the effect of coercion on the validity of consent, and the effect was nullity.

40. Lastly, since the instrument was void *ab initio*, paragraph 2 (a) was unnecessary.

41. Mr. VERDROSS said that the Special Rapporteur had drawn a sharp distinction between the older and the more recent doctrine of international law. Under the older doctrine an instrument signed by an organ of a State was void if violence had been used against that organ, but violence might be lawfully used against a State itself. The United Nations Charter had laid down quite a different form of international law, for Article 2, paragraph 4, prohibited the threat of force as well as the use of force.

42. He rather doubted the merit of the distinction made between the situations described in articles 11 and 12. If an organ of a State had acted under physical duress, or if a State was the victim of aggression, matters were clear enough; but the two forms of coercion were virtually indistinguishable where there was merely a threat to use force. The representative of a State might be threatened with reprisals against himself or his family and simultaneously with disaster to his country, or he might be promised personal gain while his country was simultaneously threatened with bombardment.

43. The recognition of a *jus cogens* rule from which the parties concerned could not depart by agreement *inter se* made the problems even clearer, and he personally advocated that solution. States Members of the United Nations could not depart from the provisions of Article 2, paragraph 4, of the Charter *inter se*, for it imposed obligations to the whole international community. Hence it was not only a matter of the reciprocal relations of States, but also of international obligations under *jus cogens*.

44. Mr. YASSEEN said that in drafting article 11 the Special Rapporteur had taken account both of international doctrine and of international practice. The principle on which the article was based was not in dispute. It was generally agreed that coercion used against the person of a State's representative vitiated consent and so justified the repudiation of a treaty concluded in such circumstances. International practice followed the same principle.

45. However, opinions differed somewhat concerning details. Mr. Ago had raised the question of coercion used with respect to the person of, or to matters of personal concern to, the representative of a State. In the particular context, the crucial issue was whether the coercion was effective, in other words capable of compelling a representative to agree to what he would normally have refused. But there might be other forms of coercion not covered by article 11. The case of a representative who was forced to sign a document under the threat of bombardment of his country's capital might be regarded as equivalent to a threat with respect to matters of personal concern to him, but as there was room for doubt on that point it would be desirable to find a formula that was satisfactory in such case.

46. With regard to the effects of coercion, the instrument signed under duress was undoubtedly void; but could such an instrument be confirmed or approved? Some speakers had drawn an analogy between article 11 and the earlier articles dealing with fraud and error. Yet surely the situation was not the same in the case of coercion as in that of fraud or error, for duress affected not only the reciprocal relations of the two parties concerned, but also the relations of both with the international community.

47. In a convention on the law of treaties that difference might well be reflected in a difference in the consequence of nullity of the instrument. It was very important to include provisions which took account of that difference, not only in article 11, but also *a fortiori* in article 12. The difference was fully consonant with the development of international law, for the modern law condemned both the use of force and the threat of force in international relations. The practical interests of States would not be impaired, inasmuch as a State which could neither confirm nor approve a treaty signed by its representative under coercion could always negotiate the treaty again.

48. Mr. AMADO said he had read with great pleasure the Special Rapporteur's commentary on article 11, in which the substance and the form blended so admirably.

49. With regard to the statements of earlier speakers who had distinguished coercion from fraud and error, he said that coercion was precisely the contrary of fraud. So far from being characterized by trickery or concealment, coercion was an open, outright threat, a forcible display of power having the object of compelling the partner to yield to a stronger will and of preventing him from manifesting his own will.

50. It was unquestionable, therefore, that an instrument signed under such conditions was void. A representative subjected to coercion could not be said to have a will of his own. A case in point was that of the President of the Czechoslovak Republic, who had been subjected to intimidation by Hitler. Such events might recur, for the world was at the mercy of such phenomena as Nazism, which were beyond all human control; it was therefore necessary to take precautions to reduce the risks to a minimum.

51. With regard to the factors constituting coercion, he disliked the expression "matters of personal concern" used in the article. A formula should be found that distinguished between coercion used against the individual and coercion used against the State. He would prefer articles 11 and 12 to be continued in a single provision dealing with coercion and drawing the distinction to which he had referred.

52. He was glad to note, as several other members of the Commission had done, that international law was developing along the right lines. The United Nations Charter had created a situation which all States should recognize. But in preparing for the instruments through which the will of States could receive expression, the Commission should not depart from the special technique of treaties.

53. Mr. EL-ERIAN said that article 11 was acceptable; he particularly endorsed the Special Rapporteur's broad conception of the nature of personal coercion which, as was explained in paragraph 3 of the commentary, need not be restricted to acts or threats of physical force.

54. The Special Rapporteur had also rendered a signal service in extending the concept of coercion against a State in the succeeding article, where he had departed from the traditional view that the validity of a treaty was not affected by having been brought about by the threat or use of force. Legal rules had undergone a fundamental change as a result of the efforts after the First World War to prohibit the use of force as an instrument of State policy. Landmarks in the process had been the League of Nations Covenant, the General Treaty for the Renunciation of War as an Instrument of National Policy⁴ (Pact of Paris) and the Stimson doctrine⁵ of non-recognition of situations, treaties or agreements brought about by the use of force in violation of the League of Nations Covenant and the Pact of Paris. The Commission itself had enunciated the principle in article 11 of the Declaration on Rights and Duties of States.⁶

55. Mr. CASTRÉN said he was prepared to accept article 11 with the drafting changes mentioned by the Special Rapporteur earlier in the meeting. The Special Rapporteur was to be commended for dealing with all forms of coercion — actual or threatened, physical or mental.

56. Several members had criticized paragraph 2 (a). Personally, he was not against its deletion, provided that the commentary indicated that the States concerned might, if they wished, affirm a treaty concluded in such circumstances, for it was surely a matter of concern primarily to the contracting States; they could hardly be required to re-negotiate the treaty.

57. Sir Humphrey WALDOCK, Special Rapporteur, summarizing the discussion, said there was general agreement that the two forms of coercion dealt with in articles 11 and 12 should be treated separately, but the Drafting Committee might find that they could be covered in a single article.

58. He recognized that some members felt difficulty concerning the expression "matters of personal concern" in paragraph 1, by means of which he had sought to cover those cases in which it might be difficult to discern the borderline between coercion against an individual and coercion against a State, and to take into account the fact that direct physical constraint was less likely to occur than attempted corruption, threat of disclosure of a past indiscretion or threat of action against members of a representative's family. The expression "in their personal capacity" would

probably be a satisfactory substitute and wide enough for the purpose he had in mind.

59. He saw no objection to deleting sub-paragraphs (b) and (c) of paragraph 1, in which he had introduced an element of election as to the kind of action the injured State might take. A more serious problem posed by paragraph 1 was how to formulate the consequences of personal coercion. In his opinion it would even be dangerous to stipulate that in such cases the State could declare the treaty nullified *ab initio*, unless the procedural checks provided for in section IV of his draft were applied. It would be still more dangerous to state that such an effect followed automatically, because then unilateral assertions might be made which would seriously undermine the stability of the treaty-making process and, in the absence of an international judge, would give free rein to subjective judgement by the State concerned.

60. He particularly wished to emphasize that point after hearing Mr. Tunkin's argument in favour of a categorical declaration that, for reasons of international public order, coercion must nullify a treaty *ab initio*. It was because of the danger of unilateral assertions of nullity that he had used the phrase "The State in question shall be entitled . . .", making the question one of a right which must be invoked and exercised in accordance with the procedures laid down in section IV. Article 11, like the other articles in sections II and III, must be read in conjunction with the procedural provisions contained in section IV of the report and intended to govern the exercise of the substantive rights arising from sections II and III.

61. There was some force in the objections raised to the provision contained in paragraph 2 (a), which he did not regard as of cardinal importance. It was intended to cover the case where, despite the irregular or even criminal conduct of one of the parties in improperly influencing the representative of the other by threats or some form of corrupt action, the injured State nevertheless wished to maintain the treaty. That kind of situation might conceivably arise, for example, with economic or commercial treaties. If the provision in paragraph 2 (a), admittedly of a rather academic nature, which appeared in the Harvard Draft, was thought unacceptable because it seemed to sanction in some measure acts that violated basic principles of international law, it should be omitted. It must, however, be understood that the members of the Commission could not have it both ways. If they declared that coercion rendered the signature an absolute nullity, the State could not be recognized as having any right to ratify or adopt the treaty.

62. The CHAIRMAN suggested that article 11 and the amendments thereto be referred to the Drafting Committee. Mr. Tunkin's interesting thesis that the nullity of a treaty signed under coercion should be absolute, on the analogy of civil law, and that its validity could not merely be asserted by the parties, could be taken up in connexion with article 12.

It was so agreed.

⁴ League of Nations *Treaty Series*, Vol. 94, p. 57.

⁵ *Foreign Relations of the United States, Japan, 1931-1941*, Vol. I, p. 76.

⁶ *Yearbook of the International Law Commission, 1949*, p. 288.

ARTICLE 12 (CONSENT TO A TREATY PROCURED
BY THE ILLEGAL USE OR THREAT OF FORCE)

63. The CHAIRMAN invited the Special Rapporteur to introduce article 12.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that article 12 raised certain major issues affecting international public order and had links with article 13, though the latter was not primarily concerned with the use of force to extract consent, but with the situation in which the object or execution of a treaty might be held to infringe *jus cogens*.

65. The general comment he had made regarding the formulation of paragraph 1 of article 11 was applicable to paragraph 1 of article 12.

66. He presumed that the Commission was in general agreement that paragraphs 1 (b) and 1 (c) should be dropped, as had been done in the case of the preceding article.

67. Mr. PAREDES said it had long been recognized that the use of force vitiated consent to a treaty. On the American continent, that fact had been recognized and accepted by the nations since the first Pan-American Conference in 1890 and repeatedly emphasized in many documents, including the Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States held at Montevideo in 1933, article 11 of which read:

“The contracting States definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force, whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure . . .”

68. The thesis emphasized in article 12 did no more than reflect the contemporary doctrine of the rejection of force as a means of imposing the will of one State on another—a doctrine which had been given full expression in the United Nations Charter and in the regional Charter of the Organization of American States.

69. In his opinion paragraph 1 of article 12, which seemed to refer only to the use of armed force, should also cover other forms of coercion which obviously had serious effects in international life: for instance, economic blockades, which could be severe enough to strangle a nation. Diplomatic pressure was also frequently used to influence the conduct of a State.

70. Mr. de LUNA said he agreed with Mr. Tunkin that articles 11 and 12 should be kept separate; but he thought they might be simplified.

71. The principle that a treaty imposed by the illegal use or threat of force was invalid had not yet become a positive rule of international law; it would gradually become a rule through evolution necessary for the era of peaceful coexistence. Several attempts in that direction had been made in the past, notably the Stimson doctrine of the non-recognition of situations resulting from the unlawful use of force.

72. Paragraph 2 very much weakened the principle of the article by providing a pretext for a State to declare lawful an instrument concluded through the use or threat of force, if the injured State subsequently acted as though the treaty were valid. Such a provision might unfortunately enable the aggressor State, by devious but still unlawful means, to keep the fruits of its aggression. Mr. Tunkin had rightly said that the interest of the entire international community was involved, as well as the interest of the two parties. The article should not leave the parties free to act in that way; it should be condensed to read:

“Any treaty concluded by force or by the threat of force in violation of the principles of the Charter of the United Nations is void *ab initio*.”

73. For technical reasons of law, it should not be provided that a treaty concluded as a result of the illegal use or threat of force was non-existent, for that would be going too far. It would suffice to say that such a treaty was void *ab initio*, not voidable.

74. With regard to the connexion between articles 11 and 12, he thought that wherever it was employed, coercion was always directed against a State through one of its organs. Modern information media, such as broadcasting, made it possible to intimidate the people of a State directly. That did not constitute either coercion of an organ of the State, or direct coercion of the State itself, but indirect coercion of a State through its citizens.

75. Mr. CASTRÉN said that article 12 raised a very important question of principle. Traditional theory recognized the validity of a treaty obtained by the threat or use of force against the State itself. But the approach chosen by the Special Rapporteur appeared to be the right one; it was in line with the modern trend in international law and raised no insuperable difficulties in practice.

76. He agreed with the Special Rapporteur that the concept of coercion should be kept within fairly strict bounds and that certain forms of pressure on a State, such as political or economic pressure, should be disregarded. Article 12 dealt with physical force only.

77. In his reference in paragraph 1 to violation of the principles of the Charter of the United Nations, the Special Rapporteur had no doubt had in mind Article 2, paragraph 4, of the Charter; but general international law, even apart from the United Nations system, also prohibited the use of force in international relations, save in a few exceptional cases, one of which, a peace treaty imposed on an aggressor, was mentioned in the commentary. Even in that case, however, some limits should be set. The victim of an aggression was admittedly entitled to fair and equitable reparation, but he could not claim more. To permit the total annexation of the aggressor's territory or the loss of its political independence would be going too far. He hoped that by the end of its discussion of article 12, the Commission would be able to find a form of words broad enough to take account of the necessary exceptions.

The meeting rose at 1 p.m.

682nd MEETING

Friday, 17 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ DE ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 12 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 12 (CONSENT TO A TREATY PROCURED BY THE ILLEGAL USE OR THREAT OF FORCE) (*continued*)

2. Mr. VERDROSS said that the principle laid down in article 12 had been recognized even before the United Nations Charter had been adopted and consequently did not only bind the States which had acceded to the Charter. It had first been stated in international practice in the Stimson doctrine,¹ in which the United States had declared that it would not recognize any treaty brought about by means contrary to the League of Nations Covenant or the Briand-Kellogg Pact.² The League of Nations Assembly had subsequently adopted a resolution to the effect that it was incumbent on the Members of the League not to recognize any such treaty.³ The principle was not explicitly stated in the United Nations Charter, but was clearly implicit in its Article 2, paragraph 4; for, obviously, if recourse to force was an international crime, a treaty imposed by force could not be valid.

3. Article 12, paragraph 1, was therefore rather too narrow in scope, for it referred only to force employed in violation of the principles of the Charter of the United Nations, and did not mention violation of other possible obligations. According to the prevailing doctrine, the fundamental principles of the United Nations Charter were also binding on States not Members of the United Nations, though that did not mean that all non-member States recognized those principles. It would therefore be useful to say so expressly.

4. Secondly, the phrase in paragraph 1 "in violation of the principles of the Charter of the United Nations" was too weak; a better wording would be: "in violation of an obligation inherent in the Charter or in any other international treaty", so that no doubt could remain that the principle was a principle of universal international law binding on all States, whether Members of the United Nations or not.

5. Mr. BARTOŠ said he agreed with Mr. Paredes that the threat of force could take the form of economic pressure. History offered many examples of total, or almost total, blockade imposed by certain States to

obtain concessions from others: one instance was the customs war between Austria-Hungary and Serbia. Austria-Hungary, which was the only route for Serbian exports to the West — at that time the sole market for agricultural products — had prohibited the entry and transit of Serbian cattle and threatened to raise customs duties on the export and transit (sic) of wheat in order to compel Serbia to renounce its claims to Bosnia and Herzegovina, which Austria-Hungary planned to annex.

6. The Special Rapporteur had been right in basing article 12 on a principle following from the basic provisions of the United Nations Charter. The use of force, however, was always a violation of the principles of the Charter. Even the right of self-defence recognized in Article 51 of the Charter merely authorized provisional resort to force in order to enable a State to preserve its independence until the Security Council, to which it was bound to appeal, had taken the necessary measures.

7. What was meant in that case was the right to resort to physical defence. A State could not resort to force or to the threat of force to conclude a treaty even if its cause was just, for that would be a violation of the principles of the Charter. The case had to be brought before the Security Council, which, as one means of restoring peace, might recommend a friendly settlement, but one free from any element of force.

8. One of the questions that arose in regard to the effect of the use of force on the validity of a treaty was whether a treaty signed under coercion was voidable, void or non-existent. Generally speaking, he favoured the French theory of non-existent instruments, but even under French case-law the non-existence of an instrument had to be declared by a court if it was contested, and also in order to safeguard relations in public life. For practical reasons he therefore considered it preferable to adopt the theory that the treaty was void, rather than non-existent.

9. A further question then arose, namely, whether the effect of regarding a treaty obtained through the use of force as void, voidable or non-existent applied *inter partes* or *erga omnes*, particularly in the case of voidable treaties. It was difficult to give an absolutely definite answer. In the first place States, whether Members of the United Nations or not, were certainly always entitled to appeal to the General Assembly or to the Security Council if the violation committed against a State, whether a Member or not, could be regarded as a threat to international peace by any State, and not only by the injured State. It could therefore be said that the question whether an instrument had in fact originated from the use or threat of force concerned the international community. If it had, the injured State was not necessarily the only State which could legitimately plead invalidity on the ground that force had been employed; it was a matter of concern to the international community as a whole. That principle gave any member of the international community the right to appeal.

10. Secondly, even if a treaty had been obtained by force, or if there was some doubt about the matter, could the State concerned ratify the treaty after the coercion had ceased? He believed that a State could not only ratify such an instrument by a renewed expression of its free

¹ *Foreign Relations of the United States, Japan, 1931-1941*, Vol. I, p. 76.

² *League of Nations Treaty Series*, Vol. 94, p. 57.

³ *League of Nations Official Journal*, 1932, Special Supplement No. 101, Vol. I, p. 87.

will, but could give it absolute effect *ex tunc*. Too much abstract and political preciseness should not be attempted in legal matters if it was liable to endanger the security of international relations. But it should certainly not be left to the aggrieved State alone to decide the matter, nor should that State be able to plead that the case lay exclusively *inter partes* or to invoke the doctrine of *res inter alios acta* vis-a-vis third States. The matter concerned the international community, which must be certain that the coercion had ceased.

11. The Commission must decide on the form of paragraph 1 of the article; it had to choose between division into several sub-paragraphs and a statement of the principle alone.

12. Once the threat had been removed, States could always affirm or denounce a treaty obtained by force, but denunciation and avoidance were two different acts. If the injured State did not ask that the treaty should be voided, the question arose whether it should be granted the right to denounce the treaty on the exceptional ground that consent had been vitiated by coercion. Affirmation should not be mentioned as one of the consequences; it should rather be a rule that any instrument could be affirmed once the will had become free again and could be properly expressed. He was not opposed to the expression of that idea, provided that affirmation was not made a consequence of the use of force, but a possibility open to the injured State, of getting out of the situation created by the coercion if the circumstances in fact required it and if that solution was more convenient to the victim.

13. He had reservations regarding paragraph 1 (b). Moreover, he did not think that the Commission could vote on article 12 as drafted; no doubt the question would be re-examined by the Drafting Committee, but he did not think that Committee would be competent to do so until the Commission had settled the principle.

14. Mr. BRIGGS said there had been an air of unreality about the discussions on the articles concerning fraud, error and coercion, in the course of which the Commission had touched upon some rather theoretical problems that rarely arose in practice. He feared that it might be running into danger of creating new ways of evading treaty obligations.

15. Article 12 might be described as well meant, but juridically meaningless. No doubt the thesis that a treaty concluded under duress was binding shocked contemporary opinion and there would be general agreement on the need for remedies against coercion in violation of the principles of the Charter. That was precisely the purpose of chapters VI and VII of the Charter, in which a positive approach had been adopted. In contrast to that positive approach, he had always regarded the Stimson doctrine as a negative one, proclaimed by a State unwilling to assume, at a particular moment, effective obligations for the preservation of peace.

16. Though machinery had been established under the Charter to deal with the use or threat of force, there had been some reluctance on the part of United Nations organs to refer matters involving violations of the

principles of the Charter to the International Court of Justice, on the ground that the law was insufficiently clear. Article 12 would certainly not make it any clearer, and failed to elucidate the nature of principles which were only too often discussed in terms of political slogans, rather than as legal concepts.

17. The provisions of article 12 as it stood might enable States, by subjective interpretation of such terms as "coerced", "acts of force", "threat of force" and "violation of the principles of the Charter", to secure unilateral nullification of a treaty which might not in fact have been vitiated in that way. The situation which article 12 was designed to cover was certainly one which must be considered, but unless the article could be formulated with greater precision, it was probably premature and would be better omitted.

18. Mr. ROSENNE said that, from the general political and moral standpoint, articles 12 and 13 were of capital importance, and the way in which they were handled would be a test of the Commission's ability to provide the kind of guidance it was called upon to give the General Assembly by virtue of its Statute and of Article 13, paragraph 1 (a), of the United Nations Charter. Cases of the kind which Article 12 was designed to cover were relatively rare, but were symptomatic of a serious deterioration in the conduct of international relations.

19. Reviewing the Commission's past work relevant to the subject, he recalled that article 9 of the draft Declaration on Rights and Duties of States, combining the principles of the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy⁴ and of the United Nations Charter, had proclaimed a positive duty of every State "to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order."⁵ Article 11 of the same Declaration, though not directly connected with the law of treaties, was also relevant to the subject under discussion, in that it imposed upon States "the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9." The General Assembly, in its resolution 375 (IV) had deemed the draft Declaration "a notable and substantial contribution towards the progressive development of international law and its codification" and as such commended it "to the continuing attention of Member States and of jurists of all nations". The duty of non-recognition, enunciated in such categorical terms in the Declaration, implied the absolute voidance of transactions that had been conducted under duress. Those pronouncements could be taken as the Commission's point of departure in the present discussion.

20. The Commission should also bear in mind the emphasis placed by the General Assembly in its resolution 1765 (XVII) on the "need for the further codification and progressive development of international law with

⁴ League of Nations *Treaty Series*, Vol. 94, p. 57.

⁵ *Yearbook of the International Law Commission*, 1949, p. 288.

a view to making it a more effective means of implementing the purposes and principles set forth in articles 1 and 2 of the Charter”, and its recommendation that the Commission should continue its work on the law of treaties in order that it “may be placed upon the widest and most secure foundations”.

21. It was of interest to note from the Sixth Committee’s report on the report of the International Law Commission on the work of its fourteenth session, the view expressed by a number of representatives that instruments “which had been obtained through extortion, violence or bad faith, or which contained provisions contrary to the fundamental principles of modern international law, were illegal and could not enjoy or continue to enjoy the protection of the principle *pacta sunt servanda*”; other representatives had maintained that “to stress some principles to the detriment of others would place matters in the wrong perspective, for the Commission must eventually consider all pertinent principles”.⁶ Those two points of view should find expression in the draft articles.

22. The kind of considerations which had prompted the Special Rapporteur to provide in article 13 that a treaty was void if its object or execution involved “the infringement of a general rule or principle of international law having the character of *jus cogens*”, and in particular if it involved “the use or threat of force in contravention of the principles of the Charter”, must lead to similar conclusions regarding treaties procured by those means. The Special Rapporteur had in fact followed Sir Hersch Lauterpacht, who had described his formulation of the principle in article 12⁷ of his report as “*lex lata*”, stating that existing law was no longer what it had been prior to the First World War.⁸ The same thesis, with varying degrees of emphasis, had been defended by many other writers.

23. Nevertheless, the Commission must always be mindful of the need to safeguard the stability of treaties and to take all reasonable steps to prevent arbitrary action and unjustified unilateral invalidation of treaties. A regular procedure to establish that a treaty was void *ab initio* was essential in a work of codification or progressive development, and that procedure could never depend merely on a unilateral assertion.

24. As Sir Gerald Fitzmaurice had pointed out in his third report, procedural provisions depending exclusively on the reaction of the injured State would be unrealistic;⁹ in a serious case of coercion, such as the agreement concluded between Nazi Germany and Czechoslovakia in 1939, the victim would hardly be in a position to invoke procedural rules of the type envisaged by the Special Rapporteur in article 25 of section IV of his report (A/CN.4/156/Add.2). Machinery had been created by the Charter of the United Nations that enabled any

Member State, in the exercise of its rights under that instrument, to bring before the appropriate organ of the United Nations any dispute or situation resulting from the use or threat of force. Indeed, all Members, if not every State, had a general political and legal interest in the general observance of the obligations, both positive and negative, deriving from the principles of the Charter and of contemporary international law.

25. It was important to realize that the consequence of voidance *ab initio* was simply that there was no treaty: it was not “*opposable*” in any way, nor could it be invoked either before a domestic tribunal or before any international organ. There would be nothing to register under Article 102 of the Charter, and the regulations on the registration of treaties might need some amendment in order to leave no doubt on that point.

26. From the fact that legally the treaty did not exist, it followed that recognition of the right and interest of all States to secure acknowledgement of the voidness of the treaty required no reconstruction of the general theory of the law of treaties; it was not a case of according to third parties a right to intervene in a treaty, and accordingly he had some difficulty in accepting paragraph 2 of article 12 as proposed by the Special Rapporteur.

27. The drafting of the text should be broad and precise, and give rise to no ambiguity. In fact, he was inclined to favour an emphatic statement of principle of the kind proposed by Sir Hersch Lauterpacht in Article 12 of his first report, but following more closely the language of the Charter and reading: “Treaties imposed by or as the result of the threat or use of force against a State or in any other manner inconsistent with the purposes and principles of the Charter of the United Nations are invalid”. He did not wish, at that juncture, to go into the question of the interpretation of certain Articles of the Charter, which had been touched upon by some members, and reserved his position on that question.

28. In addition to the provisions regarding the rights of the aggrieved party suggested by the Special Rapporteur in article 25, there was the right of any State to seize the competent organs of the United Nations of a dispute or any situation resulting from the use or threat of force of which the illegal and void so-called treaty was the manifestation. Sir Hersch Lauterpacht had proposed *de lege ferenda* that only the Court should be recognized as competent to adjudicate in the matter; personally, he doubted whether that would be sufficient.

29. He shared the Special Rapporteur’s view, expressed in paragraph 9 of his commentary to article 25, that the procedural system must be brought more into line with Article 33 of the Charter; he thought that applied, in the case in point, to the whole of the procedural system. On the other hand, the Commission need not at that stage concern itself with the operation of Article 33, which was to be discussed in the General Assembly, as a result of which he hoped that the machinery for the pacific settlement of disputes would be strengthened.

30. Although there was powerful authority for the categorical view of the *lex lata* put forward by Sir Hersch Lauterpacht, a recent writer had stated: “There is as

⁶ A/5287, paras. 42 & 43.

⁷ *Yearbook of the International Law Commission, 1953*, Vol. II (United Nations publication, Sales No.: 59.V.4, Vol. II), p. 147.

⁸ *Ibid.*, p. 149.

⁹ *Yearbook of the International Law Commission, 1958*, Vol. II (United Nations publication, Sales No. 58, V.1, Vol. II), p. 38, para. 62.

yet no general acceptance of the view that the customary law has been modified and the International Law Commission, in its work on the Law of Treaties, has not considered any change in the law in this respect. At the same time, it is curious that little consideration has been given to the force of Article 2, paragraph 4, of the United Nations Charter in this connexion."¹⁰ The only defence that could be offered to that serious indictment was that the book had been written before the Commission took up the question dealt with in article 12.

31. He hoped that before long the obsolete concepts based on the legitimacy of the use of force would be discarded as a historic relic and symbol of human folly, and that the modern law of nations would place the use of force where it belonged, beyond the pale of the law, with all the necessary consequences for all branches of contemporary international law.

32. Mr. YASSEEN said that some writers took the view that international law did not regard coercion applied to the State as an act vitiating consent; they considered that a treaty imposed by force was normal, enforceable, and in fact valid. His own view, however, was that except in the matter of peace treaties there was no such international custom. Besides, the alleged rule had been hotly contested.

33. Many writers were reluctant to regard even peace treaties imposed by force as valid, for they held that duress was incompatible with the notion of agreement, which was based on the consent of both parties. In defence of such treaties it had been said that they were the outcome of *de facto* international legislation imposed by one party on the others. Some writers had, by analogy with municipal law, asserted that peace treaties, far from being international agreements, were in fact legislation imposed by a stronger power, in the same way as in a democracy the majority imposed its will on the minority.

34. Even if the existence of a customary rule to the effect that duress did not vitiate a treaty were admitted, that rule had now lost its psychological basis, which was one of its constituent elements, and would no longer be tolerated by international public opinion.

35. Nor was it admitted in modern times that a State could resort to force to impose its will. The Covenant of the League of Nations and other international instruments had restricted the right to resort to war. The Charter of the United Nations prohibited the use or threat of force, which must be regarded as international offences. Logically, therefore, since States were not allowed to resort to force, constraint vitiated treaties.

36. Article 12 took the changed situation into account in principle, but he thought that paragraph 1 was not sufficiently general. Mr. Verdross had said that it was not enough to refer only to a violation of the principles of the Charter. Some of those principles constituted an important part of modern international law, but they did not constitute the whole body of rules of international law. Accordingly, the paragraph should state that coer-

cion vitiated a treaty if it was employed in breach of an international obligation.

37. With regard to the effects of the use of force on the validity of a treaty, in his opinion a treaty imposed by force was void absolutely, for the entire international community was involved, not merely the two parties to the treaty. The treaty might be renegotiated, but it could not be approved or affirmed as it stood.

38. Mr. AGO said that the more he thought about the relationship between the cases contemplated in articles 11 and 12 respectively, the more convinced he became that they differed fundamentally. Article 11 embodied the classic rule that the use of force against a State's representatives vitiated consent to a treaty, a rule which enabled the State whose consent was thus vitiated to declare the treaty void; if that State did not do so, then the treaty remained valid. Article 12, on the other hand, applied to cases in which the treaty was considered void not because of some defect in consent, but because the use of force was inadmissible as a means of changing an international situation. Article 12 was therefore more closely linked to article 13, which also related to cases in which the treaty was absolutely void, and void *erga omnes*, whatever might be the will of the State concerned. In fact, a State which was subject to coercion on losing a war was often not in a position to declare the peace treaty void.

39. The Commission would be assuming a great responsibility in deciding on the rule to be stated in article 12. He was inclined to think the article should lay down that the treaty was automatically void, and do so in very clear and simple terms, for example, by specifying that any treaty concluded by a State under coercion by the threat or use of force in violation of the principles of the United Nations Charter was void.

40. The expression "in violation of the principles of the Charter" had been criticized; but while it was true that international obligations other than those under the Charter existed, the fulfilment of international obligations was itself — and rightly — a principle of the Charter. The objection that States not Members of the United Nations were not bound by the Charter was easily answered; the reference to the principles of the Charter rather than to the Charter itself made the formula broad enough, for those principles applied to all members of the international community.

41. The question of procedure should, of course, be considered, but in connexion with the structure of the draft as a whole, not in connexion with each separate article.

42. He would go a little further than Mr. Bartoš in opposing the idea that a State could affirm a treaty which it had signed in the circumstances stated in article 12: if the threat ceased, the State could negotiate another treaty, but the original treaty was null and void.

43. Mr. PAL said that he found the substance of article 12 acceptable. In his country, the principle governing the effects of coercion on agreements was derived from the English common law systems and was incorporated in the legislation of 1872 codifying the law of contract,

¹⁰ Brownlie, "International Law and the Use of Force by States", Oxford, 1963, Clarendon Press, p. 405.

which laid down that a contract obtained by means of fraud, misrepresentation or duress was voidable at the instance of the injured party. He did not, however, find the drafting of the article fully satisfactory.

44. At first he had felt some hesitation in subscribing to the thesis propounded by Mr. Tunkin that a treaty entered into through an act or threat of force should be declared void *ab initio*. The repudiation of a treaty did not stand on the same footing as that of a contract. The former was likely to give rise to many complex problems, both economic and political, the historical forces having in the meantime pressed on beyond the *status quo*, perhaps towards a higher form of human community. He had also been apprehensive of unwittingly helping to open up a new field of irreconcilable tension and thus defeating the very purpose of the law. But the arguments subsequently adduced in support of Mr. Tunkin's view by Mr. Verdross, Mr. Ago and particularly persuasively by Mr. Bartoš, had fully convinced him; his misgivings about increasing the danger of international tension by opening the door to unilateral action by one of the parties seeking to repudiate the treaty had also been considerably allayed by the procedural safeguards laid down in article 25 in section IV of the Special Rapporteur's report, read with the provision contained in article 3 in section I. Both those articles were essential. If law was to be a scheme of order and not a mere speculative system of logic, the decision must not be left to the parties themselves.

45. Mr. GROS said he shared Mr. Ago's views regarding the difference between the purposes of articles 11 and 12 and the need for a more serious sanction than the mere voidability of a treaty concluded in the circumstances specified; like Mr. Ago, he regarded it as inadmissible that such a treaty could be affirmed.

46. Referring to his earlier comments on the difficulty of transferring rules of private law concerning contracts to the law of treaties, he said that in the case of article 12 the crucial issue was not the defect in consent, but the application of a sanction for a breach of the rule of international law prohibiting the use of force. Even in private law, at least in French law, when the court voided an instrument concluded under physical or mental duress, it was not so much because consent had been vitiated, as because there had been unlawful use of force.

47. The language suggested by Mr. Ago was more decisive, more definitive, and less open to controversy than article 12 as drafted, and was therefore preferable.

48. Mr. TUNKIN said that the importance of article 12 could hardly be exaggerated. He agreed with the view expressed by the late Sir Hersch Lauterpacht, and quoted by Mr. Rosenne, that the rule embodied in article 12 was part of *lex lata*. It was a rule of contemporary law, although, of course, it had not formed part of international law before the first World War.

49. Mr. Ago had spoken in the same sense and had, in addition, given convincing reasons for keeping separate the two different cases dealt with in articles 11 and 12 respectively.

50. As he had already pointed out at the previous meeting, and as had also been said by a number of other speakers, the principles stated in article 12 followed from the prohibition of the use of force in international relations. That principle had been enunciated for the first time by the Soviet State in its very first constitutional act, in the form of the prohibition of aggressive war. The Soviet Decree of 8 November 1917 had proclaimed that aggressive war was the gravest crime against humanity. That principle had been incorporated in the Pact of Paris of 1928, which had outlawed aggressive war in international relations. The United Nations Charter had developed the principle and in Article 2, paragraph 4, had prohibited the threat and the use of force. The terms of that paragraph were such as no longer to leave any loophole for justifying the illegal use of force.

51. It had been pointed out by the late Sir Hersch Lauterpacht and many others, including himself, that those provisions of the Charter had marked a great advance in international law; it was no longer possible to represent the use of force, unfortunately resorted to occasionally by some States, as falling outside the prohibition of aggressive war. The Principles of the Charter were principles of general international law and as such were binding upon all States. The prohibition of the use of force, as embodied in the Charter, had replaced the old rule of international law which used to acknowledge the right of a sovereign State to wage war — the *jus ad bellum*.

52. Since the use of force against a State was illegal, except in the case of self-defence covered by Article 51 of the Charter, it followed that a treaty imposed by the use or threat of force must be null and void.

53. At the previous meeting, he had advocated a shorter formulation for article 12. The article should state the rule that a treaty imposed by the use or threat of force in violation of the Principles of the Charter was null and void *ab initio*.

54. A further point, which he had mentioned at the previous meeting, was that, under contemporary international law, the question of a treaty imposed by coercion was the concern of all States and not only of the parties to the treaty. Accordingly, he could not accept the wording of paragraph 1, to the effect that the injured State "shall be entitled to declare . . .".

55. Peace treaties were of course imposed by force: some, but not all, might well be void under contemporary international law. A peace treaty imposed in violation of the Charter would be void. However, a peace treaty could be imposed in a manner consistent with the Principles of the Charter. He had discussed the problem in an article he had recently contributed to a publication edited by Mr. Ago.¹¹ In that article, he had explained that the 1947 peace treaties and the various agreements between the Allies concerning Germany had been validly based on the principle of the responsibility of the aggressor State.

¹¹ Tunkin, G. I., "Alcuni nuovi problemi della responsabilità della Nato nel diritto internazionale", *Comunicazioni e Studi*, Istituto di diritto internazionale e straniero, University of Milan, 1963, Vol. XI.

56. With regard to paragraph 1, the text could be improved by introducing into it the actual language of Article 2, paragraph 4, of the Charter so as to refer to "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations"; that would provide a more precise formulation for the article. Moreover, from the legal point of view, it was desirable to use the same language in the article as in the provision of the Charter on which it was based; any difference between the two texts could lead to the interpretation that a different meaning was intended.

57. With regard to the formulation proposed by Mr. Rosenne, he stressed the need to adhere to the language of Article 2, paragraph 4, of the Charter. A text which purported to annul all treaties obtained by any kind of force would not be acceptable. Some internationalists had construed the prohibition of the use of force to mean that any act which resulted from the use of force was illegal in its results. Such a viewpoint, which placed the aggressor on the same level as the victim of aggression, was contrary to contemporary international law.

58. It had been suggested by some members that article 12 would be meaningless without a reference to an international tribunal. In fact, the absence of a legislature, an executive and a judiciary was a feature common to all spheres of international law, as already pointed out by Mr. Verdross. International law could not be approached with ideas drawn from municipal law and it was highly dangerous to decry a rule of international law merely because it authorized a State sometimes to act unilaterally. An example was provided by Article 51 of the Charter, which left it to an individual State to take very grave action in self-defence against armed attack.

59. With the approach he had criticised, it might be claimed that the whole of international law was meaningless in the absence of compulsory jurisdiction. The whole matter was a very general one and of the greatest importance. Most internationalists felt that, despite its weaknesses, international law played a vital role in the maintenance of peace and in the development of friendly relations between States.

60. He personally believed very strongly that the contention that there could be no international law without compulsory jurisdiction would, at that stage, do nothing but harm to the development of international law.

61. Mr. AMADO said that the discussion reminded him of the time when the Commission had been considering the question of defining aggression. Not having been able to arrive at a complete definition based on an enumeration of aggressive acts, the Commission had decided to draft a general definition. He himself had proposed one which stated that "any war not waged in exercise of the right of self-defence or in application of the provisions of article 42 of the Charter of the United Nations is an aggressive war".¹² On that occasion, too, the Com-

mission had found itself faced with the difficulties inherent in the lack of any sanction for the act of aggression. Those same difficulties still existed.

62. The Special Rapporteur had stated the problem with admirable precision and lucidity. Article 12 seemed like the dénouement of a play — the condemnation of resort to force — in which the first act had been played by the States of Latin America. It was they, for example, which, in connexion with the dispute between Brazil and Serbia on the question of gold loans, had introduced an innovation into international law in the form of the *clausula rebus sic stantibus*. The second act had shown the danger which ensued from unilateral action by one State in relation to a treaty. That was what the Special Rapporteur was referring to in paragraph 2 of his commentary to article 12 when he drew attention to the danger of opening the door to the evasion of treaties. The third act, the climax of the plot, reflected the anxiety of a man like Sir Gerald Fitzmaurice, quoted by the Special Rapporteur in paragraph 3 of his commentary. The Special Rapporteur had dominated his subject magnificently, and the Commission, far from keeping silent, as Mr. Briggs wished, should follow him.

63. With regard to the exact wording of the article, he said that the principles embodied in the Charter of the United Nations were sacred; they were of the very essence of international life, and should be mentioned in the article. He would accept the shorter version suggested by Mr. Ago, but as he was not yet absolutely sure about the precise form of the rule to be stated, he would agree to whatever wording was preferred by the majority.

64. Mr. TABIBI agreed that article 12 was one of the cardinal articles of the whole draft. Attempts had been made to defend the traditional doctrine that the validity of a treaty was not affected by the fact that it had been obtained by force or the threat of force. That doctrine, however, belonged to a different epoch, when it had been the fashion to compel small and weak nations to submit to treaties by force or threat of force and then to enforce those treaties with the argument that their annulment or denunciation would endanger the stability of treaties, the security of international relations, and international law itself. In fact, the international law which was thus upheld was one of the many principles which had been formulated and used for the benefit of a small group of nations against others which happened to be weaker and smaller.

65. The present epoch was a totally different one, in which the Charter of the United Nations had brought about very great changes. By accepting the Charter, over a hundred Member States had pledged themselves to a new contemporary order — an order in which the use and the threat of force were prohibited under Article 2 of the United Nations Charter. That Article did not constitute a mere doctrine; practical steps had been taken by the United Nations to enforce it both in 1958 in the Middle East and in 1961 in the Congo.

66. The prohibition of the use of force and the threat of force had been reaffirmed by every important resolution of the United Nations. A striking recent example

¹² *Yearbook of the International Law Commission, 1951*, Vol. II (United Nations publication, Sales No.: 1957.V.6, Vol. II), pp. 131-132, para. 40.

was provided by the "Declaration on the granting of independence to colonial countries and peoples", embodied in General Assembly Resolution 1514 (XV) of 14 December 1960. The prohibition had been reiterated by the General Assembly at its most recent session in Resolution 1815 (XVII), unanimously adopted on 18 December 1962 on the recommendation of the Sixth Committee, which stated "the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". In operative paragraph 3 of that resolution, the General Assembly had decided to study that principle under the item "Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations", which it had decided to place on the provisional agenda for its eighteenth session.

67. The International Law Commission, as a subsidiary organ of the General Assembly, should take account of the situation reflected in that resolution, bearing in mind that the majority of States Members of the United Nations was among those which had suffered most from treaties imposed by the use or threat of force. His own country was among those which had had that unfortunate experience in the nineteenth century. It was therefore essential to incorporate in article 12 the basic idea of Article 2, paragraph 4, of the Charter.

68. He fully agreed with Mr. Tunkin that the use and the threat of force were a matter of concern not only to the parties to a treaty concluded under duress, but to the whole international community. Article 12 should clearly reflect that situation.

69. For those reasons, he could support paragraph 1, sub-paragraphs (a) and (b), of article 12, provided that the relevant provisions of the Charter were incorporated in them. On the other hand, he could not accept sub-paragraph (c), which appeared to give recognition to the illegal use or threat of force; he was certain that if such a provision were submitted to governments, it would not be accepted by them, and it should therefore be dropped.

70. The CHAIRMAN, speaking as a member of the Commission, said that he fully approved of article 12, but he wished to comment briefly on some of the points raised by previous speakers.

71. First, with regard to the possibility of the use or threat of force other than physical force, such as economic pressure, to which reference had been made by Mr. Paredes and Mr. Bartoš, he favoured the use in article 12 of the actual words of Article 2, paragraph 4, of the Charter. By using the language of the Charter the Commission would be neither restricting nor widening the scope of that language, nor prejudicing in any way the manner in which the provision might be interpreted in a particular case by the competent United Nations organs. That approach seemed to him essential, since the Commission was engaged in codifying the law of treaties and not in a study of the law of the Charter.

72. Secondly, with regard to the proposals to delete paragraphs 1 (c) and 2, which provided for affirmation and estoppel, he could accept the deletion of those provisions from article 12, but it would then be necessary to amend article 4 of Part II, so as to exclude article 12 from its application.

73. Thirdly, with regard to the drafting of the article, he agreed with Mr. Ago and Mr. Rosenne. As he understood it, Mr. Rosenne's proposal was not in substance different from that of Mr. Ago, since he wished to reintroduce language originally proposed by Sir Hersch Lauterpacht. That proposal would invalidate any treaty obtained by the use or threat of force in violation of the United Nations Charter. He understood that Mr. Rosenne also wished to broaden the wording so as to take into account the relevant rulings of the International Court of Justice.

74. Mr. ROSENNE, confirming the Chairman's interpretation of his proposal, which was on the same lines as that of Mr. Ago, said the only real difference was one of drafting and could be referred to the Drafting Committee.

75. Mr. de LUNA said that Mr. Amado's phrase "the dénouement of a play" was extremely appropriate. Three views of war had been taken, historically. The first, and very ancient, view had been that all war was a crime; that view had been propounded by Tertullian and was still held by the Quakers, Jehovah's Witnesses and conscientious objectors. The second had been that there were two kinds of war; unjust wars and just wars, the latter being a lawful means of relief or punishment if every remedy by way of pacific settlement had been exhausted, if the cause was just, if the good expected from victory was greater than the evil to be apprehended from fighting, and if the war was conducted *recto modo*. That thesis had been maintained by Vitoria, Suarez, Grotius and the naturalist school in general and was based on the notion of the general weal of the international community. The third view had been that of nineteenth century positivism, which had discarded the limitation of natural law and had maintained that the distinction between a just war and an unjust war was meaningless, all wars being justified provided that the State which declared war was a sovereign State. According to that theory, a sovereign State was in every case empowered to declare war.

76. The problem before the Committee in regard to article 12 could obviously not have arisen so long as the third view had prevailed, or so long as States had gone to war to recover debts, for example. As recently as 1933, so eminent a lawyer as Sir John Fischer Williams in a course of lectures at the Hague¹³ had denounced as nonsense the contention that the result of an unlawful act did not exist in international law. Nevertheless the treaty concluded between the Russian Soviet Federal Socialist Republic and Turkey on 16 March 1921¹⁴ had condemned intimidation as a means of imposing con-

¹³ Académie de droit international, Recueil des cours, 1933, Vol. II, p. 203.

¹⁴ British and Foreign State Papers, Vol. 118, p. 990.

tractual obligations, even before the Stimson declaration mentioned by Mr. Verdross. On 7 January 1932 Mr. Stimson, the United States Secretary of State, in a unilateral declaration of United States policy in Asia had proclaimed that the United States would not recognize any situation brought about by the illegal use of force. That declaration had not been in any way binding, and the United States had been free to withdraw it at any time. The principle embodied in it had, however, become binding as a result of the League of Nations resolution, adopted under Article 10 of the League Covenant on 11 March 1932,¹⁵ which had declared that it was incumbent on the Members of the League not to recognize any situation or treaty which might be brought about by means contrary to the League Covenant or to the Briand-Kellogg Pact. In the following year the American States had pledged themselves, by article 11 of the Montevideo Convention,¹⁶ not to recognize territorial acquisitions or special advantages which had been obtained by force. That principle had been subsequently accepted in several international instruments, and had been embodied in article 17 of the Charter of the Organization of American States, signed at Bogota in 1948,¹⁷ which provided that no territorial acquisitions or special advantages obtained by force would be recognized.

77. The principle was thus recognized in positive law, but it had not become a part of general international law, since by its decision at the 101st meeting of the League Council, the League of Nations had subsequently given Member States discretion to recognize the conquest of Abyssinia both *de facto* and *de jure*. Later had come the *Anschluss* and then Munich.

78. After the Second World War, however, a new situation had been created by the Nüremberg and Tokyo trials and especially by the adoption of Article 2, paragraph 4, of the United Nations Charter. Sir Hersch Lauterpacht had been right: the non-recognition of treaties imposed by force was most certainly a part of positive law.¹⁸

79. The Commission's conclusion should follow the lines laid down by the Special Rapporteur. The world was passing through a revolution due not only to the abolition of distance, but especially to the speed of communications, which enabled everyone to follow political events and made public opinion a key factor in international life.

80. The question whether a *jus cogens* rule existed did not worry him. The United Nations could act on its own initiative, not only at the request of an aggrieved State, which was not always in a position to report the coercion employed against it.

81. The rule stated in article 13 should apply *erga omnes* rather than *inter partes*; first, because of the obvious connexion between articles 12 and 13 — since all the instances in which article 12 applied were violations

of a principle of international law based on *jus cogens* — and secondly because the vital interests of the international community required that any obligations imposed by unlawful coercion should be invalid.

82. He agreed with Mr. Ago that there should be no question of affirming the treaty. He could accept the wording proposed by Mr. Rosenne except for the phrase "or in any other manner inconsistent with the purposes and principles of the Charter . . ." which would introduce matters dealt with in article 13. The categorical wording suggested by Mr. Ago should satisfy Mr. Verdross and Mr. Yasseen and give the Commission the basic formulation it needed.

The meeting rose at 1.5 p.m.

683rd MEETING

Monday, 20 May 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 12 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 12 (CONSENT TO A TREATY PROCURED BY THE ILLEGAL USE OR THREAT OF FORCE) (*continued*)

2. Mr. PAREDES, commenting on some points raised during previous discussions, said he fully supported the thesis that when coercion had been employed against one of the parties the treaty was void *ab initio*, or as some national codes had it, null and void, which meant that it was treated as though it had never existed. Mr. Tun-kin had emphasized the anxiety which such conduct caused, not only to the State directly concerned but to the community which had witnessed an immoral act and reacted against it. Indeed, he seemed to believe that every member of the international community was entitled to denounce the treaty, in much the same way as in municipal law any member of the public could report a crime.

3. In such cases there could be no question of ratifying the treaty or of legalizing it by any other means. It did not exist and had never existed, and the appropriate course was to conclude a new treaty, if the parties so desired, with all the necessary conditions for validity.

4. In his opinion the provision in paragraph 1 of article 12 would have more force and be more in keeping with the spirit of the United Nations Charter, which enjoined members to settle their differences by the means indicated in regional agreements, if the words "or of regional agreements in which all the contracting parties are participants" were inserted after the words "in violation of the principles of the Charter of the United Nations".

¹⁵ League of Nations *Official Journal*, 1932, Special Supplement No. 101, Vol. I, p. 87.

¹⁶ League of Nations *Treaty Series*, Vol. 165, pp. 27 ff.

¹⁷ United Nations *Treaty Series*, Vol. 119, pp. 48 ff.

¹⁸ See *Yearbook of the International Law Commission*, 1953, Vol. II (United Nations publication, Sales No. 59.V.4, Vol. II), p. 147, comment on article 12.

5. Many speakers had stressed the lack of a court competent to hear and settle international disputes, for in international relations there were not yet any judges to whom States were obliged to submit. That was, unfortunately, the case and the lack of jurisdiction was deplorable, for since the choice of a judge was voluntary it was hardly likely that anyone accused of any kind of international offence would submit to any jurisdiction. The only remedy then would be, as he had proposed, that the victim of aggression should be able to appear before the United Nations Security Council and declare the treaty void because of vitiation.

6. Mr. CASTRÉN said that, among the versions suggested for article 12, those of Mr. Verdross and Mr. Yasseen were fairly close to the draft article in that they referred to the obligations deriving from the Charter and to the principles of general international law.

7. While Mr. Ago's proposal was acceptable, he preferred that first put forward by Mr. Rosenne (682nd meeting, para. 27) and reintroduced by Mr. Tunkin and Mr. Tabibi. By referring to, and actually quoting the language of, Article 2, paragraph 4, of the Charter, that proposal removed all possibility of misinterpretation and laid down a sufficiently broad rule, since a reference to the purposes of the United Nations was made in that paragraph of the Charter. The fundamental rules of the Charter formed part of general international law, and as such bound even States which were not Members of the United Nations.

8. Since the ban on the use of force was of concern to the entire community of nations, paragraph 1 (c) and the whole of paragraph 2 should be deleted from article 12.

9. He gathered that Mr. Tunkin shared his opinion that a peace treaty dictated by a State which, though the victim of aggression, had won the war, was exceptional and should be regarded as valid, because a State which started a war of aggression was answerable for the consequences of its act. Nevertheless, the reparations demanded should be reasonable, as Grotius had maintained even in his day. He proposed that the Commission should refer to the case of peace treaties in the commentary.

10. Mr. TSURUOKA said he agreed with the majority of the Commission on the principle that treaties entered into by a State "through an act of force, or threat of force" should be deemed void. However, he hoped that the Commission, in enunciating that rule, would also settle the question of procedure and state that the treaty could be declared void only by an international tribunal to which the question had been submitted by the parties concerned.

11. He had two main reasons for that proposal. First, it was difficult to verify the existence of a threat of force or its use. There had been much discussion on the definition of aggression — a typical case for the application of article 12 — which gave rise to some scepticism regarding the proper application of that article. Secondly, it was difficult to establish that a party would not have consented to a treaty without the acts complained of. It was true that article 12 dealt with a question of public

order, but it also involved an aspect of the problem of vitiated consent. If the treaty was to be declared void, it was at least partly because consent had been vitiated.

12. If the argument that the question was exclusively one of public order were carried to its logical conclusion, every aggressor State would automatically be deprived of the capacity to conclude a treaty. But it was not always necessary or useful to invalidate treaties concluded by an aggressor State. Treaties on such matters as medical services or the exchange of prisoners, for example, should be recognized as valid, especially as the consent of the injured State was real. The Commission should take account of those facts and proceed with caution.

13. He therefore recommended a solution which, while protecting the victim's legitimate interests, would ensure the stability of international law.

14. Sir Humphrey WALDOCK, Special Rapporteur, commenting on the points made during the discussion said that as he had explained in the commentary, international public order was the principle on which article 12 was based. Quite apart from the law of treaties as such, the act of any State seeking to procure the conclusion of a treaty by the use or threat of force could be challenged as a violation of the rules of international law concerning the maintenance of peace proclaimed in the United Nations Charter, and could be brought before the Security Council or the General Assembly by the injured party, whether a Member of the United Nations or not, or by any other State even if it had no direct interest in the object of the treaty.

15. He had framed the article in terms of the right of the victim to invoke nullity, but not in a manner that would in any way exclude the right of any other State to raise the matter in a United Nations organ. That approach, however, as some members had pointed out, could open the door to unilateral and unfounded assertions of coercion to obtain release from treaty obligations, and a clear majority had emerged in favour of drafting article 12 in the form of a simple declaration that the illegal use or threat of force nullified a treaty. He had found the arguments put forward in support of such a formulation persuasive and unimpeachable in logic, since the principle clearly followed from article 2, paragraph 4, of the Charter, which had become a part of contemporary international law, but of course he still attached the same importance to procedural requirements for establishing that coercion had in fact taken place.

16. A State repudiating a treaty on the ground of alleged coercion without raising the matter in the United Nations would not easily escape the charge of having acted arbitrarily — a view that would be borne out by the provisions of the Charter. Mr. Tsuruoka's concern lest a victim of aggression be precluded from arriving at an agreement with the aggressor, say about the treatment of prisoners of war during the hostilities, was important, but did not affect the question whether or not the article should be expressed in terms of international public order.

17. If article 12 were to be re-drafted in that way, it must be kept quite separate from article 11 and must

also exclude any possibility of some form of ratification at a moment when the injured State was no longer subject to the influence of coercive action. As Mr. Ago had rightly pointed out, a new treaty could be arrived at, but only by means of a new transaction, even if the old text were used as a basis.

18. As far as the drafting of the article was concerned, he was inclined to favour a simple text of the kind suggested by Mr. Ago in some such terms as: "Every treaty the conclusion of which is procured by the use or threat of force in violation of the principles of the Charter of the United Nations shall be absolutely void".

19. A general wording of that kind was preferable to a text modelled on the language of Article 2, paragraph 4, of the Charter, which had to be read in conjunction with its other provisions concerning the use of force in self-defence or its use by the United Nations itself for the maintenance or restoration of peace. It was, after all, important to bear in mind the distinction, so emphatically brought out by Mr. Tunkin, between a treaty imposed on an innocent State and one imposed on an aggressor. A more general wording would be less open to the danger of conflicting interpretations.

20. Another reason for referring to the principles of the Charter rather than to the specific provisions of Article 2, paragraph 4, was that the former were generally regarded as part of international law and as such binding upon all States, whether Members of the United Nations or not, so that the problem of applicability to non-member States raised by Mr. Yasseen and Mr. Verdross would be solved.

21. The amendment to paragraph 1 proposed by Mr. Paredes would be self-defeating, since it would detract from the force of the general principle, which ought to be asserted in strong terms.

22. The CHAIRMAN suggested that article 12 be referred to the Drafting Committee for revision in the light of the discussion. No doubt the Special Rapporteur would also wish to make some changes in the commentary.

It was so agreed.

ARTICLE 13 (TREATIES VOID FOR ILLEGALITY)

23. The CHAIRMAN suggested that article 13 be taken in conjunction with article 1, paragraph 3 (c) of section 1, which contained a definition of *jus cogens*.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that article 13, which was of a rather general character, had been difficult to draft: he had explained his general approach to the subject fairly fully in the commentary.

25. For lack of a better, he had used the term *jus cogens*, which was not an entirely new concept in international law and was touched upon in the work of certain writers, including MacNair, but had not yet been at all fully developed. The concept was probably known in most legal systems, though it had no exact equivalent in common law countries. He agreed that article 13 should be discussed in conjunction with article 1, paragraph 3 (c), in which he had offered what was more of a description than a definition of *jus cogens*.

26. Paragraph 1 of article 13 stated the rule and paragraph 2 contained some examples, though not exhaustive, of what might be meant by violations of *jus cogens*. The examples were all fairly self-evident and each involved some element of international criminality, but he had deliberately refrained from going into too much detail. A general reference to violation of the principles of the Charter would not serve, because they were not all imperative in character.

27. Paragraph 3 dealt with the question of severance in its special application to the subject of article 13. The question of the extent to which it was permissible to separate illegal from legal provisions of a treaty might be controversial, and a special provision on the matter was needed in article 13, as the situation dealt with was different from that of treaties voidable on the ground of error. However, the paragraph could be left aside for consideration together with article 26 in section IV, which contained procedural provisions concerning severance.

28. Mr. BRIGGS said that the opening phrase of article 13 was not well chosen because a treaty constituted international law for the parties. Nor was it desirable to refer to its execution. It might be going too far to say that a treaty whose object was perfectly lawful was void because its execution infringed a general principle of international law.

29. While he understood the reasons why the Special Rapporteur had employed the expression "*jus cogens*", some other term ought to be found because, though it was sometimes used, it would give rise to difficulties. Personally, he had always avoided it and would be loath to try to explain its meaning.

30. He accordingly proposed that the article be redrafted in much simpler form to read:

"A treaty is void if its object is in conflict with a peremptory norm of general international law from which no derogation is permitted except by a subsequently accepted norm of general international law".

He had inserted the concluding proviso to cover the point dealt with in paragraph 4 of the Special Rapporteur's text.

31. Paragraph 2 should be deleted entirely, as it would give rise to unnecessary controversy.

32. He agreed with the Special Rapporteur's suggestion that discussion of paragraph 3 should be held over until the Commission took up article 26.

33. As to whether an article dealing with the subject of article 13 was necessary at all, he thought that the kind of provision he proposed was at least preferable to the method adopted in articles 8-12, which conferred on the party alleging injury a unilateral right of denunciation, although no adequate safeguards were provided in article 25.

34. At the previous meeting, he had criticized article 12 because he was concerned with the threat to the stability of treaties that would result from imprecisely drafted provisions on validity which, in the absence of compulsory jurisdiction, would allow a unilateral right to nullify.

35. In order to dispel any misapprehension about his views on the relation between compulsory jurisdiction and international law, he expressed his complete agreement with Mr. Tunkin's assertion that international law existed and was legally binding, even in the absence of such jurisdiction. But he questioned the utility of elaborating complex concepts of validity and nullity if they were to be left open to subjective interpretation instead of objective judicial determination, and were thus merely to provide States with new ways of evading treaty obligations.

36. The new text for article 12 just proposed by the Special Rapporteur was acceptable and he accordingly considered that article 13 should have its place in the draft.

37. Mr. YASSEEN said that the point raised in article 13 was as important as it was delicate: the invalidity — or, as some thought, the non-existence — of a treaty, the object of which was incompatible with a rule or principle having the character of *jus cogens*. The first question to be settled was whether peremptory norms could be said to exist in international law — whether there existed an international public order from which States could not derogate by agreement *inter se*. Personally, he would answer the question in the affirmative, but he thought that such peremptory norms were hard to identify and to apply. The concept of public order was generally recognized in municipal law, but was rather intangible, for it varied with time and place.

38. In international law, *jus cogens* raised not only the question of the autonomy of the will of States, but also that of the order of precedence of rules of international law. The point to be determined in any particular case was whether an international agreement could or could not conflict with a pre-existing rule of law. In municipal law, that problem of precedence was generally decided according to a specific criterion; it was not the substance of the rule but the body establishing it which determined its position in the hierarchy of rules of law. In France, for example, a legislative decree could be referred to the Conseil d'Etat because, although dealing with a matter for which the legislature was in principle competent, it was considered a mere regulation from the formal viewpoint.

39. In international law, however, the contracting parties themselves were the legislators and created the rules of law. The question what criterion should be adopted for deciding the order of precedence of the rules was therefore very complex. The criterion could not be the number of States accepting the rule, for that number was not always proportionate to its value and importance. Nor could it be the formal source of the rule; and it was particularly hard to say whether custom should always take precedence over a treaty rule, or vice versa. Thus the only possible criterion was the substance of the rule; to have the character of *jus cogens*, a rule of international law must not only be accepted by a large number of States, but must also be found necessary to international life and deeply rooted in the international conscience.

40. He agreed with the Special Rapporteur that it would be regrettable not to recognize the principle of *jus cogens*, for there was no doubt that a treaty designed to promote slavery, for example, or to prepare for aggression, ought to be declared void. All that was difficult to explain without recognizing the concept of *jus cogens* in international law. While it was difficult to define that concept in practical terms, the Special Rapporteur's method of giving a few examples could usefully be adopted. The examples would guide international practice and gradually bring out the rules necessary for international life and essential for its development — rules which could not be broken without giving rise to general indignation or severe censure.

41. The concept of an international public order was justified not merely, or even necessarily, by considerations of natural law; it derived from positive law, from the whole body of rules in force. Some rules relating to public order might be specifically recognized in treaties, but the absence of a clause explicitly stating that concept would not mean that the rule was purely dispositive. The true intentions of the parties had to be examined further to discover the true force of the rule.

42. The Special Rapporteur had rightly drafted paragraph 3 to make provision for cases in which only part of a treaty was void.

43. Paragraph 4 was necessary because it emphasized that *jus cogens* was not immutable and that the concept of public order must be free to evolve. So long as no supranational body existed, the international conscience was reflected in general multilateral treaties; the conferences which drafted such treaties expressed the needs of international life, echoed its trends and so had authority to determine the force of pre-existing rules.

44. Mr. TABIBI said he agreed with the conclusion of the Special Rapporteur in paragraph 1 of his commentary that "Imperfect though the international legal order may be, the view that in the last analysis there is no international public order — no rule from which States cannot of their own free will contract out — has become increasingly difficult to sustain". No State could ignore certain rules of international law when concluding bilateral, regional and international treaties. Those rules, which had the character of *jus cogens*, included the provisions of the United Nations Charter and of the conventions on slavery, piracy and genocide. It was therefore appropriate to include in the draft a provision such as article 13, stating that any treaty with those rules was void.

45. Many authorities held firmly to the view that treaties could be considered as *contra bonos mores* and invalid by reason of a conflict or incompatibility with a rule of customary or general international law. Over twenty-five years ago, in an article entitled "Forbidden Treaties in International Law" Mr. Verdross had already expressed a view which foreshadowed the solution embodied in article 13.

46. The position had become even clearer since the signing of the United Nations Charter, Article 103 of which read: "In the event of a conflict between the

obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

47. However, although he accepted paragraphs 1, 2 and 4 of the Special Rapporteur's draft article 13, he had reservations regarding paragraph 3. If that paragraph were retained as it stood, it would appear to permit the conflict of the provisions of a treaty with *jus cogens* rules and to open the door to the violation of such rules by permitting the severance of the provisions of the treaty. It was difficult to reconcile the suggestion in paragraph 3 that a treaty would not be invalidated by a minor infringement of a *jus cogens* rule with the correct statement in paragraph 5 of the commentary that "any treaty having an illegal object should be totally void and lack all validity until reformed by the parties themselves". It would be difficult to differentiate between minor and major infringements, in the absence of a provision for compulsory submission of the case to the International Court of Justice.

48. He accordingly proposed that paragraph 3 should be amended by the deletion of the word "if" and the words "is not essentially connected with the principal objects of the treaty and is clearly severable from the remainder of the treaty, only that provision..." The provisions of paragraphs 1 and 3 could then be combined.

49. The definition of *jus cogens* in article 1 was somewhat vague. He suggested that the question of the definition should be postponed until the Commission had agreed on the terms of article 13, when it could adopt a definition consistent with those terms.

50. Mr. ROSENNE said that article 13 dealt with an area of treaty law which was completely different from any so far discussed by the Commission. In the earlier articles, the Commission had been considering whether consent had been given to a treaty and, if so, whether that consent was vitiated. In the case contemplated in article 13, consent had been given to the treaty and that consent was not in any way vitiated; from the point of view of both form and substance, *prima facie* a treaty existed. The question which arose related to the object for which consent had been given.

51. The Commission should at some stage consider the question of the placing of article 13. It dealt with matters so fundamental that it should be given a more conspicuous position, but the Commission could take a decision on that point when it came to the second reading.

52. Because article 13 dealt with the object of consent, he could not agree with Mr. Briggs that there was any redundancy in saying that a treaty was void if either its object or its execution involved the infringement of a *jus cogens* rule.

53. In general, he supported the ideas of the Special Rapporteur and congratulated him both on his boldness in so lucidly expressing the content of article 13 and on the adroitness of his approach to a very difficult drafting problem.

54. He assumed the intention was that under article 13 treaties would only be void *ab initio* if they were in conflict with a rule of *jus cogens* in existence at the time they were concluded. The question of the effect on existing treaties of a rule of *jus cogens* which emerged subsequently raised different problems and was partly dealt with in other articles, notably articles 14 and 21. However, it should be considered whether all the provisions relating to *jus cogens* ought not to be brought together. For similar reasons it was necessary to consider whether the various provisions of *jus cogens* were fully consistent with the Special Rapporteur's proposals regarding the *rebus sic stantibus* doctrine.

55. With regard to the definition of *jus cogens*, he suggested that inspiration might perhaps be drawn from the explanation given by Sir Gerald Fitzmaurice in his third report, that *jus cogens* rules "involve not only legal rules but considerations of morals and of international good order".¹ He did not think it very material whether the *jus cogens* was embodied in positive laws or not. Furthermore, the question how far a rule was to be regarded as *jus cogens* might require specific determination in the light of the material context in which the rule was placed.

56. With regard to the use of the term "peremptory norm" in the Special Rapporteur's definition in article 1 and in the wording proposed by Mr. Briggs, he asked whether it was understood in the same sense by both.

57. Because of the novelty of the subject in a codification project, it might be of advantage to regard the present discussion as preliminary. The Commission would derive much benefit from the subsequent discussions in the General Assembly, the comments to be submitted by governments, and no doubt also from the views of writers.

58. He agreed with the Special Rapporteur that the treaties referred to in article 13 should be regarded as void, not merely voidable; they would then produce the same consequences as those coming under article 12. That approach, however, could give rise to certain problems. For example, what course should the Secretary-General of the United Nations adopt if a treaty which was invalid under article 13 were submitted to him for registration?

59. He shared the view that article 25 could with difficulty have application to a treaty which was void *ab initio*. It was probably in the general interest that treaties of the kind mentioned in article 13 should not be made and he recalled that the United Nations Charter contained provisions enabling the political organs to take cognizance of the situation which would arise in a flagrant instance of treaties void for the reasons mentioned in article 13.

60. With regard to paragraph 3, he was in general sympathy with the views expressed by Mr. Tabibi. It was difficult to accept the principle of severability at all unless the treaty itself made some provision for it. Any discussion of severability should be deferred until the Commission considered article 26.

¹ *Yearbook of the International Law Commission, 1958, Vol. II* (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 41.

61. A more important point, however, was that he did not believe that, in practice, there could be such a thing as a minor infringement of a *jus cogens* rule. If a rule of international law had the character of *jus cogens*, it would be a contradiction in terms to suggest that an infringement of that rule could be of a minor character.

62. Mr. PAL, referring to Mr. Rosenne's observations on the placing of article 13, said that in the common law systems, it was normal to approach the various problems dealt with in the order adopted by the Special Rapporteur. The question of the legality of the object was associated with the questions of capacity to enter into the agreement and reality of consent. He therefore had no difficulty with regard to the placing of article 13.

63. On the point raised by Mr. Briggs, he observed that, in domestic systems, objects as vitiating elements might be either those forbidden by law or those merely discouraged by it, and though all other requisites for a valid agreement were complied with, yet, if either of those two categories of objects were in the contemplation of the parties, the agreement would in the former case be illegal and in the latter case void. All illegal agreements were, of course, also void, but all void agreements were not necessarily illegal. Agreements, though not illegal, might be void in the sense that the courts would not enforce them. In the international field that distinction obviously had no place. There, to render the treaty void the object must be illegal and that seemed to him to have been the basis of the formulation of paragraph 1 presented by the Special Rapporteur. He therefore found the provisions of paragraph 1 acceptable.

64. With regard to Mr. Tabibi's views, whatever might have been the position when the international community was geographically more limited, there could be no doubt that an international public order existed now and that certain principles of international law had the character of *jus cogens*. The whole perspective of United Nations policy could be characterized as a value-orientated jurisprudence, directed towards the emergence of a public order in the international community under the rule of law. The Charter sought to establish a process by which the world community could regulate the international abuse of naked force and promote a world public order embodying values of human dignity in a society dedicated to freedom and justice.

65. The establishment of the League of Nations had marked the first pioneering effort to substitute the human device of some sort of constitutional government for the blind play of physical force in the conduct of international relations. The rules and machinery adopted in the days of the League of Nations had been intended to achieve the fivefold purpose of compelling States first, to respect each other's sovereignty, territory and legitimate interests; secondly, to abstain from imperialistic aggression and preparations for it; thirdly, to submit their disputes to international adjudication and to refrain from taking the law into their own hands; fourthly, to respect international agreements; and fifthly, to make compensation for injurious acts and violations of the law. Unfortunately, the subsequent

behaviour of States had shown their reluctance to apply those principles in international politics. That behaviour had been symptomatic of a fundamental crisis in the international legal system. Within a decade of the organization of the League, both the spirit and the letter of its rules and standards had been cast aside, thus bringing about a crisis in the international order and leading to the catastrophe of the second world war.

66. A few, perhaps only two, great powers had emerged from the war possessing national and economic power in its most highly concentrated form. However, the events of the two world wars had brought about the birth of gigantic forces in Asia and Africa and the world community was now confronted with the question of the principal co-existence of over a hundred States, and with the problem of co-ordinating different social systems in the international order. That situation demanded a mental adjustment as an actual condition of survival. It was in that context that the United Nations Charter should be studied and applied, so as to help the emergence of the essential order which it was the ultimate objective of the United Nations to achieve.

67. The Commission had already adopted that policy in its approach to article 12. Personally, he could accept the principle underlying article 13 and agreed with the Special Rapporteur in accepting the existence of an international public order. A system of treaties which relied merely on the interdependence of state interests and on the expediency of peaceful arrangements would result in a number of compromises but not in a system of international law and order. Public order should comprise a system of law which replaced a sense of obligation based on expediency by a higher allegiance to the principle of justice. A transition would thus be achieved from an immediately felt obligation prompted by obvious need to a continued obligation expressed in fixed principles; from a simple relationship between self and "another" to a complex relationship between self and "others"; from an obligation discerned by the individual self to the wider obligations defined by the community from a more impartial viewpoint.

68. In spite of the doubts expressed by some, international public order existed, albeit in an imperfect form, and therefore fully justified the inclusion in the draft of the provisions of article 13. He reserved the right to examine the details of the article on the second reading.

69. Mr. CASTRÉN said that, despite the difficulty of the subject matter, article 13 was well drafted; it was lucid, and the accompanying commentary was both full and convincing.

70. In paragraph 1, the Special Rapporteur had given preference to the principle of *jus cogens* over the formula "illegal under international law" proposed by Sir Hersch Lauterpacht. The definition of *jus cogens* had not yet been discussed, but the majority of the Commission seemed to accept the expression, which had, indeed, been used during the discussion of previous articles. In any case, it might be rather dangerous to try to specify at that point all the criteria for determining whether a rule was a *jus cogens* rule, as that would raise compli-

cated problems. *Jus cogens* was a general concept of law which did not need to be defined especially in connexion with the law of treaties. Accordingly, it was right to accept the proposition that a treaty was void *ab initio* if its object or its execution involved the infringement of a *jus cogens* rule and that the invalidity could not be cured by subsequent acts.

71. In paragraph 2 the examples given of treaties which were void under the provisions of paragraph 1 were well chosen. If the Commission decided to retain paragraph 2, sub-paragraph (a) should be drafted in the same terms as the corresponding part of article 12. The words "act or" in sub-paragraph (c) should be deleted, only the idea of omission being retained.

72. Paragraph 3 stated an exception to the general rule laid down in paragraph 1; hence paragraph 1 should open with the words "Subject to the provisions of paragraph 3".

73. Mr. AGO said he had no objection to the principles embodied in article 13; the Special Rapporteur had been right to adopt the idea of a peremptory norm of international law.

74. The concept of *jus cogens* defined in article 1, paragraph 3(c), would be considered later, but he must point out that in fact it only appeared in article 13 and might perhaps be defined in that article itself. Generally speaking, only terms which appeared frequently in the body of the draft should be defined in article 1. A definition of *jus cogens* was not really required; the phrase "general peremptory norm of international law" would be sufficient, with the addition, if need be, of the words "from which no derogation is permitted".

75. The Drafting Committee would thus be able to prepare an appropriate text for paragraph 1. He proposed, in particular, that the words "contrary to international law and" should be deleted and the wording modelled on that used in article 12, the whole strength of which derived, precisely, from its concision.

76. The substance of paragraph 2 was acceptable in principle, but he thought the two kinds of infringement dealt with in sub-paragraphs (b) and (c) should be combined in a single paragraph, for in some instances, such as genocide, it was hard to distinguish between them.

77. The case dealt with in paragraph 3 was rather academic. There were so few peremptory norms of international law, and they related to matters of such importance, that certain clauses of a treaty were hardly likely to survive if another clause derogated from a peremptory norm of international law. Even if the case was conceivable, paragraph 3 rather weakened the text and did not seem essential.

78. The idea expressed in paragraph 4 was correct in every respect, but perhaps not entirely necessary. The best example of a rule in a general multilateral treaty which abrogated or modified a rule having the character of *jus cogens* would be a rule laid down in a treaty codifying international law. It might indeed modify existing peremptory norms; only then there would be no derogation from a general rule by a particular rule, but rather

a replacement of one general rule by another. That went beyond the scope of article 13. He considered, however, that the paragraph should be dropped, as it might give rise to misinterpretation.

79. As to the substantive question raised by Mr. Rosenne concerning the import of paragraph 1 in the case of a treaty concluded before a particular rule had become peremptory, the meaning of the paragraph as drafted was certainly that any treaty infringing a general peremptory norm was void, whether it had been concluded before or after the norm had become peremptory. If the treaty had been concluded afterwards, it was void *ab initio*; if before, it became void as soon as the general rule became peremptory. A treaty by which the parties agreed to commit an act of genocide, for example, would have become void automatically at the moment when the principles relating to the prevention and punishment of genocide were adopted. There was no need to stress that point of interpretation in the article itself; it would be sufficient to mention such matters in the commentary.

80. The article's position in the draft had also been questioned. He had no fixed views on the subject, but he thought that article 13 should certainly follow article 12, since the two articles had certain common features and some of their strength lay in the fact that they affirmed adherence to the same principle.

81. Mr. BARTOŠ congratulated the Special Rapporteur for having adopted for article 13 a concept which had long been discussed by jurists, namely, the existence of an international public order overriding state sovereignty. Even if it could be said that self-limitation was practised by States which accepted the international order on a contractual basis, as it was to be hoped that they would also accept the Convention on the Law of Treaties, the starting point of the Special Rapporteur's thesis was the precedence of that order over the will of States. That was the most important element in the proposed text.

82. The question whether reference should be made to *jus cogens* rules from which States could not derogate by agreement *inter se*, or whether the formula proposed by Mr. Ago should be adopted, was secondary. It was difficult to use the term *jus cogens*, however, because it was subject to different interpretations according to the tradition of private law followed. As Mr. Gros had pointed out, it could be dangerous to use terms borrowed from private law.

83. What, then, was a general principle of international law? In 1949 he had expressed disagreement with Kelsen's view that the principles stated in the United Nations Charter were contractual, and not binding on States which had not accepted the Charter.² The development of international law, which had also been manifested in the adoption of the principles of the Charter, had not come to an end. He was more inclined to support the theory of Oppenheim, according to which,

² Kelsen, H., *The Law of the United Nations*, London, Stevens, 1950, pp. 106-110.

in order to be admitted to the international community, a State must first accept the principles of its legal order.³

84. Paragraph 2 might convey the impression that only acts which were criminal and liable to sanctions were covered by *jus cogens*. But judging by what he had heard during the discussion, he thought that the members of the Commission all had a broader conception of the content of *jus cogens*. He shared the view that *jus cogens* rules should have a much wider scope. The examples given in paragraph 2, sub-paragraphs (a), (b) and (c), were not in any way open to criticism in themselves; but if they remained in isolation they might give rise to a mistaken idea.

85. Turning to the question of the severability of the clauses of a treaty, he said that to his own knowledge, contrary to what Mr. Ago had affirmed, it often happened in practice that some of a treaty's subsidiary clauses were contrary to public order, whereas the substance of the treaty was in conformity with it. In that matter, French internal law should be followed, under which as little as possible of the content of a contract was voided. When it was possible to do so without upsetting the general balance of a treaty, only its subsidiary clauses should be voided, the validity of the effects of the general will of the parties remaining intact. However, the distinction was not always easy to make, for it could happen that what was asserted to be the principal object of an agreement had no other purpose than to divert attention from its so-called subsidiary clauses. Thus it was not easy to take a clear position on the matter with a view to drafting legal norms on the severance of subsidiary clauses.

86. On the other hand he shared Mr. Ago's opinion on the retrospective effect of *jus cogens* rules. The theory of retroactivity, which was best illustrated by the example of genocide, had been considered at the Vienna Conferences of 1961 and 1963, but had not been accepted by States in regard to the application of principles on which a mandatory character had been conferred by a treaty codifying provisions that had previously been contractual. It was also a question of principle; for what was called classical international law evolved through the modification of existing rules and the adoption of new ones. It would be regrettable to endeavour to retain vestiges contrary to the new provisions creating the *jus cogens* corresponding to the progressive development of international law.

87. Nevertheless, it should not be forgotten that neither international doctrine nor international practice unanimously acknowledged the retrospective effect of rules. Some writers maintained that rights acquired by States under former treaty provisions which were no longer compatible with the international public order subsisted even if the bases of international law changed. He did not agree. To cover that situation it was therefore important — contrary to what Mr. Ago had said — to formulate the point most explicitly in article 13. A commentary was certainly valuable for questions of theory, and teachers and judges would be able to refer to it; but

States would not consider themselves bound by the text of a commentary by the Commission, as had been clearly shown by the Geneva Conferences of 1958 and 1960 and the Vienna Conferences of 1961 and 1963.

88. On the question of the placing of articles 11, 12 and 13, he said that, despite some overlapping, those three articles marked a gradation in grounds for voidance, though they nevertheless dealt with three different subjects. They should therefore follow one another in their present order, whatever position might ultimately be assigned to them in the draft as a whole.

The meeting rose at 6.5 p.m.

684th MEETING

Tuesday, 21 May 1963, at 10 a.m.

Chairman: Mr. Edouard JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

ARTICLE 13 (TREATIES VOID FOR ILLEGALITY) (continued)

1. The CHAIRMAN drew attention to Mr. Pal's proposal, which had been circulated, that paragraph 1 of article 13 be amended to read:

“1. A treaty is void if its object is opposed to or inconsistent with the ends, purposes and principles of the United Nations.”

2. Mr. TSURUOKA said that, so far as theory was concerned, the concept of *jus cogens* existed in general international law and a treaty which conflicted with a *jus cogens* rule was void.

3. He agreed with the Special Rapporteur that the Commission should include that concept in its draft convention on the law of treaties, but he thought that article 13 should be drafted in simpler and more concise terms, because the idea of *jus cogens* was so clear in itself that it did not need to be elaborated. More elaborate drafting had been desirable in articles 11 and 12 in order to specify the practical form to be taken by that idea; but the same did not apply to article 13.

4. Three cases were conceivable in which article 13 would operate. The first was that in which the parties had deliberately concluded a treaty contrary to *jus cogens*. That would be, by the nature of things, a secret treaty, whose validity the parties would not dispute. Such a treaty would in fact be wholly void, but so long as it was kept secret, no country would have an opportunity of challenging its validity. Of course, if it were put into effect, the parties would be answerable for the consequences; but that was irrelevant to the matter under discussion. The second case was where the parties had concluded a treaty which they believed *bona fide* to be legal, but concerning which a third State held a

³ Oppenheim, L., *International Law*, 8th edition, 1955, vol. I, pp. 928-929.

different opinion. In those circumstances, the treaty would at least be presumed to be valid; and it was debatable whether it was wise to grant the third State the right to dispute the treaty's validity, for that raised a delicate question of interpretation. The third case was where the parties had sincerely believed, when concluding the treaty, that it did not contravene any *jus cogens* rule, but one of them had later come to consider that it did. There again a problem of interpretation arose, and that problem should be settled by an international tribunal.

5. Both from the theoretical and from the practical point of view it would therefore suffice if the Commission stated in its draft that any treaty inconsistent with a *jus cogens* rule was void.

6. Mr. LACHS said that the subject dealt with in article 13 was a vital one for contemporary international law, and concerned the demarcation between the formal and the substantive provisions of a treaty.

7. During recent years two perhaps conflicting trends had become discernible: on the one hand an enormous increase in the number of treaties being concluded and in the range of matters they sought to regulate, and on the other a growing number of general principles that were becoming part and parcel of *jus cogens* and thus constituting a limitation on the freedom of States in drafting treaty provisions if they were to comply with such binding rules and to respect the interests not only of third parties, but of the international community as a whole. The Special Rapporteur was to be commended on his judicious and interesting treatment of a difficult subject.

8. Some 80 years ago Bluntschli had singled out four types of treaty that were void for illegality;¹ the list had now become much longer, though that did not necessarily imply that all treaties concluded in the more distant past were legal. It would greatly contribute to the growing prestige of international law if the Commission could determine the relationship between the older treaties and contemporary international law.

9. With regard to the formulation of article 13, he had some doubts about the structure of paragraph 1. The fact of being contrary to international law should not be placed on the same footing as the consequence, which was nullity. Some re-drafting was necessary in order to separate the cause from the effect.

10. With regard to the examples in paragraph 2, although they were clearly included by way of illustration, there was perhaps some risk of piecemeal treatment in adopting that method. Sub-paragraph (a) referred to the use of force, but when that entailed armed aggression it became an international crime within the definition laid down in the Charter of the Nürnberg Tribunal.² Strictly speaking, the number of international crimes was relatively limited, but the range of illegal acts was much wider. There could be cases in which certain

treaty provisions violated international law, for example, by encroaching on the fundamental rights of third States, and were thus undoubtedly illegal though they did not involve crimes. The examples given in paragraph 2 should therefore be added to, and ought certainly to include treaties that were obviously unequal and treaties establishing spheres of influence.

11. He did not share the doubts expressed by some members at the previous meeting and considered that both acts and omissions should be mentioned in sub-paragraph (c).

12. Paragraph 3 contained a very useful and important provision that would allow parts of an international instrument not of an integral character, which were illegal, to be detached from the main body of the treaty. Such a provision would certainly be in the interests of the future development of treaty law.

13. On the question of retrospective effect, some treaties the provisions of which were legal when concluded might in the course of time become illegal. Admittedly, it was not easy to give expression to that idea, but it ought to be reflected in some way in article 13, the application of which could not be limited to the moment when the treaty was concluded, but must extend to the whole duration of its existence.

14. Mr. AMADO said that the Special Rapporteur's commentary on article 13 showed that very little had been written on *jus cogens* in international law. And yet, in municipal law the concept of public order had played a very important part; for example, when in earlier days a Brazilian landowner had arrived in England with his slaves, they had become free immediately on setting foot on English soil, where the institution of slavery was contrary to public order. The ideal would be that the concept of public order should have the same force in international law.

15. He admired the progressive spirit in which the Special Rapporteur had attempted to free the notion of *jus cogens* from the mists which enveloped it in international law. But when faced with the first sentence of the commentary on article 13, he could only envy those of his colleagues who, like Mr. Tsuruoka, found the idea of *jus cogens* so clear that it did not need to be defined. He was still wondering how article 13 could best be worded.

16. The problem, reduced to its simplest terms, was how to define illegality in international law, or how to specify the lawful or possible purposes of treaties; above all, the provision should be effective. Article 13 was necessary and its position in the draft articles was the right one, but the Commission should find an expression that was more generally understandable and less purely theoretical than "*jus cogens*". A reference to a general or fundamental rule of law might perhaps be appropriate. The expression "infringement of a general rule or principle of international law", used in article 13, might create difficulties of interpretation, for the question would arise whether "rule" and "principle" were two different things and whether the word "or" was being used disjunctively or conjunctively.

¹ Bluntschli, J. C., *Das Moderne Völkerrecht*, Nördlingen, 1878, 3rd edition, section 411, p. 237.

² *Charter and Judgment of the Nürnberg Tribunal*, United Nations publication, Sales No.: 1949.V.7, pp. 92-93.

17. He was also opposed to the enumeration of examples: he would prefer a statement of the principle alone.
18. With regard to paragraph 3, he agreed with Mr. Ago and Mr. Bartoš that every effort should be made to preserve everything that was good in a treaty.
19. Mr. YASSEEN'S question concerning the hierarchy of rules of law had underlined the connexion between article 13 and article 14.
20. Mr. TUNKIN said he hoped to resist the temptation to engage in a theoretical discussion. He was in general agreement with the principle stated in article 13 and with many of the comments already made, especially those of Mr. Ago, Mr. Yasseen, Mr. Tabibi, Mr. Lachs and Mr. Amado.
21. To an increasing extent, state practice and legal theory were being based on the assumption that there were some generally recognized principles of international law from which States could not derogate.
22. The fact that some generally recognized principles possessed the character of *jus cogens* was an innovation brought about by historical changes and by the fact that certain aspects of relations between States — even purely bilateral ones, but first and foremost those relating to the maintenance of peace — had become of interest to all. If the existence of *jus cogens* rules were admitted, it followed that a treaty infringing such rules must be regarded as void.
23. The Drafting Committee would, of course, have to discuss what term should be used to describe that relatively new phenomenon in international law, since the expression "*jus cogens*" might not be understood by laymen and indeed was often avoided by jurists themselves, as Mr. Briggs had pointed out at the previous meeting. Perhaps the expression "fundamental principles of international law", though not very precise, might be more intelligible.
24. The concept of international public order was understood differently by different writers. Some held that it was imposed as a consequence of natural law having its source in human nature or emanating from a divine source and independent of the will of States. History showed, however, that in the long run the laws governing the development of human society were decisive, and that once rules of international law ceased to correspond to those laws and to meet the demands of life, they sooner or later became a dead letter and disappeared. But the laws of development were certainly not legal in character, though they did ultimately condition the creation of rules of law by States through agreement, which he held to include not only treaties, but also custom.
25. On that point he had been misrepresented in the Sixth Committee during the General Assembly's seventeenth session by the United States representative, who had attempted to ascribe to him the view that rules of international law were the result of treaties alone. In fact he (Mr. Tunkin) had clearly expounded a different view stressing the importance of customary rules of international law created, in his view, by tacit agreement between States.
26. Some of the rules created by agreement between States in that broad sense were recognized by them as possessing the character of *jus cogens*. In other words, they were not rules imposed from above by the operation of some natural law. That being so, the Special Rapporteur had been right to include the provision contained in paragraph 4 of article 13, because a general multilateral treaty to which all or nearly all States of the international community were parties could abrogate or modify a rule of *jus cogens*. The contention of some authorities, including Sir Hersch Lauterpacht, that general rules could only derive from customary law might have been true fifty years ago, but with the great increase in the number of general multilateral treaties which were virtually universal in character, it was true no longer.
27. Although he agreed with the principle of paragraph 4, the Drafting Committee would have to consider whether that paragraph would not entail some modification of the definition of general multilateral treaties given in article 1 of Part I. Clearly, a multilateral treaty concluded between, say, five States, though it concerned general norms of international law or dealt with matters of general interest to States as a whole, could not be considered a general multilateral treaty.
28. With regard to paragraph 2, the examples given should include unequal treaties, the existence of which was of particular concern to newly independent States. Admittedly the case was covered in general terms by paragraph 1, since unequal treaties were contrary to rules of international law having the character of *jus cogens*, but a special reference to such treaties was undoubtedly needed. For purposes of definition, the language of the resolution adopted by the Afro-Asian Jurists' Conference in 1957³ could be used; unequal treaties were defined as treaties establishing gross inequality between the obligations of the parties.
29. He did not propose to comment on the separate problem of the settlement of international disputes.
30. He would like to hear the Special Rapporteur's reasons for referring to the "object or execution" of a treaty instead of simply to "a treaty".
31. Mr. PAL, referring to the simplified formula read out by the Chairman at the beginning of the meeting, said that at the risk of being accused of over-simplifying the text, he was proposing that a number of elements should be dropped from paragraph 1, in particular, the reference to *jus cogens*, which he agreed with Mr. Amado in finding somewhat imprecise. The term was not to be found in most books on international law, it was unfamiliar to lawyers trained in common law systems, and he himself had only become acquainted with it as a result of the Commission's discussions at the previous session; for those reasons, he thought it would be more appropriate in the commentary than in the text of the article.
32. The purpose of his own formulation was to bring the paragraph closer to the language of the Charter.

³ Afro-Asian Jurists' Conference, 1957, Damascus Bar Association, p. 233.

It would be for the Drafting Committee to decide which conjunction, "and" or "or", should be used between "purposes" and "principles".

33. With regard to Mr. Tunkin's proposal that a treaty should be declared void if there was a manifest inequality in the obligations undertaken by the parties, he could not agree that such inequality would suffice to make a treaty void. Some other element, such as undue influence, coercion, or the fact that one party had taken an unfair advantage of the other, must also be present; otherwise, it might be possible to invalidate a treaty between, say, the United States of America and a small State, on the ground that the United States extended benefits out of all proportion to the obligations assumed by the small State.

34. As to the examples in paragraph 2, since they were given only for the purpose of illustration, as was indicated by the opening words "In particular", there was no need to increase their number. He found the paragraph acceptable as it stood.

35. He agreed with those who suggested that paragraph 3 should be dropped, because its provisions were not altogether clear. Even under English law, it was not possible to carry the principle of severability as far as it was carried in paragraph 3; severability must have been contemplated by the parties themselves. It could be applied where several promises were included in one agreement; if one of the promises were found to be invalid, it was possible to maintain the others. Examples of severability were in practice confined to cases of restraint of trade; even in those cases, however, the original contract was examined and the judge had to be satisfied that the parties had contemplated the possibility of severance. He did not believe that a provision on those lines could be introduced into the international law of treaties.

36. He agreed with Mr. Tunkin that paragraph 4 should be retained. Its provisions were perhaps needed to help the progressive development of international law. It was desirable to cover the possibility of a change in the rules of international law having the character of *jus cogens*, since even those rules could not be final and stand for all time; all that paragraph 4 provided for was the possible progress of society.

37. The CHAIRMAN, speaking as a member of the Commission, said that he fully approved of article 13 and the ideas behind it, though he favoured a simplification of the text along the lines proposed by Mr. Briggs and Mr. Ago.

38. With regard to paragraph 1, he said that although he had always admired Mr. Pal's spirit of harmony and his anxiety to reconcile his warm support for the progress of international law with his concern for the stability of treaty relations, he thought his proposal would open the door too wide to a party wishing to escape its treaty obligations. A party acting in bad faith might invoke general grounds to claim that the treaty was "inconsistent with the ends, purposes and principles of the United Nations". As was well known, the purposes and principles of the United Nations were expressed in the Charter in the form of broad, general statements.

39. Personally, he did not favour the retention of a separate reference to the execution of the treaty. From the standpoint of the general theory of agreements, the term "object" included the execution of an agreement.

40. He was, however, in favour of dropping the term "*jus cogens*" and replacing it by wording drawn from article 1, paragraph 3 (c), of Part II. He accordingly suggested for the consideration of the Drafting Committee a formulation of paragraph 1 reading: "A treaty is void if its object involves the infringement of a general rule or principle of international law from which no derogation is permitted and which may be modified or annulled only by a subsequent norm of general international law". The words "from which no derogation is permitted" were necessary because they reflected the essence of what "*jus cogens*" constituted. The final proviso, specifying that a *jus cogens* rule could only be modified by a subsequent norm of general international law, should satisfy Mr. Ago and Mr. Tunkin by avoiding the confusion between general international law and general multilateral treaties.

41. He had no objection to paragraph 2, which gave examples.

42. It would be worth while to retain paragraph 3, but not in article 13; a more appropriate place would be in article 26, which dealt with the severance of treaties. It was hardly appropriate to introduce such a minor point in so important an article as article 13.

43. Paragraph 4 would become unnecessary if his proposal for paragraph 1 were adopted, since its final words covered the point dealt with in paragraph 4.

44. With regard to Mr. Tunkin's suggestion that an example of treaties which established a gross inequality of obligations should be added to paragraph 2, he could not agree that international law contained a rule on the subject which was above the will of the parties. International law proceeded from the opposite standpoint — that of the supremacy of the will of the parties.

45. To insert the example suggested by Mr. Tunkin would introduce into an article dealing with the legality of treaties a new defect in consent, known to French law as "*lésion*" and having no precise equivalent in the English language. In Roman law, the concept of *laesio enormis* had originated in the protection of minors below the age of twenty-five and had resulted in the emergence of contractual incapacity; it had subsequently been discredited because its abuse had led to contractual instability. Contemporary international law could not accept the concept of *lésion*, since its acceptance might, in practice, involve contractual incapacity for certain States, instead of the absolute equality prevailing today, and might affect the sovereignty and independence of States, which manifested itself, among other forms, in the capacity to enter into any treaty, as shown by the advisory opinion of the Permanent Court of International Justice of 5 September 1931 concerning the *Customs Régime between Germany and Austria*.⁴ In the light of that opinion, any suggestion for introducing the concept of *lésion* into international law would appear to be inimical to the principle of the sovereignty of States.

⁴ P.C.I.J., Series A/B, No. 41, pp. 37-54.

46. There remained the important question of determining whether inequality of obligations existed in a particular instance, and whether it would be for the parties themselves to decide the point. Even if a decision by a third party was accepted, international law provided no criteria for the determination of that question.
47. From the point of view of international relations, the introduction of that concept would be fraught with danger. In Latin America, for example, many States would be able to claim, under a provision along the lines suggested, that their various frontier treaties had resulted in a manifest inequality of obligations. Treaties over a century old might then be called in question, thereby opening a Pandora's box of difficulties in relations between States.
48. Mr. AGO said that, broadly speaking, he shared the views expressed by the Chairman. There seemed to be general agreement on the contents of article 13. A few questions of detail remained to be considered, and also the question whether certain paragraphs were appropriate.
49. The purpose of paragraph 1 was to state that a treaty was void if it derogated from a rule from which no derogation was permitted; that was very different from the idea of illegality of certain contracts, which Sir Hersch Lauterpacht appeared to have put forward. The Commission should now concentrate on the question of the peremptory norms of *jus cogens* and it might accordingly be well to change the title of the article and, taking account of what Mr. Amado had said, to delete the word "infringement", which introduced the idea of an unlawful act. There was no question of an unlawful act, and hence no question of responsibility; it was a question of derogation from a rule from which no derogation was permitted, and such derogation rendered the treaty void.
50. While he could not concur in everything Mr. Tunkin had said concerning the theory of custom, he agreed that the general rules from which no departure was permitted were either customary rules or rules which, while embodied in a treaty, were still valid as customary rules for States not bound by the treaty, and hence for States in general.
51. He agreed that it would be inadvisable to refer to both "general rules" and "general principles" of international law, for that would suggest that the Commission was attaching different meanings to the words "rule" and "principle"; he would suggest using some such expression as "general and peremptory rule from which no derogation is permitted".
52. He would prefer to avoid any reference to the principles of the United Nations Charter, because they were not all peremptory and, conversely, not all peremptory rules of international law were embodied in the Charter.
53. He had given further thought to the question of the desirability of giving examples, which arose in connexion with paragraph 2, and he thought it would be possible to give examples other than those already included in the draft — for instance, that of freedom of navigation on the high seas. But since it was intrinsically difficult to draw up a list of examples and since the peremptory norms might change, it would be better not to give any examples at all, and to allow the interpretation of the article to develop.
54. With regard to paragraph 3, he was grateful to the Chairman for his suggestion. It was, of course, true that a part of a treaty could be recognized as remaining valid, but that was rather a hypothetical case; besides, the contracting States might not find it easy to agree on which provisions of the treaty should be maintained, for the different parts of a treaty complemented one another and often established some sort of balance. The rule stated in the article would be more forceful if paragraph 3 were deleted.
55. Paragraph 4 was not necessary because it was self-evident that a *jus cogens* rule could not be set aside by a private agreement between States, but could be replaced by another general *jus cogens* rule.
56. Mr. TSURUOKA said he regretted that he had expressed himself so badly that Mr. Amado had misunderstood him. What the Commission was trying to express in article 13 was clear to everybody, and Mr. Ago had just stated it very simply: a treaty that was contrary to a peremptory rule from which no derogation was permitted was void. The ground was less certain when it came to defining the content of such rules.
57. He agreed with Mr. Ago that paragraph 1 should be re-drafted and the substance of the remaining paragraphs transferred to the commentary in order to facilitate the understanding and implementation of paragraph 1.
58. Mr. de LUNA said that Mr. Bartoš had rightly pointed out at the previous meeting that if the notion of *jus cogens* were accepted, that in itself implied the existence of rules of international law which prevailed over the will of States and from which no derogation could be permitted. Ever since 1932 he (Mr. de Luna) had been opposing the theory of state monopoly of international law, which had been upheld by the formalist positivist school predominant at that period. He was very glad, therefore, that the Commission had expressed support for a principle so essential to the maintenance of international peace.
59. Legal positivism presupposed a twofold limitation of international law. It isolated it from every economic, political, social or ethical context and regarded only the law emanating from the will of the State. Having confined international law within those bounds, the positivist school accepted it without expressing any judgement as to value and regarded it as a logically coherent system of rules arranged in a certain hierarchical order. According to that theory, international law, which reflected only the will of the State, was expressed as written law in the form of treaties and the judgements of international courts.
60. But that theory went too far, in that many treaties were no longer in force or were obsolete, even though they might not have been expressly denounced; a rule could not be interpreted outside the social context which had been the original reason for its existence. At the same time, it did not go far enough, because to

regard something experienced by society as *ipso facto* unsuitable for scientific investigation on the grounds that it was a purely metaphysical experience was to descend to negative metaphysics, which conflicted with the true bases of a positive science of law. To get out of the difficulty, the concept of customary international law was called in to shore up rules which could not rely on the formal will of the State, and the theory of legal self-sufficiency was used to adjust the rules of law to social values.

61. The positivist doctrine of law obviously could not recognize the existence of *jus cogens*, or, in consequence, that of an international public order. As Mr. Pal had so well demonstrated, every society was based on a *Weltanschauung* which was held in common by all its members. The positivist doctrine had been feasible in practice because the groups which had successively been in power in the nineteenth century had shared the same *Weltanschauung*. The international society of the period had been able to accept the idea of the unlimited will of the State because it had been relatively stable. But when a phenomenon such as Naziism appeared, the theory became questionable.

62. The contractual conception of international law, which did not recognize *jus cogens*, belonged to the time when international law had been only a law for the Great Powers. But modern international law had become universalized and socialized. The modern ideologies, of which there were at least three, must be co-ordinated if peaceful co-existence was to be achieved; for if they were not, mankind had no future. The notion of *jus cogens* ought to set bounds to the autonomy of the will of States; even if the Commission took the view that all past treaties contrary to *jus cogens* were void, international law would not be shaken to its foundations. What States lost would be balanced by their gain. At all events, selfish national interests could not be allowed to bring the common international weal to nought.

63. The essence of *jus cogens* was best defined *a contrario* by the concept of *jus dispositivum*. A distinction should be drawn between two kinds of *jus dispositivum* rules, namely, the rules from which it was possible to derogate by another rule of international law, by a unilateral act or by agreement between subjects of international law, and the supplementary rules which filled the gaps in a previous set of rules. In municipal law, it could not be said that a rule was a *jus dispositivum* rule because a subsequent law could derogate from it; if that were so, the whole of municipal law and of international law would be *jus dispositivum*. Similarly, it could not be said in international law that a rule was a *jus dispositivum* rule merely because, for example, a treaty between two States might be subject to derogation by virtue of a subsequent treaty.

64. The Special Rapporteur's definition was commendable because it satisfied moral, economic and sociological requirements which were essential for the existence of an international society, and were therefore imperative and absolute. They could not be ignored in international law, for either they would ultimately prevail or else the international community would vanish.

65. He agreed that paragraph 2 should be dropped, because the examples given in it illustrated what was prohibited, whereas *jus cogens* rules were constitutional rules of the international community and were not dependent on the will of States.

66. In paragraph 1, the words "contrary to international law" should be deleted, but the term "*jus cogens*" should be retained. Paragraph 3 should be retained, for the reasons given by Mr. Yasseen.

67. Mr. GROS said that, after so learned a debate, he would confine his remarks to positive law. From a purely pragmatic point of view, it could be said that the members of the Commission were in agreement on the purpose of their meeting, which was, after all, to draft an article of a convention to be submitted to States. A simple text would be best; to submit to one hundred and ten States an article which called for explanations and a definite position regarding the theory of law would not be sound procedure.

68. The purpose of article 13 was simply to state that fundamental rules existed in international law, from some of which no derogation was permitted. That was all that need be said, and it could be said in the terms suggested by Mr. Ago; a statement of the penalty, which was the nullity of the treaty, should follow.

69. An initial question then arose, and all the previous speakers had referred to it: the question of the content of that basic concept. That question arose in connexion with many other points of law, and precise definitions were not always attempted, for international law developed case by case through the slow progress of state practice and judicial decisions. Hence inability to define the content at present should not be regarded as a weakness; a definition would in any case be only approximate, for the law evolved and a definition could only be put in the general form of fundamental rules from which no derogation was permitted during a given period. The Special Rapporteur had brought that out very well at the end of paragraph 3 of his commentary to article 13, where he said: "Accordingly, the prudent course seems to be to state in general terms the rule that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in state practice and in the jurisprudence of international tribunals."

70. With regard to the intrinsic meaning of *jus cogens*, while accepting Mr. Ago's conception of those fundamental rules, he stressed that they were norms. The general principles of law were also rules, for otherwise they would not be generally accepted as governing international public order. Whatever term was used — general principles of law, *jus cogens* or basic norms — they were in fact rules of positive law.

71. That consideration led him to favour the simplified wording proposed for paragraph 1, namely, the deletion of the words "contrary to international law" and of the term "*jus cogens*".

72. The list in paragraph 2 did not raise any difficulty in itself, but it was not indispensable. It would be for the Drafting Committee to discuss that.

73. The hypothetical case dealt with in paragraph 3 seemed somewhat academic, since it involved giving an interpretation of a situation which might arise in other cases, in which the basic norms were not relevant. An interpretation of general treaties which did not deal with the problem of the exceptional basic norms might raise similar difficulties; besides, the effect of the disappearance of certain clauses on the balance of the treaty ought also to be considered. Those were general questions which need not necessarily be dealt with in article 13. He was therefore in favour of deleting paragraph 3.

74. In the light of the explanations given about paragraph 4, it would clearly be better to deal with that matter in the commentary.

75. While the discussion had been most interesting, he thought the time had come to refer article 13 to the Drafting Committee.

76. Mr. YASSEEN said he was convinced of the existence of *jus cogens*, which was a concept of positive law. The existence of *jus cogens* rules had been explained by reference to natural law; but it could be easily explained within the framework of positive law. For there was no doubt that States themselves could change the content of *jus cogens*. Paragraph 4 was therefore of some value, if only because it showed that *jus cogens* was a concept of positive law.

77. Paragraph 1 of article 13 merely stated the consequences of an infringement of *jus cogens* rules. It provided no guidance for recognizing the existence of a peremptory rule. It contained no substantive definition of *jus cogens*, and no criterion for distinguishing rules having the character of *jus cogens* from rules of *jus dispositivum* — optional or dispositive rules.

78. In the absence of any substantive definition and of any criteria, paragraph 2 was thus essential. The content of the concept of *jus cogens* should certainly be stated in the article by means of clear and precise examples, either those given by the Special Rapporteur or perhaps those mentioned by other members, so that States could refer to the content of *jus cogens* in international practice.

79. He had not changed his views on paragraph 3. International treaties should be safeguarded so far as possible, and paragraph 3 did so by making provision for the voiding of part of a treaty.

The meeting rose at 1 p.m.

685th MEETING

Wednesday, 22 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 13 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 13 (TREATIES VOID FOR ILLEGALITY) (continued)

2. Mr. ROSENNE said he thoroughly approved of the trend of opinion which had emerged during the discussion in favour of simplifying paragraph 1 by combining it with the definition in article 1, paragraph 3 (c), and dropping the term "*jus cogens*".

3. *Jus cogens* was a technical term which was not easy to explain to a non-jurist, and it should be remembered that the articles were going to be applied in very different circumstances by very different people. They would also have to be translated into several languages besides the official languages of the United Nations. The articles should be as clear and as self-contained as possible, even at the expense of *elegantia juris*.

4. The concept of *jus cogens* had existed in international law for a long time, even if in inchoate form. There were, however, profound differences of opinion as to the reasons for its existence and the foundations on which it rested; some based it on positive law, others on natural law, while yet others attributed to it a higher or even divine origin. But on one point there was general agreement — namely, that the concept of *jus cogens* expressed some higher social need. In principle, all legal rules were equal; the very concept of *jus cogens*, therefore, was a derogation from a fundamental legal principle. Ultimately, it was more society and less the law itself which defined the content of *jus cogens*.

5. In practice, the whole of article 13 would be given a restrictive interpretation, not only by courts, but also by other law-applying organs, such as political organs of the United Nations. There were two reasons for that: first, the article restricted freedom of contract, which was a fundamental principle of international law and indeed of international relations; secondly, it provided that treaties concluded in violation of its provisions were null and void. It was therefore essential to balance the rule embodied in the article with another fundamental principle of international law, which appeared in the United Nations Charter itself as a *jus cogens* principle: *pacta sunt servanda*.

6. In view of the wide philosophical differences that had emerged from the discussion, it was essential to retain the examples given in paragraph 2. In spite of their differences on other points, all members were agreed that those examples were illustrations of *jus cogens* principles. They differed on what additional principles should be included; their differences, however, were a warning of the difficulties which could be expected to arise in the application of article 13 and which must on no account be ignored. If the article was to have proper effect, it was essential that all those engaged in treaty-making, and in particular all international lawyers, should have a clear idea of what was meant by *jus cogens*, and an idea that was not merely philosophical or theoretical. A non-exhaustive list of examples should therefore be included in the article itself and not merely in the commentary, even at the risk of inelegant drafting.

7. He believed, moreover, that it was possible to establish objective criteria for determining whether a particular rule of international law had the character of *jus cogens*.

In that connexion, he agreed with Mr. Tunkin that the distinction between "general rules of international law" and "general principles of international law" was not of any great importance, though there was an advantage in retaining both expressions.

8. It was significant that the three examples given by the Special Rapporteur in paragraph 2 had at least two features in common. First, they were all embodied in some form or another, partly or wholly, in an international instrument; secondly, they had all been applied by courts, including the International Court of Justice, and other organs. For example, the rule stated in sub-paragraph (a) was contained in article 2, paragraph 4, of the United Nations Charter; it derived from the Pact of Paris¹ and had been applied by the Nuremberg Tribunal as *jus cogens*, and by the International Court of Justice in part of its judgement in the *Corfu Channel* case.² The rules stated in sub-paragraphs (b) and (c) had been applied by the Nuremberg Tribunal and other courts as existing international law and as *jus cogens*, though they might have a remote conventional origin in The Hague Conventions of 1899 and 1907. They had been reformulated by the International Law Commission and adopted by the General Assembly. The words of Sir Gerald Fitzmaurice, the United Kingdom representative, later a member of the International Law Commission and now a judge at the International Court, to the Sixth Committee on 3 November 1950 were very apposite: "Whatever views might be taken about the situation before the Charter of Nuremberg, the existing position was perfectly clear and no one doubted that the Nuremberg principles had become recognized principles of international law. The affirmation by the General Assembly was sufficient to make them so, so far as the Member States of the United Nations were concerned."³

9. 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 established the *jus cogens* duty of all States to co-operate in the suppression of genocide, holding that that duty was quite independent of the Genocide Convention itself and derived from the General Assembly resolutions on the subject.⁴

10. He had been much impressed by Mr. Tunkin's remarkable statement at the 682nd meeting in which he had viewed the second world war as a sanction: the coalition against the aggressors had actually been called the United Nations during that war and the United Nations of today was its successor.

11. He therefore believed that there existed elements which made it possible to determine with a reasonable degree of accuracy whether a given rule constituted *jus cogens*, bearing in mind that, especially where detailed rules were concerned, the question would have to be decided on the individual merits of each case.

12. He was not, of course, prepared to say that every General Assembly resolution, even those which constituted declarations, had *per se* the character of *jus cogens*. However, he certainly accepted the view that General Assembly resolutions could have some legal effect, though its precise extent would vary from case to case, and he was glad to note that there was an increasing body of legal opinion which agreed with that view. But having regard to the peremptory effect on treaties of the provisions of article 13, together with the presumed restrictive interpretation which that article would be given, it was essential not to work on the assumption that every General Assembly resolution — even when in the form of a declaration — constituted *jus cogens*.

13. Other objective criteria could be found. For instance, it was significant that discussion on the admissibility of reservations at conferences convened to draft multilateral conventions had largely revolved round the question of determining how far derogation from their provisions was permissible. A convention that permitted reservations to any of its clauses did not embody any *jus cogens* rule. If a convention prohibited reservations to some of its articles, there was a strong presumption that the contents of those articles constituted *jus cogens* with regard to the matter covered by the convention.

14. His conclusion was that it was necessary to include in article 13 a number of carefully chosen, adequately formulated and generally accepted examples. Subject, therefore, to drafting changes, he accepted paragraph 2, but urged the Commission to take a decision on the issue of principle before the article was referred to the Drafting Committee. If the examples were omitted, not only article 13 but the whole draft would become unworkable, unreal and unacceptable to governments.

15. He had not been convinced by the arguments adduced in support of paragraph 3, which might even contain a contradiction in terms. However, in view of the Chairman's proposal that that paragraph should be considered in connexion with article 26 on the severance of treaties, he would not elaborate further on the point.

16. With regard to the conflict between *jus cogens* and the *pacta sunt servanda* rule, he suggested that a treaty could only be considered void under a rule of international law which had the character of *jus cogens* and which had been in existence at the time when the treaty was concluded. He did not believe that, at that stage, the Commission could countenance the view that a treaty which had been validly concluded could become void under a new rule which had come into existence subsequently. The process of change in the rules of international law having the character of *jus cogens* should be carefully studied. In some areas, rules could change imperceptibly and modifications of old rules, or entirely new rules, could take many decades to become established. In other articles of the draft, the Special Rapporteur had dealt with the effects on a treaty of subsequent changes in the law. It was essential to confine the provisions of article 13 to rules having the character of *jus cogens* at the time when the treaty was concluded.

¹ League of Nations, *Treaty Series*, vol. 94, p. 57.

² *I.C.J. Reports*, 1949, p. 35.

³ *Official Records of the General Assembly, Fifth Session, Sixth Committee*, 233rd meeting, para. 5.

⁴ *I.C.J. Reports*, 1951, p. 23.

17. He also wished to reserve his position regarding paragraph 4, the wording of which could be construed, although that was certainly not the intention of its author, as enabling changes to be brought about otherwise than by formal amendment of the Charter in the case of rules having the character of *jus cogens* and emanating from the Charter.

18. Lastly, with regard to the position of article 13 in the draft, he had not been convinced by his critics. The contents of article 13 had no connexion at all with articles 11 and 12. Article 13 stated the cases in which a treaty was void and the consequences of voidance. It had been said that, in municipal codes, an article of that type would appear immediately after the articles on vitiation of consent. But there were some fundamental differences between international law and municipal law: the first was that international law was based on the principle of good faith; the second had been stated in very clear terms by the International Court of Justice in the *Right of Passage Case*, in its judgement of 26 November 1957 on the Preliminary Objections: "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."⁵ Apart from these two differences, it should also be remembered that, unlike international law, municipal law was applied under the control of judges and courts.

19. Mr. de LUNA said he had listened with interest to Mr. Rosenne's statement, which reflected the speaker's uneasiness over the widely different views of members of the Commission on the philosophical bases of *jus cogens*. It was generally acknowledged that *jus cogens* formed part of positive law; it was disagreement over the content of positive law which was the source of the difficulty. If the term "positive law" was understood to mean rules laid down by States, then *jus cogens* was by definition not positive law. But if "positive law" was understood to mean the rules in force in the practice of the international community, then *jus cogens* was indeed positive law. But surely, however divided opinion might be among its members, the Commission should set an example of peaceful coexistence in the domain of international law and adopt the ideas shared by the majority of its members.

20. As to the problem raised by paragraph 4, he thought that paragraph should be omitted.

21. Mr. Rosenne seemed to think that paragraph 3 was unsatisfactory because of the development of *jus cogens*. Actually, the reason for the change in *jus cogens* was that the legal conscience of the international community had progressed. A situation which had come into being wrongfully should disappear. Nor should that give any cause for anxiety, for international law was moving forward, not backward. He believed in the progress of humanity; the new principles of *jus cogens* which would be accepted in the future would certainly constitute an advance, and not a negation of the rules of the existing *jus cogens*.

⁵ *I.C.J. Reports*, 1957, p. 142.

22. Mr. AGO said he wished to clear up certain points, so that no misunderstanding would remain when article 13 was referred to the Drafting Committee.

23. Mr. Rosenne's statement had left him rather perplexed, for he had not had the impression that opinion in the Commission was really divided on the concept of *jus cogens* or peremptory rules. He thought the Commission had recognized that the rules in question were general rules from which no derogation was permissible, even by private agreement between two or more parties. Peremptory rules might be customary or even of conventional origin, provided that they had become general rules in the true sense of the term. They must accordingly be valid for all the members of the international community, and in particular they must be valid as customary rules for States which were not parties to the treaty laying them down.

24. It would be quite wrong to say that the United Nations Charter contained only *jus cogens* rules; but the contrary conclusion should also be avoided. Really peremptory rules were rare, and it was unlikely that they would ever be very numerous in international law.

25. On the question of the legal status of resolutions of the General Assembly, he felt bound to agree with Mr. Rosenne that they were not *jus cogens*. In fact the question did not even arise. The resolutions were not in themselves a source of international law, and hence could certainly not be the source of peremptory rules.

26. The idea expressed in article 13 was not entirely new. While it was true that some writers of the nineteenth and even of the early twentieth century had inclined to the view that in international law every rule was a dispositive rule, and while there was no doubt that the peremptory nature of certain principles had been affirmed mainly in recent times, he did not think that the concept of *jus cogens* or peremptory norms had been unknown to international law before the first world war. Some of the rules of the law of the sea, for example, which had come to be regarded as peremptory in modern times, had been peremptory in the nineteenth century, and even earlier.

27. Mr. Rosenne had raised the important question whether a rule of international law which became peremptory at a particular time affected only treaties concluded thereafter, or whether treaties concluded previously could be rendered invalid by such a rule. In the first place, he (Mr. Ago) thought it was wrong to speak of retrospective effect in the particular context. Secondly, a rule could not be described as peremptory if it allowed treaties to subsist which were contrary to its content, for that would be a contradiction in terms. He agreed with Mr. Rosenne, however, that it might be dangerous to state that idea too positively; he had mentioned it only because the contrary idea had been put forward. He did not think that the Commission should commit itself on that point in an article. The question should be settled by interpretation and practice, for the Commission's main concern should be to safeguard the existence of treaties.

28. Mr. TUNKIN said that Mr. Rosenne had drawn attention to the fact that members were not agreed on

the philosophical explanation of *jus cogens* and the sources from which it proceeded. But as Mr. Ago had pointed out, there was no disagreement on the juridical nature of *jus cogens*. The important point was that all members agreed on the practical issues that a rule having the character of *jus cogens* was one from which States could not contract out, and that such rules existed. There might be differences of opinion regarding the philosophical explanation of international law as a whole, or of different problems of international law. The essential point in the present discussion was that the Commission was engaged in the formulation not of a theoretical treatise, but of a draft convention. Members would not, of course, be able to agree on theoretical or philosophical issues; still less could they expect States to agree on such issues.

29. Mr. Rosenne appeared to have misunderstood him with regard to the second world war. He had never viewed that war as a sanction. He completely rejected the Kelsen doctrine and had never considered war as a sanction at all. In fact, he believed that even the old international law had never properly regarded war as a sanction.

30. He also regretted that the question of the legal effect of General Assembly resolutions had been raised. That question was not germane to the discussion, but since it had been raised, he felt obliged to state that on the whole he shared the views expressed by Mr. Ago and not those of Mr. Rosenne. The Charter, which constituted the basic document for the interpretation of resolutions of the General Assembly, made it quite clear that those resolutions did not impose legal obligations upon States. It was highly dangerous, and could do nothing but harm, to read into the Charter what was not there, especially with regard to General Assembly resolutions. To claim that such resolutions could impose obligations amounted to asserting the existence of a process of international legislation; that would alter the very nature of the United Nations. He agreed with Mr. Ago that General Assembly resolutions had their own place in the formation of rules of international law, but that they could never bring the law-making process in international law to completion. Rules of international law could only be established by custom or treaty.

31. Mr. YASSEEN said that, like Mr. Ago, he thought it could hardly be admitted that *jus cogens* rules and rules which contradicted them could exist simultaneously. The consequence of the formation of a new peremptory norm should be the voiding of all pre-existing rules incompatible with the new one. That was not a retrospective effect, but the immediate effect of the peremptory norm.

32. As to the force in law of General Assembly resolutions, although those resolutions were not a direct source of international law, they had an undeniable effect on the international legal order. An example had been given at the last session of the General Assembly in connexion with the 1960 resolution on colonialism. Some representatives had argued that resolutions of the General Assembly were merely recommendations, and that in consequence the 1960 resolution on colonialism

did not end the validity of the allegedly customary rules on which the colonial system was based. He had contended that the General Assembly resolution in question was the expression of the general opinion of States and could be regarded as proof of the disappearance of the psychological element indispensable for the maintenance of customary rules. Resolutions of the General Assembly, especially when they were adopted unanimously or almost unanimously, unquestionably testified to a development in world opinion which in certain cases could indirectly determine the desuetude of a rule of international law.

33. Mr. BARTOŠ said that Mr. de Luna's remarks at the previous meeting were a little embarrassing, for they suggested either that he had expressed himself badly or that he had been misunderstood. Far from being a metaphysician, he did not believe in the existence of an international legal order of abstract and absolute value which was imposed by the nature of things or which was constant. He was convinced that the international public order was merely the superstructure of the international community which resulted from the evolution of international society. It was the minimum of rules of conduct necessary to make orderly international relations possible.

34. He fully agreed with Mr. Ago, even though his reasoning might be different, that *jus cogens* did not necessarily originate in the United Nations; the Charter had given expression to certain ideas which had appeared simultaneously with a number of new possibilities. In every age, every international community had its public order, its peremptory norms. The norms were continually changing; the Charter did not mark the end of a process of evolution, but merely a stage in that process.

35. With regard to what had been wrongly called the retrospective effect of peremptory rules, he also shared Mr. Ago's view. New rules of public order became operative as from their acceptance and they produced an immediate effect on treaties concluded earlier. If that were not the case, there could be no progress. At the Danube Conference of 1948, for example, the representatives of certain States had raised the question of acquired rights.⁶ Moreover, two great principles had been proclaimed by the Conference — namely, the right of riparian States to be sole administrators of the international waterway and the equality of flags in navigation.⁷ The problem was outside the scope of the present discussion, but it was pertinent to mention that rights acquired under pre-existing treaties were valid so long as the order under which those treaties had been concluded subsisted; if the order changed, those so-called acquired rights should be extinguished or amended. In such a case — on the assumption, of course, that the change was due to evolution and not revolution — all jurists were agreed that the existing order should be preserved until after any such radical changes had occurred, when there must be a period of adjustment

⁶ Conférence Danubienne, Belgrade, 1948, Ministère des Affaires Étrangères, Procès-Verbaux des séances plénières.

⁷ *Ibid.* Convention relative au régime de la navigation sur le Danube, p. 373, article 1, and p. 379, article 26.

and transitional measures to facilitate the change-over from one régime to the other.

36. With regard to the authority of resolutions of the United Nations General Assembly — and those of the specialized agencies, which were sometimes even more mandatory in character — like Mr. Yasseen, he distinguished between formal authority and substantive authority. He agreed in principle that those resolutions had no binding formal authority. But some resolutions, such as those relating to questions of internal organization, had immediate effects for Member States and even for other States; they sometimes introduced rules which subsequently became general. Some resolutions adopted on the recommendation of the Fifth Committee, for instance, had introduced rules which had become the law of the Organization.

37. The rules of procedure of international conferences, although apparently concerned with procedure, in fact regulated certain substantive law relations between States. The resolutions of international bodies were not always direct sources of international law; but, as Mr. Yasseen had said, they expressed a state of mind. If they were followed by a long and frequent practice, they gave birth to a new concept. For instance, technical assistance, which was nowhere referred to in the Charter, had become an institution; relations of a certain kind had been established between contributing and recipient States, not only within the framework of United Nations activities, but bilaterally too, as a result of the many resolutions which had gradually clarified and modified those relations. Some resolutions represented the birth of a legal idea; others confirmed an existing rule. Accordingly, the resolutions adopted by international bodies were not negligible as sources of international law, even though their value as such was not always formally recognized.

38. The CHAIRMAN said that the Commission had held an interesting discussion, which would prove of value to all jurists on a number of points, including the question of the effect of General Assembly resolutions; it was his duty to point out, however, that that question was not germane to the article under consideration.

39. Mr. de LUNA said that, although he proceeded from entirely different philosophical promises, he found himself nearly always in agreement with Mr. Bartoš, for whose profound knowledge of legal technique, theory and practice, he had the greatest admiration. He had merely wished to say that Mr. Bartoš had given the true definition of *jus cogens*, when he had said that it was the minimum framework of law which the international community regarded as essential to its existence at a particular time; Mr. Bartoš had just repeated that definition.

40. While he had spoken more particularly of certain norms of *jus cogens*, it was by no means his claim that other norms derived from custom or treaty law did not exist in addition to those he had mentioned, which did not originate in the will of States.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that there seemed to be general agreement on the

concept to be embodied in article 13, but the problem was how to give it expression. He had used the term "*jus cogens*", which had the merit of brevity and did appear in the work of writers, eminent even if few in number. However, some members of the Commission had criticized the term on the ground that it was not sufficiently familiar to international lawyers, particularly in certain countries, and might be variously interpreted. That criticism would apply with even greater force to the expression "international public order"; personally, he had not been greatly impressed by those objections and thought that the phrase *jus cogens* could at least be conveniently used in the commentary. For purposes of cross reference in the articles themselves, once the principle of *jus cogens* had been formulated, it would be possible to refer to the rule laid down in article 13.

42. With regard to the formulation of article 13, the Commission's view seemed to be that the definition contained in article 1, paragraph 3 (c), in abbreviated form should be transferred to paragraph 1 of article 13.

43. Among the drafting suggestions made, some involved questions of substance. For example, Mr. Ago believed that the notion of infringement ought to be dropped, and although previous special rapporteurs and certain writers had dealt with the subject under the heading of illegality, he had now come round to the view that the rule should be expressed in terms simply of a treaty being void if it conflicted with a general rule of international law from which no derogation was permitted.

44. A slight difference of opinion had arisen as to whether reference should be made both to general rules and to principles. He had referred to both, having in mind that the International Court, in some of its decisions, had mentioned matters which it seemed more natural to speak of as principles than as rules, for example when invoking humanitarian considerations in its judgement in the *Corfu Channel* case. He had no strong views as to whether the double phrase or the word "rules" alone should be used, and the point could be referred to the Drafting Committee. He did not think that there was much difference between members on the substance of the matter. The difference related only to their views concerning the sources of international law. So far as he was concerned, when he spoke of a "principle", such as a principle of humanity being a rule of *jus cogens*, he was doing so on the basis that the principle was to be regarded as having been accepted as a rule of positive law.

45. Mr. Pal's amendment to paragraph 1 did not commend itself to him because it would narrow the scope of the provision; not all rules of *jus cogens* found expression in the Charter, nor were all the rules laid down in the Charter expressed as rules possessing the character of *jus cogens*.

46. Like the majority of members, he considered that article 13 should be placed in the section dealing with essential validity. He doubted whether the draft would be made any more acceptable if the article were given great prominence by being placed at the beginning. The concept it sought to set out was not new, but was not

perhaps very familiar to statesmen and might not be readily assimilated by them if it were given undue emphasis.

47. He agreed with Mr. Rosenne and Mr. Ago on the question of retrospective effect. In drafting the article he had assumed that what was known as the inter-temporal law would apply. In other words, all treaties would be covered by such a provision and the appearance of a new *jus cogens* would affect such pre-existing treaties as did not accord with it by making them no longer capable of being executed, though not invalidating the performance of the treaties in the past. He had attempted to deal with that question separately in section III, article 21 (A/CN.4/156/Add.1). The nineteenth-century conventions for regulating the slave trade were an obvious example of treaties which were valid when drawn up but subsequently became void by the development of a new rule of international law prohibiting the slave trade altogether.

48. In reply to the observations made concerning paragraph 2 of article 13, he explained that the purpose of the examples, all of which contained an element of criminality, was to indicate the kind of legal principles that were comprised in the notion of *jus cogens*. The article imposed restrictions on the freedom of States to conclude treaties and would, as such, be subject to the most careful scrutiny by them. It therefore seemed important to make clear that not every so-called fundamental principle of international law would be caught by those restrictions. States could, by agreement, freely derogate from many of those rules. Mr. Bartoš had, however, rightly pointed out that other principles not involving the commission of an international crime came under consideration and he had certainly not meant to exclude them. On the other hand he had not thought it advisable to attempt to codify the various categories of *jus cogens*. An alternative to expanding the list of examples would be to drop the paragraph altogether and deal with the matter in the commentary. He was inclined to favour the latter course, the more so as the full extent of *jus cogens* would only be determined ultimately by practice, the decisions of international tribunals and the pronouncements of political organs. The decision whether to retain paragraph 2, though involving points of substance, would partly depend on drafting considerations and could at the present stage be left to the Drafting Committee.

49. Opinion had been somewhat divided on paragraph 3, with some members advocating its deletion on the ground that to allow severance in order to maintain the validity of a treaty might appear to imply approval of a treaty which conflicted with *jus cogens*. As he had explained when introducing the article, he had inserted a provision on severance in the particular context of article 13 to draw attention to the fact that different considerations might apply there than in the case of error. The Commission should not take too hasty a decision about denying the possibility of severance in the former case. The sparse practice and little judicial guidance that existed concerning severance was in connexion with something close to *jus cogens*. He referred to the comment made in the International Court of Justice during the

case of Certain Norwegian Loans⁸ concerning so-called "automatic" reservations which some judges considered to be in conflict with the Statute of the Court. Without going into the question of how far the Statute could be regarded as *jus cogens* it was very clear that the Court regarded it as *jus cogens* for the parties. Some judges considered severance permissible; others did not. Thus paragraph 3 raised a real problem, but it was one that could be held over until the Commission took up article 26 in section IV.

50. Paragraph 4 had not given rise to any major disagreement, and it could be left to the Drafting Committee to decide whether or not the point could be covered in paragraph 1.

51. The references made during the discussion to the legal force of General Assembly resolutions were not altogether germane to the issue and he saw no advantage in pursuing the matter, on which his own views were not far removed from those expressed by Mr. Bartoš. It was necessary to distinguish between different kinds of resolutions in accordance with the different circumstances in which they were made.

52. The CHAIRMAN suggested that as, in the main, agreement had been reached on the substance of article 13, it could now be referred to the Drafting Committee, and the Commission could take up article 14.

It was so agreed.

ARTICLE 14 (CONFLICT WITH A PRIOR TREATY)

53. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 14, said that the question of conflict between treaties was a complex one, as any reader of the reports by his predecessor, Sir Gerald Fitzmaurice, or of his own commentary would appreciate. Members would note from paragraphs 1 and 2 that he had come to the opposite conclusion from Sir Gerald Fitzmaurice and Sir Hersch Lauterpacht, who had held that in certain cases invalidity could result from mere conflict with a prior treaty, and might therefore wonder why he had placed article 14 in section II. His reason was that the question had been discussed in the context of essential validity by McNair in his *Law of Treaties*, by Rousseau⁹ and by the previous special rapporteurs, though each of them had recognized that in some instances the problem was one of relative priority rather than of validity. If his general thesis in paragraphs 1 and 2, with the special provisions laid down in paragraph 3, were accepted, namely, that mere conflict of treaties did not raise the problem of nullity, but rather of priority, there might be good reason to transfer the article to another section. It did, of course, have obvious links with article 19, which dealt with implied termination by entry into a subsequent treaty. He had not yet formed any definite opinion as to the appropriate place for article 14 and wished to hear the views of the Commission before doing so.

⁸ *I.C.J. Reports*, 1957, judgement of 6 July 1957.

⁹ Rousseau, C., *Principes généraux de droit international public*.

54. The general problem dealt with in article 14 had some relevance to the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, which the General Assembly had asked the Commission to study further.

55. Mr. CASTREN said that once again the Commission was dealing with a difficult problem on which theory was divided and which the previous special rapporteur had treated with great caution. That being so, the Commission should seek guidance in practice, and in the first place in the case-law of the International Court, the body most competent in the matter. That was what the present special rapporteur had done. His draft of article 14 was simple and clear; the provisions proposed were workable, sound and prudent.

56. The Special Rapporteur had rightly emphasized that the Commission was not called upon to interpret the Charter of the United Nations, and had taken the adopted approach in saying that a treaty which conflicted with an earlier treaty should not be declared void; at most the draft should specify, without prejudice to the question of responsibility, which of the two treaties should prevail. As the Special Rapporteur said in his commentary, there were different kinds of treaties, governed by different rules. But it often happened that a single treaty contained elements of different kinds, which complicated the problem. The previous special rapporteur had distinguished a category of treaties which, in the event of a conflict, should take precedence over the others. Like the present special rapporteur, he (Mr. Castren) thought that the concept of *jus cogens*, or an equivalent concept, should be the criterion for deciding that certain treaties had absolute priority; that was the effect of paragraph 4 of article 14. The exceptions for which provision was made in paragraph 3 were also necessary.

57. The only provision of article 14 which he did not find entirely acceptable was that contained in paragraph 2 (b) (ii), under which the effectiveness of the second treaty could be contested not merely by a State which was a party only to the second treaty, but also by a State which was a party to both of the conflicting treaties. Such a case was doubtless rare in practice, but from the theoretical viewpoint it might be considered that that right should not be granted to such a State.

58. Mr. BRIGGS said that the Special Rapporteur's commentary on article 14 was extremely illuminating and convincingly demonstrated that conflict with a prior treaty did not raise any major issues of validity. The cases treated in paragraphs 1, 2 and 3 entailed limitations on capacity or stated the principle of priority. That being so, perhaps the Special Rapporteur's suggestion that the question of conflicting obligations be dealt with in a separate section should be adopted, in which case article 14 should perhaps be held over and re-drafted for consideration at a later stage.

59. Mr. ROSENNE said that he supported the views expressed by Mr. Briggs, but would go further than the Special Rapporteur, who seemed to favour combining parts of articles 14 and 19 in a separate section, and

urge that article 14 belonged to an entirely separate part of the draft — namely, that to be devoted to the application of treaties. Perhaps the Special Rapporteur should be asked to reconsider the whole question in that context.

60. He endorsed the general conclusion reached by the Special Rapporteur in his commentary.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that if the Commission agreed with the arguments he had set out in his commentary, perhaps after consulting the Drafting Committee he might be asked to state his views as to how the subject of article 14 should be handled.

62. Mr. TUNKIN said that the Commission needed time for reflection on the complex problem dealt with in article 14; no hasty decision ought to be taken.

63. Mr. PAL did not consider that the question of conflicts between treaties belonged to section II. He agreed with Mr. Tunkin that no immediate decision could be taken on the matter.

64. Mr. AMADO said that the Special Rapporteur had certainly had sound reasons for placing article 14 in the section concerned with essential validity. Moreover, in most textbooks the conflict of treaties was considered immediately after their validity. He hoped the Commission would take the opportunity of throwing new light on a question which, as he had observed at the previous meeting, was closely linked with that of the legality of the objects of treaties.

65. Mr. ROSENNE said he wished to withdraw the comment he had made regarding the second world war (para. 10 above) as a result of having misunderstood a statement made by Mr. Tunkin at the 682nd meeting.

The meeting rose at 1 p.m.

686th MEETING

Friday, 24 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

State responsibility: Report of the Sub-Committee (A/CN.4/152)

[Item 3 of the agenda]

1. The Chairman, opening the discussion on item 3 of the agenda, invited the Chairman of the Sub-Committee on State Responsibility to introduce the Sub-Committee's report (A/CN.4/152).

2. Mr. AGO, Chairman of the Sub-Committee on State Responsibility, summarizing the Sub-Committee's work, drew attention to the conclusions given in paragraph 5 and to the proposed programme of work set out in paragraph 6 of the report. The Sub-Committee had worked in an excellent atmosphere;

it had adopted its conclusions and recommendations — which were positive — unanimously, and had reason to be very well satisfied with the experiment made in preparatory work on a most difficult question.

3. Mr. ROSENNE, commending the Chairman and members of the Sub-Committee on their work, said that they had clearly gone into the subject thoroughly and a number of points about which he had felt some difficulty at the previous session had now been elucidated.

4. The Commission's original terms of reference regarding the topic of state responsibility had been laid down in General Assembly resolution 799 (VIII), in which the Commission had been requested "to undertake the codification of the principles of international law governing State responsibility". Later, however, they had been broadened by the recommendation in resolution 1765 (XVII) that the Commission should "continue its work on state responsibility, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations." He inferred from those resolutions that the General Assembly was looking to the Commission primarily for codification, though without excluding the possibility of progressive development.

5. The Sub-Committee's general conclusions were fully adequate and acceptable. The immediate objective should be to survey and evaluate the present state of the law and practice and to prepare precise draft articles covering the essential elements of the doctrine of state responsibility.

6. While he understood the reasons which had led the Sub-Committee to suggest, in footnote 2 to its report, that the question of the responsibility of subjects of international law other than States be left aside, he considered that the Special Rapporteur to be appointed on the subject would need to be careful in dealing with the question of the possible responsibility of States towards other subjects of international law and to avoid any lack of balance that could result from leaving aside a question which, *grosso modo*, did form part of the subject. That point should not be overlooked, even though that aspect of State responsibility perhaps more properly belonged to another subject on the Commission's agenda — namely, relations between States and intergovernmental organizations.

7. Assuming that the outline programme of work put forward by the Sub-Committee was accepted, the question remained what should be the next stage of the work. In view of the priorities already established by the Commission, he doubted whether much time could be devoted to state responsibility at its next — the sixteenth — session, and the best course might accordingly be not to require the Special Rapporteur to present a fully integrated set of draft articles in 1964, but to indicate what general line of approach he intended to adopt. Presumably time would be allotted for discussion of the subject at the seventeenth and eighteenth sessions.

8. In the meantime, some useful preparatory work could be done by the Secretariat, which might be asked to prepare a summary of the fairly lengthy discussions on state responsibility which had taken place in various organs of the United Nations, not only of those in the Sixth Committee; for example, there had been highly pertinent debates on sovereignty over natural resources. Such a summary would give an idea of the scope of the subject as seen by Members of the United Nations and of what problems were of particular interest to them.

9. It might be useful to re-examine the reasons for the failure, where state responsibility was concerned, of the 1930 Conference for the Codification of International Law¹ in the context of the broader treatment being proposed by the Sub-Committee. He made that suggestion because the Conference's failure in another domain, namely, the law of the sea, far from discouraging the Commission or the General Assembly from tackling that subject, had, in fact, provided a point of departure.

10. It might also be useful, though that could be left to the Secretariat's initiative, to prepare a digest of recent decisions of international tribunals on the lines of that relating to state succession (A/CN.4/151), classified in accordance with the programme proposed by the Sub-Committee.

11. Mr. PAL said he was in full agreement with the programme decided upon by the Sub-Committee, or rather with the recommended "main points to be considered as to the general aspects of the international responsibility of the State".

12. The Sub-Committee had unanimously agreed to recommend that, with a view to codification of the topic, the Commission should give priority to defining the general rules governing the international responsibility of the State. He entirely agreed with that decision of the Sub-Committee, especially as he felt assured that it did not exclude any feasible progressive development from the scope of the study.

13. The Commission was told that careful attention should be paid to the possible repercussions which new developments in international law might have had on responsibility. He took it that the expression "new developments in international law" was comprehensive enough to include all relevant new developments in international life. There would certainly be included many new historical factors not yet adequately assimilated in legal thinking on the subject. He felt assured of that from the gist of the discussions given in the summary records of the Sub-Committee's proceedings. Things that had happened or were happening in the economic, social and political order were inevitably reflected in the legal order; indeed, law must be the record of life's experience if a fatal unhinging of social relations was to be avoided.

¹ *Acts of the Conference for the Codification of International Law, Geneva, 1930, League of Nations, Vol. I, pp. 43-44 and Vol. IV.*

14. It was inexpedient to go into details of the programme at that stage; that could be left to the Special Rapporteur. The details would require careful study, however. For example, under the second point in the programme, "the forms of international responsibility", the duty to make reparation and perhaps the basis, if any, of such reparation, would have to be considered. The suggested inclusion of the doctrine of "unjust enrichment" would also be considered in that context, and the memorandum submitted on the subject by Mr. Jiménez de Aréchaga gave ample indication of the amount of study involved.

15. In dealing with the entire question of state responsibility, it was essential to remember that the State was an institution and that the question being considered was that of the responsibility of that institution in the discharge of its appointed task. It might not be possible to make a value-judgement on any particular conduct on the basis of timeless, absolute criteria, but the Commission might have to enquire whether and to what extent the conduct was "meaningful" at the time. The conduct would have to be examined to see whether and to what extent it was inevitable for the fulfilment of a given task. He would refrain from entering into further detail, however, and would only express his full concurrence with the recommendation of the Sub-Committee, so far as it went.

16. He suggested that when a special rapporteur had been appointed, the Commission should request him to prepare a complete plan of work, including special aspects of the subject, as had been done by the Special Rapporteur on the law of treaties. Priority should be given to the fields in which tensions that threatened the peace of the world had already appeared. Those fields would no doubt give rise to controversies and difficulties, but that was no reason for evading them. Every field of tension in international life should be brought under study and norms should be drawn up which could become instruments of the international community seeking to subdue the potential anarchy of forces and interests to a tolerable harmony. Beyond that general comment he did not, at that stage, wish to suggest any specific topic and preferred to leave the question to be dealt with when the complete plan was placed before the Commission by the Special Rapporteur, whom he hoped the Commission would appoint at the present meeting.

17. Mr. TABIBI said that the Sub-Committee's proposals were acceptable; he welcomed the fact that, in deference to the Commission's wishes, those of its members who had submitted memoranda had refrained from going into detail and had confined themselves to defining the general nature and elements of the doctrine.

18. The responsibility of States for the maintenance of peace was the most important topic, but responsibility for injury to persons and property had by no means lost its significance even with the acquisition of independence by many States. The feeling in the Commission on Permanent Sovereignty over Natural Resources had been that the work on state responsi-

bility should proceed rather faster. That Commission's report, as well as the relevant General Assembly decisions and documents, should be studied by the Special Rapporteur as an indication of contemporary opinion and the present-day needs of States.

19. Mr. CASTREN said that the Sub-Committee had done excellent work, respecting its terms of reference and taking into account the opinions expressed by the members of the Commission at the fourteenth session. He approved of the proposed programme of work, and was glad the Sub-Committee had unanimously recommended that, with a view to the codification of the topic, priority should be given to the definition of the general rules governing the international responsibility of the State. The Sub-Committee had also been right to propose that the Commission should leave aside the question of the responsibility of subjects of international law other than States.

20. He took it to be agreed that, in its future study of the subject, the Commission would take account of new developments in international law in other fields closely related to State responsibility.

21. Mr. LACHS said that to his regret he had been prevented from submitting a paper on state responsibility, as he had hoped, but he fully endorsed the general approach adopted in the working paper presented by Mr. Ago, whose profound knowledge of the subject was also reflected in the Sub-Committee's report as a whole.

22. Initially, views in the Sub-Committee seemed to have been divided over the treatment of the topic, but he was able to associate himself with the conclusion finally reached that it would be wise at the outset to define the scope of the doctrine and restrict the study to the responsibility of States. To go beyond that might lead to confusion and possibly to the construction of artificial concepts.

23. The question of the protection of the property of aliens certainly formed part of the subject and deserved attention. Even in that narrow sphere a new approach was necessary to take account of significant developments and many important changes, one of the most recent of which was an interesting decision of the Bremen Court of Appeal.

24. With regard to the points listed by the Sub-Committee for study, there could be no doubt that the question of the origin of international responsibility must be discussed. On the other hand, he wondered whether it would be wise to examine possible responsibility based on "risk" in cases where a State's conduct did not constitute a breach of an international obligation. On that point he agreed with the view expounded by Mr. Yasseen in the Sub-Committee: the problem would lead them into questions of *diligentia* and should be left outside the scope of the enquiry.

25. He had similar doubts about the wisdom of considering the important questions which might have to be examined in connexion with proving the events giving rise to responsibility, which were part of the law of evidence and as such should be left aside. The

Commission must concern itself with matters of substantive law. Once the legal basis of responsibility was established, the position would be clear, and special proof would be required only, if at all, in the so-called borderline cases. He held that view although he was aware, as any student of the proceedings of conciliation commissions and arbitral tribunals must be, that in the past there had been many cases involving the question of responsibility in which issues of evidence and proof had played a very large part.

26. He fully agreed with the Sub-Committee's sound and logical conclusions concerning the objective and subjective elements to be determined.

27. As for various kinds of breaches of international obligations, where subjective and objective elements might be found combined, perhaps some arrangement in the order of the problems to be studied would be needed and certain problems of drafting would call for discussion.

28. He had some doubts about paragraph 4 of the first point, in which "state of necessity" seemed to be placed on the same footing as "self-defence". The former had been invoked by States as a justification for violations of international law and in order to give legal sanction to acts essentially illegal, whereas self-defence was by definition qualitatively different.

29. The report as a whole deserved unanimous approval and represented a fresh and well-founded approach to an important topic of international law which was being placed in the proper perspective. The general directives proposed for the study of the subject formed a sound basis for the elaboration of draft articles reflecting the law and the consequences of its violation.

30. Mr. AMADO observed that the old theory of the international responsibility of States, which had been concerned essentially with compensation for injuries to the person or property of aliens, had given way to a more advanced conception in which the problem of sanctions occupied the foreground. For example, during the Sub-Committee's discussions Mr. de Luna, after referring to nuclear-weapons tests, which could pollute the atmosphere of the territory of States that had had no part in them, had maintained that it would only be necessary to say that an unlawful act had taken place; that a State had violated an obligation under international law.² The subject was expanding all the time, and that was why, despite the pessimistic forecasts that the United Nations was in danger of dissolution, he hoped that the Commission would keep on working, under United Nations auspices, to develop and codify the law relating to state responsibility.

31. It was most heartening to read a collective report which drew a single and unanimous conclusion from the opinions of a number of eminent authorities. Some of the Sub-Committee's members, such as Mr. Tsuruoka and Mr. Jiménez de Aréchaga, had taken the view that the future study should be restricted to very specific and traditional aspects of the subjects. Mr. Jiménez de Aréchaga's argument concerning unjust

enrichment in his memorandum on the duty to compensate for the nationalization of foreign property was certainly highly discerning and opened up wide prospects.³ Mr. Briggs and Mr. Gros, on the other hand, had upheld the view that the Commission should first establish the source of the international responsibility of States.⁴ He agreed with them that that line of inquiry was the key to everything else, and should be given priority over all related studies.

32. Mr. TUNKIN said that he had already expressed his views during the discussion in the Sub-Committee, but he wished to make a few observations on the report and on certain suggestions by previous speakers.

33. The essential part of the report was the plan of work set out in paragraph 6 which showed the various points to be studied by the future special rapporteur. It was important to remember that the enumeration of those points could in no way be considered as an expression of opinion with respect to substance. For example, under the first point of the plan, in paragraph 4, "state of necessity" was mentioned. That was because there had been cases in which States had referred to the doctrine of the state of necessity, so that it was essential for the Commission to express its opinion on the subject. But the inclusion of "state of necessity" in paragraph 4 did not mean the Sub-Committee placed it on the same level as "self-defence", and he fully understood Mr. Lachs' concern on that point.

34. The same applied to footnote 3 of the report, concerning the question of possible responsibility based on "risk"; the Commission would have to consider whether that question should or should not be studied as part of the topic of State responsibility.

35. With regard to future work, the Special Rapporteur on state responsibility should devote special attention to instances of state responsibility relating to the gravest breaches of international law, such as acts of aggression, violations of state sovereignty and refusal to grant independence to colonial peoples; that was the only logical approach. He fully agreed with Mr. Pal that the problems to which he had referred should be given due weight in formulating general norms for state responsibility.

36. With regard to footnote 4, he agreed with Mr. Lachs that the problem of proof was a separate one; procedural matters should not be mixed up with the substantive problems of state responsibility.

37. Mr. Rosenne had made a number of suggestions for documents to be prepared by the Secretariat. One of them entailed re-examination of the work on state responsibility done by the 1930 Hague Conference for the Codification of International Law. He did not feel that any useful purpose would be served by placing such a burden on the Secretariat; ample writings were available on the 1930 Conference, especially on its work on state responsibility. He supported Mr. Rosenne's other suggestions for documents to be prepared by the Secretariat.

² A/CN.4/152, annex I, p. 15.

³ *Ibid.*, annex II, pp. 1-21.

⁴ *Ibid.*, annex I, pp. 12-14.

38. He agreed with Mr. Pal that the codification of the topic of state responsibility should be accompanied by progressive development where necessary. The General Assembly had never limited the work of the International Law Commission in any particular field to codification alone. It had always been understood, both by the General Assembly and by the Commission itself, that in codifying any branch of international law the Commission should proceed with due regard to recent developments. The need to bear recent developments in mind had again been stressed in General Assembly resolution 1505 (XV) of 12 December 1960 on "Future work in the field of the codification and progressive development of international law". Certainly, in the specific field of state responsibility, the Commission would have to consider some proposals having the character of progressive development.

39. He fully approved of the suggestion that a special rapporteur should be appointed.

40. Lastly, he agreed with Mr. Ago regarding the success of the experiment of the two sub-committees. Whenever the occasion arose, the Commission should use that method to expedite its work.

41. Sir Humphrey WALDOCK said the Sub-Committee's report was a most useful document, as were the individual papers of members of the Sub-Committee. It was his understanding that the programme of work set out in paragraph 6 constituted a general directive rather than a strait-jacket for the future special rapporteur. His own experience was that thorough consideration of a topic was apt to reveal points which had not previously been contemplated.

42. With regard to Mr. Rosenne's suggestions on what the Commission should expect from the Special Rapporteur at the sixteenth session, the opinion of the future special rapporteur would be decisive on that point. For his part, however, he had some doubts about asking him to produce heads of articles that would present broad formulations rather than detailed provisions. Such a procedure might not enable the Commission to make the best possible use of its time. Detailed articles would ultimately have to be produced, and experience suggested that the whole discussion would then take place a second time, despite the fact that heads of articles had already been considered. An additional danger involved in that method was that it was often not possible to get a matter into proper focus until it was seen expressed in detailed provisions.

43. He agreed with Mr. Tunkin regarding the proposal for a paper on the 1930 Hague Conference. It would be sufficient if copies of the records of the conference were made available in the library.

44. He also agreed with Mr. Lachs and Mr. Tunkin regarding the need for both the Special Rapporteur and the Commission to take a very clear position on the problem of "state of necessity". Whatever view members of the Commission might hold on the inadmissibility of that plea in most circumstances, it had so often been resorted to by States in one form or another that it was essential to give prominence to a study of it. The Com-

mission should express very firm conclusions concerning that plea in order to remove the misconceptions which still seemed to exist in respect to it.

45. With regard to the question of proof, he also agreed with Mr. Lachs that questions of evidence should be kept separate from questions of substance. There were, of course, some points on which questions of responsibility and of evidence came quite close together. A good illustration was the argument submitted on behalf of the United Kingdom to the International Court of Justice in the *Corfu Channel* case, urging it to apply the doctrine of *res ipsa loquitur* for the purpose of establishing Albania's responsibility in respect of the explosions in her territorial waters. The Court had not been willing to accept the argument that Albania's responsibility should be made to depend on a presumption of law arising from the fact of the mines' being found in her waters. It had dealt with the question on a different basis from that requested by the United Kingdom, treating the matter as one of evidence and not of responsibility; on that basis it had held that the plaintiff State was entitled to a more liberal use of circumstantial evidence in such cases.⁵

46. With regard to the contents of the report, the Commission should deal with the broad lines and the general principles of state responsibility rather than with particular topics. He saw no reason to give special attention to one field of responsibility rather than to another. The Special Rapporteur on the topic would have to draw his examples from the experience available in the various fields in which questions of state responsibility had arisen in the past.

47. Mr. de LUNA said it was most gratifying that the report before the Commission should have been adopted unanimously; the credit for that was primarily due to the Sub-Committee's Chairman.

48. The first question to be considered was that raised by Mr. Rosenne. He agreed with Mr. Tunkin that in performing its task of progressively developing the law, the Commission was not limited by the resolutions which Mr. Rosenne had cited.

49. The main problem was how to resolve the conflict between the theories of subjective and objective responsibility. According to the former, *faute* alone could originate responsibility. That theory was based on Roman law, in which *dolus* was contracted with *bona fides* and *culpa* with *diligentia*, even though Roman law had also known responsibility without *faute*, for example, in the case of the loss of goods or animals entrusted to the care of boatmen, innkeepers or ostlers. The opposite theory admitted responsibility independently of *faute*, for example, responsibility by reason of risk or of the breach of a rule of international law. That view, which was of Germanic origin, had entered international law through common law.

50. Practice was not uniform, however. It was possible to interpret in the sense of objective responsibility the Island of Palmas case,⁶ article 3 of Hague Convention

⁵ *I.C.J. Reports*, 1949, p. 18.

⁶ *American Journal of International Law*, 1928, Vol. 22, p. 867.

No. IV of 1907,⁷ article 14 of the draft declaration on the rights and duties of States prepared by the Commission itself,⁸ and several decisions of the International Court of Justice, the Permanent Court of Arbitration and the General Claims Commission. But in other cases, no less numerous, it seemed that the theory of subjective responsibility had prevailed.

51. Thus the concepts involved were vague and they had been variously interpreted by writers, mainly under the growing influence of common law, which applied to about a third of the world's population. Anzilotti, Borchard, Briggs and McNair had given preference to objective responsibility, whereas Oppenheim had favoured subjective responsibility. In a resolution it had adopted in 1927, the Institute of International Law had enunciated a general rule based on subjective responsibility, but had acknowledged the existence of cases of objective responsibility. Conversely, in the preparatory documents for the 1930 Hague Conference for the Codification of International Law, emphasis had been placed on objective responsibility, while the existence of cases of subjective responsibility had been acknowledged.

52. With regard to the Hague Conference, it would be most useful if members could consult the relevant documents more easily.

53. Even though practice and theory seemed to be evolving rather towards the concept of objective responsibility, it was certain that both concepts would continue to exist. The Commission should therefore begin by stating clearly its position on the problem raised by the first point in its programme of work, "origin of international responsibility", before continuing its study.

54. Mr. LIANG, Secretary to the Commission, said it was at Mr. Rosenne's suggestion that the Secretariat had undertaken the preparation of its memorandum on resolutions of the General Assembly concerning the law of treaties (A/CN.4/154), which had proved useful to members of the Commission. He believed it would be equally useful to prepare a memorandum summarizing the discussions and the resolutions of the various United Nations organs on the subject of state responsibility. There had been occasional discussions bearing on the question in various United Nations organs other than the International Law Commission, and there was a formidable mass of documentation on the work of the Commission on Permanent Sovereignty over Natural Resources. A voluminous study by that Commission had been printed. There could, of course, be no question of summarizing the discussions of the Commission on Permanent Sovereignty over Natural Resources, because that Commission had its own summary records. The study itself, a scholarly document, should not be summarized, but would be available in printed form to members of the International Law Commission. The Secretariat could furnish a summary of the discussions and decisions of other organs of the United Nations on state responsibility

and an index to the work of the Commission on Permanent Sovereignty over Natural Resources.

55. With regard to the work of the Hague Conference of 1930, he recalled that in 1946 the Secretariat had prepared a very full memorandum⁹ for the United Nations Committee of Seventeen appointed by the General Assembly under its resolution 94(I) of 11 December 1946 on the "Progressive Development of International Law and its Codification"—the Committee on whose recommendation the International Law Commission itself had been established by General Assembly resolution 174(II) of 21 November 1947. That memorandum dealt at length with the work of international conferences on the codification of international law, and from an informal conversation he gathered that it corresponded in part to what Mr. Rosenne had had in mind. It was therefore unnecessary to undertake any further work. Personally, he believed that the failure of the Hague Conference of 1930 had been due to several causes; a great deal had been written on the subject and much space was devoted to the Conference in the memorandum he had referred to.

56. He thought that the digest of international decisions requested by Mr. Rosenne would be a very useful document, and the Secretariat would be glad to prepare it in suitable form.

57. Mr. BARTOŠ, after congratulating the Sub-Committee on its excellent work, said its report was so lucid that he could endorse it almost without reservation, but he did not agree with all the ideas expressed by members of the Sub-Committee, either in their memoranda or during the discussions. He expressed his satisfaction that certain questions had not been mentioned in the text of the report itself.

58. He agreed with Sir Humphrey Waldock that the Special Rapporteur's task would not be easy, even if a list of the questions to be examined had been drawn up. In one week, the Sub-Committee had not been able to solve all the problems involved or to lay down all the main lines to be followed in the work. Nor would the Commission be doing so merely by approving the report; that would be unscientific, for it should examine the questions of substance before deciding on the broader trends, especially as the topic was so controversial with regard to both practice and theory.

59. With regard to the question raised by Mr. de Luna whether the theory of *faute* should be considered as well as that of responsibility based on risk, he would not revert to the objective element in responsibility, since several speakers, Mr. de Luna in particular, had dealt with it very fully, but would merely draw attention to the connexion between risk and the state of necessity. In modern times, necessity could not be pleaded in defence of a wrongful act, without taking account of certain forms of responsibility, not only where a state of necessity had its origins in a *faute*, but also where acts performed in a state of necessity produced certain consequences. An act regarded as entirely excusable

⁷ Scott, J. B., *Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press, p. 103.

⁸ *Yearbook of the International Law Commission, 1949*, p. 286.

⁹ A/AC.10/5.

would not be an international wrongful act; but some risks should nevertheless be accepted by those in a state of necessity.

60. International case-law and practice recognized such risks. In maritime law, for example, there were cases in which no one was at fault, but in which certain liabilities were shared between States as between parties. In a civil war the case-law recognized responsibility incurred by the State in whose territory the war was fought, even though that State could not be said to be at fault by reason of any positive act or omission. The act might be entirely excusable, and, if so, it was not wrongful; but the fact remained that damage had been caused, so that very often the question of responsibility subsisted. In such a case there might be interstate responsibility, and it was based on risk, which also existed in international law.

61. The Sub-Committee had been right not to include specific individual cases of *faute* in its list and to confine itself to the general principle of state responsibility. He would not for the moment express any opinion on the positions taken or the situations considered by some members of the Sub-Committee in regard to that point in their remarks or memoranda.

62. He must make reservations, however, concerning the consent of the injured State as a circumstance nullifying the wrongfulness of an act. For that raised not only the question of presumed consent, which was relevant to the main problem of the law of treaties before the Commission at that session, but also the question of the limits of consent. His approval of the proposed programme as a whole did not imply that he agreed that the Sub-Committee should be free to adopt the notion that the consent of the injured party could be accepted as a circumstance which always nullified the wrongfulness of the act entirely. He made reservations on that point, although he would not object to its being mentioned in the text of the report itself.

63. The expression "collective sanctions" was used on page 4 in paragraph 3 of the second point. That expression could be interpreted in two different ways in international law; what the Sub-Committee had no doubt had in mind was collective sanctions as provided for in the League of Nations Covenant and defined in the United Nations Charter, namely, sanctions imposed by the international community, not sanctions directed against a group of persons or a people, which had sometimes been called "collective" and which belligerents and occupying Powers were forbidden to apply.

64. The Sub-Committee had rightly refrained from including individual responsibility in paragraph 3 of the first point. The Genocide Convention¹⁰ and the principles of the Nuremberg Charter¹¹ had postulated it in its most explicit form, but it was not the concern of the Sub-Committee or of the Commission. Acts by individuals had to bear some relation to state responsibility, but the Commission should concern itself for

the time being, whether by prohibition or by sanctions, only with state responsibility arising out of acts committed by individuals. In maritime law omissions by individuals might also involve the State's responsibility, as they did under the rules concerning the laws and customs of war on land laid down in the Hague Convention,¹² which made a State responsible for all breaches of those rules by members of its armed forces.

65. In dealing with the question of reparations, the Sub-Committee had been right in using the word "compensation", but what did compensation really include? An American theory of compensation was set out in one of the memoranda (A/CN.4/152, annex II, p. 1), but it was by no means certain that all the necessary conditions for compensation had always been so clear in international law. It might be considered that compensation would not always be paid in full, but would be proportional to the responsible State's ability to pay; in other words, for purposes of determining the amount of compensation to be claimed, that State would be treated, by a kind of quasi-analogy, in accordance with the modern rules applicable to bankrupts. In dealing with Germany the injured States had made a global claim to which liability was limited, and had declared beforehand that they were being compensated for the wrongful acts of the Third Reich. In the case of Italy and the other States with which peace had been concluded in Paris in 1947, a lump sum had been claimed, taking account of the ability to pay. That system was very often applied in practice, in cases of compensation to foreigners for expropriation of property.

66. The notion of compensation need not be defined yet, since the general principle was under consideration; the Commission could take that question up later, after considering any proposals submitted to it.

67. The CHAIRMAN, noting that practically all the members of the Commission who were not members of the Sub-Committee on State Responsibility had expressed a favourable view on the Sub-Committee's report, invited Mr. Ago, as Chairman of the Sub-Committee, to sum up the discussion.

68. Mr. AGO thanked the Commission for its appreciation of the Sub-Committee's work.

69. First of all, he wished to reassure all the speakers who had expressed concern at the fact that certain points had been mentioned in the Sub-Committee's report. Neither the Sub-Committee as a whole nor its members individually had expressed a final opinion on how the problems discussed should be solved. For example, the references to consent of the injured party and to the state of necessity did not mean that the Sub-Committee regarded them as circumstances which in every case nullified the wrongful nature of certain acts or omissions. All that the Sub-Committee had wished to do had been to remind the future Special Rapporteur that, however they might be settled, he would have to take those questions into account in his treatment of the subject as a whole.

¹⁰ United Nations, *Treaty Series*, Vol. 78, pp. 278 ff.

¹¹ *Charter and Judgment of the Nürnberg Tribunal*, United Nations publication, Sales No.: 1949.V.7, pp. 91 ff.

¹² Scott, J. B., *op. cit.*, pp. 100 ff.

70. Sir Humphrey Waldock, with the very wide experience he had gained during two years as Special Rapporteur, had said that the instructions given to the special rapporteur on State responsibility should not impose induly strict limitations on his work. A plan of work, which was what the Sub-Committee had drawn up, could include fairly detailed suggestions; but the Special Rapporteur would inevitably find some gaps when he came to the heart of the matter, and would have to make some adjustments. Even though the Commission and the Sub-Commission were in full agreement on the main lines of the programme, it must be possible to depart from it when going into the subject more thoroughly.

71. It had also been asked whether the main emphasis should be on codification or on progressive development. There again, just as he did not believe it possible to draw a clear dividing line between those two activities, he did not think it possible, either, to foresee whether one of them should take precedence over the other. A final conclusion on the matter could not be reached until the substance of the problems had been examined. Neither the Commission, nor the General Assembly or the Sixth Committee, could decide beforehand which points should be codified and which were suitable for progressive development. The Special Rapporteur would first have to submit rules on each point in the light of experience, of reality and of the case-law, which was fairly abundant on certain aspects.

72. Another question was what work the Commission might ask the Secretariat to carry out. A kind of index of everything done or said by the various organs of the United Nations about State responsibility would be very useful to the Special Rapporteur. The work of the 1930 Codification Conference was certainly quite well known and the memorandum which the Secretary had mentioned might be very useful. The documentation on the subject was sufficient, but what would be especially useful would be a collection of the leading cases. It would suffice if the Secretariat prepared a full and accurate index, showing the sources.

73. Provisional work and discussion would probably be of little use, and would duplicate the Sub-Committee's work. The connexion between a principal provision and secondary provisions would only become apparent when the subject was studied as a whole. Thus there was some danger of doing work which would have to be entirely revised the following year. For that reason, and because the Commission would first need to have all the documentary material the Secretariat could provide, and because a great deal of research would be needed before a report could be written, he thought the item should not be placed on the agenda for the 1964 session; a preliminary report should not be scheduled until 1965. Besides, it would be a pity to take up valuable time which might be spent completing the work on the most important subject of the law of treaties.

74. The first report need not necessarily cover the whole subject; it could be confined to the first point, leaving the second till later. That division would be practical, and consistent with the method adopted for the law of treaties. But those were merely suggestions; the Com-

mission could take the necessary decisions as its work proceeded.

75. The CHAIRMAN, after thanking Mr. Ago for his able summary of the discussion, said that, if there were no objections, he would consider that the Commission agreed to approve the report of the Sub-Committee on the understanding that the outline programme of work it contained was without prejudice to the position of any member regarding the substance of any of the questions mentioned in the programme. It was also understood that the outline would serve as a guide to the Special Rapporteur without, however, obliging him to follow it in detail.

It was so agreed.

76. The CHAIRMAN said that other points, such as the time for submission of the report, would be taken up at the end of the present session. There remained, however, the important question of the appointment of a special rapporteur for the topic of state responsibility. Mr. Ago, Chairman of the Sub-Committee on State Responsibility, had already been mentioned several times as the member best qualified to undertake the task. He therefore invited the Commission to indicate its approval of Mr. Ago's nomination.

Mr. Ago was appointed Special Rapporteur for state responsibility by acclamation.

The meeting rose at 1 p.m.

687th MEETING

Monday, 27 May 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

(resumed from the 685th meeting)

1. The CHAIRMAN invited the Commission to resume consideration of article 14 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 14 (CONFLICT WITH A PRIOR TREATY) *(continued)*

2. Mr. LACHS, stressing the importance of article 14, commended the Special Rapporteur for his approach and particularly for his commentary. The article raised certain issues of principle and his doubts had not been dispelled by the discussion. In view of the increasing number of treaties and of the danger of incompatibility of their provisions, the Commission must lay down rules for the guidance of States. Its primary concern should be the security of international transactions and the protection of the interests of parties to a treaty who

wished to rely on its provisions. The parties could not be left helpless when certain signatories entered into a new treaty that conflicted with obligations under the former treaty.

3. Paragraph 4 was the most important provision and should be placed first. Treaties which confirmed general principles of law or gave greater precision to binding rules of law could not be altered, since they confirmed what had been termed *jus cogens*. The source of the obligation lay outside the treaty itself and article 13 applied. Any conflict that might arise in such a case concerned not the treaty, but the very existence of *jus cogens*, of which the treaty only constituted evidence.

4. The second provision in order of importance was that embodied in paragraph 3 (b), which reproduced the terms of article 103 of the United Nations Charter. The Charter occupied a special place among instruments of contemporary international law and it was therefore appropriate that paragraph 3 (b) should be placed immediately after paragraph 4, which should be placed first. Article 103 of the Charter had wider implications, in particular in point of time, than, for example, article 20 of the Covenant of the League of Nations. Provisions similar to article 103 were to be found in the Paris Peace Treaties of 1947: in article 44 of the Treaty with Italy, article 10 of the Treaty with Rumania, article 8 of the Treaty with Bulgaria, article 10 of the Treaty with Hungary and article 12 of the Treaty with Finland.¹

5. An interesting illustration of the practice under Article 103 of the Charter was furnished by the Agreement of 1 July 1948 between the Universal Postal Union and the United Nations, article VI of which specified that "no provision in the Universal Postal Convention or related arrangements shall be construed as preventing or limiting any State in complying with its obligations to the United Nations."²

6. The Special Rapporteur's paragraphs 1 and 2 dealt with cases in which the freedom of action of States was not limited by a higher law. It would of course be desirable in those cases for States concluding a new agreement to define its relationship to agreements already in existence — as was done in the case of the relationship between the Geneva Protocol of 1924 and the Covenant of the League by article 19 of that Protocol³ — or to provide for the termination of the old treaty as soon as the new one came into force. An instance of that kind was to be found in International Labour Convention No. 28 of 1929, article 23 of which provided that: "Should the Conference adopt a new Convention revising this Convention in whole or in part, the ratification by a Member of the new revising Convention shall *ipso jure* involve denunciation of this Convention without any requirement of delay. . . ." ⁴

7. A somewhat different approach had been adopted in the Universal Copyright Convention,⁵ concluded under the auspices of UNESCO in 1952, to which a declaration⁶ had been attached containing a set of principles to prevent any conflict which might result from the coexistence of that convention and the earlier Berne Convention.

8. Unfortunately, States often failed to include specific clauses on the subject in their treaties and it was necessary to deal with that contingency. It might be advisable also to include principles covering cases in which such stipulations did exist, bearing in mind that article 15 dealt with such situations in relation to the termination of treaties.

9. With regard to the serious problem raised by the case contemplated in paragraph 1 (a), he thought it would be desirable to place at the very outset of that provision a confirmation of the principle of unanimity — a principle to which the Special Rapporteur subscribed. The provisions on the various cases to which the rule applied, and the various exceptions to the rule, should follow.

10. However, the main problem was that of the cases contemplated in paragraph 2. The Special Rapporteur had perhaps attached too much importance to the two cases cited in paragraph 15 of the commentary, which had been decided by the Permanent Court of International Justice; he seemed to rely not so much on what the Court had said, but on what it had not said.

11. The principle of unanimity could not be questioned. In another case, that of the Act of Algeciras of 1906,⁷ concerning Tangiers, which had not reached the Court, some of the parties to an older instrument had proceeded to revise it without the consent of the others; the parties which had revised the Act had tried to remedy the situation by communicating their decision to the absent parties with a view to obtaining their consent. Similar action had been taken for the revision of the Treaty of 1839 establishing the neutrality of Belgium.⁸

12. Article 14 did not deal with those treaties which specifically prohibited the conclusion by the parties of special agreements on the same subject, either between themselves or with third States, as was the case with the Berne Convention of 1886,⁹ the General Act of Berlin of 1885¹⁰ and the Declaration of Brussels of 1890.¹¹ The conclusion might be drawn that such stipulations had no legal effect. It was true that treaties containing provisions of that type were few in number, but it was essential to uphold the principle of unanimity and to take the existence of those provisions into account. As Judge Anzilotti had said in his separate opinion in the *Lighthouses Case*, "... it is a fundamental rule in

¹ United Nations, *Treaty Series*, vols. 41, 42, 48 and 49.

² *Agreements between the United Nations and the specialized agencies* (United Nations publication, Sales No.: 1951.X.I), p. 99.

³ *League of Nations Official Journal*, Geneva, 1924, *Special Supplement No. 23*, p. 502.

⁴ *Conventions and Recommendations, 1919-1949*, Geneva, 1949, International Labour Office, p. 165.

⁵ United Nations, *Treaty Series*, Vol. 216, pp. 134 ff.

⁶ *Ibid.*, pp. 150 ff.

⁷ *British and Foreign State Papers*, Vol. 99, pp. 141 ff.

⁸ *Op. cit.*, Vol. 27, pp. 990 ff.

⁹ *Op. cit.*, Vol. 77, pp. 22 ff.

¹⁰ *Op. cit.*, Vol. 76, pp. 4 ff.

¹¹ *Op. cit.*, Vol. 82, pp. 55 ff.

interpreting legal texts that one should not lightly admit that they contain superfluous words. . . ."¹²

13. Another question he wished to raise was that of treaties which had an effect on States that were not parties to them. Some treaties had played a decisive part in the formation of new States or had guaranteed the vital rights of States that were not parties. Such third-party beneficiaries should not be left helpless in the face of attempts to revise the treaties or to conclude new instruments which conflicted with the earlier ones.

14. He proposed that the provisions of article 14 should be rearranged, paragraph 4 being placed first and paragraph 3 second. On the points of substance he had raised, he would make no concrete proposals at that stage, but would await the explanations of the Special Rapporteur.

15. Mr. YASSEEN said that a conflict with an earlier treaty having the same substantive force would raise no difficulties if there were a single international community with a single legislative body. As in municipal law, if the judicature and the legislature were part of the same system it would be merely a matter of interpretation, since in the last resort the solution would depend on the will of the legislature.

16. But the situation was quite different in the sphere governed by international law, and especially by conventional law, since there were a large number of communities and legislative bodies. No problem arose where completely different international communities existed side by side, for every rule would then remain in force within its own sphere; but where conventional rules came into force successively in international communities which differed from each other only in part, that overlapping complicated matters.

17. Two principles had then to be borne in mind. First, respect for acquired rights: a later treaty should not impair the interests of the States parties to an earlier treaty. As a general rule, however, it would be wrong to go so far as to invalidate the later treaty. Secondly, the interests of States, which were parties to the later, but not to the earlier, treaty should be safeguarded. The contractual principle should be ignored, since the Commission was drafting rules *de lege ferenda*, and the development of international law should not be impeded merely for the sake of some States which might not be willing to bow to modern requirements.

18. The line taken by the Special Rapporteur was therefore both moderate and justifiable; it did not impair the rights of the States parties to an earlier treaty, since that treaty was held to prevail. At the same time there was no bar to the treaty's amendment. The later treaty was not invalidated, but could be carried into effect provided that the States signatories to the later treaty fulfilled their obligations to the States parties to the earlier treaty.

19. The Special Rapporteur had not laid down any absolute rule, but had provided for justified exceptions. The proviso regarding the constituent instruments of

international organizations seemed perfectly reasonable in view of the importance of such instruments and the need to provide international organizations with certain guarantees. The other exception, relating to *jus cogens* rules, was also essential. Moreover, the solutions adopted in article 14 could be more easily accepted in view of the approval of article 13.

20. Further exceptions might be conceivable, especially for conventions of great political importance based on a balanced compromise achieved with great difficulty, particularly those prohibiting derogation from their provisions by means of later conventions. They might be regarded as somewhat analogous to *jus cogens* rules.

21. The principles on which article 14 was based and the solutions put forward in it were acceptable as a whole, subject to the reservations he had mentioned.

22. Mr. TUNKIN said it was important to avoid the temptation to adopt an approach borrowed from municipal law; in article 14, it would be inappropriate to take a position based on the concept of civil liability. The situation in international relations was very different from that obtaining under municipal law; international treaties were of greater importance than contracts concluded under municipal law, for world peace could depend on the fulfilment of treaty obligations. Consequently, the provisions of article 14 were of vital importance.

23. The problems of principle involved had some bearing on the *pacta sunt servanda* rule. A State which was a party to a treaty would violate that rule if it entered into a later treaty which conflicted with its obligations under the earlier treaty. The question then arose what the legal consequences would be with regard to the validity of the later treaty; he would leave aside, for the time being, the problem of responsibility, which would be dealt with by Mr. Ago as Special Rapporteur for that topic.

24. The principle stated in paragraph 2 was correct, but the problem arose of whether that principle could be applied to every situation. Some speakers had quoted instances in which exceptions might have to be made. Personally, he thought there could be international treaties of which it was not sufficient to say that "the later treaty is not invalidated by the fact that some or all of its provisions are in conflict with those of the earlier treaty." One example was the recent agreement on the neutrality of Laos,¹³ which prohibited the establishment of foreign military bases on Laotian territory. If a treaty were concluded in violation of that provision, it would clearly not be sufficient merely to say that the provisions of the earlier treaty would prevail; such a statement might cover most of the practical points involved, but it would also be necessary to state that the second treaty was void.

25. Paragraph 1 dealt with the case where all the parties to the later treaty were also parties to the earlier treaty. In that case, the principle to be applied was that the parties could always change the provisions of the earlier

¹² P.C.I.J., Series A/B, No. 62, p. 31.

¹³ Command Papers, H.M. Stationery Office, London. Cmd. 9239, pp. 18 ff.

treaty by subsequent agreement. The problem of validity did not arise and paragraph 1 did not properly belong to the subject matter of article 14; he suggested that it should be removed from the article.

26. Mr. de LUNA said he was glad to see that the Special Rapporteur had departed from the approach adopted by his two predecessors, Sir Hersch Lauterpacht, who had held that a treaty should be void "if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties",¹⁴ and Sir Gerald Fitzmaurice, who had drawn a distinction between cases in which a previous treaty imposed reciprocal obligations and those in which the obligations imposed were of the "interdependent" or "integral" type.¹⁵

27. The Special Rapporteur had adopted a more correct approach, which had, moreover, the support both of judgements of the Permanent Court of International Justice and of the principle that conflicts between treaties should be resolved on the basis of the relative priority of conflicting legal norms, not on the basis of the nullity of the later treaty.

28. The most useful idea in the arguments of the two previous Special Rapporteurs, the idea that a treaty conflicting with a *jus cogens* rule was invalid, had been retained; any other solution would needlessly impair the stability of conventional law. Wherever *jus cogens* rules did not apply, the principles to be respected were the autonomy of the will of the parties, the principle that so far as third States were concerned treaties were *res inter alios acta* and the principle *pacta tertiis nec nocent nec prosunt*. Where a party to an earlier treaty assumed a subsequent obligation, it would be sufficient to follow the general principles governing the interpretation and application of treaties, their amendment and termination. Where a State was unable to fulfil one or other of its successive obligations, the principle of responsibility would apply, with its consequence: compensation.

29. In many instances States in a particular region which were parties to multilateral treaties had concluded among themselves regional agreements containing provisions that differed from those of the earlier treaties. For such States it was the regional agreements which had effect, by virtue of the principle *tractatus specialis derogat generali*. Many cases similar to those quoted by the Special Rapporteur and by Mr. Lachs existed in general international law; for example, not all the States parties to the Hague Convention of 1899 had become parties to the Hague Convention of 1907, but both conventions had operated simultaneously by virtue of a special clause in the latter.¹⁶

30. Mr. ROSENNE said the discussion had strengthened his opinion that article 14 dealt with the interpretation and application of treaties rather than with their validity.

¹⁴ *Yearbook of the International Law Commission, 1954*, Vol. II (United Nations publication, Sales No. 59.V.7, Vol. II), p. 133, article 16.

¹⁵ *Op. cit.*, 1958, Vol. II (Sales No.: 58.V.1, Vol. II), pp. 27-28, articles 18 and 19.

¹⁶ Scott, J. B., *Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press.

31. In most cases, subject to the overriding rules of *jus cogens*, the real problem was that of determining which set of obligations was to prevail in the event of conflict between an earlier treaty and a later one. As pointed out by the eminent French internationalist Rousseau, that could give rise to delicate situations in which legal considerations were not always predominant.

32. He believed that the guiding principles should be expressed in terms of a residual rule. Indeed, the Special Rapporteur had begun his formulation on that basis, but his approach should be more emphatic. The residual rule would apply where both treaties were completely silent on the question of other treaties and where there had been no real negotiations to try to bridge the gap between them. It was quite common for a clause to be included in a treaty dealing with its relationship with past treaties, with future treaties, or with both. It was essential that that practice should be encouraged and that the efficacy of that type of clause should not be impaired by the adoption of too general a rule. All United Nations conventions codifying international law concluded since 1958 contained a clause on the subject. On the other hand experience showed that provisions for resolving that type of conflict did not always appear on the face of the treaty, but could be agreed in the antecedent negotiations. Accordingly, the residual rule would have to be carefully formulated.

33. Paragraph 9 of the commentary referred to the effect of knowledge of the conflict between the earlier and the later treaty; he wondered whether compliance with the provisions on the registration of treaties might affect that question of knowledge.

34. With regard to paragraph 3 (a) of the article, he found it difficult to accept the proposition that the Charter of the United Nations or the constitution of a specialized agency limited the treaty-making powers of member States or raised questions of capacity. What article 108 of the United Nations Charter and similar provisions did was to lay down modalities for the conduct of negotiations, a matter which was covered by article 5 of Part I of the draft.

35. Finally, paragraph 3 (b) seemed unnecessary, because the matters it dealt with were already covered by other provisions of the draft.

36. Mr. ELIAS said he found the provisions of article 14 acceptable, except that they omitted to deal with one situation which merited attention. They dealt with the case in which the parties to the later treaty were the same as those to the earlier treaty, the case in which the later treaty had a larger number of parties and the case in which the later treaty had fewer parties; there was, however, a fourth case, admittedly a somewhat rare one: the case in which the later treaty was concluded by parties entirely different from the parties to the earlier one.

37. The provisions proposed by the Special Rapporteur were based on the attitude adopted by the Permanent Court of International Justice in the *Oscar Chinn*¹⁷ and

¹⁷ *P.C.I.J.*, Series A/B, No. 63.

*European Commission of the Danube*¹⁸ cases. The situation which he had in mind, and which had been the subject of attention at a conference held at Niamey, in the Republic of the Niger in February 1963, on the subject of the River Niger, went beyond those cases.

38. The Act of Berlin of 1885 had established an international regime for the Congo and the Niger. That regime had been confirmed and slightly modified by the Convention of St. Germain of 1919.¹⁹ As far as the Niger was concerned, France and the United Kingdom had been the riparian signatories of those treaties at the time. The territories which had then been colonies of France and the United Kingdom had, of course, since become independent. Nine independent riparian States had thus met at the Niamey Conference to consider arrangements for the development of the Niger and its utilization, in particular for the generation of hydroelectric power and the exploitation of the river's resources. The question which had arisen was whether, and if so to what extent, those nine States could seek to provide, in a treaty establishing a River Niger Commission, for the abrogation of the General Act of Berlin of 1885 and the Convention of St. Germain of 1919, in so far as those States were concerned.

39. That question could be considered from several different angles, one of which was that of State succession. Since the nine independent States had taken over the rights and duties of the former colonial Powers under the two treaties in question, they had also taken over the right to abrogate the treaties and substitute for them arrangements more acceptable from the point of view of their development schemes. The doctrine of *rebus sic stantibus* had also been invoked and, more broadly, the problem of the obsolescence of treaties. The conclusion reached by almost all the members of the prospective River Niger Commission was that the Act of Berlin, the Convention of St. Germain and the intervening Declaration of Brussels of 1890 must be deemed inapplicable to the new situation in which the riparian States found themselves.

40. The States attending the Niamey Conference had reached agreement on a Convention and on a Statute for the River Niger Commission. Those instruments had been communicated to the United Nations and circulated to France and the United Kingdom, the Powers formerly responsible for the Niger Basin, and there appeared to be general agreement that the course adopted had been unexceptionable. In any event, the nine riparian States had reaffirmed the main principles which the Act of Berlin had sought to protect: equality of treatment for the nationals of all States, and freedom of navigation for vessels of all flags.

41. He accordingly suggested that the Special Rapporteur should deal with the case of a treaty concluded between parties entirely different from the parties to an earlier treaty and with the subrogation of new States to the rights and duties of the former colonial Powers.

42. Mr. TSURUOKA said it seemed to him that the essential point in article 14 was not the substantial validity of a later treaty, since under the Special Rapporteur's draft such a treaty was not invalidated by the fact that some or all of its provisions were in conflict with those of an earlier treaty, but rather the position under conventional law of a State which had concluded two treaties and thereby assumed two mutually conflicting treaty obligations. It would be better to consider that point in connexion with the question of the application and effects of treaties. Any other problems that might arise in connexion with article 14 were relevant either to the revision of treaties or to *jus cogens* rules.

43. Accordingly, the questions dealt with in article 14 might be gone into in the commentary on article 2 or article 13, or even in connexion with the succession of States and governments.

44. Mr. TABIBI said that the length of the commentary on article 14 testified to the complexity of the subject. It was one which ought not to be approached exclusively with a view to codification, as had been done by the two previous special rapporteurs on the law of treaties, but also with a view to progressive development.

45. He agreed with the views expressed by the present Special Rapporteur, in paragraphs 3 and 4 of his commentary, as to the kind of cases in which a question of essential validity might arise, and with his statement in paragraph 18 that international jurisprudence was not perhaps entirely conclusive on the question whether and, if so, in what circumstances, a treaty might be rendered void by reason of its conflict with an earlier treaty. That was probably the main reason why Sir Hersch Lauterpacht and Sir Gerald Fitzmaurice had been chary of admitting that such conflicts ever led to nullity.

46. Although he was in general agreement with the fundamental purpose of the article, he feared that it might lead to difficulties in application, especially if the points raised by Mr. Lachs were not elucidated, and might detract from the force of the other articles on essential validity. It also appeared from the general trend of the discussion that the article in its present form would not prove acceptable. It might be preferable for the Special Rapporteur to reconsider the subject and submit a new text to the Commission.

47. Mr. AGO said that his doubts regarding the need for article 14 — which had been strengthened by the critical examination made by the Special Rapporteur himself — had not been dispelled by the discussion.

48. Paragraph 1 of the article, concerning the case in which the parties to two treaties were the same, stated an obvious truth which no one would think of disputing and which it was therefore unnecessary to reaffirm in the draft.

49. Paragraph 2 dealt with the problem of conflict between two successive treaties to which only some of the parties were the same and the effects of the conflict on the validity of the second treaty. The Commission was not concerned at that point with the problem of revision, which it would consider later. Nor could it,

¹⁸ *P.C.I.J.*, Series B, No. 14.

¹⁹ League of Nations, *Treaty Series*, Vol. 8, pp. 27 ff.

of course, hold that the earlier treaty ceased to be valid with respect to States not parties to the later one; for manifestly, if some of the parties to a treaty concluded another treaty *inter se* which conflicted with the earlier one, the second instrument was valid as between those parties; but equally obviously, as between those parties and the other parties to the earlier treaty, the validity of the earlier treaty remained intact. If the second instrument made it impossible to carry out some of the obligations deriving from the first, the question which would arise would not be one of validity, but one of international responsibility. Of the two solutions proposed in paragraph 2 (b), the first was obvious and the second seemed to deal with a purely theoretical situation, for a State which had participated in the conclusion of the second treaty could hardly contest its effectiveness.

50. Paragraph 3 dealt first, in sub-paragraph (a), with the case of a special treaty concluded between States members of an international organization, some provisions of which conflicted with provisions of the constitution of that organization. There could be no doubt that problems of that kind could only be solved by interpretation and application of the constitution concerned. Sub-paragraph (b) was not necessary, as it merely reproduced article 103 of the Charter.

51. Paragraph 4 merely repeated what had already been said in article 13.

52. There remained the case mentioned by Mr. Tunkin and Mr. Lachs: that of a State which, having first concluded with other States a treaty placing certain obligations on all of them, subsequently concluded with some of its partners or with other States, a treaty some of whose provisions conflicted with the first treaty. There would appear to be two possibilities: either the first treaty expressly limited the capacity of the parties to conclude other treaties conflicting with its provisions, in which case the second treaty was void; or else the first treaty prescribed no such limitation, in which case the second treaty was valid as between the States which had concluded it, but the State or States which were parties to both treaties had failed to fulfil their obligations under the first treaty and thereby incurred international responsibility, one of the consequences of which was that they were under a duty to eliminate the conflict between the two instruments by terminating or amending the second.

53. To sum up, article 14 contained only provisions which, if not unnecessary, merely reproduced clauses already embodied elsewhere in the draft articles or dealt with problems which the Commission would take up later. He therefore suggested that the Commission should suspend consideration of the article and pass on to the following articles, reverting to article 14 later, if necessary, to see whether any part of it need be retained or not.

54. Mr. VERDROSS said he shared the view of Mr. Tunkin and Mr. Ago that paragraph 1 of article 14 did not apply to the case of a conflict between two treaties, and should therefore be deleted.

55. According to the prevailing doctrine, if a State party to a treaty concluded with another partner a

second treaty conflicting with the first, then that State was undoubtedly bound to do everything it could to annul the second. Admittedly, it was reasonable to ask whether the Commission, one of whose tasks was to develop international law, should not go further than that doctrine; he would prefer not to give a categorical answer to that question.

56. If the Commission wished to take a decision concerning a possible conflict between the Charter of the United Nations and the provisions of another international agreement, then it should be a clear decision. It was unnecessary to reproduce Article 103 of the Charter, which had been intentionally drafted in rather vague terms so that it could also apply to a treaty concluded by a Member State with a State which was not a Member; according to Article 103, the Charter obligations prevailed in such a case, but the treaty conflicting with the Charter was not declared void.

57. Mr. PAL said that, after listening to the observations of other members and examining some of the literature on the subject, he had come to the conclusion that there was authority for the view that conflict with a prior treaty at some points touched upon the issue of validity. For instance, according to Oppenheim, a treaty conflicting with a prior treaty was illegal, a view clearly stated in the following passage:

“Treaties, whether general or particular, lay down rules of conduct binding upon States. As such they form part of international law. They are, in the first instance, binding upon the contracting parties, who must refrain from acts inconsistent with their treaty obligations. This implies the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results beneficial to the law-breaker.”²⁰

58. Article 14 should remain in section II among the articles dealing with essential validity, but should be amplified to cover both the important case raised by Mr. Elias and the case in which the earlier treaty contained clauses restricting or purporting to restrict the capacity of the parties to enter into the later treaty. The latter point needed general treatment, whereas the provision in paragraph 3 (a) was limited to the constituent instruments of international organizations.

59. Mr. GROS said it had been his understanding at the previous meeting that most members approved of the Special Rapporteur's approach in proceeding from the assumption that article 14 was concerned less with the validity of treaties than with the conflict between two treaties. However, the conflict between successive rules of law raised problems concerning the revision and the termination of treaties and the interpretation of the constitutions of international organizations; he therefore supported Mr. Ago's suggestion that consideration of article 14 should be deferred.

60. With regard to the substance, he particularly endorsed paragraph 20 of the commentary, for he did not think

²⁰ *International Law*, 8th edition, 1955, Vol. I, p. 894.

it was by applying a theory of the nullity of treaties that certain breaches of international law could be effectively penalized. The rule of estoppel was much more practical, as the Permanent Court of International Justice had indicated in its advisory opinion on the European Commission of the Danube, when it had stated the governments "cannot, as between themselves, contend that some of its [the Statute's] provisions are void as being outside the mandate given to the Danube Conference..."²¹

61. Mr. AMADO said that from the length of the commentary it was evident that the Special Rapporteur had had serious doubts about article 14. Indeed, the article did not stand up to searching scrutiny. It was inconceivable that States would behave in a manner that would make such rules necessary. The Commission's task was to give form, not to the doubts of scholars, but to scientific certainties and to the rules accepted by States. He did not think that any of the provisions of the article should be retained, since the whole of its substance was already embodied in articles 2 and 19 and whatever few points were not settled by those two articles would be covered by the provisions governing the interpretation, revision and deposit of treaties.

62. Sir Humphrey WALDOCK, Special Rapporteur, summarizing the discussion, said that although a few members of the Commission were hesitant about removing article 14 from section II, the majority seemed to agree with him that the article did not really raise any issues of essential validity. He had explained, when introducing the article, that it had been inserted in that section because the two preceding Special Rapporteurs had treated its subject-matter in that context, having found that some of the problems arising from conflict with a prior treaty touched upon validity. Until the Commission had expressed its view on the question whether any matters of validity were raised by article 14, he had thought it better to present the article in the context of validity in section II of the report.

63. As he had already suggested, the substance of the article might need to be discussed in connexion with article 19 which raised questions of implied termination of a treaty brought about by concluding a subsequent treaty. But generally speaking, if the Commission did not think the article raised any question of essential validity, it ought to be taken up at the sixteenth session when he would be presenting his draft articles on the application of treaties. It would be easier to deal with the matter of conflict after the Commission had discussed the question of the effects of treaties on third parties.

64. Some members had touched upon the question of revision. That certainly had links with the question of conflict between treaties, but had no relevance to article 14 if it were dealt with in its present context as an article on essential validity.

65. Commenting on some of the detailed observations put forward during the discussion, he said that Mr. Lachs' suggestions about rearranging the order of the clauses

had some justification, though perhaps he would differ as to emphasis. But those suggestions called for consideration only if the article were left in section II.

66. Mr. Lachs had drawn attention to treaties containing provisions dealing with the problem of incompatible obligations, or expressly prohibiting the parties from assuming incompatible obligations under some other instrument or giving the treaty priority over other treaties; but the question of validity was usually not touched upon by those provisions. A number of treaties, including the Charter, contained such provisions, and he also knew instances of two treaties containing inconsistent provisions and both claiming priority for their own provisions. But the mere introduction of such clauses did not, in his opinion, transform a conflict into an issue over validity. It was noteworthy that in the *European Commission of the Danube* case the Permanent Court had attached no special significance to the existence of an express prohibition in the Treaty of Versailles against inconsistent agreements, although the point had been stressed in the opinions of the dissenting judges. If the Commission as a whole accepted the general conclusion set out in article 14, that would certainly not mean that it sanctioned entry into inconsistent obligations; such action would be a violation of a previous treaty and would raise a question of responsibility. The injured State could always bring the matter before the United Nations and rely upon such procedural remedies as existed.

67. He would be encroaching on the territory of the Special Rapporteur to be appointed on State succession, if he were to comment on the special case brought up by Mr. Elias of an agreement to which none of the parties were the same as those to the previous treaty. He had not dealt with the matter in the article or in the commentary, because such a situation did not raise a question of validity. The question might have to be taken up in another context. The particular example of the régime of the river Congo mentioned by Mr. Elias was of the greatest legal interest. But it seemed to raise other issues than those of validity — issues of State succession and of *rebus sic stantibus*.

68. Mr. Tunkin had raised the very difficult problem of the possible existence of special cases in which conflict between two treaties might involve validity even if the general thesis propounded in article 14 were accepted, but he would have thought that the example of Laos raised a problem of capacity, and in particular the difficult problem of when diminution of capacity took place as a result of a treaty. The matter had been touched upon during the previous session, but the Commission had shown itself reluctant to press it to any conclusion. In any event, he did not regard such a case as constituting an exception to the general rule he had sought to lay down in article 14 and which appeared to have gained general support. The case seemed, as he had indicated, rather to raise a possible question of capacity and certainly a question of responsibility. In such an instance, the State regarding itself as the injured party could raise the matter in the United Nations and also seek application of the various remedies open to it under general international law.

²¹ *P.C.I.J.*, Series B, No. 14, p. 23.

69. Mr. TUNKIN said that the question at issue was not what was the proper place for article 14 but what should be its substance, and the discussion had not sufficiently clarified that. Few members had put forward really definite opinions and, with all respect to the Special Rapporteur, he himself was not convinced that treaties in violation of a previous agreement only raised problems of responsibility and not of validity.

70. As for the action to be taken by the Commission, he supported Mr. Ago's suggestion that the discussion on article 14 should be suspended, so that it could be decided later where the article should be placed and in what form.

71. Sir Humphrey WALDOCK, Special Rapporteur, said he would like to make it plain that he too favoured the course suggested by Mr. Ago.

72. The CHAIRMAN said that article 14 might be left aside until the Commission was in a position to determine whether it should be included in some part of the draft, or whether the question of conflict with a prior treaty ought to be dealt with under the topic of state responsibility or of state succession.

73. Mr. TUNKIN said it should be understood that the Commission would resume the discussion of article 14 at the present session.

74. Mr. ELIAS agreed with Mr. Tunkin: the argument that some of the issues raised by conflict with a prior treaty did not involve essential validity had not convinced him. The matter should not be held over until the following session.

75. The CHAIRMAN proposed that the decision on article 14 be deferred and that the article be taken up again at a later stage in the session.

It was so agreed.

The meeting rose at 5.55 p.m.

688th MEETING

Tuesday, 28 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider section III of the Special Rapporteur's second report (A/CN.4/156/Add.1), which began with article 15.

SECTION III (THE DURATION, TERMINATION AND OBSOLESCENCE OF TREATIES)

ARTICLE 15 (TREATIES CONTAINING PROVISIONS REGARDING THEIR DURATION OR TERMINATION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 15, 16 and 17 were clearly linked to-

gether and could be regarded as a unity. Article 15 dealt with the case in which the treaty contained provisions intended to regulate either its duration or its termination. Article 16 was, strictly speaking, of the same kind; it dealt with the case in which the treaty, on its face, appeared to contemplate an indefinite duration, making no provision of any kind for denunciation or for termination by other means; its chief relevance was its link with article 17. Article 17 dealt with the case in which the treaty contained no provisions regarding either its duration or its termination.

3. In article 15 he had stated possible rules, in case the Commission wished or thought it right to state in terms the methods by which the duration or termination of a treaty could be determined, in accordance with the various types of clause which a treaty could contain for that purpose. He fully realized that, as already appeared from one or two of the proposals for amendment, the article could be dealt with quite differently; indeed, it could be said simply that "a treaty shall endure, or terminate, in accordance with its terms, where the treaty itself makes provision for that purpose"; if that method of approach were adopted, it would be possible to shorten article 15 very considerably.

4. There were very few points in article 15 on which the matter did not really follow directly from the treaty. Perhaps the main point was in paragraph 4(c), where there was a little problem to which he had suggested an answer, but which he did not think could be said to be settled by the treaty itself. There were quite a number of treaties which contained a clause preventing the treaty from coming into force until a certain number of ratifications had been obtained; the problem was what was to happen if denunciations should reduce the number of parties below the number originally specified. He had dealt with that point in the commentary, and proposed a rule.

5. Apart from that problem, the provisions set out in the article really followed from the particular provisions of the treaty itself, so that if the Commission wished to adopt a different method it would be quite possible to dispense with some of the paragraphs. It was simply a question of whether, in a codification of that kind, it was useful or not useful to try to state explicitly the rules which would, in fact, be applied under the various forms of treaty clauses.

6. A point which might possibly be raised in connexion with paragraph 5 was that two possible methods of termination were sometimes provided for in the same treaty. Even then, it followed from the treaty itself how the two clauses would operate in conjunction, but it might be argued that it was worth noting that particular point, as he had done in paragraph 5(a).

7. Article 17 dealt with quite a complicated question on which there might be different views. If the Commission were to take a widely different view from the Special Rapporteur as to the extent to which implied rights of denunciation were to be understood in treaties, then the provisions of article 17 could be greatly shortened.

8. When the Commission had discussed articles 15, 16 and 17, it could consider whether some contraction or amalgamation of the text was desirable.

9. The CHAIRMAN drew attention to the amendments to article 15 submitted by Mr. Castrén and Mr. Briggs.

Mr. Castrén's proposal read:

"1. The provisions of a treaty which relate to the duration or to the termination thereof for one or all the parties shall be applicable subject to articles 18 to 22.

"[or, alternatively, a separate article or a reference in the commentary]. A treaty shall not come to an end by reason only of the fact that the number of parties has fallen below the minimum number originally specified in the treaty for its entry into force, unless the States still parties to the treaty so decide."

Mr. Briggs' proposal read:

"1. Except as otherwise provided in these articles, a party may denounce a treaty only in accordance with the provisions of the treaty or with the consent of all other parties.

"2. In the case of a bilateral treaty, denunciation by a party in accordance with paragraph 1 terminates the treaty.

"3. In the case of a multilateral treaty, the party denouncing it in accordance with paragraph 1 ceases to be a party to the treaty."

10. Mr. CASTRÉN said that according to article 15 the general rule was that the provisions of a treaty regarding its duration or termination, if any existed, were applicable; the other possibilities were dealt with in articles 16 to 22. Consequently, article 15 could be confined to stating the general rule, and it was unnecessary to list all the provisions covering the different cases which were contained in bilateral or multilateral treaties.

11. It might, however, be advisable to retain paragraph 4 (c), which provided that a treaty's validity was not impaired by reason only of the fact that the number of parties had fallen below the number originally specified for its entry into force; for the contrary view could also be held. The Special Rapporteur's arguments in favour of that provision were, however, wholly convincing. It was for the Commission to decide whether it preferred to deal with the matter in a separate article or in the commentary.

12. On the other hand, although sub-paragraph 5 (b) contained a new element, the case contemplated in it was hardly likely to arise in practice. Indeed, if a treaty whose duration was expressed to be limited by reference to a specified period, date or event provided that it should automatically be prolonged for a further period or periods unless denounced before the expiry of the first period, it was hardly likely that the duration of the further periods would not also be specified. That case might, if absolutely necessary, be mentioned in

the commentary, with a statement of the rule proposed by the Special Rapporteur, which seemed on the whole to reflect the intention of the parties to such a treaty.

13. Mr. Briggs' amendment was very similar to his own, particularly so far as paragraph 1 was concerned. The idea stated in paragraph 2 was correct, but self-evident. As to paragraph 3, it should be noted that a treaty might sometimes be terminated by denunciation when it required a minimum number of parties for validity.

14. Finally, he drew attention to footnote 2 to paragraph 2 of the commentary, in which the Special Rapporteur observed that it was the passing rather than the arrival of the date which was relevant when the duration of a treaty was expressed to be limited by reference to a specified date, since the treaty would expire at midnight on the date fixed by the treaty. In his opinion, that raised a question of interpretation. If a treaty was said to terminate on 31 December 1964, for instance, that meant that it expired after the date had passed; but if it was specified that the final date was 1 January 1965, the parties would probably have had the beginning of that day in mind. It was therefore better to say that the treaty remained in force until the specified date, rather than that it came to an end on a certain date.

15. Mr. VERDROSS said that articles 16 to 22 formed a complete whole and that it was essential to indicate their main lines first.

16. The reasons for terminating a treaty fell into three main groups. First, and simplest, came the common will of the parties. Secondly, if it was the will of the contracting parties when concluding a treaty that it should eventually be terminated, the treaty itself generally contained a denunciation clause. But the will of the parties might also be deduced from the records of proceedings or from the purpose of a treaty. There was no denunciation clause in the United Nations Charter, but the records showed that the parties had been in agreement that States could withdraw in certain circumstances. The third and largest group of treaties comprised those in which the parties had made no provision for termination. In that case, the problem was settled directly by general international law.

17. An article stating the general cases in which a treaty could be terminated should precede section III, before the particular cases were dealt with.

18. Mr. YASSEEN agreed with Mr. Castrén that article 15 might be summed up in a form of words to the effect that the duration and termination of a treaty were governed by the relevant provisions embodied in it. That would be better than an enumeration of all possible clauses on the duration and method of termination of a treaty, since in any case an enumeration could not be exhaustive.

19. Although he approved of Mr. Briggs' method of condensing the article, he thought his proposal omitted rather too much; for it dealt only with denunciation, whereas article 15 also referred to other means by which treaties could be terminated. Paragraph 2 of Mr. Briggs'

amendment seemed unnecessary, as the idea it expressed was too obvious.

20. Several ideas in the Special Rapporteur's draft were worth retaining, however; paragraph 4 (b), for example, stated a presumption in law, and introduced an innovation. Paragraph 4 (c) seemed even more necessary, since the number of signatories required for a multilateral treaty to come into force was not necessarily the same as the number required for it to remain in force. It would also be advisable to retain paragraph 5 (b) which introduced a presumption in law, and paragraph 6, the idea of which was useful, though obvious.

21. While he approved of the solutions proposed by the Special Rapporteur in article 15, he did not think the drafting was appropriate.

22. The CHAIRMAN said it would be advisable for the Commission to decide, at that point, whether to discuss article 15 separately or in conjunction with articles 16 and 17. His own view, based on the experience of the Commission, was that it was better to keep to well-defined points, taking each article separately as a basis of discussion. He suggested that the Commission should continue the discussion of article 15, on the understanding that members could refer to the provisions of articles 16 and 17 to the extent they considered necessary.

After some discussion *it was so agreed.*

23. Mr. BRIGGS said he supported Mr. Verdross' suggestion that a general article setting out the various ways in which a treaty could be terminated should be inserted at the beginning of section III; the articles containing detailed provisions would then follow.

24. As far as article 15 was concerned, he preferred the text proposed by Mr. Castrén to the rather lengthy draft put forward by the Special Rapporteur. His own proposal, which was not dissimilar from Mr. Castrén's, was limited to the question of denunciation; it would replace articles 15, 16 and 17, and be followed by other articles dealing with termination of a treaty by means other than denunciation.

25. In paragraphs 3 and 4 of article 15, the Special Rapporteur had really dealt with the consequences of denunciation before dealing with the right of denunciation. Article 17 dealt with the right of denunciation where not provided for in the treaty itself. It would be more correct to state the right of denunciation first and deal with the legal consequences of denunciation afterwards.

26. Paragraph 1 of his own proposal dealt with the subject-matter of article 17. Paragraph 2 was perhaps not necessary, strictly speaking, but he had introduced it because the Special Rapporteur had dealt in article 15 not only with the right of denunciation, but also with its legal consequences. The purpose of his paragraphs 2 and 3 was to formulate in more concise terms the provisions embodied in article 15, paragraphs 3 and 4 (a), of the Special Rapporteur's text.

27. In connexion with paragraph 3, he agreed with Mr. Castrén that the denunciation of a multilateral

treaty could, in certain circumstances, have the effect of termination.

28. He did not like the use of the term "duration" in the sense in which the Special Rapporteur had used it in articles 15, 16 and 17; the articles did not deal with the beginning of the duration of a treaty, but with its termination. Nor did he like the use in paragraph 4 of the expression "shall continue in force": the object of the provision was to deal with the legal consequences of denunciation.

29. There were good reasons for dealing with denunciation in a separate article; other ways of terminating a treaty could also be dealt with in separate articles.

30. Mr. LACHS said he supported Mr. Verdross's suggestion that an introductory article embodying a general formula should be inserted in section III; he also agreed with Mr. Castrén and Mr. Briggs that a shorter formulation of article 15 was desirable. The examples given by the Special Rapporteur would be very useful in the commentary, however; they would illustrate methods of terminating a treaty in accordance with the will of the parties, though it was most improbable that all the possible methods could be covered.

31. The provision in paragraph 4 (c) should be retained because it dealt with an exceptional case; it could be transferred to article 17. He agreed with the reasoning in paragraph 7 of the commentary in support of that provision. The mere fact that the number of parties had fallen below the minimum specified for entry into force was not decisive for the termination of a treaty. There were, however, certain borderline cases. For example, the European Agreement on Road Traffic¹ provided for entry into force upon ratification by three States. In view of the emphasis placed on the multilateral character of that type of convention, it was worth considering the situation that would arise if the number of parties fell to two. A further element of complication would be introduced if reservations had been entered by the remaining parties. With all the complications arising from reservations, a quantitative change could alter the nature of the treaty and make it a bilateral treaty.

32. Mr. BARTOŠ observed that the question of the minimum number of parties to a treaty affected its application as well as its entry into force. It sometimes happened that States acceded to a treaty of general interest, such as The Hague Convention on Marriage² or the Vienna Convention on Diplomatic Relations,³ in order to join the group of contracting parties which had dealt with the matter, and that most of them subsequently withdrew. Where it could be presumed that a convention would be universal, reciprocal concessions were made in order to induce certain States to become parties to it. But where many of the States for which

¹ European Agreement supplementing the 1949 Convention on Road Traffic and the 1949 Protocol on Road Signs and Signals, signed at Geneva on 16 September 1950.

² *British and Foreign State Papers*, Vol. 95, pp. 411 ff.

³ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. II (United Nations publication, Sales No.: 62.X.1), pp. 82 ff.

they had been made withdrew from the Convention, those concessions proved useless.

33. If, after the number of parties had fallen below the minimum specified for entry into force, the States which remained parties to a convention expressed their will to abide by it, then the convention, hitherto considered to be one of general interest, was transformed into a convention without that quality and might be considered to subsist in that form. In principle, however, the convention having the character of a general treaty had come to an end when the number of parties had fallen below the required minimum.

34. Again, if a treaty whose duration was limited by reference to a specified period contained a clause providing that might be prolonged after the expiry of that period, and if a large number of States denounced it, the question arose whether the States which remained parties were obliged to participate in so limited a community or whether they could denounce the treaty without awaiting the expiry of the further automatic renewal period of, say, three years, in view of the fact that they had remained parties to it because they expected to remain in a larger contracting group and did not wish to be members of a smaller one. He had no strong views on the question, but he wished to draw the Commission's attention to it.

35. Mr. TUNKIN said that the rule embodied in most of the provisions of the somewhat lengthy article 15 was that, where a treaty contained provisions regarding its duration or termination, those provisions must be applied. He was therefore inclined to favour a shorter formulation along the lines proposed by Mr. Castrén, though he had some doubts regarding the actual language of Mr. Castrén's proposed paragraph 1. That could be left to the Drafting Committee, however.

36. Article 15 also laid down another rule, which was stated in paragraph 4 (c) and reproduced in paragraph 2 of Mr. Castrén's proposal. He agreed on the need for that provision.

37. When the Commission had completed its consideration of articles 15, 16 and 17, it could consider what gaps, if any, were left to be filled; the discussion might also bring to light some new questions relating to article 15.

38. Mr. ROSENNE said he favoured Mr. Verdross's suggestion of an introductory article dealing in general terms with the matters later considered in detail in the various articles of section III. Such an introductory article would complement the provisions of article 23 of Part I on the entry into force of treaties, in particular paragraph 4, which dealt with the substantive consequences in law of the entry into force of a treaty.

39. For the same reasons as other speakers, he thought that a short article along the lines proposed by Mr. Castrén would be adequate for the purposes of article 15, though it would be useful to retain the provisions of paragraphs 5 and 6 proposed by the Special Rapporteur. The commentary, on the other hand, should be rather full, and he congratulated the Special Rapporteur on his remarkable text.

40. He understood Mr. Lachs' concern about the consequences of a fall in the number of parties to a multilateral treaty, but the question of the effect of reservations was more appropriately dealt with in the articles on reservations. The formulation proposed by Mr. Castrén for paragraph 2 was to the effect that a treaty would not come to an end by reason "only" of the fact that the number of parties had fallen below the minimum number originally specified for entry into force; that formulation, together, if necessary, with the doctrine of *rebus sic stantibus*, opened the way to the solution of the particular problem raised by Mr. Lachs. He believed that a multilateral treaty could be transformed into a different kind of treaty by a reduction in the number of parties, but that was no reason why the surviving parties should not keep it in force. The matter appeared to be one exclusively for the surviving parties themselves.

41. Mr. Gros said he thought that article 15 should be simplified; being a codifying article, it should contain nothing but what was strictly essential. He approved of the substance of Mr. Castrén's proposal; the few suggestions he had for supplementing the text could be submitted to the Drafting Committee.

42. The interesting anomalies pointed out by Mr. Lachs and Mr. Bartoš were resolved by Mr. Castrén's proposal, and incidentally, by the Special Rapporteur's draft, in so far as both texts specified that States still parties could decide to terminate the treaty. To make it quite clear that the will of those States was independent, it might perhaps be appropriate slightly to amend the expression "unless the States still parties to the treaty so decide", which occurred in both texts. It would be sufficient to specify that in special cases the States would take the necessary decisions.

43. Articles 15, 16 and 17 should be considered together, and the problems arising should be settled without going into the details of certain exceptional situations.

44. Mr. AGO said he acknowledged that it was possible to simplify article 15, but he could not accept so radical a simplification as that proposed in Mr. Castrén's text. It was not enough to say, as was done in paragraph 1 of that text, that the provisions of a treaty which related to its duration or termination were applicable, for all the provisions of a treaty were applicable, and there was no reason to specify that those relating to its duration or termination were particularly applicable. Moreover, the paragraph in question referred to articles 18 to 22; but those articles provided for other cases of termination. The Commission was engaged in codification; it must therefore state all the reasons for termination of treaties, and could not omit to mention expiry, and the resolutive condition. Merely to refer to the relevant provisions of treaties would be an over-simplification.

45. The Special Rapporteur's excellent text could be improved in points of detail. For example, paragraph 1 would become superfluous if, instead of enumerating the circumstances in which the treaty remained in force, the Commission decided, on the contrary, to list those in which the treaty came to an end. The resolutive condition, to which paragraph 2 referred, must certainly be

the subject of a separate provision, for it might be disputable whether the event on which termination depended had in fact occurred. The matters dealt with in paragraphs 3 and 4 could not be left unmentioned either; but there, too, it would be preferable to mention only the circumstances in which the treaty was terminated, as was done in paragraphs 4 (b) and (c). Paragraph 5 was perhaps not essential.

46. Mr. TABIBI said that Mr. Verdross's suggestion that an introductory article be inserted in section III was acceptable. The subject had been covered in a very comprehensive and helpful manner by the Special Rapporteur in article 15 and the commentary, but the alternative text put forward by Mr. Castrén, though it needed some modification, was preferable.

47. On a general point of drafting, he wished to make a strong plea for simplicity on behalf of those States which had to arrange for the translation of international instruments, a process which could significantly delay ratification as his own Government had found in the case of the Single Convention on Narcotic Drugs.

48. Mr. TUNKIN said that the idea of an introductory article had something to recommend it, but it might prove extremely difficult to formulate; he hoped Mr. Verdross would have some suggestions to offer.

49. The reference to articles 18-22 in paragraph 1 could only be retained provisionally until the Commission had considered those articles, when it might be found either unnecessary or possibly incomplete.

50. Though aware of the dangers of over-simplification, he still favoured a shorter text, rather on the lines proposed by Mr. Castrén. In essence, article 15 was concerned with a single rule which could be stated in one paragraph.

51. If Mr. Ago had intended to suggest that there could be certain limitations on the rule, they could be examined.

52. Mr. AMADO said he supported Mr. Ago's suggestion that the Commission should deal with the termination rather than the duration of treaties. A treaty might come to an end for a variety of reasons: for instance, because the period had expired, because the parties jointly decided that it should terminate, or because it had ceased to have any purpose — a case which justified application of the *rebus sic stantibus* clause. It was not possible to condense all these reasons into one or two provisions.

53. He himself had not yet settled the question raised by Mr. Bartoš, whether the continuance in force of a treaty required a minimum number of States to remain parties to it.

54. He had not a single criticism to make concerning the article proposed by the Special Rapporteur. Simplification was, of course, desirable, as Mr. Tabibi had urged; but the final result must be perfect. He was still opposed to enumerations, which were dangerous. The Commission was laying down rules intended for States, not for children.

55. Mr. VERDROSS said that provisionally he would suggest that the introductory article to be inserted at the head of the section should be worded as follows:

“ 1. An international treaty shall terminate:

“ (a) by express agreement between the parties;

“ (b) if it becomes obsolete;

“ (c) by virtue of a clause in the treaty itself, or by the joint will of the parties expressed in some other way while the treaty was being negotiated;

“ (d) by virtue of a rule of general international law.

“ 2. According to general international law, a treaty shall terminate:

“ (a) if it has been fully implemented;

“ (b) if its implementation becomes impossible;

“ (c) if its content becomes unlawful because of a later general rule of *jus cogens*;

“ (d) if it is denounced because of a breach by the other party;

“ (e) if the *rebus sic stantibus* clause is applicable;

“ (f) if the other party has waived all rights arising out of the treaty.”

56. In connexion with the last provision, he recalled that Germany, after the First World War, had waived all its rights arising out of the Treaty of Brest-Litovsk.

57. Mr. PAL said that the structure of article 15 might be a little over-elaborate, but none of its provisions had been contested. However, before entering into a detailed discussion of the article it might perhaps save time, since the substance of section III was unlikely to give rise to serious difficulties, if the whole section were referred to the Drafting Committee for rearrangement with an introductory article of the kind suggested by Mr. Verdross. Such an article should list the different types of provision regarding duration and termination or causes of termination in some such order as that suggested by Mr. Verdross, which would mean collecting together, in one opening article, the different topics dealt with in the section. If that general scheme were acceptable, separate articles could then be drawn up to develop each of those specific points further, as was done at present in the various articles of the section.

58. Mr. de LUNA said he fully sympathized with Mr. Tabibi in his desire for simplification with a result as nearly perfect as possible. He preferred a middle course between the two extremes represented by the most complicated text, that of the Special Rapporteur, and the simplest, that proposed by Mr. Castrén. The Commission should seek a text which would combine brevity with the maximum effectiveness.

59. He approved of Mr. Verdross's proposal in principle, but thought it should be developed a little. For instance, one of the causes of termination was denunciation. Denunciation, however, was the outcome of a unilateral declaration, which took effect only when it was agreed to by the other party. If a treaty did not make express provision for denunciation, or if there were any doubt

on the point and one of the parties denounced the treaty, the other parties could object. Experience showed, however, that an objection was not always effective, and that the unilateral act of one of the parties might, in the end, impose the treaty's termination *de facto*. That was what had happened in the case of the Treaty of the Brest-Litovsk.

60. Again, parliaments intervened not only when treaties were concluded, but also when they were terminated. Reference should therefore be made to constitutional restrictions on denunciation, as well as on ratification, accession and acceptance.

61. Mr. BARTOŠ said he approved of the text proposed by Mr. Verdross except for sub-paragraph 2 (e); for the application of the *rebus sic stantibus* clause generally entailed revision of a treaty, but very rarely its termination. If, however, the circumstances were such that it could be maintained that far-reaching amendments were necessary, that would be equivalent to the conclusion of a new treaty; but he merely wished to raise the question, without attempting to answer it.

62. Mr. YASSEEN said he agreed with Mr. Bartoš that the main function of the *rebus sic stantibus* clause was to enable a treaty to be revised, but he thought that in some cases the change in circumstances was so general and so far-reaching as to necessitate termination of the treaty.

63. Mr. LACHS said he considered that the Commission should first discuss article 15 and the remaining articles in section III and then take up the question of whether or not to insert an introductory article of the kind suggested by Mr. Verdross.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that as the causes of extinction of a treaty were numerous and likely to be controversial, he had grave doubts about the utility of an introductory article such as that contemplated by Mr. Verdross.

65. The text of article 15 had been criticized on the ground that it was dangerous to list examples. But the text did not contain any examples; they were only given in the commentary and not in the article itself, which merely stated the manner in which treaties came to an end. No doubt new ways of their coming to an end would occur in the future, but all would be covered by the terms he had used in paragraph 2.

66. It was clear from the discussion that there had been some misunderstanding about the drafting of article 15: in fact, it had been based on a close study of a considerable number of treaty provisions concerning duration and termination. Admittedly, the text could be simplified, but the question was to what extent. An article of the kind envisaged by Mr. Castrén would need to be cast in a somewhat different form if it were to escape Mr. Ago's very pertinent criticisms. The simplification some members were pressing for was perhaps excessive. Something between the two extremes was necessary and in a work of codification it was often necessary to state the obvious explicitly.

67. The Commission would do better to model the article on article 23 in Part I, concerning entry into force. It should first state in general terms that when a treaty contained specific provisions regarding its duration, it would terminate in such a manner or upon such a date or event as it might prescribe. Certain other elements in article 15 should then be dealt with in succeeding paragraphs; for example, there seemed to be general agreement on the need to retain the provision in paragraph 4 (c). The point made in paragraph 3 might also need mentioning: when a treaty terminated upon notice, the act of giving notice was not enough; it had to take effect under the terms of the treaty itself.

68. The point raised by Mr. Ago regarding the need to differentiate between resolutive conditions and other clauses of termination could be left to the Drafting Committee.

69. Perhaps, for the time being, article 15 could be referred to the Drafting Committee on the understanding that its consideration would have to be deferred until the Commission had reached a conclusion about articles 16 and 17.

70. The CHAIRMAN suggested that article 15 be referred to the Drafting Committee for consideration and re-drafting in simpler form once the Commission had completed its discussion on articles 16 and 17.

It was so agreed.

ARTICLE 16 (TREATIES EXPRESSED TO BE OF PERPETUAL DURATION)

71. The CHAIRMAN invited the Special Rapporteur to introduce article 16.

72. Sir Humphrey WALDOCK, Special Rapporteur, said the article was designed to deal with the special situation in which the parties clearly expressed their intention that the treaty should remain in force indefinitely, thus by implication excluding the right of denunciation. In such cases, the treaty could only fall by subsequent agreement between the parties or by the operation of international law. Perhaps the expression "perpetual duration" would not find favour, but he had thought it necessary to deal with that special case in order to ensure that the provisions of article 17 did not defeat the expressly declared intention of the parties. The discussion would show whether a separate article was in fact necessary or whether the point could be dealt with under article 17.

73. Mr. BARTOŠ said that the idea of the perpetuity of a treaty, which was contradicted by history and by social relations as they really were, should be resolutely rejected. Even the most dogmatic authorities now acknowledged that law evolved. A treaty might be concluded for an indeterminate period which the parties intended to be very long; it was also possible for certain customs to be almost perpetual; but a treaty could in no circumstances be regarded as having perpetual binding force. Hence he was definitely in favour of deleting article 16.

74. Mr. BRIGGS said he entirely agreed with Mr. Bartoš. A treaty could certainly remain in force for a very long time; indeed, during the second world war, the United Kingdom Government had invoked a fourteenth century treaty with Portugal in order to enable the United States to establish military bases in Portuguese island territories in preparation for the landings in North Africa, but the concept of perpetuity was offensive to the legal mind. Perhaps the Commission could pass on to article 17 and then decide whether in fact the point dealt with in article 16 needed to be covered.

75. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that all he had sought to do in article 16 was to indicate what rules applied to treaties of indefinite duration.

76. Mr. VERDROSS said he thought that article 16 should be deleted. In the absence of a specific clause on termination in the treaty itself, or of other provisions adopted by the parties, the treaty remained in force unless its termination ensued from some rule of international law. That was made abundantly clear by the other articles, whose provisions article 16 merely repeated *a contrario*.

77. Furthermore, even if it might be thought that perpetual treaties existed, such treaties could nevertheless become obsolete, so that no useful purpose would be served by declaring them to be perpetual.

78. Mr. AGO said he agreed that the word "perpetual" had somewhat startling implications, but clearly the Special Rapporteur's intention had only been to draft an article on treaties of indefinite duration. However that might be, he himself did not think the article necessary. It met a logical requirement in the system established by the Special Rapporteur, having regard to the form given to article 15; but if the Drafting Committee decided to amend article 15 in the manner he had proposed — namely, by mentioning only the circumstances in which a treaty came to an end — article 16 would become unnecessary.

79. Mr. ROSENNE said that for purposes of codification, the substance of article 16, whether incorporated in a separate article or not, should be retained. He shared Mr. Ago's objections to the word "perpetual" which should be replaced by the word "indefinite".

80. Mr. de LUNA said that the words "perpetual" and "perpetually", used in the heading and in the text of article 16, were not very felicitous. The perpetuity of a treaty was a pious hope, not a historical reality. To speak of the "perpetual" duration of a treaty would be a misuse of the term.

81. Mr. CASTRÉN said he favoured the retention of article 16 provided it was reworded in such a way as to replace the idea of perpetuity by a more acceptable idea, such as that of indefinite duration.

82. As to the substance, article 16 was not unnecessary because articles 18 and 22 embodied reservations. Moreover, article 17 went so far that it was important to retain article 16 in order to restrict the scope of article 17.

83. Mr. LACHS said that he had doubts about both the content and the form of article 16: no treaties were eternal. If anything at all needed to be said on the subject, it could be said in the next article.

84. Mr. YASSEEN said he was not greatly embarrassed by the word "perpetual", which was in common use, though he agreed that the alleged "perpetual" duration might come to an end. However, he agreed with Mr. Verdross and Mr. Ago that, since the conclusions of article 16 followed logically from the other articles, there was no need for a special article in which to state them.

85. Sir Humphrey WALDOCK, Special Rapporteur, said he did not altogether share the view that the rule he had tried to state in article 16 could be held to follow from other provisions in the draft; he believed it would be necessary to devote a special provision to treaties intended to be of indefinite duration. He did not insist on the term "perpetual", but merely wished to exclude such treaties from the somewhat broad scope of the provisions concerning the right of denunciation contained in article 17. In the latter, as readers of his commentary would be aware, he might have gone rather far in admitting an implied right of denunciation; for after studying existing state practice, he had reached a conclusion as to the general intentions of States in regard to the duration of various types of treaty which he himself had not altogether expected.

86. Perhaps the Drafting Committee could be asked to consider article 16 in the light of the conclusions reached on article 17.

87. The CHAIRMAN suggested that further consideration of article 16 should be deferred. The Commission would be better placed to judge whether article 16 could be deferred to the Drafting Committee for redrafting in the form of an exception to article 17 after the latter had been discussed.

It was so agreed.

The meeting rose at 12.55 p.m.

689th MEETING

Wednesday, 29 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider article 17 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 17 (TREATIES CONTAINING NO PROVISIONS REGARDING THEIR DURATION OR TERMINATION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 17 raised important issues, and the way in

which they were handled would have a direct bearing on, for example, articles 20 and 22. He hoped the Commission would bend its main efforts to reaching a clear consensus of opinion on paragraphs 3 and 4, which were the key provisions in article 17.

3. The major issue of principle to be decided was whether or not to accept the thesis that there was an implicit right of denunciation when treaties were silent about their duration or termination. Some eminent authorities had taken the view that there was no such right unless expressly provided for by the parties. Others, including the previous special rapporteur, Sir Gerald Fitzmaurice, had taken a more moderate line admitting that in certain instances an implied right of denunciation existed. Giraud in a recent study had advanced the opinion that, in the absence of provisions regarding denunciation, any general multilateral treaty could be denounced at any moment.¹

4. At the outset he had been disinclined to allow extensive rights of denunciation, but on examining state practice he had been impressed by the frequency with which clauses concerning termination of one kind or another had been inserted in treaties in recent times. Admittedly, as the matter was fundamentally one of interpreting the intention of the parties when the treaty was silent, the case could be argued either way, but he had come round to the view that for purposes of codification the better course would be to allow a right of denunciation unless the treaty was clearly intended to be of indefinite duration or was of such a nature that such an intention must be presumed. Except in treaties of that nature the absence of a provision concerning denunciation was almost certainly the result of the parties' inadvertence and did not reflect an intention to keep the treaty in force indefinitely. A carefully regulated implied right of denunciation governed by proper procedural requirements would make for stability and for respect for treaties and international law. He had set out in considerable detail in the commentary the reasons that had induced him to take up that position.

5. Paragraph 2, the drafting of which could perhaps be improved, was intended to deal with the fairly wide category of treaties which had a finite object and the parties to which must be assumed to have intended the treaty to continue in force until that object was achieved. In the case of those treaties there could be no implied right of denunciation.

6. Mr. CASTRÉN said that although he generally shared the views of the Special Rapporteur, he had serious doubts about the article under discussion, on account both of its underlying principle and of the special rules proposed in it. True, the Special Rapporteur proposed, as a residuary rule, that a treaty should be terminable only by subsequent agreement between the parties, but he stated in paragraph 23 of the commentary that he had done so more from respect for the authorities than from any deep conviction; and that residuary rule lost much of its value through the fact

that the Special Rapporteur provided for the termination of treaties of several categories by unilateral denunciation or withdrawal.

7. The Special Rapporteur had manifestly been influenced by Giraud, of whose views he rejected only the most radical; yet Giraud's report on the amendment and termination of collective treaties² had been criticized by many jurists. Although it was true that the Special Rapporteur could invoke the authority of so eminent a jurist as Oppenheim, he had proposed four categories of treaties that were subject to denunciation, whereas his predecessor had proposed only two, Lord McNair recognized only one, and the majority of writers, including Rousseau, admitted no exception to the principal rule, a view likewise adopted in the Harvard Research Draft.³

8. The attitude of States on that point was not clear and could be interpreted in two ways. For the Special Rapporteur, the fact that most of the treaties in the four categories he mentioned contained a denunciation clause or had been concluded for a short period of time proved that where the treaty contained no relevant provision, the intention of the parties was that it could be denounced. He himself believed that the absence of a relevant provision in a treaty should be interpreted to mean that the possibility of denunciation had been deliberately excluded. Some forty years ago, Finland had concluded several trade treaties and a number of treaties on social, cultural and scientific co-operation which were still in force and several of which contained no denunciation clause. In his view, the present system, supported by the authorities and based on the *pacta sunt servanda* rule, was the best and should be retained.

9. The Special Rapporteur stressed several times in his commentary that the rules in article 17 concerning denunciation and withdrawal merely established presumptions. Yet paragraph 3 was formulated as an absolute rule.

10. The rule stated in paragraph 2 was correct, but the final restriction, "until devoid of purpose", was unnecessary and perhaps even theoretically incorrect, as it might be considered that even in such a case the treaty remained formally in force.

11. Paragraph 3 (a) should be deleted for the general reasons he had already explained.

12. Paragraph 3 (a) (ii) seemed to contradict paragraph 4 (c). In contemporary international law, a treaty of alliance or of military co-operation could not be other than defensive and have the maintenance of peace as its object; a treaty of an aggressive nature would be contrary to the United Nations Charter and to international law in general. Paragraph 3 (a) (iii) was rendered excessively broad and vague by the use of the words "or any other such matters". With regard to paragraph 3 (a) (iv), it would be regrettable if treaties of arbitration, conciliation or judicial settlement could be terminated by a unilateral act not provided for in the treaty itself, as the Special Rapporteur seemed to acknowledge in paragraph 18 of his commentary.

¹ Giraud, E., "Modification et Terminaison des Traités collectifs", *Annuaire de l'Institut de droit international*, 1961, Vol. I, p. 73.

² Giraud, E., *op. cit.*

³ *American Journal of International Law*, 1935, Vol. 29, Supplement, Part III, p. 1173.

13. Paragraph 3 (c) would no longer be needed if article 15 were reworded in the way he had proposed at the previous meeting (para. 9).

14. It was not certain that the enumeration, in paragraph 4, of treaties which continued in force indefinitely in the absence of provision in the treaty for denunciation or withdrawal, was complete. The residuary rule stated in the following paragraph was insufficient to make good any possible omission, because it was subject to interpretation. Moreover, it might be advisable to delete the last three lines of paragraph 4, since the first of the two conditions laid down was clearly established in section II of the draft and the second followed from paragraph 2.

15. The Commission should redraft article 17, taking the rule stated in paragraph 5 as its starting point, deleting paragraph 3 (a), and possibly incorporating in the commentary, as examples of treaties which could not be denounced, the five classes of treaty mentioned in paragraph 4. Paragraph 1 and paragraph 3 (b) could be retained.

16. Mr. TSURUOKA said he had little to add to Mr. Castrén's remarks. He agreed that denunciation of a treaty should not be allowed unless the parties had expressly or tacitly agreed otherwise, and it was a substantial concession to allow the agreement to be tacit. That was the predominant view of the authorities and the one which prevailed in the practice of governments. Japan had had experience of it about forty years earlier, when it had wished to denounce unilaterally several restricted multilateral treaties concerning China; the announcement of that intention had raised a storm of protest from the eight other parties to the treaties.

17. Mr. de LUNA said he had grave doubts about article 17, which raised a general problem of law. Law demanded security, sometimes even placing it above absolute justice. The essential point in international society was that States — like individuals under municipal law — should be able to calculate the consequences of their acts. On that score he was opposed to article 17. On the other hand, experience of international life showed that States sometimes suffered restrictions on their freedom without being able to rely on the grounds for invalidation set out in section II of the draft, and were unable to secure the inclusion of denunciation clauses in a treaty. Out of sympathy for the weaker party, he would therefore be inclined to leave the door ajar for certain possibilities of denunciation, as the Special Rapporteur proposed. But on the whole he preferred the position taken by Mr. Castrén and Mr. Tsuruoka.

18. A denunciation clause was found in many treaties; did its absence then mean that the parties had tacitly accepted the possibility of denunciation or that they had wished to exclude it? In his view, every treaty was a particular case and should be interpreted separately. Moreover, it was clear from international practice that States did not hesitate to invoke Giraud's argument or the contrary one, as their interest dictated. Consequently, neither the fact that certain clauses appeared in many

treaties nor the practice of States justified the conclusion that the principle *pacta sunt servanda* should be attacked. The problem should be solved by interpretation of the will of the parties, and if no such interpretation was possible, a treaty could be terminated only by mutual consent of the parties. That rule afforded the maximum security.

19. As to the problem of extinction of a treaty through the disappearance of its object, a distinction should be drawn between complete fulfilment and actual disappearance of the object; but he would not press that point.

20. Lastly, denunciation could be accepted in the case of treaties setting up an international organization, but in addition to compliance with the prescribed periods, a State should be required to have fulfilled all its obligations to its former partners.

21. Mr. AMADO said he feared that article 17 might carry the Commission beyond the limits imposed by the rules of law.

22. With regard to the problem of denunciation, some writers held that treaties which did not contain a denunciation clause could nonetheless be denounced where the *mutuus consensus* implied a *mutuus dissensus*. In such cases, it might be held that the States concerned had tacitly granted each other a right of denunciation. That intention might be presumed in the case of treaties having successive effect which were not expressly concluded for a specified duration, and when there was reason to believe that the contracting parties had not wished to establish a permanent state of affairs. That applied, in particular, to technical treaties, under which the rights and obligations of the parties were identical and the withdrawal of one party would gravely impair the value of the instrument for the other contracting parties.

23. On that problem, however, he shared the views of Mr. Castrén and Mr. Tsuruoka; it would be very dangerous to accept the proposition that the whole structure of a treaty could be demolished. He was particularly opposed to the rule contained in paragraph 3 (a) (iv). The problem involved was a very important one; if the Commission did not reach agreement, he would ask for a vote, if need be.

24. Mr. VERDROSS said that, although he had often supported the Special Rapporteur against the majority of the Commission, he was radically opposed to article 17. Not only *de lege lata*, but also *de lege ferenda*, he found it impossible, for reasons of security, to accept a rule which would completely destroy the principle *pacta sunt servanda*. Apart from cases in which the *rebus sic stantibus* clause applied, to which he would revert later, a treaty could only be denounced in two cases: first, when denunciation was permitted by an express clause in the treaty itself or where the records of the negotiations made it sufficiently plain that the parties had wished to permit denunciation, and secondly, when one of the parties broke the treaty.

25. In drafting paragraph 3 (a) (iv) the Special Rapporteur had perhaps had in mind the withdrawal by France and Great Britain, during the second World War, of their recognition of the compulsory jurisdiction of the International Court. That was not a case of denunciation,

but of application of the *rebus sic stantibus* clause; for when they had accepted the Court's compulsory jurisdiction, France and Great Britain could not have foreseen that it would one day become a prize court. A treaty of arbitration or conciliation could not normally be denounced unless it contained a specific denunciation clause or unless the records showed that the parties had agreed to permit denunciation.

26. Mr. PAL said he would confine his remarks to the right of denunciation provided for in paragraph 3. It was a matter of common knowledge how the Declaration of London of 1871⁴ had been repeatedly disregarded by many States, and if their conduct was at all relevant to the issue under discussion there was much to be said in favour of the thesis developed by the Special Rapporteur. If the duty to comply with a norm was thus disregarded by statesmen whose sense of obligation was otherwise active and awake, it was most likely that they felt that duty to be in conflict with the obligation to act in accordance with reality and with a view to the practical consequences of their acts, which would affect the millions under their care. He preferred to assume that normally contracting States would behave in that way only when their practical sense came in conflict with their legal conscience and they believed the practical ends to be of superior value. Their duty to respect international law would thus sometimes be subordinated to political considerations concerning the consequences of certain courses of action. It seemed to him that the rule proposed by the Special Rapporteur would help to reconcile political and legal requirements and assist governments to abide by their legal obligations without having to disregard their practical responsibilities. It would certainly be advisable to keep the front door open a little, in order to avoid clandestine entry by the back door.

27. International law could not depend for its efficacy on prescribing imperative abstract rules; it must rely on the power of persuasion and therefore avoid undue rigidity. The Special Rapporteur's proposal, which he supported, was well calculated to further the aim, proclaimed in the preamble to the United Nations Charter, of establishing conditions under which justice and respect for the obligations arising from treaties and other sources of international law could be maintained. Without demanding any rigid final equilibrium it would help towards an approximate correction of the situation.

28. Mr. BARTOŠ said that generally speaking he shared the views expressed by Mr. Castrén, Mr. Tsuruoka, Mr. Amado and Mr. Verdross; as he did not wish to repeat these views, he would confine himself to a comment on the application of paragraph 3 (a) (iv).

29. It was possible to imagine, for example, the case of a trade treaty of specified duration concluded in the knowledge that its application was the subject of a treaty of arbitration or judicial settlement by which a certain regime had been established between the parties. If that treaty of arbitration — allegedly accessory, but in fact regulating the stability of relations between the parties —

were denounced, the regime it had established would be abolished; it could be said that at that moment the very basis for application of the trade treaty vanished, that new circumstances were created, and that the initial treaty itself must be revised in order to restore secure relations, or be regarded as terminated by virtue of the *rebus sic stantibus* clause. That example showed how dangerous it would be to accept the situation that article 17 would establish. The stability of the international order was at stake. And if the treaty in question was not an economic, but a political one, concerning the security of States and the maintenance of peace, it would be still more serious if the possibility of unilateral denunciation were recognized.

30. Mr. YASSEEN said that, although the principle *pacta sunt servanda* was a corner-stone of international order, all possibility of adaptation by means of certain correctives and exceptions must not be ruled out. It was accordingly necessary to allow the parties to a treaty to review their positions in certain cases. But such revision would be difficult if it were always subject to the agreement of the parties. A treaty involving the vital interests of a State should be terminable at the instance of one of the parties, even if it was silent on the question of its duration. That would perhaps make it possible to amend the old treaty or to conclude a new one more in keeping with the new circumstances.

31. He was thinking mainly of political treaties, such as treaties of alliance, which were not always freely consented to, yet could not readily be avoided by reason of defective consent. The Special Rapporteur had been right to place such treaties in the category of treaties which could be denounced even though they did not contain an express denunciation clause. That applied especially where such a treaty was concluded by a government not incontestably enjoying the people's support. It would accordingly be well to consider the possibility of making the principle *pacta sunt servanda* more flexible, though with caution, in order to adapt it to the requirements of international life.

32. Mr. BRIGGS said that the reason why he had put forward an alternative article on the denunciation of treaties to replace articles 15, 16 and 17 in the Special Rapporteur's report (previous meeting, paras. 9 and 24), was largely that he had not been satisfied with the provisions of article 17. His proposal would fit in with the general introductory article to section III proposed by Mr. Verdross and, as he had already indicated at the previous meeting, further articles dealing with termination other than by denunciation would be needed. His own text differed radically from that of the Special Rapporteur because, in his opinion, international law did not permit denunciation, except in accordance with the provisions of the treaty or with the consent of all the other parties.

33. In paragraphs 2 and 3 of his text he had dealt with the legal effects of denunciation; paragraph 3 did not indicate whether a multilateral treaty would survive after being denounced by one of the parties and so might possibly need modification.

⁴ British and Foreign State Papers, Vol. 61, p. 1198.

34. Analysing the structure of article 17, he said that paragraph 2 would certainly need redrafting: the qualification "by their nature" was dangerously vague. Presumably the provision was designed to deal with the case of treaties which continued in force unless there had been failure to fulfil the purpose intended, for example, when a party to an arbitration treaty refused to implement it after it had entered into force.

35. He could find no instances in practice to support the rule proposed in paragraph 3, which appeared to have been inspired by a doctrine upheld by English writers. The German, Italian and United States authorities he had had time to consult did not subscribe to the theory that, in the absence of an express provision regarding termination in any of the types of treaty listed in that paragraph, an implicit right of denunciation was to be presumed. The arguments adduced by the Special Rapporteur in paragraph 11 of the commentary could with the same force be used to prove the opposite contention, that if treaties were silent about termination, the parties had deliberately intended to exclude denunciation. Intention had to be interpreted from what was expressed in the treaty itself or probably, in certain cases, from the *travaux préparatoires*, but if there was no evidence as to what the intention of the parties had been, then a rule of the kind being proposed by the Special Rapporteur would conflict with the principle *pacta sunt servanda*.

36. The provision in paragraph 3 (b) seemed to be intended to provide a way of circumventing the procedures for amending the United Nations Charter, so as to permit of unilateral withdrawal in certain cases. He had never been convinced that a right of withdrawal did in fact exist.

37. Mr. ROSENNE said that article 17 was one of the most important in the draft. Any member of the Commission who had ever been called upon to give a legal opinion concerning the right of denunciation would be acutely aware of the delicate and difficult problems created by a denunciation or purported denunciation of a treaty. He fully subscribed to the bold and correct approach adopted by the Special Rapporteur and supported his proposal, which would become clearer if firmly drafted in terms of a residual rule. That would also bring out the importance of articles 15 and 16.

38. There was a great deal of doubt and confusion about what the law was on the matter and neither state practice nor doctrine offered much clear guidance, so it must be frankly admitted that the Commission was engaged in framing a rule *de lege ferenda*.

39. Since what was involved was a residual rule, the dominant factor was the interpretation of the intention of the parties, not merely as expressed in the treaty itself, but, as the Commission had realized at the previous session, as ascertained from all the circumstances attending the conclusion of the treaty.

40. Generally speaking, he accepted as a point of departure the proposition that treaty obligations could only be dissolved by mutual consent. Doctrine and state practice had both placed reliance on the Declaration of London of 1871, though it was more ambiguous than was sometimes realized, and if the reference to

that Declaration were retained in the commentary, then some mention should also be made of the resolution adopted by the Council of the League of Nations on 17 April 1935,⁵ which largely reaffirmed the principles underlying the Declaration; both those statements brought out the serious political implications of a situation that caused a State to denounce a treaty, as well as the grave effects of such action, and illustrated what Mr. Pal had wisely described as the problem of reconciling political and legal requirements.

41. The Special Rapporteur's proposal for a regulated right of denunciation for certain types of treaty would meet a serious need and lead to greater stability in international relations. He emphatically contested the assertion that it would destroy the principle *pacta sunt servanda*, particularly if it were coupled with assertion of the rule that, in general, denunciation was not legally permissible, and it would go far towards minimising the kind of political difficulties which could arise with the denunciation of important treaties. On that last point he had been impressed by some of the considerations advanced in the passage from Giraud's study, quoted in paragraph 8 of the commentary. Such a rule would also be of assistance to those responsible for drafting treaties and should result in a clearer expression of intention by the parties, whether in the treaty itself or in the related documents which often provided the source for interpreting intention.

42. In paragraph 9 of the commentary the Special Rapporteur had mentioned the kind of difficulties that had arisen over denunciation clauses during the discussions at the Conference on the Law of the Sea.⁶ If a clear residual rule had existed at that time, the task of government representatives and legal advisers in deciding how to vote would have been greatly simplified. Such a rule would automatically provide the means for ascertaining the intention of the parties, which in the present confused state of doctrine and practice was not available.

43. With regard to drafting, the article should begin with a statement of the general principle, and the exceptions should follow. Perhaps it was unnecessary to include examples in the text; but if they were omitted, they should appear in the commentary. If paragraph 2 were retained, perhaps it would be better expressed if the words "until the purpose of the treaty is discharged" were substituted for the words "until devoid of purpose".

44. While it might be a matter of regret that treaties of arbitration, conciliation or judicial settlement had been included in paragraph 3 (a), he had no serious difficulty in accepting that category as one for which a regulated right of denunciation ought to be recognized; but if sub-paragraph (iv) were retained and the commentary was accepted more or less in its present form, reference to declarations accepting the optional clause ought to be removed from the latter, because such instruments were not of quite the same character as arbitration treaties.

⁵ League of Nations, *Official Journal*, May 1935, No. 5, pp. 551-552.

⁶ United Nations Conference on the Law of the Sea, 1958, *Official Records*, Vol. II, pp. 19, 56 and 58.

45. He found it difficult to accept paragraph 3 (b) because he did not consider — and the commentary seemed to bear out his view — that the constituent instruments of an international organization came within the scope of a residual rule or that the right to withdraw from them should be regulated in a general code on the law of treaties.

46. He supported Mr. Castrén's suggestion that the proviso at the end of paragraph 4 should be deleted. Sometimes treaties were denominated a *modus vivendi* for purely diplomatic reasons, but were in fact intended to have an indefinite duration.

47. One important issue which was not touched upon in the article was the effects of denunciation — a matter that would certainly have to be discussed, because whether lawful or not, denunciation created a new situation and the effects could be entirely different from those following upon the expiry of a treaty; the question could perhaps be taken up in conjunction with Mr. Verdross's proposal for an introductory article.

48. Mr. AGO said that the Special Rapporteur's method of listing examples and categories made it more difficult for the Commission to reach unanimity, because some of the members might attach particular importance to one or other of the categories. Article 17 was far too detailed and the form in which it was drafted could certainly not be final. Some of the points it contained should be placed in the commentary and others could be omitted.

49. Undeniably, however, the problem existed and a rule was needed. The essential principle was that when a treaty contained no provisions regarding its duration or the right of the parties to denounce it or to withdraw, it was necessary to ascertain what the will of the parties had in fact been. That will might be deduced from the nature of the treaty, from its object or from the circumstances of its conclusion. Hence the basic principle was that stated in paragraph 5. Although he agreed with the Special Rapporteur on the substance of that paragraph, he thought it would be better to refer specifically to the problem of denunciation and withdrawal rather than to the duration of the treaty. It should be stated that the problem was one of interpretation, and that the nature of the treaty or the circumstances of its conclusion would show whether denunciation or withdrawal were permissible or not. For even if a treaty could be denounced, that did not necessarily imply that it was of a temporary nature, especially if it was a multilateral treaty. That however, was simply a matter of drafting.

50. For cases in which interpretation did not clearly bring out the will of the parties, a rule would have to be stated, if only to remind the parties of the need for a clear statement of their intention. Such a rule should, however, be as strict as possible and provide adequate safeguards. The Special Rapporteur himself held that view, since he had listed various types of treaty in regard to which there could be no question of denunciation.

51. On the other hand, the Special Rapporteur had listed several cases in which there could be a presumption in favour of denunciation or withdrawal. It would be more appropriate to mention those examples in the

commentary. The greatest caution should be exercised in recognizing the possibility of a State's withdrawal. It might perhaps be recognized in the case of trade agreements, which nearly always contained clauses on duration or denunciation, since they were concluded to meet a given situation. In other kinds of treaty, States usually endeavoured to limit the obligations of the parties. The possibility of an oversight must, of course, always be taken into account, but as a rule, if States omitted to include a specific clause on the subject, it was because they did not wish to permit denunciation. To do so would therefore run counter to the true intention of the parties.

52. On the whole article 17 was undoubtedly necessary, for the fact that such a rule was stated was even more important than the content of the statement. The article should therefore be redrafted in more condensed form and the various categories of treaty listed in the commentary.

53. Mr. LACHS commended the Special Rapporteur on the great effort he had made to find a solution to a very difficult problem; his excellent commentary illustrated the difficulties involved and the conflicting views on the issues under discussion. Personally, he could not subscribe to the extreme view put forward by Giraud, that general multilateral conventions constituted a kind of prison for the contracting parties.⁷ Nor could he subscribe to the other extreme view in favour of the right to denounce treaties.

54. Treaties generally provided for balanced reciprocal advantages for the parties. In some cases, one of the parties would benefit from the terms of the treaty immediately, but the other would have to wait a long time before deriving some advantage, meanwhile faithfully carrying out its obligations under the treaty. If it were open to the former party to denounce the treaty at any time, that would be tantamount to permitting it to derive the full benefit from the terms of the treaty and then to terminate it when the time came, so to speak, to pay for what it had received.

55. Sometimes, because of the nature of the treaty, it could be assumed that the parties had intended to leave open the possibility of denunciation or termination after a period of time. An important point to remember was that the absence of a specific provision on the subject of denunciation or termination could be due to a mere oversight on the part of the negotiators; in fact, he had come across two cases in which an agreement had been concluded without any stipulation as to the date of its entry into force or of its expiry.

56. That being so, the question arose under what conditions the provisions of article 17 would come into operation. Those conditions should not be confused with conditions arising from a fundamental change of circumstances and in their determination, both objective and subjective elements should be taken into account, bearing in mind always the intention of the parties.

57. There was a case for a provision along the lines of article 17, but a formula must be found which steered

⁷ See Commentary, para. 8.

a middle course between the two extreme views he had mentioned. That applied particularly to the list of types of treaty given in the article. Some of the examples needed careful consideration while others entered dangerous fields. In particular, he agreed with Mr. Briggs that the example relating to withdrawal from an international organization should be dropped. He did not find the example in paragraph 2 of the commentary on withdrawal from the World Health Organization at all convincing; he had had serious doubts at the time regarding the correctness of the procedure adopted. Moreover, the question of usage would inevitably arise in connexion with international organizations. Some were so recent that no usage existed, while even for some of the older ones there might not yet be any experience of the problem of withdrawal.

58. With regard to the examples in paragraph 4 (a), he had doubts regarding the case of a treaty which granted "right in or over territory". There was a considerable difference of opinion among writers as to whether international law recognized the existence of permanent rights over foreign soil. It was doubtful whether the concept of an easement in perpetuity existed in international law.

59. He also had doubts about the example in paragraph 4 (b) of a treaty establishing "a special international régime". An obvious example was the trusteeship system which, at the time of the signing of the United Nations Charter, had been widely believed to be an institution of a permanent character; by 1963, however, it had become clear that the institution was dying out.

60. As to the examples in paragraph 3 (a), some of the treaties mentioned could have a temporary character. The treaties of alliance or of military co-operation mentioned in sub-paragraph (ii) could be considered as merely temporary, until an effective system of collective security was worked out.

61. Those remarks, however, did not affect his general view that it was desirable to have an article along the lines proposed by the Special Rapporteur. It should take the form of a residuary rule and the Drafting Committee and the Special Rapporteur should be asked to submit an alternative draft in the light of the discussion.

62. Mr. TUNKIN said that the discussion had revealed a cleavage of opinion among members. Some felt that acceptance of the Special Rapporteur's draft would endanger the very principle of *pacta sunt servanda* and that, where a treaty was silent on the subject of denunciation or termination, it could only be denounced with the consent of all the parties. Others, while supporting that principle, were prepared to recognize exceptions to it, dictated by the realities of life.

63. The general problem involved was connected with the relationship between rules of customary international law and rules of conventional or treaty law. Giraud's views had clearly been influenced by the old theory that general international law consisted solely of customary international law and that conventional law was only a particular international law.

64. His own view was that, in international relations, conventional norms of international law were on exactly

the same level as customary norms. Customary norms were not subject to any condition regarding their duration. The position was the same with regard to treaty law: when a treaty was silent on the subject of its duration, the principle was that it could only be dissolved by the consent, express or tacit, of the parties.

65. The thesis proposed by Giraud was not only mistaken but dangerous, because it would detract from the principle *pacta sunt servanda*. He could not accept the assumption that because a State was under no obligation to enter into a treaty, it could therefore dissolve the treaty at any moment. It was the essence of an agreement that it should bind the parties.

66. He therefore accepted the principle that, if the treaty were silent, it could only be dissolved with the consent of the parties. He also believed that some specific situations called for exceptions to that rule. It was necessary to balance the need to preserve the rule with the need to take certain facts into consideration, and it was precisely that balance which the Special Rapporteur had succeeded in achieving.

67. While he thus agreed with the principles on which article 17 was based, with regard to its formulation he inclined to the views put forward by Mr. Rosenne and, as he had understood them, by Mr. Ago. The article should be redrafted so as to state, first, the principle that a treaty could be dissolved only with the consent of the parties, after which the exceptions would follow. That would involve deleting paragraphs 4 and 5, because their content would be covered by the general rule to which he had referred.

68. With regard to the examples given in paragraph 3, he did not think that "a commercial or trading treaty" should be included. He would retain treaties of alliance or military co-operation and treaties for technical co-operation in economic, social, cultural, scientific, communications or other such matters, but he was doubtful about treaties of arbitration, conciliation or judicial settlement.

69. With regard to paragraph 3 (b), he shared the view that it was not desirable to try to solve the particular problem of the constituent instrument of an international organization in a draft on the law of treaties.

70. Mr. GROS said that although he had made a careful study of the Special Rapporteur's very full commentary, he could not endorse his argument. The problem could be approached from another angle. The argument put forward by some members of the Commission, the basis of which he accepted — namely, that the actual facts required a specific situation in law to be treated more flexibly in certain circumstances — led to the conclusion that a regulated right of denunciation was needed. But where were the rules to be found? Certainly not in the text of article 17, since the members of the Commission did not agree about the various categories of treaty to be considered and the classification of treaties according to their nature was contested.

71. A general definition would therefore have to be adopted. A State could not be permitted to denounce

a treaty merely because it no longer appeared sufficiently advantageous. There were other cases, such as impossibility of executing the treaty or a change in the circumstances, which the Commission would consider. But when did a State really need a right of denunciation governed by rules other than the general rules of international law which applied to the cases he had mentioned? It was certainly possible to put forward hypothetical cases, but it was no use reasoning from anomalies.

72. If a State had concluded a treaty of indefinite duration and wished to amend it for legitimate reasons, its first step would surely be to approach the other party. It must therefore at least be presumed that the other party or parties had refused to negotiate. The most reasonable procedure would be to state that in treaties of indefinite duration, there was a tacit *pactum de negotiando*. It could then be recognized that if a State refused to negotiate the amendment of such a treaty without valid grounds, it violated an obligation implicit in the treaty.

73. He would revert to the substance of article 17 later.

74. The CHAIRMAN, speaking as a member of the Commission, said that for the first time he found himself not fully in agreement with the substance of a rule proposed by the Special Rapporteur. Article 17 was too timid in proclaiming the residuary rule and at the same time too bold in enumerating exceptions. The previous special rapporteur had been more assertive in expressing the rule and less generous in the matter of exceptions.

75. With regard to the various provisions of the article, paragraph 2 related to a different mode of termination of a treaty, namely, fulfilment of its intended purpose; the provision should be retained, but should form a separate article.

76. The enumeration in paragraph 3 (a) was unduly long. He could not agree with the inclusion of commercial or trading treaties. Practically all the establishment treaties between Latin-American and European countries had been concluded in the form of commercial treaties and would be placed in jeopardy if it were possible to denounce them in the manner set out in paragraph 3 (a). Nor was he certain that the examples given in the other sub-paragraphs were entirely valid, particularly the example in sub-paragraph (iv) of a treaty of arbitration, conciliation or judicial settlement.

77. In fact, it was not so much the nature or the subject matter of a treaty which made it open to denunciation, but the will of the parties or the circumstances of the conclusion of each treaty which showed whether it was intended to be permanent or not.

78. He agreed with those members who had urged the deletion of paragraph 3 (b), while paragraph 4 would be logically unnecessary if the residuary rule in paragraph 5 were expressed as such.

79. Consequently, although he could not support the Special Rapporteur's text, he was equally unable to support Mr. Briggs's alternative which went to the opposite extreme and would allow practically no right of denunciation unless permitted under the terms of the

treaty itself. Mr. Briggs himself, in his statement, appeared to have yielded a little from that extreme position when he had admitted that the right of denunciation might be deduced from the *travaux préparatoires* or inferred from the nature of the treaty or the circumstances attending its conclusion.

80. His views were very close to those of Mr. Ago, in that he favoured an article on simple lines, expressing the general rule that, where a treaty contained no provision on denunciation or termination, the right of denunciation would exist only where it could be inferred from the *travaux préparatoires* or from the circumstances attending the conclusion of the treaty. In all other cases, the consent of the parties would be necessary. The Commentary could give a list of examples including, with the necessary qualifications and reservations, some of the instances referred to in paragraph 3 (a).

81. Sir Humphrey WALDOCK, Special Rapporteur, said the majority of members appeared to be opposed to his approach to article 17. Other members, on the other hand, desired to retain, in a simplified article, the general concept that, in certain classes of treaty, a regulated right of denunciation was implicit; those members, like himself, favoured a carefully regulated right of denunciation, not a right of denunciation without notice.

82. Although article 17 appeared radical at first sight, it should be remembered that paragraph 3, the controversial paragraph, constituted a residuary rule. Most treaties were covered by the provisions of article 15 and their denunciation or termination was governed by the provisions of the treaties themselves. Article 16 dealt with the case where the intention of the parties was to conclude a treaty of indefinite duration. Article 17 stated the principle that a treaty could only be terminated in accordance with its own terms or by agreement of the parties.

83. His policy had been accurately described by Mr. Ago. He realized the difficulties which would arise from the examples he had given, but it was necessary to list the examples given in paragraphs 3 and 4 in order to be able to discuss them. Of course, if the Commission were to adopt the course of stating the principle that the termination of a treaty could only take place in accordance with its own terms or by agreement between the parties, the examples given in paragraph 4 would become unnecessary; exceptions would naturally have to be specified and they would be those of the list in paragraph 3 (a) which the Commission would agree on. Unfortunately, it was clear that it would be a very difficult task to draw up an agreed list of exceptions, and the Commission might have to fall back on the course suggested by Mr. Ago of adopting a general formula allowing for certain exceptions based on the nature of the treaty or the circumstances of its conclusion.

84. He fully agreed with Mr. Ago that it was essential to have some provision on the subject in order to give clear guidance to States and encourage them to include provisions on denunciation or termination in their treaties. A general formula would be of little help in that respect.

690th MEETING

Thursday, 30 May 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

85. It had been suggested that the intention to permit denunciation could be inferred from the *travaux préparatoires*. But it was a rule that, where the text of a treaty was clear, it was not permissible to refer to the *travaux préparatoires*. And, where a treaty contained no clause on the subject of denunciation or termination, it could be urged that the text of the treaty was clear and that it did not provide for the right to denounce. The difficulty could perhaps be resolved by a provision stating that reference could be made to the *travaux préparatoires* for the purpose, with due regard to the nature of the treaty.

86. With regard to the proposals that paragraph 3 (b) should be deleted, his purpose in including that provision had been to exclude from the operation of the rule embodied in article 17 treaties which were constituent instruments of international organizations. When adopting the various articles of Part I at the previous session, the Commission had usually made an exception for such treaties or referred to the constitutional practice of international organizations.

87. With regard to Mr. Gros' suggestion, the idea of re-negotiation was very interesting, but he felt that cases which came under that heading would hardly present any real difficulty. The purpose of article 17 was to deal with cases in which no agreement had been reached by the parties and it was necessary to determine whether a right to denounce the treaty existed. If such a right were granted, it would have the important effect of persuading the other party to re-negotiate; the absence of such a right could leave one of the parties at the mercy of the other. The absence of a specific provision on the subject of denunciation or termination of a treaty was often due to mere oversight, especially in the case of treaties in simplified form.

88. His views had not been influenced in any way by those of Giraud or indeed of any other writer, although he had drawn inspiration from certain writers, mainly English, in the selection of examples. Essentially, the provisions of article 17 were based on state practice. Since, in the great majority of cases, treaties contained provisions on the subject of denunciation or termination, it was reasonable to assume that States normally regarded it as important that treaties should have a limited duration.

89. He suggested that he should undertake the re-formulation of articles 15, 16 and 17 in the light of the discussion; in the case of article 17, he would endeavour to formulate the rule first and to make the exceptions follow. The Drafting Committee could consider and finalize the new texts, which would then be submitted to the Commission for its consideration.

90. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to the course suggested by the Special Rapporteur.

It was so agreed.

The meeting rose at 1.5 p.m.

1. The CHAIRMAN invited the Commission to consider article 18 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 18 (TERMINATION OF A TREATY
BY SUBSEQUENT AGREEMENT)

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing the article, said he had prepared a somewhat lengthy text because he considered it necessary to formulate a number of problems that arose in connexion with the termination of a treaty by subsequent agreement in order to give members an opportunity to express their views on those problems.

3. Paragraph 1 dealt essentially with the question of the unanimity necessary for the termination of a treaty. Its provisions followed from the position adopted by the Commission regarding the articles in Part I of the draft on the participation of new States in a multi-lateral treaty.

4. Some members might perhaps feel that the provisions of paragraph 1 (a) were unnecessarily complicated. Basically, like those of paragraph 1 (c), they embodied the rule that the unanimous agreement of the parties to a treaty was necessary for its termination. Paragraph 1 (a), however, took into account an additional point: the interest of other States which might have a right to accede to the treaty. It would be for the Commission to consider whether article 18 should specify that the consent of those States would also be required, at least for a certain period after the conclusion of the treaty.

5. Paragraph 1 (b) dealt with a somewhat exceptional case and its provisions were analogous to the corresponding ones in Part I on the subject of participation in a treaty. Some members might wish to omit that paragraph, but he thought the point should be covered in article 18.

6. Paragraph 2 was based on the logic of applying to the question of termination the provisions contained in the treaty itself concerning the procedure for its amendment or revision. It could, of course, be argued that the parties were masters of their own procedure and it might therefore be necessary to insert at the beginning of the paragraph the proviso "Unless the parties otherwise decide".

7. Paragraph 3, although it related to the form of the agreement, in fact dealt with certain points of substance. It was not at all uncommon for a treaty to be terminated by drawing up a new treaty to replace it. The

question which arose was whether less formal ways of termination could be accepted, such as negotiations which did not lead to the signature of a new treaty. The case covered in paragraph 3 (c) was close to that of desuetude; it was often not at all easy to distinguish between one form of termination and another.

8. Paragraph 4 was purely procedural; it could perhaps be transferred elsewhere in the draft but he thought that, for the time being at least, there was some advantage in keeping it in article 18.

9. Paragraph 5 was merely intended to cover the possibility of suspension as an alternative to termination of an agreement.

10. Mr. CASTRÉN said that in general he approved the line taken by the Special Rapporteur and the way he had formulated the article. He would therefore confine himself to comments on a few points of detail.

11. The distinction made in paragraph 1 between treaties drawn up at an international conference and other kinds of treaties was fully justified. Some account should, indeed, also be taken of the opinions of States which had participated in the conference but had not yet become parties to the resultant treaty, when termination of that treaty was contemplated.

12. It was also normal practice to consult governments on the length of the period for which such States retained the right to become parties to the treaty. The Special Rapporteur had stated in his commentary that he had in mind a period of ten years; in his (Mr. Castrén's) opinion, a much shorter period could be fixed.

13. The provision in paragraph 2, which contained a rule *de lege ferenda*, seemed both logical and practical. When a treaty prescribed a specific procedure for its amendment or revision, it was arguable that that procedure could also be applied for its termination, since complete revision in fact meant the replacement of the original treaty by a new one, and consequently the termination of the first treaty.

14. The provision in paragraph 3 (c), on the other hand, might perhaps lead to difficulties in application, but it should no doubt be considered in the light of paragraph 4, which satisfactorily regulated the procedure to be followed for treaties having a depositary. It might be advisable to extend the application of paragraph 4, to make it cover all multilateral treaties.

15. Paragraph 5, which likewise seemed to state a rule *de lege ferenda*, was justified and acceptable.

16. Mr. ROSENNE said that on the whole he shared the views expressed by Mr. Castrén. However, paragraph 1 (a) made no distinction between signatories as such and other States which had participated in drawing up the treaty. In that respect it followed article 9 of Part I on participation in treaties. However, in article 19 of Part I, dealing with acceptance of and objection to reservations, the position of the signatories had been rather more definitely brought out in connexion with a similar problem, and he thought that example should be followed in the present context.

17. With regard to the concluding provision of paragraph 1 (a), he thought that a specified period somewhat shorter than the ten years suggested by the Special Rapporteur — perhaps five years — would better protect the interests of signatories, and that the specified period should run not from the date of the adoption of the treaty, but from the date of its entry into force.

18. Paragraph 2 should be retained, but the commentary should make it clear that it referred to the termination of the treaty as a whole and not to the cessation of participation in it by an individual State.

19. Paragraph 4 (a) should ultimately be included in article 29 of Part I. At the present stage, however, its provisions should be left in article 18, so that the point they covered was not overlooked during the second reading. Paragraph 4 (b) ought to remain in article 18 on the analogy of article 19, paragraph 3, in Part I.

20. Mr. YASSEEN said that the rules proposed by the Special Rapporteur in article 18 were logical and in conformity with the general principles of law. While he readily acknowledged that account should be taken of the interests of States which had not yet become parties to the treaty, and that their right to accede to it should be respected, he suggested that it might be possible to go a little further and require the agreement, not only of two-thirds of the States which had drawn up the treaty, but of two-thirds of the States which were entitled to accede to it.

21. The expression "within an international organization", used in paragraph 1 (b), seemed to him to be too broad, for it could include treaties drawn up at an international conference. It would therefore be preferable to speak of a treaty adopted by an organ of an international agency.

22. Moreover, it would seem logical to lay down stricter conditions concerning the binding force of the instrument by which a treaty was terminated, and to require that it should have the same legal force as the instrument by which the treaty had been concluded.

23. Mr. LACHS said he agreed with the general outline of article 18 and, in particular, with the principle of a qualified majority stated in paragraph 1 (a). The figure of two-thirds corresponded to the majority specified in most treaties of the type under consideration, though there were exceptions; the Universal Postal Convention of 1878, for example, specified a majority of three-fourths.

24. In paragraph 2 of his commentary, the Special Rapporteur touched on a point which was not fully reflected in the text of the article, namely, the "strongly entrenched principle of international law that a treaty cannot by itself deprive third States of their rights under a prior treaty". It was essential to define what was a third State, a problem to which the Chairman of the Commission had made an important contribution in an article published in the *American Journal of International Law*.¹ The Special Rapporteur appeared

¹ Jiménez de Aréchaga, E., *Treaty Stipulations in favour of third States*, *American Journal of International Law*, 1956, Vol. 50, pp. 338 ff.

to consider as third States those which had participated in the drafting of the treaty but had not become full parties to it. There were cases, however, in which some States participated in the drafting of a treaty, but *ex definitione* took no part in it and were not meant to become parties to it. Their rights were specifically laid down in the treaty, however, and they intended to avail themselves of those rights. It had been stated by the Permanent Court of International Justice in a well-known judgment that "rights of third States should not be lightly presumed," but there were cases in which they were quite clearly stated.

25. There were also cases in which a treaty contained provisions in favour of third States that had not participated in the drafting. The Paris Peace Treaties of 1947² contained certain provisions in favour of the States termed "the United Nations". In fact, a number of the States which constituted the "United Nations" — as defined in those treaties — were not signatories to them, but nevertheless benefited from the rights stipulated in the treaties, especially the most-favoured-nation clause. Another example was the Aaland Islands Convention of 1856, which had stipulated certain rights in favour of a non-contracting party, Sweden. The Committee of Jurists appointed by the League of Nations Council had held that Sweden was entitled to benefit from the treaty, although not a party to it, until the treaty was terminated by the parties.³

26. When certain rights were clearly specified in favour of a third State, and that State had availed itself of those rights, the parties to the treaty were no longer free to dispose of the rights of that third State. For example, Poland had not been a party to the 1918 Armistice Agreement or to the Convention of Spa, but was nevertheless entitled to certain rights under those agreements.

27. A case of that kind could arise under the provisions of paragraph 1 (b); an agreement could be entered into within an international organization to set up a new State, which would not, of course, be a party to the agreement. He had in mind United Nations decisions setting up as independent States certain countries formerly under trusteeship. He invited the attention of the Special Rapporteur to the question whether the parties to an agreement of that type, which could take the form of a treaty, were entitled to go back on its terms to the detriment of the newly independent State, which was not a party to the agreement under which it had come into independent existence.

28. Mr. AGO observed that article 18 was one which raised no question of principle, but only a question of expediency in regard to certain rules to be followed in order to secure the best possible results. Any rule would be to some extent arbitrary, since time limits and majorities had to be fixed. On the whole, however, the Special Rapporteur's draft seemed entirely acceptable.

² United Nations *Treaty Series*, Vols. 41, 42 and 49.

³ League of Nations *Official Journal*, 1920, Special Supplement No. 3, pp. 18-19.

29. Article 18 dealt with the termination of a treaty by subsequent agreement, where the treaty contained and — more important — where it did not contain, an express termination clause. It might perhaps be preferable to start from the essential rule stated in paragraph 1 (c), that the mutual agreement of the parties was required for the termination of a bilateral treaty. That also applied to a multilateral treaty, when it was not a general multilateral treaty, even though the rule was sometimes difficult to apply in practice.

30. In the case of a treaty "drawn up within an international organization" the solution proposed in paragraph 1 (b) was self-evident. He also approved of the rule stated in paragraph 2 for treaties prescribing a special amendment or revision procedure, since in the extreme case amendment was tantamount to termination.

31. A practical problem arose where a treaty had been drawn up at an international conference. In addition to the agreement of all States which had become parties, paragraph 1 (a) required the agreement of two-thirds of the States which had drawn up the treaty. In most cases it was, of course, a majority of two-thirds of the States which had drawn up the treaty that was required for its adoption, but perhaps the principle should be, precisely, that the majority required for terminating a treaty must be the same as that required for its adoption. That would make the rule appear rather less arbitrary. He also agreed with Mr. Yasseen that it would be better to refer to the States entitled to accede to the treaty than to those which had taken part in drawing it up.

32. As to the need for the agreement of "all those which have become parties to the treaty", he would make no proposal or criticism. He pointed out, however, that a single State would be able to veto the termination of the treaty, and he wondered whether the rule might not sometimes prove rather inflexible.

33. The most usual case was, of course, that provided for in the last phrase of paragraph 1 (a). It was unlikely that the parties would wish to terminate a treaty drawn up by an international conference until a long period had elapsed since its conclusion. In the normal case provided for, the States which were entitled to accede to the treaty but had not done so would have nothing more to say. But should complete unanimity of the parties be required? That would be the most logical rule, but where a treaty had many signatories there would be some danger of a veto by a single State. A certain arbitrary element could not be avoided in any case, but from among the possible arbitrary rules the most practical rule should be chosen.

34. With regard to paragraph 3, he was not sure that an enumeration of the various forms of agreement terminating a treaty was needed in the article; it might be more appropriate in the commentary.

35. As to paragraph 4, he wondered whether withdrawal, which had already been considered in conjunction with denunciation and which did not result in termination of the treaty, should be dealt with in sub-paragraph (a).

36. Mr. de LUNA said that, as several previous speakers had observed, article 18 should start from the general principle, not from an enumeration of particular cases. Paragraph 1 should therefore be in the form of a declaration, which might read:

“A treaty may be terminated at any time by any kind of mutual agreement, even tacit, between all the parties.”

37. He doubted whether States which had participated in the adoption of a treaty but had not yet become parties to it should have the right granted them by paragraph 1(a). The commonest reason for States failing to ratify a treaty was oversight or negligence. Legally, such States had no acquired right, but only an expectation of a right. The only right they could be accorded was that of acceding to the treaty so long as it existed.

38. He had some doubts about the unanimity principle. As Mr. Ago had stressed, the danger of giving a State a right of veto, as it were, and thus obstructing the development of international law, should be avoided.

39. The CHAIRMAN, speaking as a member of the Commission, said that he too was opposed to paragraphs 1(a) and (b), which appeared to suggest that a treaty might be terminated by the will of States not parties to it, even though the States actually bound by the treaty might wish to keep it in force.

40. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that in the case contemplated in paragraph 1(a), such a result was precluded by the proviso “including all those which have become parties to the treaty.”

41. The CHAIRMAN, speaking as a member of the Commission, said that his point remained valid for paragraph 1(b), which appeared to disregard the will of the States parties to the treaty. The existing rule of international law in the matter was that termination of a treaty by dissent required the concurrence of all States bound by the treaty. He saw no reason for departing from that basic rule.

42. The approach adopted by the Special Rapporteur in article 18 was similar to that of article 6, of Part I, on the adoption of the text of a treaty. In fact, there was a great difference between the adoption of a text and the extinction of a treaty. In the former case, the participating States had a legitimate interest in the text which they had adopted and opened for signature and ratification; at that stage, it was open to States to assume obligations under the treaty or not, at their choice. Article 18 dealt with a completely different situation: the treaty was already in force and the question which arose was that of putting an end to the obligations assumed by States under the treaty; it did not seem at all appropriate to apply, for that purpose, a procedure similar to that chosen for the adoption of the text.

43. Mr. TUNKIN pointed out that paragraph 1 of the commentary began with the passage: “Where the treaty itself provides for an express right of denunciation, or, where such a right is to be implied under

article 17, the termination of the treaty is unlikely to give rise to any problem. Where, however, there is no such right, serious difficulties may arise.” Hence article 18 as drafted by the Special Rapporteur was apparently intended to deal only with the case in which the treaty was silent regarding termination. If that was the intention, it should be expressed more clearly in the text of the article. He himself would be opposed to any different rule, because it would be manifestly unjust to override the will of the parties in that respect.

44. With regard to paragraphs 1(a) and (b), he agreed with the Chairman that article 6 of Part I and article 18 dealt with completely different situations. In the case of the adoption of a text, States remained free to sign and ratify the treaty or not to do so; article 18 contemplated the termination of the mutual rights and obligations arising from the treaty. He could not see how it was possible to adopt a rule to the effect that a two-thirds majority could set at naught the rights of other States under a treaty without the consent of those States.

45. Paragraph 1(a) raised the question whether States other than those bound by the treaty should have a voice in its termination. The Special Rapporteur had been right to include a provision giving such a voice to States that had participated in drawing up the treaty. Contemporary practice showed that a certain lapse of time was necessary for a State to decide whether to ratify a treaty or not. It was therefore appropriate to take that fact into account and to allow potential contracting parties a voice in the termination of the treaty for a certain period. However, he thought the suggested period of ten years was too long and that, probably, five years should be sufficient for a State to make up its mind.

46. Paragraph 1(a) could give rise to another problem to which attention had not yet been drawn. The actual parties to an agreement might wish to terminate it, but they could apparently be overruled by a two-thirds majority of the States which had participated in drawing up the treaty and which might be benefiting from it without being parties. That situation could arise because under paragraph 1(a) a two-thirds majority of those States was required to terminate the treaty, quite apart from the consent of the parties.

47. Another possible solution of the problem contemplated in paragraph 1(a) would be to apply the system it provided for not to the actual termination of the treaty, but to the decision to convene a new international conference to discuss the revision or possible termination of the treaty.

48. With regard to paragraph 1(b), he considered that the character of a treaty was in no way affected by the fact that it had been drawn up within an international organization. The treaty was still an agreement between States, binding upon them; in principle, it was for the States parties to the treaty to settle all problems arising from it, if the rules in force within the organization did not provide otherwise.

49. As he saw it, there were only two possibilities. Either the treaty itself contained a provision concerning

its termination, in which case that provision should apply, even if the treaty had been drawn up within an international organization. Or the treaty was silent on the subject; but even in that case, he could not accept paragraph 1 (b), which constituted an innovation and, in his view, an unjustified one.

50. He saw no reason to impose on international organizations a rule that a treaty could be terminated "by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ". The constituent instrument of an international organization might well contain no provision for such action and might not give any organ of the organization the power to put an end to treaties concluded within its framework. It was unlikely that States would be prepared to accept a rule that would give international organizations such overriding powers over the States parties to a treaty.

51. Paragraph 1 (b) should state that the decision concerning termination would be taken in accordance with the rules in force in the international organization, if a rule conferring power to terminate treaties on a specific organ existed, and if it did exist, States would be aware of the fact.

52. With regard to paragraphs 3 and 4, he shared the doubts expressed by Mr. Ago. Their provisions were too detailed and it might prove difficult to secure for them the assent of States at a large international conference.

53. Mr. AMADO observed that article 18 faced the Commission with an example of the new problems raised by the development of international relations. Bilateral treaties, or treaties to which only a few States were parties had not been as complicated as the big contemporary multilateral treaties. Consequently, the problems relating to the termination of the earlier treaties had been easier to solve; it had been sufficient to follow existing practice.

54. In considering the possibility of terminating a treaty, the difficulty lay in interpreting the will of the States which had concluded it. It certainly went against the grain to use the word "arbitrary" in speaking of law; but there was no alternative in the circumstances. In the case dealt with in paragraph 1 (b) the question was to what extent the States concerned had delegated their will to the international organization within which the treaty had been drawn up. The Special Rapporteur, who had understood the problem very well, had given the reasons for his position in paragraph 4 of his commentary, where he said "Nevertheless, when a treaty has been drafted within an organization and then adopted by a resolution of one of its organs, there is a case for saying that the organization has an interest in the treaty and that its termination should be a matter for the organization".

55. He agreed with those members who advocated beginning with a statement of the general principle of mutual agreement between States. To meet Mr. Yasseen's objection to the French wording "*dans le cadre d'une organisation internationale*", the words

"*au sein d'une organisation internationale*" might be substituted.

56. Mr. PAL said he had at first felt inclined to accept paragraph 1 with certain minor drafting changes, but the remarks of the Chairman had led him to consider it more carefully.

57. As he read paragraph 1 (a), two conditions were required for the termination of the treaty: first, the agreement of all the States which had become parties to the treaty, and, secondly, the agreement of not less than two-thirds of the States which had drawn up the treaty. He still believed that that was the meaning intended, and if so he was in favour of accepting the provision. To make the first of those conditions clear, however, a few drafting changes would be needed. The provision "including all those which have become parties to the treaty" was intended to mean "including the agreement of all those States which have become parties to the treaty". As the draft stood, the clause seemed to qualify "the States which drew up the treaty"; if that were so it would mean quite a different thing, and even a majority of the States parties to the treaty would suffice. He believed that was not the intention and therefore suggested that the drafting be changed as he had indicated to clarify the position.

58. The last part of paragraph 1 (a) showed that the intention of the provision was to require, for a specified number of years for purposes of the termination of a treaty, the unanimous consent of the States parties thereto and also the agreement of not less than two-thirds of some, but not all, of the potential parties thereto. On the expiry of the specified period, only the agreement of the States parties to the treaty would be necessary, as expressly stated at the end of paragraph 1 (a). That approach was consistent with the principle underlying articles 5 to 9 of Part I, which the Commission had adopted at its previous session.

59. He agreed with Mr. Yasseen that it would be advisable to give some voice in the termination of the treaty not only to the potential parties indicated in paragraph 1 (a), but to other potential parties as well.

60. He also agreed with the view that the general principle stated in paragraph 2 should take the form of an express opening provision of the article.

61. Mr. YASSEEN said that the discussion had cast some doubt on the solution adopted in paragraph 1 (b). It was true, as the Special Rapporteur maintained, that the treaty referred to in that paragraph was almost a treaty of the organization, but that was no reason for overlooking the fact that it also belonged to the parties; consequently the difference in treatment between the cases dealt with in sub-paragraphs (a) and (b) of paragraph 1 should not be so marked. It should be laid down in sub-paragraph (b) that the majority required for a decision of the competent organ must comprise all the parties to the treaty.

62. He accepted Mr. Amado's suggestion for the wording of the French text of sub-paragraph (b).

63. Mr. BRIGGS said he agreed that there was need for a provision concerning termination by subsequent

agreement. He considered that article 18 should begin with a statement of the rule contained in paragraph 1 (c). He certainly did not subscribe to the view that the provisions of the treaty concerning termination must always be complied with, for if a treaty concluded for a specific term of years were found, before that term had expired, no longer to serve any purpose, there was nothing whatsoever to prevent the parties putting an end to it by agreement.

64. He was not in favour of retaining the substance of paragraph 1 (a) because he did not recognize that signatories possessed any vested right in regard to termination. The case which paragraph 1 (a) was intended to cover was in any event largely hypothetical: it seemed far-fetched to imagine, for example, that the Geneva Conventions on the Law of the Sea, which required twenty-two ratifications or accessions to enter into force, might be ruled out of existence by the States which had ratified while others were still waiting to do so.

65. He agreed with Mr. Tunkin's view of paragraph 1 (b); once a treaty had been created, the fact that it might have been drawn up within an international organization became irrelevant and the parties must have the decisive voice on its termination. That provision also should be omitted.

66. The obligation prescribed in paragraph 2 was not particularly stringent, but he doubted whether such detailed provisions, or those set out in paragraphs 3 and 4, were appropriate; perhaps paragraph 4 might be taken up in connexion with article 29 of Part I, as suggested by Mr. Ago. Paragraph 5 was not objectionable.

67. Mr. EL-ERIAN said that on the whole he found article 18 acceptable, but it ought to be reformulated to state first the principle that a treaty could be terminated by agreement between the parties and in accordance with the relevant provisions, and then the residual rules.

68. It was important to distinguish between treaties concluded at a conference convened by an international organization and those adopted by a resolution of an organ of an international organization.

69. In paragraph 1 (a) the Special Rapporteur had rightly recognized the interest of the States which had taken part in drawing up the treaty; they ought to have some say in its termination.

70. With regard to paragraph 1 (b) he agreed with Mr. Tunkin that a treaty drawn up within an international organization was still an agreement between States and that its character as such was not affected. It should be noted, however, that there was a class of treaties initiated by, and drafted within, an international organization, and then adopted by a resolution of one of its organs. The special interest and concern of the international organization in the future and fate of such treaties would justify granting it some say in their termination. He thought, therefore, that the solution suggested in paragraph 1 (b) should reconcile two considerations: namely, the continuing character of the treaty as an agreement between the States parties to it and the special interest and concern of the international organi-

zation within which the treaty was initiated, drafted and adopted.

71. Mr. AGO said he had two comments to make. First, it seemed that some members of the Commission considered that article 18 governed only cases in which the treaty itself prescribed no termination procedure. That was perhaps not entirely correct. If all the parties agreed to terminate the treaty, even by a procedure other than that prescribed in it, they could obviously do so. The Commission should simply take care to express itself in such a way that the formula adopted could not be interpreted otherwise.

72. Secondly, he agreed with Mr. Tunkin in recognizing that termination was a different act from adoption. Nevertheless, there was no reason why the same majority should not be required for both. For terminating a general multilateral treaty, Mr. Tunkin had himself envisaged the procedure of convening another conference of the same States; but the majority required for termination of the treaty at the Conference would certainly be the same as the majority required for its adoption. Hence Mr. Tunkin's comments militated in favour of the proposal he had put forward.

73. The Special Rapporteur, for his part, had envisaged other procedures: for example, the depositary of the treaty might be instructed to communicate any proposal for termination to all the States concerned; in that case, too, it was obvious that the majority required for terminating the treaty should be the same as that required for its adoption. Otherwise, a treaty whose adoption had required a majority of three-fourths might be terminated by a majority of only two-thirds, if that procedure were followed, whereas a majority of three-fourths would be required if the procedure adopted was to convene another Conference of the States concerned, which would be illogical. Any procedure requiring a specified majority had something arbitrary about it, but if the same majority were prescribed for termination as for adoption, arbitrariness would be kept to a minimum.

74. Mr. TUNKIN said that, in the case of bilateral agreements or treaties concluded by a group of States, the parties could amend or terminate the treaty at any time by common consent, whatever its provisions regarding termination. The real problem arose with general multilateral treaties, when a number of States had already become parties and others could reasonably be expected to do so. Mr. Ago had contended that for that category the same majority rule as was laid down in article 6 of Part I should be applied, though he had recognized that the two situations were not the same. In fact there was a profound difference between termination and adoption and the same rule would certainly not do for both.

75. To impose a two-thirds majority rule wherever a treaty was silent on termination procedure would open the door to numerous abuses and to every kind of political manoeuvre to secure a two-thirds majority for terminating treaties and extinguishing the rights of a minority. Such a dangerous rule might well exacerbate international tension and would certainly be unaccept-

able to many States because it would be used as a form of international legislation. Subject to a few modifications, he was prepared to support the provision put forward by the Special Rapporteur in paragraph 1 (a).

76. Mr. ROSENNE said he questioned whether the difference between adoption and termination was as great as some members seemed to think. In fact, from the legal point of view, the transactions of adopting a treaty, when the rules of article 6, Part I would apply, and terminating a treaty by means of a new agreement, were very similar.

77. There was considerable force in the argument that the rights of the parties required special protection and, as the Chairman had pointed out, that matter had not been expressly provided for in paragraph 1 (b). The point could be covered by drafting changes; otherwise paragraph 1 (b) would not be acceptable.

78. Apart from the rights of the States taking part in drawing up the treaty, there was a case for recognizing, for a certain period, the special status of signatory States, corresponding to their rights under some of the provisions of Part I, because with the act of signature they assumed certain obligations.

79. The CHAIRMAN, speaking as a member of the Commission, said that his comments on paragraph 1 (b) might perhaps have been misunderstood. He had wished to draw attention to the serious consequences that such a provision would have for treaties drawn up at Pan-American Conferences. Paragraph 1 (b) seemed to provide no safeguard for the parties already bound by the treaty, and could expose them to decisions by non-signatories concerning termination of a treaty in force between a limited number of States.

80. Mr. AGO pointed out that he had never proposed that any majority of the States which had drawn up a treaty could be a substitute for the agreement of the parties. He had always based his position on the Special Rapporteur's formula, which required both a majority of the States which had drawn up the treaty and the unanimous agreement of the States which had become parties to it. Far from being too liberal, his formula was in fact stricter than that advocated by Mr. Tunkin. He had merely raised the question whether a single party could be allowed to veto a treaty's termination.

81. Mr. de LUNA said he still thought that to give a voice in the matter of termination to States which had merely drawn up a treaty, but had possibly not even signed it, and had in any case not become parties to it, would introduce an unnecessary complication. It would be the first time that such States had been granted any such right, and by a negative vote preventing the required majority, some of them might completely frustrate the unanimous will of the parties. Any such rule would be tantamount to rewarding States for negligence and would be completely contrary to practice, which allowed a few parties to terminate a multilateral treaty *inter se* and conclude a fresh treaty, and at the same time to continue to recognize the validity of the earlier treaty vis-à-vis those of their former co-signatories who were not parties to the new treaty.

82. Mr. TSURUOKA said that, to view the matter from a practical standpoint, the actual circumstances in which treaties were terminated must be borne in mind. In the case of a bilateral treaty it was a simple enough matter. In the case of a multilateral treaty, whether general or restricted, a new treaty was usually substituted. In that case the existing rules were entirely adequate.

83. Article 18, therefore, dealt solely with residual cases. For instance, a conference might adopt the text of a treaty, which might then be ratified by some, but not all, of the participating States, and the States which had become parties to it might subsequently agree unanimously that they wished to be relieved of their obligations. The States which had taken part in the conference, but had not ratified the treaty would then have to be allowed to participate in drawing up a new treaty to replace the earlier one. That was a very simple matter, and did not constitute an innovation.

84. Sir Humphrey WALDOCK, Special Rapporteur, said that the cases dealt with in paragraph 1 (a), to which some speakers seemed to have taken exception, might not be frequent or present serious difficulties. Nevertheless cases under that provision could arise. For example, a multilateral treaty on a technical matter might be open to participation by a large number of States, but might be found to be in need of replacement before many States had ratified or acceded to it. The question might then arise whether the treaty should be terminated. Again, a number of modern multilateral treaties only required a small number of ratifications to bring them into force and it would be unthinkable that the two or three States which had ratified and brought a treaty into force should be able to terminate it shortly afterwards, thereby frustrating all the others that might be contemplating ratification. He had not found Mr. de Luna's argument opposing paragraph 1 (a) convincing.

85. He agreed that the omission regarding the consent of the actual parties to the treaty in paragraph 1 (b) must be made good.

86. Although there was a certain similarity between the problems posed by adoption and termination there was also an important difference, for when a treaty had been brought into force, it gave rise to acquired rights which must be safeguarded if it were being terminated. The interests of States which had negotiated and signed the treaty must also be taken into account to a certain extent as they had been in article 9 of Part I, which dealt with the question of opening a treaty to participation by States not entitled to accede to it under the clauses of the treaty, and which gave a say in the decision to do so only to the States which "drew up" the treaty. The Special Rapporteur had followed the formula adopted by the Commission for that article. If the Commission were now to decide in the present connexion to give a voice also to States merely entitled to become parties, it might later have to reconsider its position with respect to the drafting of article 9 of Part I.

87. Mr. Ago had raised the question whether a two-thirds voting rule should be applied or the voting rule used

for the adoption of the treaty. The Commission should keep in mind that the two-thirds rule had been inserted in article 9 of Part I, and that no provision had been made in that article to cover cases of a different rule being applied during the negotiations.

88. He agreed with Professor Briggs in doubting whether the article should be so worded as to exclude treaties containing clauses on termination; for such treaties were not infrequently expressed to continue in force for comparatively long periods and occasion might arise for their termination by agreement of the parties. That was perhaps a matter which could be covered in drafting together with a number of other points made during the discussion, which could be left to the Drafting Committee.

89. He did not propose to take up the question mentioned by Mr. Lachs of cases in which it was arguable that the treaty created substantive rights in favour of third parties, because the whole question of the effect of treaties on third States was a very complex one which properly belonged to his next report. He might, however, remind the Commission that Sir Gerald Fitzmaurice, in his fifth report, had taken the view that such rights could exist in favour of non-parties, but that the beneficiaries were not entitled to obstruct the action of the States parties to the treaty creating the rights, if by common consent they had agreed on its termination.⁴

90. Rather special considerations applied to the category of treaties of a constitutional character mentioned by Mr. Lachs, and for the purposes of the present discussion they could perhaps be left aside.

91. Some members seemed to think that paragraph 2 could serve a useful purpose and it might be considered by the Drafting Committee.

92. He did not favour Mr. Briggs' suggestion that paragraph 3 be deleted and believed that in modified form it should be retained. If its sub-paragraphs (b) and (c) were retained, then the provisions in paragraph 4 would also be necessary, since without them the procedural clauses concerning the means of arriving at an agreement to terminate the treaty would be incomplete. But at a later stage of the Commission's work, it might be found more appropriate to include the substance of paragraph 4 in the article in Part I dealing with the functions of a Depositary.

93. Mr. VERDROSS said he regarded the provisions of article 18 as *lex ferenda*. The Commission could, of course, make proposals, but it was governments that would decide whether to accept or reject them.

94. In his view paragraph 1 (a) was a revolutionary provision which went beyond conventional law and opened the door to international legislation.

95. Mr. AGO observed that there was no question of terminating a treaty solely by the decision of a specified majority of the States which had drawn it up. A second condition was stipulated in paragraph 1 (a): the agreement of the parties to the treaty. Hence the provision was not as revolutionary as Mr. Verdross thought.

96. Mr. de LUNA said he recognized that the unanimity rule was *lex lata*, but the other condition stipulated in paragraph 1 (a) was quite revolutionary. The least that could be required was that the States which had drawn up, but had not ratified, a treaty should be obliged to show their goodwill, perhaps by a purely formal ratification, before they could participate in the decision on its termination.

97. Mr. AMADO said that in modern times a single State could hardly be allowed to frustrate the will of a hundred other States that wished to terminate a treaty. The discussion on reservations at the previous session had shown that times had changed since the days of the League of Nations. The Commission's task was to develop the law, and it should not hesitate to take a decision *de lege ferenda*.

98. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Lachs' views on the rights of third parties. It was to be inferred from the judgment of the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex case*⁵ that the acquired rights of third parties were not necessarily extinguished when the treaty from which they emanated was terminated by the contracting parties. As the problem would be coming up for discussion at the sixteenth session, it should be understood that the question of the survival of acquired rights of third parties was reserved under article 18.

99. Mr. LACHS said it was important that that point should be made clear in the commentary.

100. The CHAIRMAN suggested that article 18 be referred to the Drafting Committee in the light of the discussion.

It was so agreed.

The meeting rose at 12.50 p.m.

⁵ *P.C.I.J.*, Series A/B, No. 46.

691st MEETING

Friday, 31 May 1963; at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider article 19 in Section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 19 (IMPLIED TERMINATION BY ENTERING INTO A SUBSEQUENT TREATY)

2. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 19, said that its contents followed

⁴ *Yearbook of the International Law Commission, 1960*, Vol. II (United Nations publication, Sales No.: 60.V.1, Vol. II), pp. 79 ff.

logically from article 14, which dealt with conflict with a prior treaty. Since the Commission had reserved its decision on article 14, he suggested that the decision on paragraph 2 of article 19, which dealt with the question of *inter se* revision of a prior treaty, and which was very closely linked with article 14, should also be deferred.

3. The problem of the implied termination of a treaty by entering into a subsequent treaty on the same subject-matter was a very real one. It had been clearly explained by Judge Anzilotti in his separate opinion in the *Electricity Company of Sofia* case,¹ referred to in paragraph 2 in the commentary.

4. The problem could be said to arise only in connexion with interpretation where two instruments were set side by side and there was perhaps disagreement between the parties as to whether they were inconsistent with each other and, if so, what was really the effect of the second instrument on the first. A point of principle would arise, however, if after interpretation of the two instruments it was found that in the second instrument the parties appeared to have intended wholly to displace the first. The point was whether that situation did not give rise to an implied termination, even though no clause had been inserted in the second treaty to cover the problem of its effect on the first. Sometimes, the parties to the new treaty would include in it an express provision on the termination of the earlier one, but more often than not, they would omit to do so.

5. The provisions of paragraph 1 were intended to cover the point in the more straightforward type of case, where all the parties to the earlier treaty were also parties to the later one. The language was based upon the treatment of the matter in the separate opinion of Judge Anzilotti to which he had referred. That opinion showed that a problem of interpretation arose. Judge Anzilotti had also dealt with the question whether, in the event of the new treaty coming to an end, the parties were thrown back on the earlier treaty, which would thus be revived.

6. Questions of interpretation were very much at the root of the application of article 19. Accordingly, it might be suggested that the article was not necessary in section III, though he personally believed that it was. Article 18, when it emerged from the Drafting Committee, would probably recognize tacit agreement to terminate a treaty; it was therefore appropriate also to include article 19 to deal with the particular form of tacit agreement to terminate which consisted in adopting a subsequent treaty that wholly displaced the earlier one.

7. Paragraph 3 was largely procedural. He therefore suggested that for the time being the Commission should concentrate its attention on paragraph 1.

8. Mr. ROSENNE said that he would confine his remarks to paragraph 1. He had the greatest difficulty in accepting article 19 at present because, as the Special Rapporteur had pointed out, the real question was largely

one of interpretation, and not essentially one of termination of a treaty. Furthermore, he was not fully convinced by the commentary, particularly paragraph 2.

9. The Special Rapporteur's commentary was largely based on the separate opinion of Judge Anzilotti in the *Electricity Company of Sofia* case. That opinion was one of the few opinions of Judge Anzilotti which he had been unable to understand. He did not believe that the obligations arising out of a declaration under the optional clause of the Statute of the Permanent Court of International Justice or the Statute of the International Court of Justice could be regarded as equivalent to an obligation arising out of an international treaty within the meaning of the draft articles under discussion, and therefore he could not accept the premiss taken by Judge Anzilotti and now followed by the Special Rapporteur. The conflict between that type of transaction and a treaty was not analogous to the problem, dealt with in article 19, of the conflict between two treaties. Furthermore, he was unable to understand the concept of the revival of a treaty to which both the separate opinion and the Special Rapporteur had referred.

10. He was impressed by the fact that the commentary relied on a separate opinion which was not really germane to the problem of article 19. No instance of State practice had been cited in support of the proposed provision.

11. In view of the complexities of the issues involved, it was not advisable at that stage to deal with the problem, which was essentially one of interpretation necessitated by bad drafting. If the two successive treaties concerned were both bilateral treaties, the negotiators of the second should be aware of the precise treaty relationship between the two countries. The problem might be somewhat different in the event of a conflict between a multilateral treaty and a bilateral treaty.

12. He was not criticizing the actual provisions of paragraph 1, but could not agree that it was either necessary or desirable to introduce them into the present text. The inclusion of too many provisions depending on implication in the draft articles relating to termination of treaties was to be deprecated.

13. Another important point was the necessity to preserve the hierarchical relationship between the concept of *jus cogens* and the principle stated in Article 103 of the Charter, on the one hand, and the substantive provisions of individual treaties on the other. The provisions on implied termination of a treaty could not apply where the earlier treaty contained rules having the character of *jus cogens* or was an obligation to which Article 103 of the Charter applied.

14. Article 19 supplied a presumption which would operate only under the terms of the second treaty. The matter was therefore really one of the application and interpretation of treaties rather than of their termination.

15. If Mr. Verdross's proposal for an introductory catalogue of modes of termination were adopted, the inclusion of a reference to obsolescence could very well cover such problems of termination as might arise in the cases contemplated in article 19.

¹ P.C.I.J., Series A/B, No. 77.

16. Termination of a treaty meant its termination as a source of binding rules of conduct. However, he would hesitate to say that the treaty necessarily terminated in so far as it affected rights acquired and situations created under it; that distinction had been well brought out in the *Ambatielos* case.²

17. Mr. VERDROSS said he approved of article 19 in principle, and in particular of paragraph 2 (b), but he had some doubt about paragraph 2 (a). The provision was acceptable if the earlier treaty embodied only dispositive rules from which the parties could depart, but if the earlier treaty embodied peremptory rules, then the position was different.

18. Mr. TUNKIN said he found the provisions of paragraph 1 acceptable in principle, but agreed with Mr. Rosenne that they should be made subject to other provisions of the draft.

19. The principle stated in the opening sentence of paragraph 1 would seem to apply where the parties to the second treaty failed to express therein their intention to abrogate the first treaty. To bring out that meaning more fully, the proviso "without expressly abrogating the earlier treaty" should be replaced by some such wording as "if the new treaty does not contain a provision expressly abrogating the earlier treaty".

20. The provisions of paragraph 1 (a) seemed logical: if all the parties to the earlier treaty were also parties to the later treaty and if their intention to terminate the earlier treaty were expressed in declarations at the Conference or in some other way, then there were sufficient grounds for considering the earlier treaty as having been abrogated by the will of all the parties. The will of the parties was expressed not in the new treaty itself, but in some other way, and could be manifested after the conclusion of the second treaty, so that it appeared unnecessary to limit the operation of paragraph 1 (a) to the time the new treaty was concluded.

21. He was prepared to accept paragraph 1 (b), which laid down two important conditions: that the provisions of the later treaty must be incompatible with those of the earlier one, and that the two treaties must not be capable of being applied at the same time.

22. He could not, however, accept paragraph 2 (a). It was not always permissible for two parties to a treaty to enter into a subsequent agreement setting aside some of the provisions of the treaty in relations between themselves. They could do so, for example, in the case of certain provisions of the Vienna Convention on Diplomatic Relations:³ two parties to that Convention could enter into an agreement between themselves not to accord diplomatic privileges to the technical and administrative staffs of their respective embassies; such an agreement was not prohibited by the Convention because it did not affect the interests of the other parties to the treaty in any way. But the position was altogether different in the case of treaties such as the agreement on the cessa-

tion of hostilities in Laos.⁴ That agreement contained a provision (article 6) prohibiting the establishment of foreign military bases on the territory of Laos; it was not possible for Laos and one of the other parties to the agreement to conclude a new treaty purporting to establish such bases. That situation obtained even though the prohibition in question was not a *jus cogens* norm of general international law. The new treaty would represent a breach of obligations to all other participants in the earlier treaty. In a case of that type, it was the nature of the treaty itself which did not permit the new transaction. Paragraph 2 (a) should contain a qualification to that effect.

23. Mr. BARTOŠ said he agreed with Mr. Verdross and Mr. Tunkin, and, on many points, with Mr. Rosenne. He would add only three comments, the first two of which related to the possible application of paragraph 1.

24. First, it was questionable whether all the parties to the first treaty necessarily had to participate in the second. There were cases in which some of the parties to a treaty lost, in the interval, their status as parties directly and legitimately concerned in the regulation of the matter covered by the treaty. For example, States which had possessed "recognized rights" in certain territories claimed always to be entitled to participate in a treaty concerning those territories. Later, the status of the territories having changed, international relations had also changed, in his opinion; if it was a question of modifying the conventional régime established by the treaty, could it be said that the agreement of all the original parties was essential? If that condition had to be fulfilled — if, for example, all the parties to the General Act of the Berlin Congo Conference of 1885,⁵ had to participate in the establishment of a new régime governing the Congo river — then the new States would never be able to free themselves completely from the tutelage of the former colonial Powers. The phenomenon of a State losing its status as a party through a change in circumstances without ceasing to be a subject of international law raised a delicate question both on the political and on the legal plane.

25. His second comment related to the case already mentioned by the three previous speakers: that in which the parties wished to replace an earlier treaty by a new one embodying *jus cogens* rules. Manifestly, the parties could not change such rules. But where was the borderline of *jus cogens*? Should the *jus cogens* rules laid down by the initial treaty be taken into account, or the *jus cogens* rules existing when the amendment or termination of the treaty was contemplated? A treaty such as the Convention of Constantinople⁶ concerning the legal status of the Suez Canal in fact established several exceptions to the general rules on straits and canals. Had those exceptions the status of *jus cogens*? During the two world wars, the Allied Powers had not respected the provisions of that Convention. Conse-

² *I.C.J. Reports*, 1953, pp. 10 ff.

³ United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 1961, *Official Records*, Vol. II, pp. 82 ff.

⁴ Command Papers, H.M. Stationery Office, London, Cmd. 9239, pp. 18 ff.

⁵ British and Foreign State Papers, Vol. 76, pp. 4 ff.

⁶ *Op. cit.*, Vol. 79, pp. 18 ff.

quently, the question had since been raised whether those Powers had or had not estopped themselves from claiming the right, as Contracting Parties, to participate in the modification of the status of the Canal.

26. Thirdly, there was the case in which a new treaty established a régime that was applicable so far as certain States were concerned, though the earlier treaty remained in force for other States. There was no great difficulty if the matters involved were technical or related to the enjoyment of certain privileges, but if the treaty was of paramount importance to international relations, it was impossible to allow two different régimes to subsist side by side. In the Treaty of Peace signed in Paris in 1947, Italy and Yugoslavia had agreed on a plan for the establishment of a free territory of Trieste,⁷ which was to constitute a kind of separate State. Subsequently, a provisional settlement had been arrived at under which the territory in question had been placed under the civil administration of the two States. They had then indirectly agreed that the settlement might be permanent. Three of the signatories to the Treaty of Paris — the United States of America and the United Kingdom by prior approval, and the Soviet Union by a political statement approving the peaceful settlement of the dispute — had indirectly approved that settlement. That being so, could it be said that the other signatories to the Paris Treaty still had the right to invoke the terms of that Treaty in regard to Trieste?

27. Those three questions might have great practical importance, especially in the event of a political dispute between States, and in view of the substantial territorial changes that had occurred, the recognition of the principle of self-determination, the establishment of new States and, in general, the development of international relations. They should not be dealt with in the article itself, but they should at least be mentioned in the commentary.

28. Mr. CASTRÉN said that article 19 to some extent duplicated article 14, as the Special Rapporteur had noted in his commentary, but without going into the relationship between the two. It might, of course, be argued that article 14 dealt generally with cases in which there was a conflict between treaties, whereas article 19 considered the more particular question, not settled by article 14, whether such a conflict could have the effect of extinguishing the earlier treaty. In any case, the two articles could certainly be continued but as the Commission had not yet decided either on the substance or on the final form of article 14, his remarks would be quite general.

29. He proposed that the substantive idea set out in paragraph 1 should be added to article 14, paragraph 1, at the end of sub-paragraph (b), and that paragraph 2 (a) should be substituted for article 14, sub-paragraph 2 (b) (ii). Paragraph 2 (b) could be deleted, as it was covered by sub-paragraph 2 (b) (i) of article 14. Paragraph 3 could also be deleted.

30. If article 19 were retained as a separate article, then paragraphs 1 and 2 (a) would perhaps need to be supplemented by a proviso dealing with cases covered by *jus cogens* and with the obligations of States Members of the United Nations and other international organizations, similar to the proviso in article 14.

31. Mr. TSURUOKA said that, although largely in agreement with Mr. Rosenne, he would not go quite so far. He thought that there might be some advantage in retaining the main idea of article 19. The essence of paragraph 1 should be retained, but it might be enough to specify that a treaty was abrogated if such was the common will of the parties. As such a provision would have to be interpreted in the light of the will of the parties, there would be no need to give further details. The final passage in paragraph 1 was unnecessary, for it stated the obvious.

32. The situation covered by paragraph 1 (b) was hard to define and he doubted whether such a provision should appear in article 19. That a later treaty could not be contrary to a *jus cogens* rule was obvious, but where an earlier treaty permitted certain actions, the question was whether the later treaty contained provisions incompatible with those of the earlier one. That was a question he would prefer to leave to an international court. Even if the later treaty did not constitute a breach of the earlier one, it was by no means certain that the earlier treaty should cease to be operative; if the parties had assumed obligations in the later treaty which conflicted with those under the earlier one, their responsibility was involved, but that did not mean that the earlier treaty should cease to be applicable.

33. Paragraph 2 raised questions of interpretation and was out of place in article 19.

34. There was no need for paragraph 3; if it was to be kept, the superfluous words "by implication" should be dropped.

35. Mr. YASSEEN said he would confine his remarks to paragraph 1, as the Commission could not discuss paragraph 2 until it had decided on the final form of article 14.

36. The idea of implied termination of a treaty by reason of the conclusion of a subsequent treaty was correct. The criteria laid down by Judge Anzilotti in his separate opinion, to which the Special Rapporteur had referred, had great logical force, although the Court had considered them inapplicable to the particular case.

37. The word "manifested" should be interpreted to mean that the parties had signified their agreement in some way other than by an express clause in the treaty, for instance, in statements during the conference at which the treaty had been drawn up, for it was solely a matter of terminating a treaty by tacit agreement.

38. He doubted whether paragraph 3 was necessary, since it was obvious that the earlier treaty was only terminated because the later treaty had come into force.

⁷ United Nations *Treaty Series*, Vol. 49, pp. 186 ff.

39. Mr. TUNKIN said that Mr. Bartoš had raised two very important problems. The first was that of certain old treaties such as the General Act of Berlin of 1885, and the position of the newly independent States with regard to them. The position was really quite clear: a treaty such as the General Act of Berlin was void under article 13 because it infringed a general rule of international law having the character of *jus cogens*. The newly independent States were not called upon to terminate such a treaty, because no valid treaty existed. The position was not in any way affected by the fact that, as pointed out by Mr. Elias at an earlier meeting (687th meeting, para. 40), newly independent States might insert in a contemporary treaty some material provision drawn from an obsolete treaty.

40. Mr. Bartoš had also, and quite properly, raised the question of *jus cogens*. When the Commission had discussed article 13, it had clearly understood the term *jus cogens* as meaning norms of general international law which were binding on all States and from which no derogation was permitted. He himself had drawn attention to certain particular norms of international law from which no derogation was permitted, such as the prohibition of foreign military bases in neutral Laos: that type of provision had much in common with *jus cogens* rules, but nevertheless belonged to a separate category. It was not advisable to widen too much the concept of *jus cogens*, which should be confined to general norms of international law.

41. Mr. BRIGGS said that he would confine his remarks to paragraph 1 since he agreed that the Commission could hardly discuss paragraph 2 until it had taken a decision on article 14.

42. Where the parties to the second treaty expressly abrogated the first, no problem arose; the provisions of paragraph 1 were intended to deal with the narrow point whether that result could be brought about implicitly. While he had no strong theoretical objections to those provisions, he had in practice some hesitation in going so far as to say that the case would be one of implied termination. He preferred the approach adopted in article 22 (a) of the Harvard draft, which stated that: "A later treaty supersedes an earlier treaty between the same parties to the extent that the provisions of the later treaty are inconsistent with the provisions of the earlier treaty." It seemed much more satisfactory to view the whole question as one of priority and of the later treaty superseding the earlier one to the extent to which the two were incompatible. He did not favour treating the question as one of outright termination of the treaty.

43. With regard to the remarks made on the subject of *jus cogens*, he noted that all speakers had so far assumed that the *jus cogens* rules would be in the first treaty; in fact, they could just as well be in the second.

44. Mr. BARTOŠ said he had wished to raise the general problem of changes in the composition of the parties to a treaty — what might be called the dynamism of the status of party to a treaty. A State might cease

to be a party to the purpose of a treaty not only as a result of the succession of States and governments, but also as a result of a change in the situation. Conversely, a State might be directly interested in the amendment or termination of a treaty to which it was not a party, either because it was a newly created State or because a new state of affairs had arisen. That question was not directly connected with the application of the *rebus sic stantibus* clause and it was not settled by any existing rule of international law, but practice called for the establishment of a rule.

45. Mr. PAL said that he also would confine his remarks to paragraph 1. He did not see why the question of *jus cogens* had been brought into the discussion of article 19 at all. The provisions of that article assumed that there were two valid treaties, but that there was some incompatibility or conflict between their provisions. If one of the treaties was invalid for other reasons, there could be no question of applying article 19.

46. As far as the formulation of paragraph 1 was concerned, he preferred a simplified wording along the lines suggested by Mr. Briggs.

47. Mr. EL-ERIAN said he too would confine his comments to paragraph 1, because it was impossible to express any conclusive view on paragraph 2 until a decision had been taken on article 14 and other articles with which article 19 was closely connected. There could be no doubt, however, that it would be useful to establish some guiding principles concerning implied termination, because of the difficulty governments often encountered in drafting provisions on express termination. The problems had come up in acute form during the 1954 negotiations over the Anglo Egyptian Treaty, following Egypt's unilateral abrogation in October 1951, which the United Kingdom Government had not recognized, of the 1936 treaty.⁸

48. The problem of the effects of subsequent treaties was closely connected with articles 21 and 22 and would probably have to be held over until those articles were taken up.

49. He doubted whether articles 14 and 19 could be combined in the manner suggested by Mr. Castrén because the former was concerned with conflict between two treaties from the point of view of validity and the latter from the point of view of termination.

50. He agreed with the Special Rapporteur that article 19 should cover incompatibility between two treaties as well as cases of conflict when the subject-matter was identical.

51. The CHAIRMAN, speaking as a member of the Commission, said that he endorsed the majority view that a provision on implied abrogation on the lines of that contained in paragraph 1 was needed.

52. Paragraph 1 (b) was preferable to the wording of the Harvard Draft suggested by Mr. Briggs, because it laid down stricter requirements for implied termination of the treaty.

⁸ League of Nations *Treaty Series*, Vol. 173, pp. 402 ff.

53. Paragraph 2 raised the question whether *inter se* agreements between some of the parties to the previous treaty were valid. In his opinion an affirmative reply was called for in view of the changes in the number and identity of States and of the evolution of what might be termed international legislative organs. Apprehension had been expressed about the Commission giving general approval to such procedure, because it might provide a few of the parties to a treaty, the observance of which was of interest to all the parties, with an easy way of violating its provisions by entering into an agreement with one another that was incompatible with the original purpose of the earlier treaty. Perhaps that issue might be held over for further consideration and it might be feasible at a later stage to find means of avoiding such a possibility.

54. Sir Humphrey WALDOCK, Special Rapporteur, commenting on the points made during the discussion, said that the most radical criticism of paragraph 19 had come from Mr. Rosenne, who considered that implied termination was a matter of interpreting the will of the parties and should not be the subject of an article in section III of the report but could perhaps be taken up in connexion with the articles to be discussed at the next session, concerning the application of treaties. He did not subscribe to that view because he believed that the question whether or not a prior treaty had actually been terminated could arise in practice. No doubt, there was in such cases a preliminary question of interpretation as to the relation between the provisions of the two treaties. But the interpretation having been made, there remained, in cases where the parties had said nothing express on the point, the question whether the second treaty displaced the first and terminated it or left it in being. From the juridical point of view there was clearly a major difference between a mere question of conflict between two treaties and the question whether one of them had come to an end. Although there had not been many instances of such cases, they could arise in the future and Judge Anzilotti had drawn attention to the importance of having a rule concerning implied termination in order to determine whether a prior treaty had become extinguished when, for some reason or other, the later treaty had ceased to be in force. The majority of the Commission seemed to be of the opinion that a provision on the subject of implied termination was necessary.

55. Mr. Rosenne, when referring to the Special Rapporteur's reliance on the statements made by Judge Anzilotti, had deprecated unilateral declarations under the optional clause being treated on the same footing as treaties for the purposes of article 19. But that had clearly been the way the matter had been viewed by Judge Anzilotti in the *Electricity Company of Sofia* case, when he had dealt with the Belgian and Bulgarian declarations under the optional clause and the earlier Belgo-Bulgarian Treaty of Conciliation as two contractual instruments which conflicted with each other and whose relative status required to be determined. That case had turned essentially on the issue of the

intention of the parties with regard to the two instruments, which also constituted the core of the problem in article 19, so that Judge Anzilotti's opinion had been most pertinent and helpful to him as Special Rapporteur in formulating the provision contained in paragraph 1.

56. Paragraph 2 raised the difficult problem of agreements *inter se* — a matter which had not been yet sufficiently thrashed out to enable the Commission to reach a conclusion on that paragraph. At first it had seemed to him dangerous to open the door too widely to such agreements, but practice indicated that they were being given increasing recognition.

57. He entirely agreed with Mr. Briggs and Mr. Pal that considerations of *jus cogens* had no relevance whatever to article 19, which was concerned with valid treaties that, by virtue of the definition to be inserted in article 13, could not be contrary to *jus cogens*. If article 13 could be satisfactorily drafted, no saving clause on that point would be necessary in article 19.

58. On the other hand some further thought might have to be given to the question raised by Mr. Bartoš concerning the possible existence of a special class of treaties possessing an imperative character from which derogation was not permitted in particular circumstances. Such treaties did not, strictly speaking, possess the character of *jus cogens*, the boundaries of which, as Mr. Tunkin had pointed out, should not be unduly widened.

59. Certain other points raised in the discussion were more germane to provisions concerning revision, which was the more normal procedure for putting an end to a certain treaty régime.

60. A number of issues brought up by Mr. Bartoš would certainly need further thought and might have to be referred to in the commentary. To mention only one of them, he would hesitate to deal, in article 19, with the particularly difficult subject of changes in the composition of the parties, which might prove extremely difficult to express in a paragraph of an article on implied termination. He must point out that that question, as indeed a number of other questions which had been raised in the discussion of article 19, was no less relevant for the previous article and perhaps for some other articles.

61. He agreed that paragraph 3 might be self-evident and therefore redundant.

62. At the present stage it would probably be wiser to refer only paragraph 1 to the Drafting Committee. As far as wording was concerned, he still thought that the article should refer to termination, rather than supersession, as advocated by Mr. Briggs, because the latter term was ambiguous and could mean not only termination, but also partial replacement.

63. The CHAIRMAN suggested that paragraphs 1 and 3 should be referred to the Drafting Committee and that paragraph 2 should be considered in connexion with article 14. It would then be possible for the Commission to decide whether or not any part of paragraph 2 need be retained in article 19.

It was so agreed.

ARTICLE 20 (TERMINATION OR SUSPENSION OF A TREATY FOLLOWING UPON ITS BREACH)

64. The CHAIRMAN invited the Special Rapporteur to introduce article 20.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that before introducing article 20 he wished to inform the Commission that he was preparing a section V of his second report, which would contain two or three short articles dealing with the effects of treaties. He had delayed completing that section, and would not do so until he had seen what decisions were taken by the Commission on the main issues concerning termination.

66. He had set out the issues in article 20 at some length and no doubt members would have suggestions for shortening it. Because of the difficulty and importance of the subject he had provided a very full commentary, and that made it unnecessary for him to say much in introducing the article. The authorities seemed to be divided into two schools of thought, one holding that the right to terminate was a necessary sanction that could be imposed upon breach of the treaty, the other that the value of such a sanction was outweighed by the danger of abusive assertions of breach by States wishing to terminate a treaty no longer to their political advantage. Like his predecessor, Sir Gerald Fitzmaurice, he had been influenced by the latter consideration.

67. The CHAIRMAN drew attention to the amendment submitted by Mr. Castrén, which read:

" 1. In the case of a material breach of a bilateral treaty by one of the parties, the other party may denounce the treaty or only the provision of the treaty which has been broken or suspend its operation, subject to the reservation of its rights with respect to any loss or damage resulting from the breach.

" 2. In the case of a material breach of a multilateral treaty other than one falling under paragraph 3 by one of the parties, any other party may:

" (a) in the relations between itself and the defaulting States, apply the provisions of paragraph 1;

" (b) in the relations between itself and the other parties, withdraw from the treaty, if the breach is of such a kind as to frustrate the object and purpose of the treaty.

" 3. (Former paragraph 5)

" 4. A breach of a treaty shall be deemed to be material if it is tantamount to setting aside any provision:

" (a) with regard to which the making of reservations is expressly prohibited or impliedly excluded; or

" (b) the failure to perform which is not compatible with the effective fulfilment of the object and the purpose of the treaty."

68. Mr. PAREDES said that although the problems dealt with in the last few articles seemed to him to have most important implications and to have been treated with deep insight, he had not expressed his opinion on

them because he had been constantly hoping that the Commission would meet the wish, so opportunely expressed by Mr. Verdross, that classes of treaties should be specified. He did not understand how a common rule could be applied to the different kinds of treaty, since it was well known that they differed in many respects: sometimes by the importance of their content, which ranged from general rules of international application and *jus cogens* to trade agreements of limited interest; and sometimes by the manner of their fulfilment, since some treaties concluded legal proceedings and stabilized a situation, so that there was a definitely acquired right without any need for subsequent acts by the contracting States, whereas others required subsequent acts by the obligated party. There were also differences in the obligations imposed, for some treaties provided for mutual obligations, while others placed obligations on only one of the parties. All those characteristics should be covered by the law of treaties.

69. With regard to the last mentioned variety of treaties, it seemed that the Special Rapporteur had only had in mind those placing obligations on both parties, since the only solution he proposed was denunciation by the injured party. But to invalidate the treaty was the aim pursued by the party which had violated it and would thus completely satisfy that party's purpose. What was needed was to prescribe sanctions.

70. His second reason for not having spoken was that he had expected another need to be met: the drafting and discussion of those key articles to which the rest frequently referred and which seemed likely to be amended in the light of the discussions. The Commission was thus continuing to discuss the referring articles without the text they referred to. But if the latter were drafted in different terms it would be necessary to reconsider the articles referring to it from a different viewpoint.

71. There was no doubt that the rule stated by the Special Rapporteur in paragraph 1 was correct. Nevertheless, he feared that the provision in paragraph 1 (b) would open the way for unjustified denunciation, especially where a treaty did not offer equal advantages to the parties. The provision should be clarified by adding the requirement that the breach must be of a really serious nature.

72. He could not understand the purpose of paragraph 2 (b) which seemed to refer to the case of a legislative body refusing to ratify a treaty; in such a case the treaty would not exist for the State in question, so that it would be wrong to speak of a material breach.

73. Mr. de LUNA said that, while he agreed in substance with the Special Rapporteur's views, he regarded Mr. Castrén's amendment as an improvement, because it simplified the wording and yet retained the essence of the Special Rapporteur's draft. His comments on the substance would therefore apply to both texts.

74. Paragraph 1 of the Special Rapporteurs' draft seemed to have one or two gaps. For the breach of a treaty by one party to entitle the other to denounce the treaty or suspend its operation, the breach must obviously be unlawful. For example, in the case of a bilateral or

multilateral treaty concerning means of communication, it might happen that, under Article 41 of the United Nations Charter, State A completely interrupted its rail communications with State B, those communications being vital to State B. Would State B be entitled under article 20, paragraph 1, to denounce the treaty in force between the two countries? Obviously not; he thought it would be advisable to say so and to provide for that case in paragraph 1.

75. Another point seemed to have been left out of account in paragraph 1: the possibility of a State invoking, for the purpose of denouncing the treaty or suspending its operation, a breach committed perhaps fifty years earlier, whereas the other clauses of the treaty had been complied with throughout that period. It would be advisable to fix a reasonable period, say 5 to 10 years, within which a State was entitled to invoke a former breach as grounds for terminating a treaty.

76. Paragraph 2 seemed dangerous for the stability of treaty law. It was equivalent to the *clausula si omnes* of the Hague Conventions on the Laws and Customs of War.⁹ For if a Power sought to withdraw from a treaty that was contrary to its national interest, but did not dare to take the initiative of a unilateral denunciation for fear of international opinion, of the reparations it might have to pay, or of the risk of reprisals by the other parties, then paragraph 2 offered it a chance of releasing itself from its obligations without risk by inducing a small satellite State to commit a breach of the treaty that could be described as "material".

77. In addition, according to Sir Gerald Fitzmaurice, certain categories of treaty embodied absolute obligations, though not obligations prescribed by *jus cogens*. Not only did their breach by one of the parties not entitle the other parties to denounce the treaty; it did not even justify non-observance of the treaty by the other parties with respect to the defaulting party.

78. With regard to paragraph 4, he approved of the expression "material breach", which was preferable to "fundamental breach", as had been shown by Talalayev in an article published in the *Soviet Year Book* for 1959.¹⁰ However, the provision should take account of cases in which the breach was extenuated, though not nullified, by the circumstance that it had been provoked by the earlier attitude of the injured State.

79. Admittedly, article 20 contemplated only the termination or suspension of a treaty in consequence of a breach; but it might happen that the denunciation of one treaty was lawful because of the breach of another. That situation could arise where two treaties were so closely inter-related that the breach of one frustrated the purpose and object of the other, or where the breach was of a treaty vitally important to the injured State,

which had previously fulfilled most of its obligations. The defaulting party would not be affected by the denunciation of that treaty, and the injured State could then, as a reprisal, suspend the application of another treaty.

80. A State might decide to denounce a treaty for reasons other than a breach. If, for example, a State was seeking to overthrow the established régime of another State by all the means at its command, it would probably be absurd to maintain a treaty of friendship in force between the two countries, even though the treaty did not prescribe any grounds for denunciation.

81. He considered that in article 20 the expression "unlawful breach" would cover all the cases to which he had referred.

82. Mr. CASTRÉN said he agreed with the Special Rapporteur on all matters of principle; the purpose of his amendment was merely to simplify the formulation of the draft by eliminating anything that repeated provisions of other articles, or was not essential.

83. Paragraph 1(a) of the draft stated a universally recognized principle. It need not be retained, because the same idea followed indirectly from paragraphs 1 and 2 of his amendment, which also covered paragraph 1(b) of the draft. It was more logical to state the main rule first, specifying the cases and circumstances in which a State could denounce or suspend a treaty on its breach by the other party. Then should follow the definition of a "material" breach which could lead to denunciation.

84. Paragraph 1 of the amendment corresponded in substance to paragraph 3 of the draft, sub-paragraphs (a) and (b) of which had been incorporated in it.

85. Paragraph 2 of the amendment reproduced the essence of the Special Rapporteur's paragraph 4 in more concise terms. Paragraph 4(b) had been deleted, because the other parties to a treaty, which were not concerned in its breach, could obviously terminate or amend it by subsequent agreement.

86. He had included the whole of paragraph 5 of the draft as paragraph 3 of his amendment.

87. Paragraph 4 of his amendment reproduced the Special Rapporteur's paragraph 2 in shortened form. Paragraph 4(a) of the draft, which was self-evident, had been deleted; the reference to article 18 in paragraph 4(b) was also unnecessary.

88. He had deleted paragraph 2(c) of the draft because it was covered by paragraph 4(b) of his amendment.

89. Mr. de LUNA had said there were gaps in his amendment; but the same gaps appeared in the Special Rapporteur's draft on which his amendment was based. The answer to Mr. de Luna's point about a breach of a treaty which had occurred long ago was that such cases were covered by article 25. With regard to Mr. de Luna's criticism of paragraph 2, there might indeed be some classes of treaty to which the paragraph should not apply.

⁹ Scott, J. B., *Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press, pp. 100 ff.

¹⁰ Talalayev, A. N., *The Termination of International Treaties in the History and Practice of the Soviet State* (in Russian), *Soviet Yearbook of International Law*, 1959, Moscow, Publishing House of the Academy of Science of the USSR, pp. 144 ff.

692nd MEETING

Tuesday, 4 June 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 20 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 20 (TERMINATION OR SUSPENSION OF A TREATY FOLLOWING UPON ITS BREACH) (*continued*)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 5 of article 20 dealt with the special case of a treaty which was the constituent instrument of an international organization. The formula it embodied had been used in a number of articles of Part I, such as the article on the participation of additional States in a multilateral treaty and the article on the effect of reservations. During the present session, many members had expressed a preference for not inserting a substantive provision on that special case in the articles, but adopting the alternative course of excluding such treaties from the provisions of the draft. If the Commission wished to adopt that course, it might be simpler to transfer paragraph 5 to a general provision covering all the cases in which the question of such treaties arose in the draft articles.

3. Mr. TUNKIN said that in substance he agreed with the Special Rapporteur's approach to the subject-matter of article 20. He had some comments to make, however, partly on the substance of the various paragraphs and partly on the general structure of the article.

4. To begin with, paragraph 1 was redundant; it did not state any rule and was in the nature of a preliminary explanation which could well be dropped from the article.

5. The Special Rapporteur had, very properly, drawn a distinction between the application of the principles of the article to bilateral treaties and to multilateral treaties. Where bilateral treaties were concerned, he preferred the text proposed by Mr. Castrén at the previous meeting (para. 67) which was much simpler. He also agreed with Mr. Castrén that the provision on the subject of bilateral treaties should form the first paragraph of the article, instead of the third as proposed by the Special Rapporteur.

6. The Special Rapporteur and Mr. Castrén both envisaged two situations: one in which the injured party might denounce the treaty or suspend its operation, and one in which the injured party might terminate or suspend the application of only that provision of the treaty which had been broken. With regard to the latter situation, he did not believe that it was possible to envisage the actual termination of the application of a single provision of a treaty; the article should only

provide for the suspension of a single provision. It would be dangerous to recognize a right to terminate only part of a treaty; many treaties, by their very nature, did not lend themselves to such treatment. The removal from a treaty of some of its provisions could completely change the substantive characteristics of the treaty.

7. Where multilateral treaties were concerned, he favoured a provision along the lines of paragraph 2 of Mr. Castrén's amendment. It would not be appropriate to recognize a right to terminate or suspend only the provision of the treaty which had been broken; only a right of suspension should be specified.

8. A problem arose in connexion with general multilateral treaties, which established or tended to establish rules of general international law. It would not be appropriate to provide for the right of a State to denounce such a treaty when another State happened to commit a breach of it. International practice showed that such breaches were not uncommon. However, in many instances it would be unthinkable for a State to invoke a breach by another State in order to violate a general norm of international law in its relations with that State. It would therefore be advisable to exclude general multilateral treaties from the application of the rule stated in paragraph 4 of the Special Rapporteur's text and in paragraph 2 of Mr. Castrén's amendment.

9. With regard to the definition of a material breach in paragraph 2 of the Special Rapporteur's text, the examples given seemed to have been somewhat arbitrarily chosen. He would have preferred a general formula which, although perhaps less precise, would provide better guidance. If the Commission accepted the method of enumeration, he would prefer the list contained in Mr. Castrén's paragraph 4, subject to the deletion from paragraph 4 (a) of the words "or impliedly excluded".

10. With regard to paragraph 5, he was in full agreement with the Special Rapporteur's suggestion that treaties which were the constituent instruments of international organizations should be excluded from the application of the draft by a general provision. Such a provision would be justified, because each international organization was a separate entity and could be left to settle for itself the difficult problems that might arise in connexion with its constituent instrument. Such constituent instruments were sometimes very different from international treaties. However, no exception should be made with regard to treaties concluded within an international organization; they were ordinary treaties and all the provisions of the draft articles should apply to them.

11. Mr. BRIGGS said that the only paragraph in article 20 that embodied an existing rule of international law was paragraph 1 (a) which, as pointed out in paragraph 10 of the commentary, stated "what appears to be the universally accepted principle that the violation of a treaty, however serious, does not of itself put an end to the treaty". The remainder of the article constituted a proposal, and one which was based neither on State practice nor on the decisions of international tribunals, but on the theories of writers and on speculation.

12. Paragraph 3 permitted the unilateral termination of a bilateral treaty. Paragraph 4 permitted a State to release itself from its obligations under a multilateral treaty; on that point he agreed with Mr. Tunkin that general multilateral treaties should be treated as a special category.

13. With regard to the checks or limitations which the Special Rapporteur's text placed on the unilateral right to terminate a treaty or repudiate its provisions, the first was that which confined the operation of article 20 to the more serious breaches termed, in paragraph 2, "material" breaches. Paragraph 2(a) stated that a repudiation of the treaty constituted such a material breach while paragraph 2(c) gave the further example of refusal to implement a provision requiring submission to arbitration or judicial settlement. He had no objection to those examples, but could hardly agree with the examples in paragraph 2(b), particularly sub-paragraph (ii): "the failure to perform which is not compatible with the effective fulfilment of the object and purpose of the treaty". Almost any breach would be covered by that provision, and the whole criterion of a "material" breach would seem to fall down.

14. A second check was provided in article 25 of Section IV, which set out certain steps to be taken prior to the unilateral termination of a bilateral treaty or the unilateral repudiation of the provisions of a multilateral treaty. The provisions of that article fell a long way short of submitting to the International Court of Justice the question whether a breach had been committed and, if so, whether the breach was "material".

15. Therefore, in the absence of more adequate safeguards, he would prefer an article 20 which contained, first, a statement of the principle in paragraph 1(a) of the Special Rapporteur's text and, secondly, a statement of the right to suspend the application of the treaty pending judicial determination of the issues involved. The Commission could very well put forward such a suggestion to governments, but if it felt that the suggestion was not politically feasible, he would propose, as an alternative, that the article should be confined to the statement in paragraph 1(a), leaving to state practice its practical application to the questions which arose. Though he had no enthusiasm for the existing system, which consisted in retaliatory practices, it would be better to leave matters as they stood than to introduce a unilateral right of repudiation which was no part of contemporary international law.

16. He agreed with Mr. Tunkin that there should be no question of terminating the application only of the provision of the treaty which had been broken; a right of suspension was all that should be provided.

17. Mr. TABIBI said that the difficulties in article 20 arose from the lack of machinery for supervising treaties and determining whether a breach had been committed. It was necessary to avoid endangering the security of international transactions by opening the door too wide to the repudiation of treaty obligations by one party on the pretext of a breach committed by another.

18. The easiest way of dealing with the problem would be for the parties to the treaty to establish procedure

for the submission of any dispute to arbitration or to the International Court of Justice. Where the parties could not agree on such procedure, it was difficult to decide which was in the right. Article 20 should state a general rule to deal with such situations; its provisions should not be too rigid, but should be designed as a guide.

19. With regard to the text proposed by the Special Rapporteur, paragraph 1 should be dropped. Sub-paragraph (a) did not state any rule and was therefore redundant; he could not accept sub-paragraph (b), because a treaty should always be considered as a unit and it was not appropriate to provide for termination or suspension of its operation "in whole or in part".

20. He shared Mr. Tunkin's view that general multilateral treaties should receive separate treatment; they often established their own procedure for dealing with breaches and it was therefore desirable not to lay down too rigid a rule in the matter.

21. As far as the form of the article was concerned, he found Mr. Castrén's text more acceptable than that of the Special Rapporteur. He agreed with the Special Rapporteur's suggestion that paragraph 5 should be transferred to a separate article.

22. Mr. LACHS said that article 20 dealt with a very important question. On the whole, he supported the Special Rapporteur's general approach, particularly his idea of a "material breach". The construction of certain parts of the article had raised some doubts in his mind, but his objections were partly met by the amendment proposed by Mr. Castrén.

23. In defining the consequences of the breach of a treaty, it was necessary to strike a balance between the preservation of the principle *pacta sunt servanda* and the need to safeguard the position of the injured party.

24. For the purpose of defining a "material breach" the Special Rapporteur had put forward two criteria. The first was the formal one stated in paragraph 2(b)(i) which linked the definition with the making of reservations; he did not like the reference there to reservations "impliedly excluded". If the provision was regarded by the parties as an important one, they would not have failed to prohibit reservations to it expressly. He therefore suggested that paragraph 2(b)(i) should be amended to refer only to reservations "expressly prohibited under article 18...".

25. He shared the doubts expressed by Mr. Tunkin and Mr. Briggs regarding general multilateral treaties. It would hardly be fair for a State to invoke a breach of a general multilateral treaty by another State in order to avoid its obligations under that treaty.

26. The question of general multilateral treaties also raised the issue of treaties which had a specific relationship with general principles of international law. Sometimes a treaty such as the United Nations Charter confirmed certain general principles of international law; its provisions were then declaratory of international law and the source of the obligations was outside the treaty. Sometimes, as a result of the long existence of a treaty, its provisions became part of international law. Thus the

Nuremberg Tribunal had found that the Hague Convention of 1907 and the Red Cross Convention of 1929 had, by 1939, become part and parcel of international law, and had accordingly over-ruled the objection that Germany was not bound by the Red Cross Convention of 1929 in its relations with those allied belligerents which were not parties to it.¹ An attempt had been made in the *Asylum* case (Colombia/Peru)² to invoke the provisions of the 1933 Montevideo Convention on Political Asylum as evidence of customary law, although the other party in the case had not ratified that Convention: but the attempt had failed.

27. In the application of article 20, exceptions should be made for treaties which embodied rules of general international law; otherwise, a State might be tempted to invoke a breach by another State as an easy way out of its obligations under a rule of general international law.

28. He supported the Special Rapporteur's suggestion that the question of the constituent instruments of international organizations should be dealt with in a general provision. That question arose in connexion with a number of articles and could best be dealt with by a general formula.

29. Mr. BARTOŠ said that in addition to the rule *pacta sunt servanda*, article 20 embodied a number of principles recognized in international law. The first of those principles was that laid down in paragraph 1 (a), but it was by no means certain that the rule admitted of no exception.

30. Furthermore, the rule *pacta sunt servanda* was linked to the rule *do ut des*. The literature and the case-law spoke both of the obligation to respect treaties and of the equivalence of the reciprocal stipulations of the parties. Modern treaties concluded under United Nations auspices often contained provisions under which one State could not demand of another something that it refused to accord itself, contrary to the provisions of the treaty or by a restrictive interpretation of it. It followed from the principle *do ut des* that a party which was asked for specific performance could decline to do whatever the other party did not perform; that entailed the potential right to suspend the application of a clause in the treaty until a settlement was reached or until a remedy had been found.

31. There was a fundamental rule, referred to by Mr. Lachs, that the right to refuse to perform a treaty was not absolute. There were cases in which, by the very nature of things, and in a purely material sense, the parties found themselves confronted by rules regarded as part of international public order and having the force of general custom. Mr. Lachs had rightly mentioned in that connexion the interpretation which the Nuremberg Tribunal had placed on the Geneva and Hague Conventions. While it was permissible to refuse certain concessions provided for in a treaty, it was not permissible to refuse to observe rules of *jus cogens*, which

expressed an absolute duty towards the international community, even if the other party did not fulfil its obligations under the same rules.

32. The Special Rapporteur seemed to have taken careful account of the rules to which he had just referred, and had found himself compelled to codify them as rules *de lege ferenda*, or, in other words, as provisions contributing to the progressive development of international law. It was therefore necessary to consider whether the Special Rapporteur's proposal satisfied the principles and needs of the modern international community.

33. To begin with, what was meant by a "material" breach? Was the term to be construed in an objective or in a subjective sense? Those questions raised the dangerous matter of the severability of clauses, and severance itself might be harmful. He agreed with Mr. Tunkin that it would be dangerous to provide for the possibility of denunciation in the case of any and every breach of a treaty.

34. With regard to paragraph 5, he endorsed the comments made by Mr. Lachs. It would be difficult to grant, so explicitly, to an organ of an international organization which was not a judicial organ, the right to determine whether or not a treaty had been violated and whether the rights or obligations of one of the parties were terminated. There, the Commission was moving from law into politics. Even the Charter itself made no provision for anything more than suspension if it was violated. The Commission could hardly grant to organs which were not judicial, rights that vested solely in the court.

35. He commended the efforts made by the Special Rapporteur to seek out the problems which really arose in modern international life and find the means to solve them. The comments he had made also applied to Mr. Castrén's proposal, which really only differed from the Special Rapporteur's text in that it was more concise.

36. Mr. YASSEEN said that the principle on which article 20 was based could not be impugned either in international or in municipal law, but international case-law threw little light on it. The lack of case-law, however, did not necessarily mean that there was no rule, especially when the rule was too evident. In that connexion Lord McNair had rightly said: "As in municipal law, the more elementary a proposition is, the more difficult it often is to cite judicial authority for it."³

37. Paragraph 1 (a) stated an indisputable truth. It was clear that a private person could not, by pleading the breach of an agreement by the other party, claim that the agreement had become unenforceable. An injured party might resort to non-performance as one alternative, but if it did not do so, the treaty remained in force. Nor was the rule laid down in paragraph 1 (b) open to dispute; there was no need even to look for supporting evidence in positive law, for that rule was the logical consequence of the way in which conventions operated in general.

¹ Judgment of the International Military Tribunal, London, 1946, H.M. Stationery Office, Cmd. 6946, pp. 45 ff.

² *I.C.J. Reports*, 1950, pp. 277 ff.

³ *Law of Treaties*, 1961, p. 554.

38. With regard to Mr. Brigg's argument that the principle in article 20 was acceptable subject to provision for the submission of disputes to judicial settlement, the difficulty was no greater than in the case of a treaty voided for error, fraud or coercion. It had proved possible to draw up rules covering such defects in consent without the necessity of accepting the idea of compulsory jurisdiction or a prior undertaking to resort to arbitration. The institutions of the international order were still very imperfect, and the vagueness of the rules of international law, as compared with those of municipal law, went a long way towards explaining why most States were reluctant to accept an international jurisdiction in advance; for they did not know exactly what rules would be applied. If the Commission refrained from drawing up rules of international law because of such refusal to accept an international jurisdiction, it might end up with a text that would retard the development of international law. After all, the international legal order provided several means of settling disputes.

39. On the whole, he agreed with the substance of the Special Rapporteur's draft. He had been right to include the concept of a "material" breach. Most writers recognized that any breach of a treaty by one party could entitle the other party to denounce it. At the beginning of the twentieth century, only a few writers had seen any need to distinguish between an insignificant derogation and a material breach. That wholly logical distinction had gradually gained acceptance in doctrine, and quite rightly so. Besides, it should not be forgotten that the concept "material" was entirely relative; for a rule might be of great importance to one party and of much less to the other.

40. He was doubtful about the final proviso in paragraph 4, however. In particular, should that paragraph apply to general multilateral treaties?

41. Furthermore, as Mr. Lachs had pointed out, certain *jus cogens* rules expressed in a treaty or convention might originate outside the convention itself, which did no more than declare those rules. The fact that one of those *jus cogens* rules declared in a treaty clause was not applied did not, therefore, mean that the other party was not bound by the rule in question, which had been binding even before the treaty was concluded.

42. He shared Mr. Tunkin's views on the possibility of denouncing a single clause of a treaty. Although he had argued that in other cases of defective consent, a single article might perhaps be voided — for instance, if it conflicted with *jus cogens* — in the case under consideration, the injured party should only be allowed to suspend the application of the article which had not been observed by the defaulting party, for denunciation would impair the treaty's unity and sometimes its indivisibility. The article in question would not be void *per se*, as it would be if it conflicted with a *jus cogens* rule; nor did denunciation affect its essential validity in any way. A State which did not wish to exercise its right to denounce the treaty as a whole because a single article had not been complied with should therefore be entitled to suspend the application of that article alone.

43. With regard to paragraph 5, he approved of the exception made in the case of a material breach of a treaty which was the constituent instrument of an international organization, but treaties concluded within an international organization should not be assimilated to such constituent instruments.

44. Mr. VERDROSS said he would not comment on paragraph 1 (a) since it had met with general approval.

45. He agreed with Mr. Tunkin that a clear distinction should be made between bilateral and multilateral conventions. In the case of a multilateral convention, provision should be made only for suspension, the convention remaining in force in other respects. The *jus cogens* rules would of course have to be excepted from suspension, as Mr. Lachs had rightly observed. International practice supplied examples, notably the Red Cross Conventions of 1929⁴ and 1949⁵ on the treatment of prisoners of war, which expressly provided that if a State infringed the humanitarian rules for the treatment of prisoners, the other States were not entitled to suspend the performance of their obligations. The rules in question were, therefore, plainly formulated *jus cogens* rules permitting of no derogation even if they were broken by one of the parties.

46. So far as paragraph 5 was concerned, he agreed that a distinction should be made between the breach of a treaty which was the constituent instrument of an international organization and the breach of a treaty which had been concluded under the auspices of such an organization; in the latter case there was no need to establish rules derogating from the general rules.

47. Bilateral treaties, however, posed a more difficult problem. According to the doctrine which had prevailed hitherto, if a party to a bilateral treaty committed a breach, it was open to the other party either to ask for specific performance or else to denounce the treaty. Mr. Briggs had quite rightly said that cases of denunciation were very rare in international practice. The most recent was perhaps the denunciation of the Treaty between Egypt and the United Kingdom, which Egypt had repudiated after the Suez incident.

48. There remained the particularly delicate question what was a "material" breach. The Commission should either admit that the breach of a bilateral treaty conferred the right to denounce or else accept Mr. Briggs's proposal, which came to practically the same thing, for he too recognized that the innocent party was free, by way of reprisal, to suspend the operation of a treaty. The Commission's decision should be unambiguous, for no objective criterion existed for distinguishing between breaches which were material and those which were not. In the case of a bilateral treaty on consular relations or on establishment, it was virtually impossible to say which articles were "material" and which were not. Hence, either the word "material" should be deleted, or the Commission should adopt Mr. Brigg's proposal and grant the right of suspension only.

⁴ League of Nations *Treaty Series*, Vol. 118, pp. 345 ff.

⁵ United Nations *Treaty Series*, Vol. 75, pp. 135 ff.

49. Mr. TSURUOKA said that his position on the principle of article 20 was very close to that taken by Mr. Briggs. On the one hand, a sanction had to be provided for the breach of a treaty, and, on the other, the stability of the international order had to be maintained; in that dilemma he would, for practical reasons, prefer a provision allowing the injured party to suspend the performance of the treaty.

50. The question which more particularly engaged his attention was whether the expression "material breach" in paragraph 2 should stand. If so, then the meaning of "material" would have to be defined. For the purposes of the definition, the Special Rapporteur had inserted a cross-reference to certain provisions of article 18 of Part I concerning the formulation of reservations. Admittedly, the idea of a "material" provision and that of a provision admitting of no reservations coincided to some extent; yet the two ideas were distinct, and the provision in sub-paragraph 2 (b) (i) would hardly operate in the case of bilateral treaties, in which reservation clauses were very rare. He therefore considered that the cross-reference should be deleted and that the meaning of "material" breach should be defined.

51. Mr. ROSENNE said that some of the difficulties to which the article was giving rise were due to the fact that the Commission was dealing with generalities and had to take into account the existence of many different types of treaty and the varieties of breach which could, and did, occur. He was uncertain whether the various suggestions for differentiating between certain classes of treaty would prove adequate. Perhaps some additional ones would also need to be considered.

52. Generally speaking, he subscribed to the very similar approaches adopted by the Special Rapporteur and by Mr. Castrén in his amendment. A statement of the rule contained in paragraph 1 (a) of the Special Rapporteur's text was necessary whatever the article's ultimate form, and it would not be altogether correct to claim that the general principle was already covered in articles 2 and 3 of section I.

53. As Mr. Tabibi had pointed out, many treaties included express provisions dealing with breach. For example, a number of both bilateral and multilateral instruments contained a compromissory clause conferring jurisdiction over disputes arising out of their interpretation or application on the International Court of Justice. A more complex example was the elaborate provisions laid down in the Constitution of the International Labour Organisation for dealing with allegations of breach of the International Labour Conventions. Article 20 could not be formulated in terms of a residual rule and must clearly indicate that such special provisions, whether incorporated in the treaty itself or in an ancillary instrument, took precedence over the more general rules to be set out in the article.

54. He did not agree with the view expressed by some members that judicial machinery, particularly that of the International Court, was the only machinery that could properly deal with breaches of a treaty. That might be the desirable ultimate aim, but in the present state of the international community and considering

current conceptions of international relations, he was by no means convinced that every breach would give rise to a justiciable dispute. However, some provision for third-party control, whether political or judicial, along the lines of Article 33 of the Charter would be useful, particularly if framed in rather more specific terms, such as the Special Rapporteur was proposing in a later article.

55. At the present stage, he could accept, in principle, the proposals of the Special Rapporteur and Mr. Castrén for the definition of a material breach, though he would prefer the Special Rapporteur's text; both were preferable without the amendment suggested by Mr. Tunkin. In view of the tenor of the discussions that had taken place at the previous session and the conclusions reached about the implied right to make reservations, some reference to article 18 of Part I should appear in the article.

56. In the case of bilateral treaties, the definition of a material breach by reference to the criteria for the admissibility of reservations could hardly apply, since the Commission had agreed at the previous session that no right of reservation could exist in regard to such treaties. Accordingly every provision must be regarded as being important to both sides and by the same token any breach would be a material one. The same was probably true of treaties concluded between a small group of States. In the case of multilateral treaties, however, a provision that was important for one party might not necessarily be important for the others and it was not clear how so subjective a matter could be referred to political or judicial adjudication by a third party.

57. If paragraph 2 (c) of the Special Rapporteur's text were retained, it must be made absolutely clear that a State which had accepted jurisdiction and was brought before the Court retained intact its right to raise preliminary objections.

58. Furthermore, the wording of that paragraph should be brought into line with the text of the Charter which, in Article 94, paragraph 1, spoke of compliance with a decision of the Court, but made no mention of acceptance of its judgment. There was a difference between compliance and acceptance. For instance, one of the International Court's recent judgments had not been accepted by one of the parties to the dispute; that party had gone so far as to inform all Members of the United Nations, through the Secretary-General, of its reasons for not accepting the judgment, but had announced at the same time that, in conformity with its obligations under Article 94 of the Charter, it would comply with the judgment.

59. Mr. Tunkin's suggestion that general multilateral treaties should be given special treatment had considerable merit, but before committing himself finally on that point, he wished to see how such a provision could be formulated.

60. With regard to the possible remedies available in case of a breach, of the three mentioned, namely, termination, denunciation and suspension, only denunciation was defined in article 1 of the Special Rapporteur's second report. He was not altogether clear as to what termination or suspension involved; he assumed suspen-

sion meant that the innocent party or parties would temporarily refrain from carrying out their obligations under the treaty following a breach of the same treaty by the offending party. But the questions then arose for what period they would refrain and what the legal relations between the parties would be during that period.

61. It would seem preferable to choose the term denunciation to describe the remedy for a breach, it being understood that the injured State or States possessed the usual right of election as to the action to be taken.

62. Some members had ventured into other realms of international law, such as the law of reprisals, presumably within the limits set by the Charter and in conformity with *jus cogens*. If the Commission felt that the situation caused by the breach of a treaty came within the application of the contemporary law of reprisals, then it should say something explicit in that regard rather than try to devise some other formula which might only confuse the issue.

63. Some mention of when the injured State must take action should be made in the article to supplement the provisions of article 4.

64. He reserved his position on the question of severability until it was discussed under article 26 in section IV.

65. He welcomed the Special Rapporteur's constructive suggestion that the constituent instruments of international organizations should be dealt with separately.

66. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 1 (a) in article 20 would serve a useful purpose even though it might not contain a rule of conduct for States.

67. He supported Mr. de Luna's suggestion that paragraph 1 (b) should be expanded to include an illegal as well as a material breach of a treaty.

68. The provision in paragraph 2 (a), which had been omitted by Mr. Castrén in his amendment, was worth retaining.

69. The Special Rapporteur's definition of a material breach was acceptable and the provision in paragraph 2 (c) provided a helpful indication of one important type of violation.

70. Paragraph 3 was also acceptable as expressing an established rule of international law.

71. The most difficult problems were connected with paragraph 4. In the case of multilateral treaties which provided for the reciprocal interchange of concessions and where the contractual character of the *do ut des* was evident, the same right of suspension or termination should be recognized as for bilateral treaties in so far as such a right was a general principle of law. On the other hand, a similar privilege might not exist to the same extent if there were breaches of a multilateral treaty enunciating general rules of law which must continue to be observed by the other parties. For while the violation of a contract in municipal law gave rise to a right to suspend or terminate the application of the agreement, the violation of a municipal law by one of those submitted to it did not give the same privilege

to others, because that would lead to anarchy. Similarly, in the international field a breach of the Convention on the Continental Shelf, for example, would not entitle the other parties to encroach upon the Continental shelf of the defaulting State, because in such a case they would be affecting the rights and interests of other States in the maintenance of general law and order on that matter.

72. However, it was not certain that the solution of the problem would be to confine the right of the complying parties to suspending the application of a multilateral treaty with respect to the defaulting State, thus depriving those parties of the right to consider the treaty terminated with respect to the defaulting State. The complying parties might be interested in depriving the defaulting State of its status as a party to the treaty, with all the rights that entailed as to participation in its revision, and the prestige of continuing to be a party although with suspended rights. Furthermore, the right of suspension might lead to the same difficulties, with respect to the maintenance of general law and order, as those originated by the exercise of the right to consider the treaty terminated with respect to the defaulting State.

73. In his opinion, the essential point was that the right of the complying parties to suspend or terminate the treaty did not release them from their mutual obligations and from their duty to respect the general interest in the maintenance of international order. There was a phrase in paragraph 4 (a) which covered that important point and to which more emphasis should perhaps be added. It was provided that the right to terminate or suspend the application of the treaty could only be exercised by a party "in the relations between itself and the defaulting State". Perhaps the words "without affecting the rights or interests of the other complying States" should be added.

74. The possibility of collective action envisaged in paragraph 4 (b) and in the final proviso constituted a welcome contribution to the progressive development of the law on the subject which did not appear in Mr. Castrén's text.

75. The rule proposed by the Special Rapporteur in paragraph 5 was a valuable one, but a distinction should be made between treaties drawn up under the auspices of an international organization, which then had no further interest in the matter, and those whose execution was supervised by an international organization. In the former case, the States parties should not be deprived of the rights they would possess by virtue of paragraph 4.

76. Subject to article 20 being amended to take account of those observations, he could support the Special Rapporteur's proposals.

77. Mr. CASTRÉN noted that several speakers had taken the view that the Special Rapporteur's draft assigned excessive rights to the injured party. He agreed that it might be wise to make an exception in the case of general multilateral treaties.

78. The principle of the indivisibility of treaties had also been referred to. That was a problem which the Commission would consider later, in connexion with article 26.

Some speakers held that, in the case of a minor breach, the only permissible remedy should be the suspension of the treaty's operation. In practice, the cases which could arise were so diverse that the relevant rules should be very flexible, as the Special Rapporteur had rightly endeavoured to make them. It might happen that a single provision of a treaty was of the utmost importance. The breach of one article might cause very serious prejudice to the other parties, and in those circumstances the right of denunciation seemed to be justified.

79. According to the procedure proposed in article 25, all cases contemplated in article 20 were to be the subject of searching inquiry, and generally speaking it was possible to work out acceptable solutions. Thus article 20 did afford some protection against possible abuses.

80. Mr. TUNKIN said that there seemed to be some misunderstanding about the purport of paragraph 1 (a) of the Special Rapporteur's text. Some members had asserted that it embodied an essential principle, but in his opinion it amounted to nothing more than a paraphrase of the maxim *pacta sunt servanda*, which was the basis of the whole draft. The remainder of article 20 dealt with derogations from that principle.

81. Paragraph 1 (b) was extremely general and merely provided an explanation without laying down any rule. Contrary to the view expressed by Mr. Briggs, he considered that the only well-established rule in the matter of material breach was that it entitled the other party or parties to denounce or withdraw from the treaty. That right had often been invoked for purposes of annulling a treaty so that the principle must be regarded as *lex lata*.

82. General multilateral treaties which were purely declaratory of customary norms of international law presented no problem, because even denunciation by one party could not entitle the others to repudiate their obligations, the source of which might lie either in customary or in conventional law. Modern general multilateral treaties should be placed on the same footing as customary rules, which had become part of general international law.

83. He would hesitate to exclude from the scope of article 20 only those rules deriving from general multilateral treaties and possessing the character of *jus cogens*.

84. He associated himself with Mr. Yasseen's comments concerning the view that it was useless to elaborate norms of international law in the absence of a compulsory international jurisdiction. That issue would have to be discussed in another context outside the law of treaties.

85. He agreed with Mr. Rosenne that it must be clearly stated that, when a treaty contained express provisions concerning its breach or when the constituent instrument of an international organization contained machinery for dealing with breaches of conventions concluded within it, such *lex specialis* would prevail over any of the rules which might be laid down in article 20.

The meeting rose at 6 p.m.

693rd MEETING

Wednesday, 5 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 20 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 20 (TERMINATION OR SUSPENSION OF A TREATY FOLLOWING UPON ITS BREACH) (continued)

2. Mr. de LUNA said that, like Mr. Yasseen, he had been disturbed by the views expressed by Mr. Briggs at the previous meeting (para. 11) concerning the principles stated in article 20. Mr. Briggs thought that, apart from paragraph 1 (a), the article was based on the theories of learned writers and on speculation. But he (Mr. de Luna) considered that the Special Rapporteur had stated the problem with remarkable clarity and had proposed a sound solution.

3. He went further than Mr. Tunkin and maintained that the principle that "a material breach of a treaty by one party entitles the other party or parties to denounce or withdraw from the treaty or to suspend, in whole or in part, its operation" was not an exception to the rule *pacta sunt servanda*, but rather a corollary of the principle of the sanctity of treaties. In the application of its provisions, a treaty should not conflict with the principle of good faith, without which the rule *pacta sunt servanda* was meaningless. That explained the maxim of the Roman jurists: "*frangenti fidem, fides non est servanda*".

4. According to a universally recognized principle, failure to observe the obligation to act in good faith in the performance of a contract constituted, in municipal law, a fraud entitling the defrauded party to denounce the contract without prejudice to any claim for damages. That principle had been proclaimed many times in international case-law, for instance, in the cases of the *Polish Nationals in Danzig*,¹ the *Serbian and Brazilian Loans*² and the *North Atlantic Coast Fisheries*,³ in all of which the Permanent Court of International Justice and the Permanent Court of Arbitration had stressed the element of good faith. Moreover, under Article 2, paragraph 2, of the United Nations Charter, Members were bound to "fulfil in good faith the obligations assumed by them".

5. If the party injured by a breach continued to be bound by the treaty without having the right to denounce it, there would be a violation of the principle of reciprocity, which itself was merely the expression of the principle,

¹ P.C.I.J., Series A/B, No. 44.

² P.C.I.J., Series A, Nos. 20/21.

³ Hague Court Reports, New York, 1916, Oxford University Press, pp. 141 ff.

embodied in Article 2, paragraph 1, of the Charter, of the sovereign equality of all States.

6. The municipal law of most States recognized the defence of non-performance, which followed from the principle of the interdependence of obligations. Similarly, in municipal law, it was a general principle that a contract could be denounced forthwith if one of the parties, by its own fault, failed to perform its obligations. Accordingly, the article proposed by the Special Rapporteur, far from constituting a proposal *de lege ferenda* or *Begriffsjurisprudenz*, designed to fill a lacuna in positive international law by logical deductions, was in fact based on a principle of existing international law.

7. Although case-law offered no examples of express rulings on the point, he could quote three examples from general multilateral treaties of different periods: the Universal Postal Convention,⁴ under article 78 of which the postal service with any country which did not respect the freedom of transit of mail could be suspended; the 1899 Hague Convention on the Laws and Customs of War on Land,⁵ article 40 of which provided that any serious violation of an armistice by one of the parties gave the other party the right to denounce it and to recommence hostilities; and the 1923 Geneva Statute on the International Regime of Maritime Ports,⁶ article 8 of which provided that each Contracting State could suspend the benefit of equality of treatment from any vessel of a State which did not effectively apply the provisions of the Statute.

8. He could also quote an example from state practice: that of the Soviet Union, which had denounced the treaties governing its alliances with the United Kingdom (1942) and France (1944) on the ground that the two treaties in question had been violated by the Treaty of Paris concluded in 1954 with the Federal Republic of Germany.

9. With regard to the question of reprisals, he did not share the view of Mr. Rosenne, but fully agreed with Mr. Verdross that non-aggressive reprisals, like self-defence, were of the very essence of international law.

10. He had already proposed that the concept of *faute* should be introduced in connexion with the non-performance of a treaty; international courts, even if they were competent to deal with cases of treaty-breaking of great political importance, could not always satisfactorily settle political disputes, which differed from legal disputes in that one or even all of the parties were opposed to the application of existing international law, which they considered unjust. That was why it had been said that, internationally, *de maximis non curat praetor*.

11. Mr. EL-ERIAN said there appeared to be general agreement regarding the principle stated in article 20; the differences which had arisen lay in the approach to the real scope of the principle and the proper conditions for its application. Article 20 struck a balance between

recognition of the principle and the definition of its scope and conditions of application. As the Special Rapporteur had pointed out in paragraph 9 of his commentary, the application of the article was narrowed by "the modern practice of giving to many classes of treaties comparatively short periods of duration or of making them terminable by notice".

12. There were three possible approaches to the problem. The first was a simple general formula of the kind to be found in some private drafts, such as that in article 202 of Field's draft code, which read: "An obligation created by treaty is extinguished, either, . . . 5. By breach of its conditions by the nation entitled to performance."⁷ The same approach had been adopted by Bluntschli, article 455 of whose draft code read (translation): "When one of the contracting parties fails to carry out its undertakings or violates the treaty, the injured party is entitled to consider itself released from its obligations."⁸

13. The second approach was that adopted by Mr. Briggs, which would provide for provisional suspension that would only become definitive by judicial determination.

14. The third was the more elaborate approach adopted by the Special Rapporteur and, in substance, by Mr. Castrén.

15. Many members had expressed concern at the risk of abuse of the right embodied in article 20, but one safeguard was provided by the requirement that the breach involved must be a "material" breach, and another by the variety of the means of redress. Both the Special Rapporteur and Mr. Castrén envisaged suspension of the provision of the treaty which had been broken, or suspension of the whole treaty, culminating in its termination or the withdrawal of the injured party. The requirement of a time-limit for the exercise of a claim to suspend or terminate a treaty would also act as a check. For the more serious cases of termination, certain procedural requirements might be laid down, such as the submission of a reasoned statement by the injured party giving the defaulting party reasonable time to answer.

16. With regard to the relationship between the substance of the article and the machinery for judicial settlement, the Commission would have ample opportunity to discuss that matter when it considered article 25. The question of judicial settlement could not be approached in the abstract. The progressive development of international law should not be made to wait upon compulsory judicial settlement; in fact, that development would itself help to create conditions conducive to strengthening the machinery for the peaceful settlement of disputes. He had noted that the draft submitted by the United States delegation to the Disarmament Committee envisaged acceptance of compulsory jurisdiction only for disputes concerning the disarmament treaty at the first stage of disarmament, but for all disputes at the second stage.⁹

⁴ League of Nations, *Treaty Series*, Vol. 40, pp. 27 ff.

⁵ Scott, J. B., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press, pp. 100 ff.

⁶ League of Nations, *Treaty Series*, Vol. 58, pp. 301 ff.

⁷ Field, D. D., *Outline of an International Code*, 2nd edition, New York, 1876, Baker, Voorhis & Co.

⁸ *Le Droit international codifié*, 3rd ed., Paris, 1881.

⁹ ENDC/30, pp. 18 and 25.

17. With regard to the question of inherent international obligations, referred to by Mr. Lachs, he pointed out that the previous Special Rapporteur, Sir Gerald Fitzmaurice, in paragraph 1 (iv) of article 19 of his second report, had described that type of obligation as one "... where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty ... so that the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions."¹⁰

18. Lastly, he agreed with those members who considered that the subject-matter of paragraph 5 should be treated separately.

19. Mr. AMADO pointed out that successive special rapporteurs had used different adjectives to describe the gravity of a breach of a treaty. Sir Gerald Fitzmaurice had used the word "fundamental"; the present special rapporteur, after some hesitation, had finally chosen the word "material". It might be asked what other adjectives could be found to express the idea that the mere breach of a treaty could not bring about its extinction. He admitted that he was at a loss to find an answer.

20. Article 20 was concerned with two contrasting but fundamental ideas: the principle *pacta sunt servanda* and the maxim *frangenti fides, fides non est servanda*, in other words, the principle of the stability of treaties and the principle of good faith. The writers taught that the breach or non-performance of a treaty did not directly entail its extinction *ipso jure* and did not necessarily render it void. A breach merely authorized the injured party to withdraw from the treaty. Another basic idea was that the mere allegation of a breach was not sufficient to enable the injured party to withdraw from the treaty. Either the party accused of a breach must admit its fault, or the fault must be established by an international authority, or all the parties must agree to the treaty's extinction. The Special Rapporteur had taken those points into account, as had Mr. Castrén in the simplified text he had submitted to the Commission (691st meeting, para. 67).

21. None of the differences of opinion that had arisen concerning the proposed text related to the substance, except where general multilateral treaties were concerned; for it was inconceivable that a single State should be able to obstruct a virtually universal agreement.

22. The Commission should adopt either the text submitted by the Special Rapporteur or Mr. Castrén's simplified version. With regard to the part of the article which referred to the United Nations Charter, however, he proposed that the discussion should be adjourned and that it should be examined separately.

23. Sir Humphrey WALDOCK, Special Rapporteur, said the discussion had shown that most members were reluctant to follow Mr. Briggs in the course he had suggested. Nevertheless, in view of the importance he attached to Mr. Briggs' opinions, he would comment briefly on the point.

24. It was going too far to say that the rule underlying article 20 was not an accepted rule of international law. An examination of diplomatic notes and official statements showed that there already existed a considerable state practice evidencing clear acceptance of the principle that a substantial breach of a treaty might create a right to terminate the treaty. The diplomatic material showed a striking difference in the attitude of States towards the question of termination resulting from a breach and the *rebus sic stantibus* doctrine. When the latter doctrine was invoked, it was often met by a denial of the right to denounce the treaty unilaterally on the basis of that doctrine, the respondent State claiming that its agreement was necessary for termination of the treaty by reason of the change in circumstances. In the situation contemplated in article 20, however, diplomatic correspondence showed not only quite frequent reliance by States on the principle that a serious breach gave rise to a right of unilateral termination, but no disposition on the part of the respondent State to dispute that principle itself. Consequently he had had no difficulty in accepting it as part of international law.

25. Like Mr. Briggs he attached the greatest importance to the procedural aspects of the question. But he must stress that, whatever conclusions the Commission might reach on questions of jurisdiction and procedure, it was still essential to formulate as precise rules as possible on the subject-matter of the article; in fact, the more uncertain the position with regard to jurisdiction, the more necessary it was for the substantive rules to be given a strict and precise formulation.

26. Mr. Tunkin and other members had suggested that the scope of the article should be restricted to those treaties which did not themselves provide a remedy for the situation contemplated. In principle, he was ready to accept that point of view, but he thought it would be going too far to restrict the scope of the article to treaties which were altogether silent with regard to the consequences of a breach. No doubt, as pointed out by Mr. Rosenne, a treaty might contain provisions on the peaceful settlement of disputes and those provisions would constitute a very important form of remedy in the event of a dispute arising between the parties. However, the existence of such a remedy would not necessarily mean there was no room for the application of the principle embodied in article 20, for instance, where there was no actual dispute as to the breach. He therefore suggested that the point should be met by making the provisions of article 20 "subject to any provisions on the subject of remedies which may be contained in the treaty itself".

27. Several members had suggested that general multilateral treaties should receive special treatment. Personally, he was not at all convinced that it would be an easy matter to distinguish between general multilateral treaties and other treaties for the purposes of the present article. A general multilateral treaty might contain very diverse kinds of obligations. To take as an example the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, some of the norms they stated might have the character of rules of general customary international law from

¹⁰ *Yearbook of the International Law Commission, 1957, Vol. II* (United Nations publication, Sales No.: 1957.V.5, Vol. II), p. 31.

which it was not possible for States to depart by agreement between themselves. But many of the norms contained in those conventions were not rules of *jus cogens*. On the contrary, they were designed to operate essentially in the bilateral relations between individual States which would in many cases be free to derogate from them by mutual agreement. It would seem difficult to exclude, in the relations between a defaulting State and injured State, the application to those conventions of the principles stated in article 20, especially in the event of a persistent breach.

28. A point to be borne in mind was that general multilateral treaties, which often took a long time to enter into force, took still longer to become universal, and it was in fact rare for anything like the full number of potential parties to take the necessary steps to be bound by the treaty. The acceptance of such treaties was very uneven, although some of the rules they embodied might become part of customary international law. It seemed questionable whether a "general multilateral treaty" should be excepted from the normal rules concerning denunciation and suspension when many States remained non-parties.

29. Another point to be remembered was that certain multilateral treaties contained a jurisdictional clause or there was a separate protocol containing an optional clause providing for judicial settlement or arbitration. If a State persistently violated certain clauses of a treaty in its relations with another State, it would seem unreal to exclude any possibility of the denunciation or suspension of the treaty, or of some of its clauses, by the injured party vis-à-vis the defaulting State. Unless such a right were recognized, the injured party might find itself still bound by the jurisdictional clause in its relations with a defaulting party with regard to the treaty as a whole, even though it was unable to secure observance of certain provisions by the defaulting State. True, the principle *inadimplenti non est adimplendum* might to a certain extent provide a solution. But the contractual element present in every general multilateral treaty made it difficult to draw a clear distinction between general multilateral treaties and other treaties for the purposes of article 20. Even a general law-making treaty had the dual aspect of an instrument embodying general legal norms and one establishing contractual obligations between each pair of States. Thus such essentially law-making treaties as the Genocide Convention¹¹ and the Geneva Conventions of 1949¹² imposed procedural obligations of a contractual character and were open to reservations as well as being subject to denunciation.

30. He thought that the moment the Commission sought to exclude certain categories of treaty obligations from the operation of article 20, it would find it necessary to distinguish, as the previous special rapporteur had done, not between various types of treaty, but between the different kinds of obligation they contained, according to whether the obligation was of a reciprocal kind or not. As was pointed out in paragraph 6 of his commentary, he recognized the significance of the distinctions drawn

by his predecessor between the different types of obligation — reciprocal, interdependent and integral. But, because of the contractual element inherent in every treaty obligation, he had not been convinced that those distinctions ought to be made the basis for excluding particular categories of treaty from the operation of the general rule in article 20. The distinctions drawn by the previous special rapporteur had been very elaborate and the Commission itself did not seem to wish to enter into such complications, though some members had raised the problem of multilateral treaties, more especially in relation to rules of a *jus cogens* character.

31. In his view, the point made by some members in regard to rules of *jus cogens* was really more a question of the effects of the termination of a treaty than of a right to denounce a treaty by reason of a party's breach, and he had already covered that aspect of the matter in section V, in an article on the legal effect of the termination of a treaty (A/CN.4/156/Add.3, article 23). That article would contain a paragraph reading:

"The fact that under paragraph 1 or 2 of this article a State has been released from the further execution of the provisions of a treaty shall in no way impair its duty to fulfil any obligations embodied in the treaty which are binding upon it also under international law independently of the treaty."

In drafting that article, he had drawn inspiration from the provisions of the 1949 Geneva Conventions. But unlike those conventions, the great majority of general multilateral treaties did not contain any provision of the effect of denunciation on the position of the denouncing State in regard to obligations contained in the treaty forming part of general international law.

32. A particularly striking example was the Genocide Convention, which contained a clause setting out a right of denunciation without any provision for the continuance of obligations. Yet, it would be manifestly absurd to suggest that denunciation of the Genocide Convention by a party could affect the prohibition of the crime of genocide by international law. The fact of the matter was that the Genocide Convention contained, in addition to the substantive clauses relating to the prevention and suppression of genocide, certain procedural clauses in respect of which a right of denunciation was appropriate.

33. For all those reasons, he had hesitated to draw any distinction between treaties in regard to the right to denounce in article 20. He suggested that the Drafting Committee should be invited to consider the whole question in the light of the discussion and submit a revised text to the Commission.

34. Mr. Tunkin had suggested that the reference to the termination of individual clauses of a treaty should be dropped, so that the provision would specify only a right of suspension. The suggestion seemed attractive at first sight: excision of a particular clause from a treaty could easily affect its balance, although, of course, it could be suggested that the defaulting party had only itself to blame for that situation. He would therefore be prepared to support the suggestion that suspension alone should be contemplated.

¹¹ United Nations, *Treaty Series*, Vol. 78, p. 278.

¹² *Ibid.*, Vol. 75.

35. Mr. Rosenne had asked the meaning of the term "suspension"; his own view was that suspension would involve non-application of the clause in question until it became clear that the defaulting State was ready once again to apply the whole of the treaty.

36. Mr. de Luna had suggested that, when referring to a breach of a treaty, it should be made clear that the reference was to an unlawful breach, and had instanced the possibility of a breach being authorized by the Security Council. That point might be considered by the Drafting Committee to see whether it could be covered without unduly complicating the draft.

37. Mr. de Luna had also suggested that it should be made clear that the breach, in addition to being an important one, must not have been provoked or caused by the other party. In practice, allegations of provocation were very frequent and that point too should be considered by the Drafting Committee. Perhaps it would be appropriate to include in article 19 a reference to article 4 of Part II, which dealt with the loss of the right to denounce a treaty as a result of the acts or omissions of the State alleging the injury. The provisions of paragraph 4 of article 22, on the doctrine of *rebus sic stantibus*, were also very close to the line of reasoning put forward by Mr. de Luna.

38. The main problem to be solved was that of defining a breach, and Mr. Yasseen was right in saying that it would be a step forward to propose a rule providing for a right of denunciation only in the case of an important or material breach, for there were a number of authorities who did not differentiate between different kinds of breach. Certainly there seemed to be general agreement in the Commission on the need to keep the definition narrow. He had tried to provide some form of objective test whereby a breach would be regarded as substantial if it were tantamount to setting aside a provision concerning which reservations were excluded under article 18 of Part I. Some members seemed to favour another kind of definition, but the difficulty was to choose a suitable form of words that would avoid any element of subjectivity. Although he had an open mind on the matter, and although the whole question would obviously need further consideration by the Drafting Committee, he believed that his own solution might be acceptable if modified as suggested during the discussion, for instance, by Mr. Tunkin, who wished to omit the words "or impliedly excluded" in paragraph 2 (b) (i); but the reference to article 18 of Part I might have to be retained, since otherwise the case of bilateral treaties would not be covered.

39. He had already suggested that the constituent instruments of an international organization or treaties concluded within an international organization should form part of a separate general provision. The second category had to be covered because of treaties of the type of the international labour conventions.

40. It would also be necessary to maintain the distinction already introduced in Part I between treaties concluded under the auspices of an international organization at a conference convened by it, and those concluded within the organization; in the latter case, the application of

article 20 would have to be limited to treaties whose execution was supervised by the organization.

41. Some members had touched on the question of the law of reprisals and Mr. de Luna had suggested that there could be cases in which termination might be justified because of the violation of another treaty; but in his opinion, the Commission could not enter into such issues in formulating the present article.

42. Although certain points still remained to be settled, he thought that article 20 could be referred to the Drafting Committee. The Committee might concentrate its attention on Mr. Castrén's text, which was based on his own, but was certainly neater, though he had some reservations about its wording. Once it had a simpler draft before it, the Commission could re-open discussion of the article.

43. Mr. BRIGGS said that before the article was referred to the Drafting Committee, he wished to say that, despite the great respect he had for the Special Rapporteur's opinion, he felt bound to reject his claim that there existed a unilateral right to repudiate treaty obligations on the ground that a breach had been committed. In paragraph 2 of his commentary, the Special Rapporteur had himself pointed out that state practice did not give much assistance in determining the true extent of such a right and that in most cases the denouncing State had put an end to the treaty for quite other reasons, alleging violation primarily in order to provide a respectable pretext for its action; and in paragraph 4 he had gone on to say that international jurisprudence had contributed comparatively little on the subject. He (Mr. Briggs) therefore continued to think that in article 20 grounds for termination were being provided which did not exist in international law.

44. The CHAIRMAN observed that, whatever collective decision might be reached by the Commission on individual articles, members would no doubt continue to hold different views on whether the rules formulated in particular cases expressed existing law or had been arrived at *de lege ferenda*.

45. He suggested that article 20 be referred to the Drafting Committee.

It was so agreed.

ARTICLE 21 (DISSOLUTION OF A TREATY IN CONSEQUENCE OF A SUPERVENING IMPOSSIBILITY OR ILLEGALITY OF PERFORMANCE)

46. The CHAIRMAN invited the Special Rapporteur to introduce article 21.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that although article 21 was in a sense linked to article 22, it did deal with a distinct juridical issue, which should, he thought, be kept in a separate article.

48. As he had explained in the commentary, paragraph 1 dealt with a matter so closely connected with the problem of state succession that he had hesitated to include

it in the draft, although the Harvard Research group and the previous special rapporteur had included provisions of that kind in their drafts. He hoped members would give their views on whether or not paragraph 1 should be retained.

49. The core of the article was contained in paragraphs 2 and 3, which sought to cover contingencies that were unlikely to be frequent, but could nevertheless arise in practice.

50. Paragraph 4 was concerned with the effect on existing treaties of the development of new rules of *jus cogens*. In the course of its discussion on article 13 (683rd, 684th and 685th meetings), the Commission had agreed that provisions which conflicted with such rules would render a treaty void, and it was obvious that the paragraph required some re-drafting to bring its formulation into line with that decision. Perhaps paragraph 4 might be left aside for consideration by the Drafting Committee in the light of the provision concerning *jus cogens* to be inserted in article 13. It might ultimately prove desirable to embody paragraph 4, possibly in revised form, in a separate article.

51. Mr. VERDROSS said he approved, in principle, of the draft of article 21 submitted by the Special Rapporteur, especially paragraph 4.

52. However, he wished to comment on paragraph 1, which provided that a treaty could be dissolved if one of the parties to it was extinguished, provided always that the extinction of that party had not been brought about by means contrary to the provisions of the United Nations Charter. In his opinion, extinction could not occur in that way, for if a State were occupied or annexed in violation of the principles of the Charter, the occupation or annexation was void in law and the State annexed continued to exist as an international personality and as a legal entity. The last two lines of paragraph 1 (a) should therefore be deleted, but the commentary should explain how the paragraph was to be interpreted.

53. Mr. ROSENNE said that in his opinion paragraph 1 should form a separate article; the general proviso contained in paragraph 1 (a) should be retained either in the article itself or in the commentary.

54. After hearing the comment made by Mr. Verdross, he inclined to the view that some explicit reference should be made to *de facto* or temporary extinction of a State by means contrary to the provisions of the Charter, as opposed to extinction in conformity with the Charter, for example, when two States agreed to amalgamate.

55. Sub-paragraph 1 (a) (i) raised a serious question of principle when it stipulated that the extinction of one of the parties could be invoked as having dissolved a bilateral treaty. At its previous session the Commission, in article 1, paragraph 1 (a), of Part I, had accepted for its purposes the obvious principle that a minimum of two parties was required to create a treaty, and it could normally be assumed that if the number of parties fell below two, the treaty would be dissolved. However, since then the question had been raised whether that condition necessarily held for the continuation of every

treaty, or if not of the treaty as such, then at least of the obligations arising under it.

56. His doubt had been prompted by reading the judgement of the International Court in the *South-West Africa* cases (preliminary objections)¹³ regarding the mandate and its continuation in force despite the disappearance of one of its parties, the League of Nations; that decision had to be read in the light of some of the dissenting opinions in which specific reference was made to the Commission's pronouncement of 1962 concerning the number of parties needed to create a treaty.¹⁴ Admittedly, the Commission had deliberately excluded from the scope of its draft articles the treaties to which an international organization was a party. Nevertheless, the Court's judgement might have some relevance to bilateral treaties between States. The question to be considered was whether in certain circumstances the surviving party to a bilateral treaty, which continued to enjoy the rights created by the treaty, continued to be subject to the obligations it had accepted under that treaty after the extinction of the other party; the *South-West Africa* cases seemed to indicate that the extinction of one party did not necessarily lead to impossibility of performance, and hence to the dissolution of the treaty.

57. The wording of paragraph 1 (b) would need some modification so as to make clear that, as stated in the last sentence of paragraph 4 of the commentary, it was intended to cover the possible extinction of a party to a treaty concluded among a small group of States, in which event the usefulness of the treaty might be greatly impaired.

58. He had no very strong views on whether paragraph 4 should remain in the same article as paragraphs 2 and 3 or be transferred to article 13.

59. Mr. CASTREN said he supported the line taken by the Special Rapporteur in article 21, subject to a few drafting amendments. Paragraph 1 should be deleted and its subject-matter dealt with in connexion with the succession of States and governments. If the Commission should decide to retain that paragraph, however, he would suggest that the words "provisions of the Charter of the United Nations" should be replaced by "principles of the Charter of the United Nations" or "rules of general international law".

60. In paragraph 2, the phrase "after its entry into force" seemed unnecessary, for it was obvious that the performance of a treaty did not generally begin until it had entered into force.

61. According to paragraph 2 (a), a treaty might be terminated by reason of the disappearance or destruction of the physical subject-matter of the rights and obligations contained in the treaty, provided that the purpose of the treaty was not to ensure the maintenance of that subject-matter. But it might be impossible to replace the physical subject-matter of the treaty; hence the words "if it can be replaced" should be added at the end of the clause.

¹³ *I.C.J. Reports*, 1962, pp. 319 ff.

¹⁴ *Ibid.*, p. 475.

62. For paragraph 3 he suggested a more concise text reading:

“If in a case falling under paragraph 2 there is substantial doubt as to whether the cause of the impossibility of performance will be permanent, the treaty may only be suspended until the impossibility of performance has ceased.”

Obviously, if the impossibility of performance became permanent contrary to expectation, the main rule applicable would be that stated in paragraph 2.

63. Mr. de LUNA endorsed the views expressed by Mr. Verdross, Mr. Rosenne and Mr. Castrén. The idea expressed in paragraph 1 should be retained, but placed in a separate article, as its subject-matter was separate. He agreed with Mr. Verdross that the proviso in paragraph 1(a) should be deleted; for either the State in question continued to exist and the rule stated in paragraph 1 was not applicable, or else it had ceased to exist, in which case the treaty could not be said to remain in force.

64. The very interesting case mentioned by Mr. Rosenne — an obligation deriving from a bilateral treaty which subsisted after one of the parties had disappeared — was not an ordinary bilateral obligation. An obligation always had a certain element of “alterity” — to use a term from metaphysics; if an obligation of that kind survived, it was because it was an obligation not only to the party which had stipulated it in the treaty, but also to the international community, as had been maintained in the case of the mandates entrusted to the Union of South Africa by the League of Nations.¹⁵ In the normal case of a bilateral treaty, in which there was no substitution of the treaty obligation, the obligation always ceased, because all the obligations deriving from a treaty were extinguished where there was no element of “alterity”. But in any case, the Commission need not discuss that problem.

65. He approved of paragraphs 2, 3 and 4, and agreed with Mr. Verdross that paragraph 4 was essential. There were three cases of impossibility: physical, legal and moral; provisions concerning them would serve as a transition to article 22, which dealt with the doctrine of *rebus sic stantibus*. In the case of moral impossibility, the treaty could still be executed, but if the circumstances had changed it could not be held that a State was bound to execute the treaty.

66. Mr. AGO said he had some doubt whether paragraph 1 should be retained. It was true that the extinction of a State party to a bilateral or multilateral treaty raised a number of problems, but it was questionable whether it was really appropriate to deal with them in that context.

67. If the treaty conferred on one of the parties a specified right *in rem*, such as the right arising from a treaty of cession recognizing a State's sovereignty over certain territories, the right *in rem* clearly subsisted, even if the other contracting party to the treaty ceased to exist.

In the case of a contractual right, the whole problem of state succession arose. If a treaty conferred a right that was connected, for example, with the particular situation of a certain State, it might, indeed, be thought that on that State's disappearance, the right subsisted vis-à-vis the successor State; that was a typical problem of state succession, but it should not be dealt with in article 21.

68. Moreover, in such a case it was not the treaty itself, but the right as such which remained in being. Even if there were a so-called succession relationship between the former State and the new State, the earlier treaty as such no longer existed, and the right it conferred, together with the corresponding obligation, was, in a sense, the subject of a new tacit agreement between the State possessing the right and the new State.

69. The extinction of a State contrary to the principles of the United Nations Charter raised another very difficult problem. Even if the State's extinction had been brought about by means contrary to the provisions of the Charter, it might also happen that the treaty became physically impossible to apply, and was therefore dissolved, at least so long as the lawful situation was not restored. In short, the two questions dealt with in paragraph 1 should not be considered in connexion with the dissolution of treaties; in any event, there was no necessity to mention rules that were self-evident.

70. Mr. BRIGGS said he agreed with the Special Rapporteur that the matter dealt with in paragraph 1 did not properly belong in the draft at all, and should be considered in the context of state succession.

71. Paragraph 4 ought to be transferred to some other part of the draft.

72. He was uncertain as to what was meant by the expression “to call for” in paragraph 2; did it refer to the act of bringing termination to the attention of an international organization or the International Court of Justice, or to the act of notifying the other party or parties?

73. On the more general question of whether an article consisting of paragraphs 2 and 3 was necessary at all, he said that the issue was not really one of termination, but of impossibility of performance as a valid justification for the treaty provisions not being carried out.

74. Mr. GROS, in reply to the questions put by the Special Rapporteur, said that it would be well to delete paragraph 1; on that point he endorsed the explanations given by Mr. Ago. Paragraph 4 could be incorporated in article 13.

75. With regard to paragraphs 2 and 3, he was reluctant to recognize impossibility of performance as a separate ground for the dissolution of a treaty; he was more inclined to regard it as a problem connected with the doctrine of *rebus sic stantibus*, dealt with in article 22, which might be supplemented by a provision concerning impossibility of performance.

76. But if the Commission adopted the Special Rapporteur's presentation in two separate articles, he saw no reason why article 21 should not consist of the existing

¹⁵ See *I.C.J. Reports*, 1962, pp. 319 ff.

paragraphs 2 and 3; for the new paragraph 3 he would prefer the wording proposed by Mr. Castrén.

77. Mr. TUNKIN said that the problems dealt with in article 21 were extremely complicated and it would be wise to give members time for further reflection; in the meantime the Commission could take up article 22.

78. He did not feel able at that stage to express a final opinion on whether the problem with which paragraph 1 was concerned should be dealt with in the draft or taken up later in connexion with state succession.

79. He was in general agreement with paragraph 2.

80. Though he believed that a clause was needed to cover the complete disappearance or destruction of the physical object of a treaty, like Mr. Briggs he was not clear as to the meaning of the phrase "to call for the termination". The rule stated in paragraph 4 was an important one and would represent real progress; he was strongly in favour of its inclusion.

81. Mr. LACHS said that articles 21 and 22 both dealt with impossibility or extreme difficulty of performance and should be discussed together with a view to their possible amalgamation. Article 21 was concerned with the effects of the extinction of one of the parties, the disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty, the permanent disappearance of a legal arrangement or regime established by the treaty, and the establishment of a new rule of international law which rendered the performance of the treaty illegal. Article 22 was concerned with an essential change in circumstances which would frustrate the further realization of the object of the treaty or make performance of the obligations contained in it essentially different from what had been originally undertaken by the parties.

82. The dividing line between what certain writers described as absolute impossibility and relative impossibility of performance was not very clear in either article, but of course the cases that arose in practice varied widely and the whole range of possibilities could hardly be fully covered by the rules to be formulated.

83. In connexion with paragraph 1, the Commission would have to consider, in addition to the question of the extinction of one of the parties, the possibility of the discharge of an obligation leading to self-destruction — a plea that had been made by Turkey in the *Russian Indemnity* case of 1912.¹⁶ On that occasion the plea itself had failed, but it was significant that the Permanent Court of Arbitration had admitted that such a plea could legitimately be advanced. Another question to be considered besides illegality of performance was what the International Court of Justice, in the *South-West Africa* cases, had described as insurmountable difficulties of a juridical nature.

84. In discussing various possibilities envisaged in both articles, the Commission must bear in mind the influence of the time factor and the inevitable changes that it

could bring about in the nature of the object originally contemplated by the parties at the time of concluding the treaty.

85. He hoped that the title of article 22 would be changed because of the negative connotation which the doctrine of *rebus sic stantibus* had recently acquired, both for lawyers and laymen.

86. The CHAIRMAN invited members to give their views on the two procedural suggestions before the Commission.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that he preferred Mr. Tunkin's suggestion because, as he had already pointed out, there were juridical reasons for dealing separately with the matters covered in articles 21 and 22, and it might not prove expedient to combine them. On the other hand, if the Commission were first to take up article 22, it might subsequently find it easier to reach a conclusion on article 21.

88. He had used the doctrine of *rebus sic stantibus* as the title of article 22 because it was a convenient label, but he recognized the force of Mr. Lachs' objection and would be prepared to suggest an alternative: he had not used the expression "*rebus sic stantibus*" in the text of the article.

89. The suggestion that paragraph 4 should be incorporated in article 13 of section II did not commend itself to him; he believed that a provision concerning conflict with a rule of *jus cogens* that led to termination must remain in section III and should not be included in article 13 of section II, which dealt with conflict with *jus cogens* as a ground for invalidating the treaty *ab initio*.

90. The CHAIRMAN suggested that, since the Special Rapporteur had given it his preference, the Commission should follow Mr. Tunkin's suggestion and take up article 22, after which it would revert to article 21.

It was so agreed.

The meeting rose at 12.50 p.m.

694th MEETING

Thursday, 6 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Inter-American Juridical Committee

1. The CHAIRMAN welcomed Mr. Gaicedo Castilla, the observer for the Inter-American Juridical Committee.

2. Mr. GAICEDO CASTILLA, speaking at the Chairman's invitation, expressed his pleasure at being able to attend the meetings of the Commission and his keen interest in its work.

¹⁶ *Hague Court Reports*, New York, 1916, Oxford University Press, pp. 297 ff.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

ARTICLE 22 (THE DOCTRINE OF *rebus sic stantibus*)

3. The CHAIRMAN, opening the discussion on article 22, drew attention to the alternative text proposed by Mr. Castrén, which read:

“The validity of a treaty cannot be modified by a change in circumstances unless:

- (a) The change has taken place with respect to a fact or state of facts which existed when the treaty was entered into;
- (b) It appears from the object and purpose of the treaty and from the circumstances in which it was entered into that the parties must both, or all, have assumed the continued existence of that fact or state of facts to be an essential foundation of the obligations accepted by them in the treaty;
- (c) The effect of the change is such as in substance to frustrate the further realization of the object and purpose of the treaty or to render the performance of the obligations contained in the treaty something essentially different from what was originally undertaken;
- (d) The change does not relate to stipulations of a treaty which:
 - (i) Effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights; or
 - (ii) Accompany a transfer of territory or boundary settlement and are expressed to be an essential condition of such transfer or settlement;
- (e) The change was not caused, or substantially contributed to, by the acts or omissions of the party invoking it;
- (f) The change has been invoked within a reasonable time after it first became perceptible;
- (g) The party concerned has not precluded itself, under the provisions of article 4 of this part, from invoking the change of circumstances;
- (h) The change of circumstances has not been expressly or implicitly provided for in the treaty itself or in a subsequent agreement concluded between the parties in question; and
- (i) The procedure laid down in article 25 of this part has been followed.”

4. Sir Humphrey WALDOCK, Special Rapporteur, said that article 22 could certainly be simplified to some extent, as had been proposed by Mr. Castrén. His own draft was designed to place a number of specific points regarding the doctrine before the Commission for decision. Paragraph 1 was introductory in character; the main substance of the article was contained in paragraph 2. Paragraph 3 contained a negative proposition and paragraphs 4 and 5 dealt with cases in which it was arguable that essential changes in circumstances

should not be capable of being invoked for purposes of termination. Paragraph 6 was concerned with the procedural aspects of the application of the doctrine of *rebus sic stantibus*, which seemed to him very important.

5. In discussing the article, members should keep in mind the procedural provisions of article 25, because a number of authorities were strongly of the opinion — and there was considerable support for it in practice — that the doctrine could only be applied by agreement between the parties, or as a result of some form of independent determination that the proper conditions had been satisfied.

6. He would have no objection to changing the title of the article, which Mr. Lachs had criticized at the previous meeting, because as he had explained in the commentary he did not subscribe to the theory that the doctrine derived from the presumption that the parties had intended to subject the treaty to an implied condition. But the question of the title could not usefully be considered until the Commission had reached a conclusion on the content of the doctrine dealt with in the article.

Mr. Bartoš, first Vice-Chairman, took the chair.

7. Mr. PAL said that the *clausula rebus sic stantibus* had been devised in an attempt to legalize the antinomy between the law's claims to perennial validity culminating in the maintenance of the *status quo* and the historical forces pressing beyond the *status quo* perhaps towards higher forms of human community. Gentilis was generally credited with having introduced the maxim *omnis conventio intelligitur rebus sic stantibus* in the sixteenth century, when he had asserted the existence of a tacit condition in the treaty itself that treaties were binding only if circumstances remained unchanged. In developing that theory he had drawn upon the writings of the civilians, but the theory was in fact older still and had originated in canon law, which had sought to temper the rigour of Roman private law with considerations of equity. Suarez had also recognized the doctrine of *rebus sic stantibus*.

8. In the seventeenth century the theory had been rejected by Grotius, who had emphasized the importance of good faith in maintaining treaties and pointed out that they differed from contracts in as much as their repudiation raised more complex problems. According to Suarez they remained binding on the successors of the princes who had originally concluded them. He had later qualified his position, however, by admitting that where there was absolute certainty that the continuance of the existing circumstances was the very reason for the conclusion of the treaty, a change would excuse repudiation. In the eighteenth century, Bynkershoek had also rejected the doctrine of the existence of a tacit *rebus sic stantibus* clause, but had created a new loophole by maintaining that a sovereign could be absolved from a promise which it was no longer in his power to keep. He had introduced the requirement of some kind of third-party determination in the matter. Later in the same century Vattel had admitted the possibility of a vital change in circumstances which might affect the application of a treaty.

9. In discussing the doctrine of *rebus sic stantibus* many modern writers had looked to the principles of supervening impossibility of performance in municipal law governing contracts. The fundamental rule was that a party to a contract, the terms of which were absolute and not subject to any condition whether expressly stated or implied, must carry out its obligations or pay damages for failure to do so, even though for unforeseen reasons those obligations might become unexpectedly burdensome or even impossible to fulfil. However, the parties could expressly make the obligation to perform conditional upon its continued possibility, and there could be cases in which such a condition would be assumed to exist by implication, even if not expressly laid down.

10. In municipal law, the courts proceeded on the footing that they had no power to release the parties from their contractual obligations, but had to construe the meaning of a particular contract in terms of what the parties as reasonable men should have intended. The purpose of interpreting the contract was not to modify the agreement, but to find out and give effect to the real intention of the parties.

11. An analysis of the various decisions on the subject would show that the theory of the implied condition was used in two different senses. Sometimes it was taken to mean a condition which, although the parties had not expressed it, the Court could read into the contract, not in order to modify their agreement, but in order to give effect to it regarded as their real intention. It was thus taken as a genuine condition. At other times it was taken to mean a condition which, in the circumstances that had arisen, a positive rule of law required the Court to impute to the parties from the outside, irrespective of their intention. It was then only a fiction — something really added to the contract by law. In certain types of case the courts readily inferred an implied condition in the contract to the effect that the disappearance or destruction of its subject-matter or of certain persons could put an end to the obligations. That principle had been extended to include changes in a particular state of affairs or an event not taking place, when they formed the inducement for the parties to enter into the contract, as distinct from the basis of the contract; it was also applied in cases of incapacity to perform personal services. In commercial contracts it was based on the doctrine of frustration of the venture.

12. Another recognized ground for impossibility of performance was changed in the law or in its operation by reason of new facts such as the outbreak of war.

13. With regard to the modern application of such rules to treaties, he wished to draw attention to Oppenheim's views that:

“Although, as just stated, treaties concluded for a certain period of time, and such treaties as are expressly or impliedly made for the purpose of setting up an everlasting condition of things, cannot, in principle, be dissolved by withdrawal of one of the parties, there is an exception to this rule. Vital changes of circumstances may be of such a kind as to justify a party

in demanding to be released from the obligations of a treaty which cannot be abrogated by unilateral notice.”¹

14. The same writer considered that the *clausula rebus sic stantibus* embodied a general principle of law as expressed in the doctrines of frustration, or supervening impossibility of performance or the like, and had said that in that sense “every treaty implied a condition that, if by any unforeseen change of circumstances an obligation provided for in the treaty would imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned”. That vital point had not been taken into account in article 22, which might even run counter to it.

15. The modern doctrine thus seemed to embody the same principle as the law of various countries which recognized a vital change of circumstances as a ground for the dissolution or discharge or unenforceability of a contract. But the *clausula rebus sic stantibus* did not give a State “the right, immediately upon the occurrence of a vital change of circumstances, to declare itself free from the obligations of a treaty; it was only entitled to claim to be released from them by the other party or parties.

16. The general principle of the inviolability of treaty obligations had been upheld by a number of States in the 1871 Declaration of London;² but that Declaration had been almost immediately contravened by many, which was indicative of the difficulty some States seemed to have experienced in fully respecting such a rule. He hoped it would prove possible so to frame article 22 as to make it unnecessary for States unjustifiably to disregard certain obligations as they had in the past. Of course no rule could be perfect and it would hardly be possible to devise a permanent and final rule. But since he preferred to assume that statesmen were actuated by good will, he was not for suspecting bad faith everywhere; it was not to be supposed that the reins of government would suddenly be taken over by persons unwilling to respect the law though lack of moral sense. If States consistently disregarded that duty, the reason was that it conflicted with another and perhaps higher obligation to consider the practical consequences of actions which might affect their nationals. Perhaps the rule proposed by the Special Rapporteur would serve to reconcile political and legal considerations, thereby enabling governments to observe it without disregarding their political responsibilities.

17. The tragic events of recent times might provide some insight into the issues involved and encourage changes in a theory which had been developed in the course of past centuries. States could now be expected to be alive to the new responsibilities implied in their existence by the growing interrelationship of the international community and to reconsider the whole concept of sovereignty, the exercise of which was necessarily becoming dependent on the rule of law and not on

¹ *International Law* (8th edition, 1955), paragraph 539.

² *British and Foreign State Papers*, Vol. 61, p. 1198.

physical capability. One of the tasks which faced modern States was to establish, in co-operation with one another, an international order as an extension of the growing institutional functions being assumed internally, as a result of which States were assuming ever wider obligations to protect the welfare and security of the individual. In so far as any function of a State could now be exercised only in co-ordination with other States, its organizational supremacy was bound by the laws of interstate functional co-operation. The law-giver, on the other hand, must be alive to the increasing possibility of supervening difficulties in the performance of treaty obligations undertaken perhaps under quite different circumstances.

18. Mr. TSURUOKA said he approved of the general lines of the Special Rapporteur's draft of article 22; it introduced a certain flexibility into the *rebus sic stantibus* clause with the object of diminishing the dangers which the clause presented for the stability of the international legal order. It was better to base the rules on the theory of unforeseen circumstances than on that consent. It would also be preferable to lay down strict limits to the effects of the *rebus sic stantibus* doctrine by providing that the parties to a treaty did not possess a unilateral right of denunciation or the right to regard the treaty as having terminated automatically when one of the parties was able to plead a material change of circumstances. The right of either party to request negotiations for the revision of the treaty should be recognized, and if those negotiations failed the party concerned should be required to accept the decision of some international authority, such as an international court.

19. With regard to the individual provisions in the draft article, he thought paragraph 1 (a) should be retained. In view of the controversies and abuses to which the application of the *rebus sic stantibus* doctrine had given rise, it was well to stress at the outset that the article dealt with an exception to the principle *pacta sunt servanda*. Paragraph 1 (a) could be followed by paragraph 3, which might possibly require a few drafting amendments, though he believed that the idea expressed in it should be retained.

20. A more appropriate place for paragraph 1 (b) would be in paragraph 2, to which it would serve as an introduction. He approved of paragraph 2, which provided a safeguard against possible abuses.

21. Paragraph 6 also seemed to him to be essential. Perhaps sub-paragraph (b) should specify the steps which a State must take in the case of an essential change of circumstances, whose effect in law would comprise two stages. First, States would be given the right to request the revision of the treaty. Secondly, the party concerned would be invited to apply to an international court, which would probably order the revision of the treaty in order to bring it into line with the changed circumstances. The Commission should exercise great caution and avoid opening the door to abuses, but it should not fail to recognize the rights of the party to which a change of circumstances might be unduly prejudicial.

22. Mr. CASTREN said that article 22 dealt with an important, very delicate and controversial matter. Although most modern writers admitted the existence of the *rebus sic stantibus* principle in international law, they also rightly stressed that its scope should be limited and that the circumstances in which it could be invoked should be defined. The doctrine was widely accepted in customary law too, but with considerable limitations. For example, it was generally held that a party to a treaty was not free to denounce it unilaterally, even if it claimed that an important change of circumstances had occurred. As the Special Rapporteur had noted in paragraph 5 of his commentary, the Secretary-General of the United Nations accepted the *rebus sic stantibus* clause only in exceptional cases.

23. There were various theories regarding the legal foundation of the *rebus sic stantibus* doctrine: they should be carefully examined, for a great deal might depend on the point of departure chosen. The Special Rapporteur had chosen the so-called "objective" theory, which seemed the best from the practical point of view, and the reasons he had given for his choice carried conviction. He agreed with the Special Rapporteur's views on the application of the clause to treaties of limited duration as well as "perpetual" treaties, and believed the solutions he had proposed to be the best. In setting limits to the *rebus sic stantibus* doctrine the Special Rapporteur had, for the most part, followed the practice or case-law of States, which could be generally accepted.

24. The principal object of his own proposal for article 22 (para. 3 above) was to simplify the text. To avoid repetition, he had grouped together in a single paragraph all the conditions necessary for application of the *clausula rebus sic stantibus*. The paragraph was drafted in negative terms in order to emphasize that the clause was applicable only as an exception.

25. Paragraph 1 in the Special Rapporteur's draft should be deleted; its essence was reproduced in the single paragraph he (Mr. Castrén) had proposed. He had dropped the Special Rapporteur's paragraph 3, as it seemed quite clear that the motives referred to in it could not affect the validity of a treaty. He had retained paragraph 5 (b) as sub-paragraph (d) (ii) of his own proposal, though very reluctantly, because it was a rather special case, which was probably already covered by paragraph 5 (a). On the other hand, he had omitted paragraph 5 (c). The Special Rapporteur had justified that provision in paragraph 17 of his commentary by stating that the dissolution of an international organization and the withdrawal of a member from it were matters to be settled by the organization itself. The constituent instrument of an international organization, however, might make no provision for withdrawal, as in the case of the United Nations Charter, but it was generally considered that the right of withdrawal existed. The Special Rapporteur himself took that view, as he had explained in his commentary on another article of the draft. If an organization's constitution was silent on the right of withdrawal, a member wishing to withdraw would probably rely in the first place on the plea

of a change in circumstances. Provided the general conditions were fulfilled, there seemed to be no reason for rejecting that plea.

26. He had also deleted paragraph 6 (a), because the parties to a treaty were obviously free to amend it by a subsequent agreement. That matter was already covered by articles 18 and 19, and it was hardly necessary to refer to those articles in article 22.

27. Above all, a State which wished to relieve itself of the obligations it had assumed under a treaty must not be given the right to act unilaterally; it must be required to follow the procedure laid down in article 25. That rule was stated in paragraph (i) of his text, which corresponded to the Special Rapporteur's paragraph 6 (b).

28. As to the title of the article, Mr. Lachs' objection might be met by substituting the words "change in circumstances".

29. Mr. TABIBI said he was in favour of combining articles 21 and 22 so as to cover in one article the various grounds for dissolution of a treaty because of supervening impossibility of performance. The provisions were no less important than those on essential validity in section II. The whole question was of special importance to countries in Asia and Africa which were unable to discharge their obligations under certain treaties because of the disappearance of the object or of a vital change in circumstances.

30. He hoped that, in discussing article 22, the Commission would keep article 21 in mind. He could not agree with the view that paragraph 1 of that article should be dropped; it was vitally necessary to state that any treaty, whether bilateral or multilateral, came to an end if one of the parties disappeared; but it did not seem desirable to retain the proviso at the beginning of the paragraph, as the rules governing state succession had not yet been formulated. He agreed with Mr. Ago that the last phrase of the paragraph should be dropped because it might give rise to difficulties; in any case it was unnecessary, since the extinction of a party brought about by means contrary to the Charter would lead the United Nations to take appropriate steps, especially if such an event were to constitute a threat to peace.

31. Paragraph 3 of article 21 must certainly be retained as there were instances of treaties being suspended without being terminated.

32. To return to article 22, the basic idea in paragraph 2, which formed the core of the article and referred to doctrine, could be retained, but it should be drafted more clearly.

33. On the other hand he had some doubts about the wording of paragraph 4, which might be prejudicial to small and weak States, since they were the most likely to neglect to invoke an essential change in circumstances for the purpose of withdrawing from a treaty.

34. He had strong objections to paragraph 5, which was inconsistent with the principle of self-determination and should be deleted.

35. Mr. VERDROSS said that articles 21 and 22 related to very different matters. Article 21 dealt with cases in which performance of a treaty became impossible, whereas in the situation envisaged in article 22 there was nothing to prevent performance, but a State party to the treaty could ask to be relieved of its obligations for special reasons.

36. He well understood why the Special Rapporteur had hesitated to include in his draft an article based on the theory of *rebus sic stantibus*, which had given rise to abuses not only in practice, but also in doctrine. He had overcome his hesitation, however, because there were cases in which the principle could genuinely be applied.

37. The essential point was to specify clearly that the cases covered by article 22 were exceptions to the rule *pacta sunt servanda*. It was obvious, and no one disputed that, as was stated in paragraph 1 (a), a change in circumstances did not in itself affect the continued validity of a treaty, for in international life circumstances were changing all the time. He would prefer a positive statement of the exceptional cases in which the *rebus sic stantibus* clause was applicable.

38. But the main problem arose in connexion with paragraph 2 (b), concerning the case in which the parties must have assumed the state of facts existing when the treaty had been entered into to be an essential foundation of the obligations accepted by them in the treaty. If the parties had contemplated the possibility of a change in the circumstances, they had surely done so because they agreed that the treaty was valid only in certain circumstances. The *rebus sic stantibus* clause was then unnecessary, for it could be concluded, by interpretation, that the treaty was incapable of performance. The *rebus sic stantibus* clause applied only if the parties had made no provision on the subject, but it could reasonably be assumed that they would not have concluded the treaty if they had expected the essential change which had occurred after its conclusion. That view was illustrated by a case already referred to at a previous meeting, namely, the denunciation of the optional clause of the Statute of the Permanent Court of International Justice by France and the United Kingdom after the beginning of the second world war, in order to avoid proceedings against them by a neutral State in a prize case, which had not been foreseen at the time of accepting the optional clause.

39. Paragraph 5 (c) precluded the application of the *rebus sic stantibus* clause in the case of a treaty which was the constituent instrument of an international organization. The records of the San Francisco Conference, however, might be held to support a contrary opinion. The United Nations Charter contained no denunciation clause, but the parties had agreed to provide that if a radical change, such as amendment of the Charter, took place, States which did not accept that change would be able to withdraw.

Mr. Jiménez de Aréchaga resumed the Chair.

40. Mr. LACHS said that the discussion had shown the complexity of the subject. The doctrine of *rebus*

sic stantibus had been a matter of continued concern to lawyers. The history of international law and international relations showed that it had been frequently abused for purposes in direct conflict with the very essence of the doctrine, so that it had tended to become discredited in the eyes of lawyers and laymen alike. The Commission should not dispense with what was an essential element of treaty law on that account, however.

41. He fully concurred with the view expressed by the Special Rapporteur in paragraph 8 of his commentary that "the *rebus sic stantibus* doctrine is an objective rule of law rather than a presumption as to the original intention of the parties to make the treaty subject to an implied condition". He commended the Special Rapporteur for his efforts to detach that doctrine from the question of the original intention of the parties and for formulating an objective rule in the matter, and he supported the formula embodied in paragraphs 1 (a) and 2 of the article.

42. With reference to Mr. Verdross' comments he pointed out that there were cases in which a treaty made explicit provision for the contingency contemplated in article 22; for example, article 43 of the International Sugar Agreement signed in London in 1956 provided that:

"(1) If circumstances arise which, in the opinion of the [International Sugar] Council, affect or threaten to affect adversely the operation of this Agreement, the Council may, by a Special Vote, recommend an amendment of this Agreement to the Participating Governments."³

Paragraph (3) of the same article then laid down that the consent of all participating governments to the amendment was necessary, and the following paragraphs went on to state the position which would obtain following the acceptance or non-acceptance of an amendment by the governments of countries holding 75 per cent of the votes. Paragraph (5) of the article contained an interesting provision, which read:

"(ii) The Council shall determine forthwith whether the amendment is of such a nature that the Participating Governments which do not accept it shall be suspended from this Agreement from the date upon which it becomes effective. . . ."⁴

43. With regard to the question of the definition of "an essential change in the circumstances", the reference in paragraph 2 (a) to a change "with respect to a fact or state of facts which existed when the treaty was entered into" was not exhaustive. Changes of law could be equally relevant from the point of view of article 22; he was thinking in particular of changes of law which affected the validity or the binding force of the treaty and which, without making it illegal, made its performance impossible. A change in régime — referred to in article 21 — could also be relevant.

³ *United Nations Sugar Conference, 1956, Summary of Proceedings* (United Nations publication, Sales No.: 57.II.D.2), p. 71.

⁴ *Ibid.*, p. 72.

44. The whole situation envisaged in article 22 was very close to that of impossibility of performance dealt with in article 21. As had been pointed out by one of the governments which had replied to the questionnaire of the Preparatory Committee for the 1930 Conference for the Codification of International Law, there was a limit to what a State could be expected to perform. The case could be described as one of quasi-impossibility of execution. The text proposed by the previous special rapporteur and quoted in paragraph 13 of the commentary clearly showed how difficult it was to draw the line between the impossibility of performance envisaged in article 21, and the situation contemplated in article 22. For those reasons, he felt that it should be possible to combine the provisions of articles 21 and 22.

45. A further point arose in connexion with article 22: the contemporary international scene was characterized by the existence of many out-moded treaties which needed to be replaced by new ones. Certain jurists believed that the later the law the better it was, and a German jurist had aptly pointed out that "what was enough yesterday was not enough today". It was therefore appropriate for the Commission, while putting forward its recommendations, to encourage States to revise out-moded treaties and bring them up to date.

46. With regard to paragraph 6, which referred to the procedures envisaged in articles 18 and 19 and in article 25, he pointed out that article 25 had a much wider scope, in that it offered negotiation as an alternative to termination. It would be wise to leave the door open for negotiations between States, since it was better to renegotiate a treaty than to terminate it.

47. He found Mr. Castrén's text acceptable, though an effort should be made to combine the contents of articles 21 and 22. He also agreed with Mr. Tsuruoka's suggestion that paragraph 3 should be moved higher up in the article; alternatively, it could be omitted altogether.

48. In paragraph 5, he agreed with the exception of "stipulations of a treaty which effect a transfer of territory" or "the settlement of a boundary", but could not agree to the exception of stipulations effecting "a grant of territorial rights". A reference to any such rights was inappropriate. A leader of one of the African States had recently observed very appositely that a lease of land in perpetuity in his State was incompatible with the sovereignty of the State.

49. Mr. ROSENNE said he had been much impressed by the Special Rapporteur's commentary and the conclusions he had embodied in article 22, and particularly by his survey of the various theories of the doctrine of *rebus sic stantibus* and their possible consequences. He would therefore refrain from discussing those theoretical issues.

50. He found the Special Rapporteur's conclusions generally acceptable, and also approved of the formula put forward by Mr. Castrén, which was similar in substance. One principle which ran right through all the provisions of the article and the statements in the commentary was that the doctrine of *rebus sic stantibus*

did not apply automatically to terminate a treaty; there must be some control over its invocation and application.

51. Like Mr. Lachs, he had been most impressed by the commentary, and particularly by a passage in paragraph 6, which read:

“... if the other party is obdurate in opposing any change, the fact that international law recognizes no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties may impose a serious strain on the relations between the States concerned.”

It was clear from that passage that the rule in article 22 provided a residual guarantee to cover the case in which negotiations failed owing to the obduracy of one party: the article thus constituted a contribution to the regulation of peaceful change.

52. He was gratified to note that the provisions of article 22 were based squarely on an objective rule of law and had not been made dependent on any legal fiction. At the present time, any reliance on legal fictions should be viewed with suspicion.

53. He had some comments to make on the structure of article 22, which arose out of the discussion of the previous articles. Section III was entitled “The Duration, Termination and Obsolescence of Treaties”. The discussion had shown the difficulties to which the concept of duration could give rise and had revealed a tendency to shift the emphasis from duration to termination. Consideration might accordingly be given to drafting the provisions of article 22 on the basis of the assumption that a treaty would always continue in force until it was terminated.

54. With regard to paragraph 2(b), although he had no objection of principle to its provisions, he thought that as drafted it was somewhat close to the earlier articles which dealt with error. But it was not the function of the *rebus sic stantibus* doctrine to supply a supplementary rule for a situation that was close to error; it should rather, by supplying an objective rule, constitute a point of departure for renegotiating an out-of-date treaty.

55. He assumed that paragraph 5(c) would be dropped and its contents transferred to the new general article the Special Rapporteur proposed to introduce on treaties which were the constituent instruments of international organizations.

56. He suggested that in paragraph 1 of the commentary, the reference in the third sentence to “the absence of any general system of compulsory jurisdiction” should be replaced by wording similar to that adopted by the Commission at its previous session with regard to reservations: “... in the absence of any tribunal or other organ invested with standing competence to interpret the treaty...”⁵ In paragraph 5 of the commentary, he could not accept the reference to the study, prepared by the Secretary-General at the request

of the Economic and Social Council, of the present legal validity of the undertakings relating to the protection of minorities placed under the guarantee of the League of Nations.⁶ As he had the strongest reservations with regard both to the passage quoted and to the conclusions reached in the secretariat study, he hoped the passage would be dropped and that consideration would also be given to the fact that the whole of paragraph 5 of the commentary was of a controversial character.

57. It had been suggested by some members that articles 21 and 22 dealt with very similar matters and should therefore be merged, but he agreed with Mr. Verdross that they dealt with completely different matters. Article 21 dealt with actual impossibility of performance, but article 22 was intended to give legal recognition to a situation in which further performance was obviously undesirable rather than impossible. The consequences and implications of the two situations could be altogether different, and he therefore considered that the two articles should be kept separate, though it was not a major question of principle. He recognized, of course, with Mr. Lachs, that the line of demarcation between the two articles was difficult to draw in many cases, but from the legal point of view he saw no reason why a given situation should not come under more than one article.

58. Lastly, he differed from Mr. Verdross with regard to his example of the communications made by the United Kingdom and France in September 1939 to the Secretariat of the League of Nations concerning the application during the War of their acceptances of the compulsory jurisdiction of the Permanent Court of International Justice. As he had already pointed out on another occasion, it would be dangerous to draw analogies from that type of declaration for the purposes of the general law of treaties; the obligations arising out of such a declaration were not completely analogous to those arising out of a treaty. Moreover, a declaration was not drawn up by a process of negotiation, which, as the Commission had recognized in 1962, was essential to the formation of a treaty. As far as the particular example was concerned, when the United Kingdom Government has accepted the compulsory jurisdiction of the Permanent Court of International Justice in 1929, it had published a well-known memorandum explaining the circumstances in which that acceptance would operate.⁷ In that memorandum, it had clearly foreseen the situation which later arose in 1939 and had given the reasons why the Permanent Court would not, in its view, be competent to deal with the cases of prize law to which Mr. Verdross had referred. The case had not been one of changed circumstances, but of a unilateral declaration which had been drawn up from the start on the basis of a clearly defined position.

59. Mr. YASSEEN said that the principle of *rebus sic stantibus* existed in international law. It was imposed by

⁶ E/CN.4/367.

⁷ *Command Papers*, London, H.M. Stationery Office, Misc. No. 12 (1929), Cmd. 3452.

⁵ *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, p. 21, para. 10.

the very nature of written law and by the constant changes in the international community; it canalized the revolt of facts against texts; conventional rules could not be adapted *ad infinitum*. In his view it was not a clause, but an objective rule of *jus cogens* from which derogation was not possible by express provision. With regard to the applicability of the principle, treaties of specified duration could not be excluded; such treaties should be subject to it, for changes could occur before they expired.

60. The Commission should endeavour to clarify the law on the question and to lay down criteria, for not all changes led to the revision or termination of a treaty.

61. The definition given in paragraph 2 was both reasonable and practical; it could limit the application of the principle. On the other hand, the exception stated in paragraph 3 might conflict with the facts of international life, for whether the political change had been brought about by revolutionary or by democratic means, it could not be excluded from the sphere of application of the principle of *rebus sic stantibus*. If a State had concluded a treaty of alliance with another Power, and if, thereafter, a revolution took place, one of the main objects of which was to secure the country's non-alignment, it was hardly conceivable that the new state of affairs would permit of maintaining the treaty of alliance in force. Similarly, if a political party won an election and changed the foreign policy of the State, would it be possible to maintain an earlier treaty of alliance in force? Accordingly, he was not in favour of the exception made in paragraph 3.

62. The Special Rapporteur had taken the view that the *rebus sic stantibus* doctrine was an objective rule of law, but he had departed somewhat from that view in paragraph 4(b). The fact that a State had failed to invoke the change within a certain period should not debar it from doing so later.

63. Subject to those comments, he approved of the text proposed by the Special Rapporteur. Mr. Castrén's proposal would be useful when it came to drafting the final text.

64. Mr. AMADO said he had no wish to criticize the development of law; on the contrary, the elevation of the *rebus sic stantibus* clause to the rank of an established principle of international law was a matter for satisfaction. The voluminous literature on the subject and the lively discussions devoted to it even by students reminded him of Edouard Herriot's remark that culture was what remained after one had forgotten everything else. It might also be asked what remained of the *rebus sic stantibus* clause after all that had been said and written about it. What remained was the principle that treaties were inviolable, but not for ever.

65. Confronted with that clause, which was now an objective rule, the jurists of his generation felt that they should advise caution, because of its exceptional character. Those who had been brought up to believe in the sanctity of the maxim *pacta sunt servanda* and in the inviolability of treaties were always inclined to adopt a defensive attitude to the insidious wiles of that

serpent of the law, the *rebus sic stantibus* clause. In their eyes it represented an element of mobility as against perpetuity and treaties made to last.

66. The Special Rapporteur had introduced an innovation by providing that treaties of limited duration might also be subject to the *rebus sic stantibus* rule. He was glad to note that the majority of the Commission appeared to support that innovation.

67. He had some doubts about the beginning of the article, the wording of which was rather too much like that of a law-book, and about the enumeration of contingencies. He would refrain from criticism, however, as several other members had not yet given their views, and would confine himself, for the moment, to saying that he did not like the idea of giving States a lesson on things they were supposed to know in any case. It was obvious that States were guided only by their own interest; to listen to anyone who thought they might be idealistic was a waste of time.

68. Mr. PESSOU observed that one of the grounds for the extinction of a treaty under article 21 was the state of necessity. Although the plea of necessity was controversial, Sir Gerald Fitzmaurice had included its main application in his fourth draft.⁸ The ensuing discussions had brought out the ambiguities inherent in that concept.

69. The state of necessity had been defined as an objective situation in which a State was threatened by a present or imminent danger imperilling its existence, territorial status or independence, from which it could escape only by infringing foreign interests protected by international law, and in which it would suffer serious prejudice if it executed the treaty to the letter.

70. Some authors seemed to have confused necessity with *force majeure*, which was irresistible pressure on a State, depriving it of the ability to choose between execution and breach of the treaty. The rule of necessity had also sometimes been confused with the *rebus sic stantibus* clause. That clause was applied primarily according to the terms of the treaty, whereas necessity dictated that the first consideration must be the situation and particular competence of each party. The two questions were quite different, and he considered that the Special Rapporteur's articles 21 and 22 should be kept separate.

71. In the present crisis in the international community, necessity could not, of course, be accepted as a rule of law, since it was bound up with fundamentally contradictory claims. But it could not be totally disregarded on that account; every situation must be considered on its merits, subject to certain conditions: first, the necessity must be real and pressing and must leave the State only a choice between executing the treaty and relinquishing its prerogatives or breaking the treaty and preserving its prerogatives; secondly, the incompatibility between execution of the treaty and the exercise of the powers of the State must not have been expressly foreseen; thirdly, the plea of necessity should operate to suspend the State's treaty obligations without terminating the

⁸ Yearbook of the International Law Commission, 1959 (United Nations publication, Sales No.: 59.V.1, Vol. II), Vol. II, pp. 44-45.

treaty itself; fourthly, the plea of necessity, if accepted, should not suffice in itself to exonerate the State from all responsibility. That was understandable in a situation in which a State was in immediate military or physical danger or needed to take measures in the public interest to ensure the proper functioning of its institutions or to protect the vital interests of its nationals.

72. His position would depend on the particular circumstances of the case considered, but he also hoped to be guided by the views of the other members of the Commission.

The meeting rose at 12.55 p.m.

695th MEETING

Friday, 7 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 22 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 22 (THE DOCTRINE OF *rebus sic stantibus*) (*continued*)

2. Mr. AGO congratulated the Special Rapporteur on his commentary on article 22, which constituted a complete survey of the question and an excellent analysis of practice, and also contained a number of theoretical considerations of great interest.

3. With regard to the title, he thought it would be preferable to speak of the "clause" or "principle" of *rebus sic stantibus*, for the Commission was called upon to codify rules, not theories.

4. As to the basis of the principle, the Special Rapporteur had expressed a clear preference for one of the theories mentioned, but had fortunately rectified it in certain respects; for to adopt the theory in question exactly as it stood might be unrealistic. Although it seemed to be true that international law contained a rule of objective law under which a change in the external circumstances could, in certain exceptional cases, bring about the termination of a treaty, and although the rule providing for the operation of the *rebus sic stantibus* clause could be called a customary rule, nevertheless it was important not to carry the objective theory too far and completely ignore the will of the parties, which was the essential basis for the validity or termination of a treaty.

5. As the Special Rapporteur had pointed out, a change in the circumstances existing when a treaty had been concluded could not be regarded as a ground for termination unless it was clear that at that time the parties had

considered those circumstances to be an essential condition of their consent. If, on the other hand, it appeared that the treaty would have been concluded if the circumstances had been different, and even if the situation had been as it became later, then there could obviously be no question of applying the *rebus sic stantibus* principle or of termination by reason of the change in circumstances. That was the only respect in which he thought the objective theory should be rectified. Once the principle was clearly understood, the terms of article 22 could readily be accepted.

6. As usual, the Special Rapporteur had submitted a very detailed text in order to elicit opinions and arrive at a more representative and concise text. Instead of examining the text, the Commission could therefore confine itself to approving the principle, subject to later drafting improvements. To consider the provisions in excessive detail might lead to unnecessary discussion and uncertainty. That was one of the dangers of the detailed enumerations in paragraphs 4 and 5. For example, was it certain that the *rebus sic stantibus* clause could never operate in the circumstances referred to in paragraph 5(b)? Some latitude should be left for interpretation and practice.

7. The real fear which seemed to be inspired by the *rebus sic stantibus* clause was not unfounded, because it could provide a means of avoiding the execution of a treaty. However, the Special Rapporteur had rightly said that the clause was a safety-valve established by international custom, and like the Special Rapporteur, he thought that the rule should apply not only to perpetual treaties, but to fixed-term treaties as well. It could be noted from practice that, when a State invoked the *rebus sic stantibus* clause, the other State generally declared that it acknowledged the existence of the principle, but that it was not applicable to the case in point.

8. With regard to paragraph 6, caution should be exercised in regard to procedure. No State could be the judge in its own cause and decide unilaterally that a treaty had lapsed by reason of changed circumstances. The agreement of both parties to an objective procedure must be obtained where possible. But it must not be forgotten that in case of disagreement there was an international dispute in which the positions of the two States concerned were equally valid. In such cases recourse should be had to the usual means of settlement. The procedures applicable did not differ from those generally appropriate.

9. Mr. EL-ERIAN said that there was an organic relationship between articles 21 and 22 in that both were concerned with supervening events relating to the execution of a treaty and outside the control of the parties, which called for revision by subsequent treaty. There was therefore a strong case for combining the provisions on impossibility and illegality of performance in article 21 with those of article 22, which dealt with what Mr. Lachs had aptly termed "quasi-impossibility of execution" — the case in which changed circumstances made continued execution burdensome for a contracting party.

10. The theory of *imprévision* had been evolved by the highest administrative court of France, the *Conseil d'Etat*, in its decision of 1916 in the *Compagnie du Gaz de Bordeaux* case. That decision had had a considerable influence in many Roman-law countries, and it was significant that it took the form of a corollary to the rule on impossibility of execution.

11. The admirable commentary by the Special Rapporteur and the observations of members showed that there was general support for the view that discarded the old theory of an implied *clausula* and regarded article 22 as expressing an objective rule of international law. The fiction of the *clausula rebus sic stantibus* had served its purpose as a basis for legal thinking in the early stages of development of the rule, but it should now be dispensed with, just as in its draft articles on diplomatic intercourse and immunities¹ the Commission had discarded the old theory which based diplomatic privileges and immunities on the fiction of extra-territoriality and had adopted instead, as the basis for the rules on diplomatic relations, the more objective theories of the representative character of diplomats and of functional necessity.

12. He supported the suggestion that the title of the article should be changed, the words "doctrine of *rebus sic stantibus*" being replaced by some formula which referred to changed circumstances; that amendment would solve the problem of what might be called a certain allergy to the doctrine of *rebus sic stantibus*. For when the Egyptian delegation had consulted the late Professor Hudson about the 1947 proceedings in the Security Council on the continued validity of the Anglo-Egyptian Treaty of 1936, that eminent jurist had advised against using the words "*rebus sic stantibus*" and had preferred to say that the treaty had "outlived its purpose". It had been pointed out by Mr. Briggs, however, in an article written about that time,² that, although use of the words had been avoided, the doctrine of *rebus sic stantibus* constituted the whole foundation of the Egyptian case.

13. Article 22 dealt with the effect of changed circumstances on the continuity of treaties. In approaching that problem, the Commission should bear in mind the need to base the law of treaties on secure foundations; at the same time, as it had done in preparing its drafts on diplomatic and consular relations, it should give due weight to the consideration that the development of appropriate rules on the subject should contribute to increased harmony in the relations between States.

14. He welcomed the statement by the Special Rapporteur that state practice in the matter was often expressed in diplomatic notes and claims. Although courts had frequently avoided expressing an opinion on the merits of the *rebus sic stantibus* doctrine itself, many cases could be cited from the practice of States. For instance, the Government of Norway had announced on 22 August 1922 that it felt obliged to denounce the treaty of 2 November 1907 between Norway on the one

hand and France, Germany, Great Britain and Russia on the other, because, among other reasons, it considered that "the events of recent years had produced such changes in the realm of foreign politics that the international situation was now quite different from what it had been when the treaty was concluded"; it had added that "by reason of those changes the treaty has in reality lost its principal foundation".³ The other parties to the treaty had given their consent.

15. Again, in deciding the case of Rothschild and Sons versus the Egyptian Government, arising out of that government's refusal in 1922 to continue payments to the firm on the grounds that, with the termination on 8 December 1914 of Turkish suzerainty, Egypt was freed from all tribute to Turkey and accordingly from the obligation to continue such payments, the Mixed Court of Appeal of Alexandria had expressed no opinion on the doctrine of *rebus sic stantibus*, thus illustrating once more the fact that courts often did not find it necessary to decide on the merits of that doctrine, but based their decisions on other grounds.⁴

16. With regard to paragraph 5 of the Special Rapporteur's text, which also appeared in the proposal submitted by Mr. Castrén at the previous meeting (para. 3), he fully agreed with the apprehensions expressed by Mr. Tabibi. He could not accept a sweeping provision which removed a whole category of treaties from the scope of article 22. If the intention was to refer to cases in which execution of the treaty had been completed and to the question of the material position created by the treaty, the paragraph should be couched in different terms. The obsolete theory that a state of war between the parties terminated all treaties *ipso facto* had now been superseded by a theory which made the effect of war dependent on the character of the treaty; political treaties were automatically terminated, but certain treaties, such as humanitarian conventions, were actually brought into effect by a state of war, while others were suspended for the duration of hostilities. Certain treaty provisions were not affected because they called for no further execution; the material situation created by the treaty stood, notwithstanding the state of war.

17. Mr. TUNKIN said that the main difficulty over article 22 was that the doctrine of *rebus sic stantibus* had never found expression in a precise rule of international law. The commentary on the article correctly pointed out that opinion on that doctrine was widely divided, ranging from its acceptance as a sort of higher law, to complete denial.

18. He agreed in principle with the Special Rapporteur and with those members who considered the doctrine of *rebus sic stantibus* to be a rule of international law in force. That view was based on state practice accepted, it seemed, as a rule of law, and was supported by the opinion of writers. The essential task of the Commission was to state the rule clearly and describe the circumstances in which it applied. Certain historical considera-

¹ *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9*, pp. 11 ff.

² *American Journal of International Law*, 1949, Vol. 43, pp. 762 ff.

³ *Revue générale de Droit international public*, 2nd series, 1924, Vol. 6, pp. 299-301.

⁴ *Journal du Droit international*, 1926, Vol. 53, pp. 754-766.

tions which were often invoked in connexion with the doctrine, but which were completely extraneous to contemporary international law, must be discarded; in fact, as Mr. Lachs had suggested, it would be better not to use the phrase "*rebus sic stantibus*" at all.

19. The rule in article 22 was objectively necessary. The development of international law was determined by the laws of development of human society. If a rule of law came into conflict with new social forces, it must give way to those forces. It was therefore clear that the rule in article 22 served a useful purpose by providing one of several legal possibilities for the adaptation of rules of law to the requirements of life.

20. With regard to the relationship between the principles *rebus sic stantibus* and *pacta sunt servanda*, some members considered article 22 as an exception to the latter principle. Personally, he thought it would probably be more correct to consider the two principles as two separate rules, rather than as a rule and an exception. Whereas the principle *pacta sunt servanda* applied to valid treaties, the effect of the doctrine of *rebus sic stantibus* was to invalidate a treaty, so that in respect of such a treaty there could be no question of applying the principle *pacta sunt servanda*.

21. With regard to the text of article 22, the central provision was that embodied in paragraph 2. The Special Rapporteur had indicated that he regarded the rule in article 22 as an objective rule and his view had been supported by many members. Nevertheless, the provisions of paragraph 2 (b) required an investigation of the intention of the parties and laid down a condition based on their will. Those provisions referred to a problem of interpretation of the treaty and did not embody an objective rule. He would have had no objection to the retention of paragraph 2 (b) if it had expressed a separate condition which, by itself, brought the rule in article 22 into operation; but he could not accept the present formulation which required that the conditions stated in sub-paragraphs (a), (b) and (c) of paragraph 2 should exist simultaneously. Such a requirement would mean that the rule would practically never apply.

22. He agreed with Mr. Yasseen that paragraph 3 should be deleted. A change in the policies of a State could take different forms; it could not be excluded *a priori* in the manner proposed by the Special Rapporteur, because it could constitute an essential change in the circumstance forming the basis of a treaty.

23. Paragraph 4 seemed to raise more problems than it solved. For example, in the case envisaged in sub-paragraph (a), if the party concerned had acted lawfully or if the acts in question were not connected with the treaty but there had been an essential change in circumstances, he saw no reason why the party should be precluded from invoking the rule in article 22. Nor could he approve of sub-paragraph (b) as it stood, because it might happen that a State was unable, because of circumstances beyond its control, to avail itself of the right to invoke a change of circumstances, even though it was fully aware of that right. As to sub-paragraph (c), it really dealt with a problem of interpretation.

24. With regard to the consequences of a material change of circumstances, he agreed with the Special Rapporteur that the treaty should be considered voidable rather than void. But the question then arose what was the content of the rights and obligations that might derive from that objective rule of international law. Article 22 made provision for the right either to call on the other parties to the treaty to express their opinion on the change in circumstances, or to institute court proceedings. Personally, he considered that the other parties were under an obligation to enter into new negotiations. He agreed with Mr. Ago that a dispute could arise and that, in that case, all the modes of peaceful settlement of disputes were available to the States concerned. However, he did not feel that the possibility of unilateral termination should be completely excluded, because situations could arise in which no other course was open to the State concerned. That State could have valid reasons for terminating the treaty or withdrawing unilaterally from it, and its right to do so should be recognized.

25. On the question of the relationship between articles 21 and 22, careful consideration should be given to the suggestion by Mr. Lachs that the two articles should be combined. It was true that they dealt with different subjects, but their provisions had much in common. For example, the situation envisaged in article 22, sub-paragraph 2 (c) (i), where the change had the effect of frustrating the further realization of the object and purpose of the treaty, had a great deal in common with that envisaged in article 21, paragraph 2 (a), of the disappearance of the physical subject-matter of the rights and obligations contained in the treaty.

26. With regard to the other provisions of article 21, he observed that paragraph 1 concerned state succession and dealt with the very complicated problem of the extinction of the international personality of one of the parties to the treaty, but without covering the whole subject. The Drafting Committee should consider whether that paragraph ought to be retained provisionally; a final decision could be taken after the Commission had dealt with the report on state succession.

27. Paragraph 4 of article 21 had its proper place in article 13, which dealt with rules of international law having the character of *jus cogens*, but that question could be left to the Drafting Committee. When that article had been discussed in the Commission (683rd-685th meetings), certain members had raised the question of new rules which might emerge after the conclusion of a treaty; it had been explained that, in that event, the new rules would prevail.

28. Mr. BRIGGS said that he had not been convinced by Mr. El-Erian's arguments for combining articles 21 and 22 and was disposed to agree with the Special Rapporteur that impossibility of performance and unwillingness to perform were two sufficiently distinct topics to merit separate articles.

29. He had no objection to the title of article 22, which indicated that the article was concerned with a doctrine and not an implied clause or a rule of international law. The doctrine was a familiar one in treaties and had

been invoked by States before courts and tribunals, though never without being challenged and, to his knowledge, never successfully. Accordingly, he did not regard the principle of *rebus sic stantibus* as a customary or objective rule permitting of the automatic termination of a treaty by the unilateral action of a State, or one which automatically terminated the treaty. The Special Rapporteur, with great skill and wisdom, had sought to reduce a doctrine that had caused so much confusion to a rule of duty in the interests of the common good, which would be capable of judicial application when a decision had to be reached about the consequences to the validity of a treaty of changed conditions or an allegation of changed conditions.

30. He preferred the Special Rapporteur's text to that of Mr. Castrén, who had omitted to deal with the important points covered in paragraphs 1 (a), 3, 4 and 6 (a). Owing to the uncertainty surrounding the doctrine of *rebus sic stantibus*, the rule must be drafted with the greatest precision and there was justification for also indicating the circumstances in which it could not be invoked, as had been done by the Special Rapporteur.

31. The provision contained in paragraph 1 (a) was of capital importance and might be amplified by the addition, at the end, of the words "or entitle a party thereto to terminate or withdraw from the treaty", taken from the beginning of paragraph 6.

32. Paragraph 2, in the restrictive form proposed by the Special Rapporteur, must certainly be retained and was firmly grounded in practice. In that paragraph the Special Rapporteur had reconciled in masterly fashion the various theories as to the nature of an essential change, and he did not share the apprehension that there might be some inconsistency between them.

33. The exception stated in paragraph 3 was worth keeping and he agreed on the important limitations set out in paragraphs 4 and 5, which would provide valuable safeguards against abuse. Contrary to the view expressed by some members, he considered that the limitation contained in paragraph 5 (a) was fully justified, because the doctrine of *rebus sic stantibus* could not be applied to clauses in a treaty which had already been executed, but must be confined to executory provisions.

34. He agreed with the provision in paragraph 6 (a), but wondered whether any reference to the provisions of articles 18 and 19 was necessary. He reserved his position as to whether, as provided in paragraph 6 (b), a unilateral right of termination on the ground of an essential change in circumstances could be exercised under the procedure laid down in article 25.

35. Mr. PAREDES said that a fusion of articles 21 and 22 would be neither easy to achieve nor acceptable, owing to the number and nature of the matters they dealt with which were quite dissimilar. Article 21 alone referred to three or perhaps four separate cases, each of which would be worth a separate article. Paragraph 1 dealt with the effects on treaties of the extinction of one of the parties; paragraph 2 with the complete and permanent disappearance of the physical subject-matter of a treaty; paragraph 3 with the temporary impossibility of performance of a treaty; and paragraph 4 with moral

impossibility of performance because the object of the treaty had become illegal. Those were all very difficult matters on which very different views were held. He would deal with them when the Commission decided to examine article 21; at the present stage he merely wished to stress that the content of that article was substantially different from that of article 22. For whereas article 21 dealt with cases of physical or moral impossibility of performance, article 22 concerned problems arising out of a change in circumstances by which a treaty, though still possible to execute, was rendered far more burdensome than had been supposed at the time of its conclusion, for one of several of the contracting parties or for all of them.

36. To state the position properly, it was necessary to refer to the different kinds of treaty, distinguishing between those which concluded legal proceedings and gave rise to firmly established rights, and those which imposed on the parties certain future conduct or obligations to perform, or to refrain from, certain acts. The latter treaties included some of limited duration and others of no fixed term which remained in force indefinitely.

37. It was to treaties which imposed future conduct that it was necessary to apply the principle of *rebus sic stantibus*, which merely meant that when there was a change in the circumstances in which the relationship had been formed, the obligations of the parties could also change.

38. As had already been pointed out in the Commission, the *rebus sic stantibus* doctrine should be regarded as a correct interpretation of the treaty, rather than as an exception to the principle of the binding force of treaties. For a treaty was concluded in view of the circumstances of the contracting parties as judged by them at the time, and had the circumstances been different they would probably not have concluded the treaty or would have drafted it in quite different terms. And the essence of the *rebus sic stantibus* rule was a material change in the circumstances, not just any change. The importance of such changes could be assessed from the provisions of the treaty itself or the records of the negotiations which had led to its conclusion. For example, a country might have undertaken to supply another country with a certain quantity of goods, at a time when it had sufficient of them for its internal consumption and for the promised exports; then sudden changes, such as exhaustion of its mines or oil wells, might have considerably reduced the quantities available so that it could no longer easily satisfy even its own internal needs. Should that country nevertheless be required to fulfil its treaty obligations? In his opinion it should not; and it was easy to see that if it had foreseen the change it would not have entered into the undertakings it had. In a great many cases the factors which had decided the parties to conclude an agreement were ascertainable and there had been a material change in them.

39. He agreed with Mr. El-Erian that each kind of treaty should be considered differently, the rights created being clearly differentiated to see whether the *rebus sic stantibus* doctrine was applicable to them or not. As

he had said before, it was only applicable to treaties which imposed certain future conduct or obligations to perform, or to refrain from, certain acts, not to treaties which concluded legal proceedings.

40. If those considerations applied to treaties of limited duration, they were much more important in the case of treaties of unlimited duration. No one could enter into an undertaking for ever. That was why, under most systems of municipal law, contracts of service for life were prohibited. The same should apply even more strongly to States, because their life was much longer. Consequently a rule should be established which exempted the parties from being bound indefinitely by an undertaking in spite of changes in all the circumstances; and that was the rule known as *rebus sic stantibus*.

41. With regard to the application of the rule laid down in article 22, he considered that the only consequence should be suspension of the executory provisions of the treaty until the competent authority, whether judicial or of some other kind, had taken a decision on the matter or until the parties reached an agreement constituting a new treaty.

42. The *rebus sic stantibus* principle should be accepted, and the kinds of treaty to which that form of revision was or was not applicable should be properly specified and classified.

43. Mr. ELIAS said that article 22 was one of the most important in the two reports so far submitted by the Special Rapporteur, and the commentary analysed the issues in a particularly illuminating way. The Special Rapporteur had rightly decided in favour of including an article on the doctrine of *rebus sic stantibus* although some of his predecessors had not done so, for the very good reason that its omission might open the door to abuses or violations of international law connected with recent political changes.

44. The Special Rapporteur was to be especially commended for having tried to frame an objective rule from a controversial doctrine which had formerly possessed the status of a mere presumption or implied term. No judicial decision had ever been based on the existence of such a rule, yet the principle of *rebus sic stantibus* must be regarded as one of the fundamental assumptions in public international law, and Mr. Tunkin had been right in asserting that it was an independent rule which did not necessarily conflict with the principle *pacta sunt servanda*.

45. Another signal contribution made by the Special Rapporteur was his decision, in the face of persuasive arguments to the contrary by Sir Gerald Fitzmaurice, to regard the doctrine as applicable not only to so-called perpetual treaties, but also to treaties of limited duration, depending on the circumstances of each case.

46. With regard to the text of article 22, he agreed with Mr. Briggs that the title should be retained, though he would prefer it to be slightly amended to read: "The application of the doctrine of *rebus sic stantibus* to treaties."

47. The subject matter of the article being entirely distinct from that of article 21, he was opposed to the suggestion that the two articles should be combined.

48. Paragraph 1 should be omitted, and the beginning of paragraph 2 might then be re-worded to read: "A party to a treaty is not entitled to modify or terminate it on the ground that an essential change has occurred in the circumstances forming the basis of the treaty, except in the following cases:" Sub-paragraphs (a), (b) and (c), with some drafting changes, would follow. Sub-paragraph (b) might with advantage be re-drafted to bring out more clearly the Special Rapporteur's thesis, stated in paragraph 12 of the commentary, that although the doctrine of *rebus sic stantibus* was properly to be regarded as an objective rule of law, its application in any given case could not be divorced from the intentions of the parties at the time of entering into the treaty.

49. Paragraph 3 should be omitted and the point about a change in the policies of the State claiming to terminate the treaty should be dealt with in the commentary. Obviously, it might be one of the factors that a court would have to consider in adjudicating on a claim.

50. Paragraph 4 dealt with an interesting point and might be retained, though it would require revision. He had some doubts, however, about the wisdom of including sub-paragraph (a), because of the complications that the theory of contributory negligence, already a difficult one in municipal law, might introduce in the international sphere. Sub-paragraph (b) seemed generally acceptable but might need some re-drafting so as to bring out more clearly the distinction between the effects of unreasonable delay and estoppel. Perhaps a more restrictive application of the provisions of article 4 would be needed in the context.

51. Paragraph 5 ought to be deleted; he saw no good reason for excluding treaties concerned with a transfer of territory or boundary settlement from the application of a rule enabling a party to invoke an essential change in circumstances for the purpose of termination. The Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and the District of Gex*⁵ had not laid down that the doctrine was inapplicable to those types of treaties, and its judgement gave no authority for creating a rule of that kind, which would certainly provoke a wide divergence of opinion among States. Of course, the stability of the international order demanded respect for territorial rights and frontiers, but any dispute should be left to judicial decision, and it would be undesirable to try to lay down any general rule. The explanations given in the commentary would be quite sufficient if paragraph 5 were omitted.

52. Consideration of paragraph 6 might be deferred until the Commission took up article 25.

53. Mr. BARTOŠ said that, even though he might be repeating some remarks already made during the debate, he would comment on article 22, because it dealt with an important question which should be settled in the codification of the law of treaties. The Special Rapporteur was to be congratulated on having taken the initiative of introducing the *rebus sic stantibus* doctrine into his draft.

⁵ P.C.I.J., Series A/B, No. 46.

54. He himself had examined the subject in detail when submitting the Yugoslav draft of the declaration on the rights and duties of States to the General Assembly of the United Nations. Despite the dynamism of the life of the international community, he had not altered the stand he had taken thirteen years ago and would maintain the views he had then expressed.

55. It was generally agreed that the point of departure consisted of two rules: *pacta sunt servanda*, which was the foundation of the law of treaties and had been solemnly accepted in the United Nations Charter, and what was known as the *rebus sic stantibus* clause, also a general rule of international public law, which was connected with the former rule and was an integral part of it. In the course of history, there had been a change in the nature of that clause; *rebus sic stantibus* was no longer a clause implied in a treaty, but a fundamental rule, whether the parties had foreseen changes in the circumstances or not. Hence it was neither a clause nor a doctrine, but a rule of *jus cogens* in international law, even if it gave rise to controversy among States or jurists holding different views. In view of the objections to which the application of the *rebus sic stantibus* rule had given rise, when introducing the Yugoslav draft declaration, he had concluded that it had brought about a situation in which various abuses were possible because the rules of law on the subject were uncertain and not firmly established. For purposes of codification, it was necessary to lay down certain minimum rules to prevent abuses.

56. In the first place, the *rebus sic stantibus* rule was necessary in order to avoid insoluble problems which would arise if the *pacta sunt servanda* rule were applied literally and without exceptions. Such application would lead to absurd situations, provoke unnecessary disputes and hamper relations between States if one of the parties insisted on the letter of the treaty contrary to justice, which was the very basis of international relations and international law, even if the circumstances had changed. Such application of the *pacta sunt servanda* rule would lead to impossibilities, whereas its correction by the *rebus sic stantibus* rule would be a step towards a justice that was not abstract, but real, being founded on the elements of international life.

57. To ensure stability in the application of treaties it was necessary to take account of the circumstances, which meant the state of affairs, the general situation in the world and the substance of the relations between the parties; it was necessary to allow for the difference between when a treaty had been concluded and that prevailing when the *rebus sic stantibus* principle was invoked.

58. In addition, the parties must act in good faith; that condition was not only applicable to the *rebus sic stantibus* rule, it was the foundation of law of treaties, and an absolute requirement which could never be dispensed with.

59. A change in the circumstances had to fulfil certain conditions if it was to entitle a State to invoke the *rebus sic stantibus* rule. First, the change had to be an important one; all members agreed with the Special Rapporteur

on that point. Secondly, it had to be an objective change; he supported the view that a party to a treaty could not invoke a change in circumstances which it had itself caused by some arbitrary act. There, however, he differed from the Special Rapporteur; he considered that if application of the *rebus sic stantibus* rule was to be precluded by an act of the party invoking it, that act must be an unlawful one. For if the change was the effect of a lawful act, accepted under other rules of international law, it could not be said that it was not an objective change brought about by acts reflecting the development of international society. Thirdly, the change must seriously affect the position in law of the party invoking the *rebus sic stantibus* rule. A case in point was where the obligations or status of one of the parties became disproportionate and the new state of facts was no longer normal according to the generally accepted understanding of *jus cogens* or international relations, even if the obligations had been reduced or the status perhaps even improved as compared with what had been originally agreed. In such a case he thought that the *rebus sic stantibus* rule was applicable, because the reciprocal obligations of the parties were no longer in balance, or the status of one of them was no longer in keeping with the new order of things.

60. With regard to the effects of application of the *rebus sic stantibus* rule, the view held by the Yugoslav Government, and put forward in his own writings, was similar to that expressed by Mr. Ago, but only partly coincided with that of the Special Rapporteur: it was that the sole effect of the rule was to give a party the right to ask for either the revision or the termination of the treaty, not the right to denounce it unilaterally. If the Commission wished to arrive at an equitable solution, its draft must not allow a party to contravene justice by using a change of circumstances to evade its obligations entirely if the other party offered to renew the treaty on an equitable basis and was willing to accept any arbitral award made in the case. To the right of one party to ask for application of the *rebus sic stantibus* rule corresponded the duty of the other party to accede to a request for revision if it was well grounded. If the negotiations failed and there was a dispute, he thought revision of the treaty was to be preferred, but a right to terminate it could be recognized if it became impossible to execute or created an illegal situation. He was not in favour of regarding the *rebus sic stantibus* clause as justifying termination in every case, and would prefer to offer a choice between revision, which did not constitute termination of the treaty, and termination itself.

61. With regard to the draft of article 22 proposed by the Special Rapporteur, he thought the Commission should accept as a general principle that the *rebus sic stantibus* rule could be invoked to terminate a treaty. He agreed with the Special Rapporteur that a change in circumstances did not, as such, affect the continued validity of a treaty, and he approved of paragraph 1 (a). That idea was stated more explicitly in paragraph 6 (b), which laid down a procedure for invoking a change in circumstances, and provided that the procedure

could only be carried out at the request of the parties concerned.

62. On the other hand, he was entirely opposed to the idea expressed in paragraph 3. To say that a change in the policies of the State claiming to terminate a treaty did not constitute an essential change in circumstances would be going against history. Not only a revolution proper, but far-reaching changes in certain key sectors, could bring about political changes which really amounted to an essential change in circumstances, but one due to the very nature of things, and which could not be regarded as due to any fault committed by the State in which the change had occurred. It would, moreover, be contrary to the provisions of the United Nations Charter, which recognized the right of peoples to self-determination and, consequently, their right to make any political changes they pleased, even if they caused profound changes in circumstances. Hence he could not accept paragraph 3, and he did not even think, like Mr. Elias, that the idea should be mentioned in the commentary.

63. He doubted whether paragraph 4(a) was justified. It could be contended that a change which was caused by the acts or omissions of the party invoking it could be taken into consideration — for example, in the case of an agricultural country in process of industrialization, which wished to withdraw from certain trade treaties, if at the time of their conclusion the parties had had the agricultural nature of the country in mind. With regard to paragraph 4(b), he did not share the opinion of the Special Rapporteur. To refuse a party the right to invoke changes, even after a certain time had elapsed since their occurrence would, in his view, be to penalize the party which had acted in good faith by endeavouring to go on applying the treaty even after the circumstances had changed. As to paragraph 4(c), he had already put forward views contrary to those of the Special Rapporteur on that point; *rebus sic stantibus* was not now regarded as an implied clause which could be set aside by the parties, but a general rule supplementing the *pacta sunt servanda* rule. Otherwise the stronger State would always exert pressure to secure the inclusion of a clause such as that referred to in paragraph 4(c).

64. He hesitated to accept the Special Rapporteur's text of paragraph 5. He could not accept sub-paragraph (a), for it would mean recognizing that a treaty effecting a transfer of territory need take no account of future changes resulting from the application of the principle that peoples possessed the right of self-determination. Moreover, as was shown by certain recent treaties on frontier delimitation, a particular boundary line might have been adopted in view of circumstances existing at the time when the treaty had been concluded, but which had since changed (e.g., shortage of water or communications). Lastly, where cession of territory was concerned, a State might have ceded bases as the price of its independence; must that be regarded as a perpetual title if changes subsequently occurred which caused the ceding State to request that the transfer be revoked? He was also opposed to sub-paragraph (b), since it followed from sub-

paragraph (a). Sub-paragraph (c) was out of place in paragraph 5.

65. In conclusion, he stressed that he was opposed to paragraphs 3, 4 and 5, and proposed that they should be deleted. On the other hand he could accept paragraph 6 in principle, though it should be reviewed when the Commission had settled the question arising out of article 25.

66. The CHAIRMAN, speaking as a member of the Commission, said that a provision concerning an essential change in circumstances was certainly necessary. He had no strong feelings about the title of the article, but if the present title were rejected it might be replaced by the wording used by the Permanent Court, namely, the "principle of a change of circumstances determining the lapse of a treaty".

67. Paragraphs 1(a) and 1(b) might perhaps be combined in an introductory sentence of the kind proposed at the beginning of Mr. Castrén's text. That text, however, made no mention of one necessary requirement, namely, that the change itself must be of an essential or fundamental nature.

68. Apart from drafting, he had no objections to paragraphs 2(a) and (b). In order to give more objective expression to the underlying idea of the latter, it might perhaps be re-drafted to read: "It appears from the object and purpose of the treaty or from the circumstances in which it was entered into that the continued existence of that fact or state of facts was a determining factor for both or all of the parties in concluding the treaty." The Permanent Court had indicated in the *Free Zones* case⁶ that the historical background and circumstances surrounding the conclusion of the treaty would need to be examined in order to establish whether the conditions which had changed had been viewed by both or all of the parties as determining the conclusion of the treaty. It was in that respect that the original intention of the parties became significant.

69. He had serious doubts about the desirability of retaining paragraph 2(c); it would be wiser to follow the Harvard Draft and the Havana Convention on Treaties,⁷ and not to include a provision concerning the effects of a change in facts, important thought that subject was in an academic exposition of the doctrine of *rebus sic stantibus*. He had even more serious objections to sub-paragraph 2(c)(ii), which might encourage claims to terminate a treaty merely because the execution of obligations had become more onerous, because the value of the other party's execution has diminished or because events had supervened to render the treaty no longer advantageous to one of the parties. If the principle of *rebus sic stantibus* was extended in that manner, it might prove destructive of the principle of maintenance of treaty obligations.

70. There seemed to be no reason to exclude a change in the policies of a State from qualifying as a change in circumstances within the definition laid down in paragraph 2, when certain policies might have been

⁶ P.C.I.J., Series A/B, No. 46.

⁷ Hudson, *International Legislation*, Vol. 4, pp. 2378 ff.

assumed by the parties to be an essential foundation or a determining factor in the conclusion of the treaty, especially as changes in economic circumstances, for example, seemed to be admitted. Perhaps it had not been the Special Rapporteur's intention to exclude changes in policy, in which case paragraph 3 would merely require re-drafting.

71. The matters dealt with in paragraph 4 could probably be adequately covered by article 4, sub-paragraph (c), if suitably re-drafted, though paragraph 4 (c) of article 22 could be dispensed with if the words "and unforeseen" were inserted at the beginning of paragraph 2, after the word "essential".

72. He agreed with Mr. El-Erian that paragraph 5 was concerned not with treaties as such, but with a situation created by their execution, and the case thus seemed to be covered by the provision in article 28, paragraph 1 (b) (A/CN.4/156/Add.3). Clearly, territorial rights established by a treaty would not be affected by the doctrine of a change in circumstances, because the parties would have no further interest in securing the termination of a treaty already executed. The point made by Mr. Bartoš was an entirely separate one concerning the possibility of revision or adjustment of treaties, or as some called it, the question of peaceful change. For those reasons, he considered that paragraph 5 could well be omitted.

73. He was in favour of paragraph 6, but it ought to be discussed in conjunction with article 25.

74. Mr. LIU said that the right to terminate or modify a treaty, whether on grounds of breach, impossibility of performance or a change in circumstances, must not be exercised lightly and must be hedged about with adequate safeguards.

75. He approved of the way in which the Special Rapporteur had circumscribed the application of the doctrine of *rebus sic stantibus* in formulating a precise and workable rule. All the points covered in his text deserved to be retained. He doubted whether the kind of simplified provision in which all the conditions were placed on the same footing without any distinction, as proposed by Mr. Castrén, would prove acceptable.

76. The question of combining articles 21 and 22 was perhaps, in essence, a drafting matter, and he held no strong views on it.

The meeting rose at 1 p.m.

696th MEETING

Monday, 10 June 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 22 in section III of the Special Rapporteur's second report (A/CN.4/156/Add.1).

ARTICLE 22 (THE DOCTRINE OF *rebus sic stantibus*) (continued)

2. Mr. PAL said that having already made his general observations on the article, he would confine his remarks to how it ought to be formulated.

3. He was not in favour of amalgamating article 22 with article 21, because the two dealt with quite distinct subjects.

4. He fully subscribed to the conclusion reached by the Special Rapporteur in paragraph 8 of the commentary that the theory of an implied term should be rejected and that the doctrine of *rebus sic stantibus* should be formulated as an objective rule of law by virtue of which, on grounds of equity and justice, an essential change of circumstances radically affecting the basis of a treaty entitled a party to call for its termination. Clearly the article must be carefully drafted so as to be fully consonant with that thesis. Paragraph 2 (b) would have to be framed as an objective rule and not in terms of the intention of the parties or of an implied condition to be found in the treaty itself.

5. The rule should also be extended to cover a point brought out by Oppenheim, namely, that "if by an unforeseen change of circumstances an obligation provided for in the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned."¹

6. For the reasons given by Mr. Bartoš, Mr. Tunkin and Mr. Yasseen, he found paragraph 3 unacceptable and also felt some hesitation about paragraph 4, more especially its sub-paragraph (a), because it seemed to imply that the doctrine of *rebus sic stantibus* could only be relied on when there had been a change for the worse. That view was quite untenable; the doctrine applied whenever an essential change had taken place, whatever its nature.

7. He concurred in the arguments put forward by Mr. Bartoš, Mr. Tunkin and Mr. Yasseen against paragraph 5.

8. Mr. PESSOU said that in an earlier statement (694th meeting, para. 68) he had pointed out the fundamental difference between the circumstances in which the principles of necessity and *force majeure* were applied as possible grounds for the termination or suspension of a treaty. It was not possible, without danger of confusion, to assimilate those two principles to the *rebus sic stantibus* clause.

9. Several speakers had said that articles 21 and 22 should be combined. He did not agree. It was true that in some of the cases considered in article 21 there was also a change of circumstances, but that change did not itself play a decisive part.

10. In defining the *rebus sic stantibus* clause, it had been said that it applied to a change in circumstances which made realization of the objects of the treaty

¹ *International Law*, 8th edition, 1955, paragraph 539.

totally impossible. But the clause operated, not as a condition of the treaty, but as a general principle of law.

11. In his opinion, the practice worked out in the case of the fourteen new African States made it possible to safeguard the freedom of action of the new States, and at the same time to ensure that no legal hiatus was left in international relations on the transfer of powers. To quote only the most recent example, immediately after the proclamation of Algeria's independence the new Algerian State had enjoyed the benefit of the frontier conventions and of the agreements concluded by a small number of States to the advantage of the whole international community. Yet the change had been a fundamental and vital one. What was taking place was, in fact, a development of practice by Africa and France. The new State, by its silence, would be bound by those general conventions to which the former territorial sovereign had been a party; but by a simple notification, and without following the procedures laid down in the treaties, it could announce that it did not accept them.

12. In his view, the transfer to international law of the French legal theory of *imprévision* was the best way to justify the *rebus sic stantibus* clause while keeping it within reasonable limits. The legal ties formed between the metropolitan territory and a former colony when its independence was recognized changed quickly and peacefully. Despite the absence of specific provisions in the agreements establishing the independence of the fourteen African States constituting the African and Malagasy Union, the change had never caused any difficulty. It was presumed that the change was accepted as a condition inherent in the process of decolonization.

13. Accordingly, he approved of the position adopted by the Special Rapporteur and Mr. Briggs. Articles 21 and 22 should be kept separate, but he thought the rule in article 22, paragraph 5, should be made rather more flexible.

14. Mr. ROSENNE said that the general trend of the discussion prompted him to think that his previous criticism of paragraph 2 (b), on the ground that it was not the function of the *rebus sic stantibus* doctrine to supply a supplementary rule in regard to a situation which was close to error, had been too mild. It had since become apparent that the Commission must satisfy itself that paragraph 2 (b) in its existing form was in fact consistent with the objective rule that was being formulated. What must be clearly brought out there was that the doctrine of *rebus sic stantibus* was applicable not so much when there had been an essential change in the circumstances assumed by the parties to have existed, as when there had been an essential change in the actual circumstances leading to a real change in the character of the obligation itself and in its execution.

15. He had not been convinced of the need to drop paragraph 2 (b) altogether, as advocated by Mr. Tunkin, though it would certainly have to be re-worded

and shorn of its subjective element; it remained to be seen whether that could in fact be done.

16. Paragraph 2 (c) must not be made entirely dependent on the will of the parties. Except in those cases in which it was obvious that an essential change had taken place, the rule should require some experience of executing the treaty in the changed circumstances to have been gained, which demonstrated objectively that the changes had altered the character of the obligation itself. That notion seemed to have been introduced by the Special Rapporteur in paragraph 4 (b), where he referred to the essential change becoming perceptible, but it ought to be reflected in paragraph 2 (c) as well.

17. If he had understood him correctly, Mr. Tunkin had stressed the need — speaking of it almost as an obligation — to make a genuine attempt to re-negotiate a treaty which had become inapplicable because of changed circumstances, and regarded that as a consequence of invoking the doctrine of *rebus sic stantibus*. If that principle were accepted, then the proper corollary would be to allow a unilateral right of denunciation in the event of one of the parties refusing to conduct negotiations in good faith, after a reasoned request to do so had been made by the other party, as provided in article 25, paragraph 1 (A/CN.4/156/Add.2).

18. In the long run, a well-regulated limited right of denunciation could facilitate the diplomatic handling of the problems posed by fundamental changes in circumstances and the consequent frustration of the original obligation. In that respect he attached perhaps less importance to article 25, which was an article of last resort, than to the procedural provisions of articles 23 and 24, by virtue of which a distinction could be made between a purely political declaration that a treaty had been denounced and a formal legal act of denunciation. Such procedural requirements would provide a check appropriate to diplomatic techniques, which did not require third-party intervention even for the settlement of disputes.

19. In the course of the discussion, it had been suggested that a close interdependence between substantive and procedural rules was a feature of only one or two systems of law. Without going into the theoretical aspects of the matter he wished to point out that in all systems of municipal law, detailed substantive rules presupposed the existence of regular procedural provisions; whether they were closely interrelated or not was merely a matter of degree. In studying the problem of *rebus sic stantibus*, he had been impressed by the virtual unanimity of doctrine, and perhaps even of state practice, in making recognition of the principle in any form conditional on the existence of certain well-defined procedural requirements.

20. The criticism directed at paragraphs 3 and 4, which were to some extent connected, was not without justification, and they could perhaps be omitted without prejudice to the substance of the article. He would, however, suggest the inclusion, perhaps among the general provisions of Part II, of a rule which he believed to be uncontroversial and generally accepted, namely,

that a mere change of government as such did not affect the continued validity of a treaty.

21. He also considered that a provision was necessary to deal with the effects of a suspension of diplomatic relations on the implementation of treaty obligations. Such an eventuality could come within the meaning of changed circumstances, and a provision might be called for by Article 41 of the Charter.

22. Mr. de LUNA said that the *rebus sic stantibus* principle, like treaty revision, was simply a particular aspect of peaceful change. The doctrine which had grown up from that principle was so closely bound up with the most fundamental questions of international law that the stand taken on it by any writer was a true reflection of his thinking on the nature and function of international law.

23. While it was true that the origins of the *clausula rebus sic stantibus* went back to the School of Bologna and Gentilis, it had been Vattel, with his realistic approach, who had given it currency, mainly because it filled an imperative need of international law by reconciling the antagonism between the static nature of the law and the dynamism of international life. It could, as it were, act as a safety-valve for the law of treaties by mitigating the rigidity of the *pacta sunt servanda* rule.

24. The need for a doctrine of peaceful change was all the greater in modern times because existing international law had been formed during the static periods of international life. Some degree of dynamism had begun to make itself felt in the law of treaties after the 1919 peace treaties, notably in the League of Nations Covenant, in which some provision had been made for the revision, or even the suspension, of treaties. The present trend of socialization and universalization of international law should result in conventional law becoming more flexible, though it should not fall into anarchy on that account.

25. It was in an attempt to provide a solution of that problem which would allow for the necessary balance between the dynamism of international life and the static nature of the law, that he and Mr. Verdross were jointly submitting a draft of article 22, which read:

" 1. The validity of a treaty may be contested if a change in the circumstances, not foreseen by the parties, essentially affects the purpose and object of the treaty and the fundamental balance of the parties and of their obligations and rights under the treaty.

" 2. For a treaty to be terminated by a change in circumstances, the following conditions must apply:

" (a) The change has not been caused, or substantially contributed to, by acts or omissions of the party invoking invalidation;

" (b) Invalidation has been invoked within a reasonable time after the change in circumstances first became perceptible to the party invoking it.

" 3. A party claiming the extinction of a treaty obligation must follow the procedure laid down in article 25 of Part II."

26. He would not embark on a discussion of the doctrine, but would examine the practice. Rules of municipal law analogous to the *rebus sic stantibus* clause had been adopted in different countries to solve the problem posed by the perpetuity of contract where an essential change in circumstances had occurred. That idea was known in French, Spanish and Italian law as the theory of *imprévision*, and in common-law countries as "frustration of contract". International case-law was less conclusive, but apparently admitted the *rebus sic stantibus* principle implicitly; at least it had never expressly rejected it.

27. In their joint proposal he and Mr. Verdross had adopted the Special Rapporteur's thesis that the *rebus sic stantibus* principle was a rule of objective law, but they had couched it in stricter terms to prevent the re-introduction — which might ensue from sub-paragraph 2 (b) of the original draft — of the idea of presumption of the intention of the parties, which was an arbitrary legal fiction. As Mr. Verdross had pointed out, there were only two possibilities: either the will of the parties could be determined by applying the rules of interpretation accepted in international practice, or it could not, because the treaty was silent on the matter. Some means must therefore be found to avoid the application of a treaty which had become inequitable owing to a change in circumstances not foreseen by the parties.

28. A treaty was a legal instrument embodying the common will of the parties. Hence it was only that will, as embodied in the treaty, which should be interpreted. It was different in municipal law, in which a distinction could properly be made between the subjective and the objective will. In international law the method of interpretation had at first been essentially subjective, then it had evolved towards an objective conception which had finally prevailed.

29. The authors of the joint proposal wished to change the title of article 22, by substituting the word "rule" for "doctrine", though personally he would accept the word "principle". It was, in fact, neither a clause nor a doctrine, but a rule which had been introduced into state practice to take account of the possible effects on the contractual obligations of States of a change in circumstances occurring independently of their will. Such a change could alter the objective balance of the treaty relations. The resultant imbalance removed the treaty obligation from the sphere of application of the original rule by virtue of which it existed and transferred it from the sphere of *pacta sunt servanda* to that of *rebus sic stantibus*, or else extinguished the obligation. As the rule to be observed by the parties under a treaty, whether bilateral or multilateral, derived from the agreement of the parties, on abrogation it ceased to be their common will, or if it survived, it was by virtue of a *jus cogens* rule other than *pacta sunt servanda*.

30. The *rebus sic stantibus* rule was a general rule of international law; not only did it not conflict with or weaken *pacta sunt servanda*, but, on the contrary, it was in fact an integral part of that rule, which it complemented and made applicable in practice. It therefore operated not *ope contractus*, as the subjective doctrine

had it, but *ope legis*. The foundation of both rules lay in the concept of *uberrima fides*, which should be taken not in its psychological meaning of the will of the parties, but in its ethical meaning of the will in law.

31. The wording of paragraph 2 of the joint proposal made it sufficiently clear that its authors could accept neither paragraph 3 nor paragraph 5 of the Special Rapporteur's draft. He did not understand why the Special Rapporteur had excluded the application of the *rebus sic stantibus* rule to treaties dealing with the settlement of a boundary.

32. He could not accept the amalgamation of articles 21 and 22 either, for although both were based on the principle of good faith, one dealt with physical and legal impossibility of performance, and the other with moral impossibility.

33. He agreed with Mr. Pessou that the state of necessity was entirely different from the *rebus sic stantibus* concept, since it involved justification of a breach of international law where the object was to protect the vital interests of a State; according to the *rebus sic stantibus* principle, on the other hand, the party injured by the change in circumstances could request the termination of the treaty, but it was required to follow the procedure laid down in article 25. It might be argued that the party's good faith would be hard to establish even before a court. That was true; but to enforce treaties too strictly might encourage their breach.

34. Mr. GROS said that the problem was not one of validity, but of the application of treaties. Private law was being invoked; but a contract concerning which impossibility of performance or *force majeure* was pleaded was not a void contract; it was a contract incapable of being carried out. Similarly, in the case concerning the contract for the supply of gas, in which the *Conseil d'Etat* had developed the theory of *imprévision*, the contract had remained valid, and the *Conseil d'Etat* had never ruled that performance was impossible; it had, in reality, directed the parties to revise the contract by mutual agreement and under its supervision. The relationship between the theory of *imprévision* and international law could only be purely intellectual, for in the case in point the *Conseil d'Etat* had had to judge between the consumers, the public utility concessionaire and the State or the municipalities which had granted the concession. It might have decided in favour of any of those different interests according to its understanding of the general interest. But how, in international law, could the interest of one State be given preference over that of another without violating the principle of the sovereign equality of States?

35. What the Commission was concerned with was the effect in international law of circumstances extraneous to a treaty on the execution of that treaty. It was discussing the case of treaties which, while not incapable of performance, ought to be revised for reasons of equity, an essential change having occurred in the external circumstances which had been taken into consideration at the time of their conclusion. The right method would be to place such exceptional revision on the same footing as normal cases of revision, in other words to provide

for revision by means of another treaty. Most treaties contained either a revision clause or a denunciation clause, so that they did not raise the problem of *rebus sic stantibus*, a doctrine which had formerly been justified by the non-existence of an organized international society and by the defectiveness of the technique by which treaties were concluded.

36. Today, when it became necessary to revise a treaty because of unforeseeable circumstances, the State concerned could first request revision by amicable arrangement. If that were refused, and the interest involved was important, it could apply to an international organization for measures of conciliation or for a recommendation. In most cases, it could invoke safeguarding procedures of the type provided in all recent technical and economic treaties and used for the past fifteen years in all economic unions and organizations (for instance, in the event of fundamental disturbances or "intolerable distortions"). Where political interests were at stake, it could either obtain the other party's consent to negotiation, which solved the problem, or, if negotiation was refused, it could submit the dispute to a regional organization or to the United Nations, as appropriate.

37. It was important to see if and when the *rebus sic stantibus* doctrine was useful in modern society. It was useful as a residuary rule in the case of treaties having no revision or denunciation clause, and between States not members of international organizations, whose function was, precisely, to provide machinery for revision by amicable arrangement. But how could that rule be applied? The reason why practice and case-law offered so little evidence was, no doubt, as the Special Rapporteur had shown, that only imprecise language made it possible to accept a theory of *imprévision* in international law. As soon as a definition was given, as in article 22, two conflicting opinions appeared. One had been stated by Sir Gerald Fitzmaurice and the Special Rapporteur and was admirably set out in paragraph 13 of the commentary on article 22; he saw nothing to add to it. As to the contrary opinion, that some members of the Commission had taken the view that a change in the attitude of one party towards a treaty was sufficient to secure its avoidance, and some had said that a change in the policy of a State should justify recourse to the *rebus sic stantibus* theory. Where did the notion of a change of policy begin, and where did it end? It was not possible to affirm that the rule *pacta sunt servanda* was the basis of treaty law and at the same time propose that a State should be free to revise a treaty at will. If the theory of the change of motives or attitudes prevailed, no State would wish to enter into any treaties except those providing for immediate settlement. As could be seen from paragraph 1 of the commentary, Sir Gerald Fitzmaurice had rejected that theory from the start and he (Mr. Gros) would only add that anyone who cast doubt on the durability of treaties was contributing not to the progress of international law, but to its ruin. That theory could only lead to a regionalization of international undertakings, not to the development of friendly relations between States, for which the Commission was called upon to establish the rules.

38. He had already described the procedure by which, in his opinion, revision in the event of fundamental changes would be successful. Apart from the cases in which revision was possible by virtue of provisions in the treaty itself, or through the good offices of international organizations, it should be recognized that the interested party was entitled to secure *bona fide* negotiation. He pointed out that in its advisory opinion in the case of the *Railway Traffic between Lithuania and Poland*, the Permanent Court of International Justice had held that "the engagement incumbent on the two governments . . . is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements."² It was not enough for a State to consider that it had sound reasons for unilaterally denouncing a treaty, for the other State would probably have equally sound reasons for rejecting its denunciation. The Commission could not adopt such a rule; to do so would be to encourage disputes and to prefer one claimant to another without any legal reason.

39. The text proposed should therefore be retained, and he would suggest only one change, in paragraph 5: if it were thought that the words "territorial rights" might give rise to doubts — though in fact they referred to a boundary settlement or an element of such a settlement — those words could be deleted.

40. Mr. AGO said he wished to make some further comments on various points in the text of article 22. He would not dwell on paragraph 1, since most members considered that sub-paragraphs (a) and (b) could be combined and the paragraph condensed.

41. The essential provisions in paragraph 2 were sub-paragraphs (a) and (b), for they laid down the conditions under which changes in circumstances could adversely affect the permanence of a treaty. He was prepared to accept that the principle *rebus sic stantibus* constituted a general objective rule of international customary law suitable for codification. All the same, there were two elements in the operation of that principle: one objective, the other necessarily subjective and not capable of being wholly eliminated. The first was a real change in the external situation, but the second was a connexion between that change and the treaty, or rather between that change and the "consensus" of the parties. Thousands of treaties survived changes in the external situation; some even remained valid despite the substitution of another State for one of the contracting parties. The objective element of the change could not, therefore, be the sole consideration. Although he agreed with Mr. Rosenne that certain drafting changes might be necessary, he could not consent to the elimination of an essential element; for the *rebus sic stantibus* clause to be applicable the situation when the treaty was concluded must have been an essential element in its conclusion, without which there would have been no treaty. In other words it must appear certain that if the situation which had arisen later had existed when the treaty was being negotiated, the consent of the parties would not have been given. It was therefore absolutely necessary to retain paragraph 2 (b).

42. On the other hand he agreed with the Chairman that sub-paragraph 2 (c) could be deleted; it added nothing essential and probably left some possible cases out of account.

43. With regard to paragraph 3, as Mr. Gros had observed, the essential point was that the change must have been a change in the external circumstances, not depending only on the will of one of the parties. If a change in the policies of one of the parties was to be regarded as adequate grounds for impugning the validity of a treaty concluded by that party when it was following another policy, it would be no use concluding treaties.

44. Paragraph 4 was not entirely necessary. The ideas embodied in it were true enough, but some of them at least could be dealt with in the commentary.

45. In dealing with paragraph 5, as Mr. Gros had said, the Commission should bear its responsibilities in mind. To cast doubt on the transfer of territories and to permit the *rebus sic stantibus* clause to operate in such matters might make all boundary settlements provisional. The many examples even in recent history showed how dangerous it would be to introduce the *rebus sic stantibus* doctrine in such a context.

46. With regard to paragraph 6, which stated the most important point in the article, he agreed with Mr. Gros that a choice must be made between the idea of revision, which was a sound method and preserved the sanctity of treaties, and the principle of the *rebus sic stantibus* clause, which, if admitted, would entail voiding the treaty, not merely the right to propose revision. If the Commission decided in favour of revision — the principle of the right to negotiate revision — the title of the article would have to be altered to "change in situation".

47. Mr. CASTREN noted that all the members who had spoken before him appeared to accept the *rebus sic stantibus* clause, though it had rightly been emphasized that it would be dangerous to allow States to invoke it lightly. Most members had nevertheless proposed deleting several of the conditions which the Special Rapporteur considered necessary to prevent abuses, but the Commission was far from being unanimous.

48. Personally, he was convinced that paragraphs 5 (a) and (b) should be re-drafted to exclude from the scope of the *rebus sic stantibus* clause only those stipulations of a treaty which effected a transfer of territory, the remainder of the enumeration being deleted; paragraph 5 (b) would thus be omitted entirely. He did not wish to go any further, in order not to weaken the principle *pacta sunt servanda* by leaving too much freedom to States.

49. The provision proposed by Mr. Verdross and Mr. de Luna would probably not afford adequate safeguards against abuses. Besides, the somewhat subjective criteria set out in paragraph 1 of their proposal were deemed difficult to accept.

50. Mr. VERDROSS said he wished first to rectify his previous statement (694th meeting, para. 37). He accepted the idea developed by Mr. Tunkin that the *rebus sic*

² P.C.I.J., Series A/B, No. 42, p. 116.

stantibus clause did not constitute an exception to the principle *pacta sunt servanda*; what it involved was really a reasonable interpretation of that principle.

51. It would be better to say, in paragraph 1 (b), that the validity of a treaty might be “contested” by reason of an essential change in the circumstances, rather than that it might be “affected”, for invocation of the clause could not automatically put an end to the treaty; it merely conferred the right to request revision or termination.

52. There was a contradiction between paragraph 1 (b) and paragraph 2 (b); paragraph 1 (b) referred to an objective criterion, an “essential change in the circumstances”, whereas paragraph 2 (b) referred to a “fact or state or facts” considered by the parties. A distinction had to be made; paragraph 2 (b) was based on the idea that both parties had foreseen a change. That situation was possible, but then the *rebus sic stantibus* clause would not be applicable *stricto sensu*. There was a case not covered by that sub-paragraph, however: that in which the change had not been foreseen, but it could reasonably be assumed that the treaty would not have been concluded if the change had been foreseen. It was only in that case that the *rebus sic stantibus* clause applied. Those two cases could be dealt with together; but it would then be necessary to change the title of the article by substituting the words “revision of treaties” for “*rebus sic stantibus*”.

53. If that understanding of the *rebus sic stantibus* principle was accepted, it became possible to place a reasonable interpretation on paragraph 3. There were, of course, political changes which in no way affected a treaty, but there were cases in which it could be said that if the contracting parties could have foreseen the change which had later occurred they would not have committed themselves. The test, therefore, was always whether States would have committed themselves or not. That was the most important problem. If that idea were taken as the starting point, all other solutions became easy.

54. With regard to treaties concerning transfers of territory, reference had been made to changes occurring in international law after the conclusion of a treaty, and to the right of peoples to self-determination; but that had nothing to do with the *rebus sic stantibus* clause; for in such cases the rule applicable was *lex posterior derogat priori*.

55. Mr. TUNKIN said that he could not agree with the view that the *rebus sic stantibus* principle constituted a sort of overriding rule. Life was a continual development, which could be evolutionary or revolutionary, and that development could have the effect of making a treaty out of date. But the *rebus sic stantibus* principle was not the only legal principle which afforded a possibility of changing a treaty; indeed, he agreed with Mr. Gros that it was not the main one and was merely an additional means of revising treaties. All the articles from article 12 to article 19 afforded a possibility of terminating or revising a treaty. Article 12, for instance, rendered void a treaty imposed by the illegal use or threat of force, while article 13 dealt with treaties void

for illegality of their object — under its provisions, if the rules of *jus cogens* changed, treaties which conflicted with the new rules were void for illegality. In fact, it was clear that the field of application of article 22 was limited and that the importance of its provisions should therefore not be over-estimated.

56. Nor could he agree with the view that article 22 was of special importance to the newly independent States. In the cases mentioned during the discussion, the treaties affecting those States would be voided by other and more important articles than article 22. For example, a treaty imposed on a former colony which had since become an independent State would certainly be void for illegality, because it would violate such rules of *jus cogens* as the principle of self-determination and the principle of the sovereignty of States. Unequal treaties had also been mentioned, but they were covered by other articles of the draft.

57. The importance of paragraph 2 (b) had been stressed by Mr. Ago. He could not agree, however, that the provisions of that paragraph should be combined with those of paragraph 2 (c). The fact or state of facts which had existed when the treaty was entered into might continue, but a change might still occur which frustrated the further realization of the object and purpose of the treaty. The change might relate to some entirely new development and have no connexion with the fact or state of facts considered by the parties at the time of the treaty's conclusion. The point raised by Mr. Ago was in fact adequately dealt with in sub-paragraph 2 (c) (i), which stipulated that the effect of the change must be such as “in substance to frustrate the further realization of the object and purpose of the treaty”, and that provision should be retained. It was immaterial, for the purposes of its application, whether the change it envisaged came within the scope of paragraph 2 (b) or related to different matters.

58. He shared the Chairman's views regarding paragraph 2 (c) (ii), the provisions of which were perhaps unduly broad.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that at the next meeting he would sum up the discussion on the main issue of the choice between an objective and a subjective approach to the *rebus sic stantibus* doctrine; for the moment, he would confine his remarks to three points.

60. First, with regard to the suggested amalgamation of articles 21 and 22, although there had been some difference of opinion, the discussion had shown that a substantial number of members were opposed to it. The obvious solution, in principle, was therefore to keep the two articles separate; that solution would not sacrifice any point to which importance was attached by those members who wished to see the two articles amalgamated, whereas if the two articles were amalgamated, it might be difficult for many members to accept their combined provisions. His own view was that the articles should be kept separate, among other reasons because of the serious risk of complicating the already difficult subject of *rebus sic stantibus*.

61. Secondly, with regard to Mr. Rosenne's request for omission of the reference in paragraph 5 of the commentary to a study prepared by the Secretary-General at the request of the Economic and Social Council, he himself had certain reservations concerning that study, as he had meant to indicate in his commentary when referring to the fact that it had been based on a non-contentious examination of the problem of the minorities treaties. The authors of the study had not heard the arguments on both sides of the question. He had mentioned the study in his commentary because he had thought it right to place before the Commission one of the few studies based on an elaborate examination of the *rebus sic stantibus* doctrine in a particular context, but he agreed that there was no need to give it undue prominence in the final report.

62. Thirdly, he noted that there was general agreement in the Commission that, whatever the difficulties of the *rebus sic stantibus* doctrine, article 22 should apply to all kinds of treaties, not only to treaties of indefinite duration. That was a point of importance, because nearly all the previous authorities had confined the *rebus sic stantibus* doctrine to treaties of indefinite duration. The Commission appeared to be unanimous in taking a different stand, and he thought it made the right decision.

The meeting rose at 6 p.m.

697th MEETING

Tuesday, 11 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

ARTICLE 22 (THE DOCTRINE OF *rebus sic stantibus*) (continued)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 22 (A/CN.4/156/Add.1).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission was agreed on the need to formulate the doctrine of *rebus sic stantibus* as an objective rule of law, but there was some difference between what members meant when they spoke of the objective character of the rule. Some members regarded the doctrine as applicable only when the change related to circumstances which had originally constituted an essential foundation of the treaty; others seemed to regard the doctrine as an absolute overriding principle whereby subsequent changes, whether related to the original basis of the contract or not, could be invoked by a party as a ground for dissolution of the treaty. Those two currents of opinion had found their expression in proposals to omit either paragraph 2 (b) or paragraph 2 (c).

3. Some members, including Mr. Verdross, had asserted that paragraph 2 (b) was drafted in a way inconsistent with his aim of laying down an objective rule. He did not agree with that criticism and considered that the paragraph as drafted provided an objective rule requiring that the change must be a change in the circumstances which the parties had assumed to be an essential foundation of the treaty. The highest court in his own country had in recent years adopted the objective theory of the frustration of contracts through supervening changes of circumstances, and in doing so had stated the rule in terms very similar to those used in article 22.

4. Accordingly, while disagreeing with the contention that there was an element of subjectivity in paragraph 2 (b), he recognized that the wording might be misunderstood and should therefore be modified. Perhaps the necessary clarification could be achieved by combining paragraphs 2 (a) and 2 (b) in some such wording as:

“(a) a change has taken place with respect to a fact or a state of facts which existed when the treaty was entered into and was an essential foundation of the obligations accepted by the parties to the treaty.”

Even with such wording it would remain the fact that that object and purpose of the treaty would still have to be examined in order to discover whether the circumstances in which a change had occurred had formed an essential foundation of the treaty.

5. The divergence of opinion on paragraph 2 might be at least partially bridged by re-drafting, after which certain points of difference might appear less significant than before. If the new text failed to command general acceptance, the controversial issues would have to be put to the vote.

6. He was bound to observe that the Drafting Committee's task might not be easy, as precisely what members had in mind when speaking of the objective character of the rule was somewhat obscure. For instance, there had been a difference of opinion between the Chairman and himself. The Chairman had suggested that paragraph 2 (b) would be more objective if the circumstances were defined as having been a determining factor in persuading the parties to enter into the treaty. In his submission, such a formulation would be a more subjective way of expressing the idea than the original draft and would mean having to refer back to the subjective intentions of the parties.

7. In paragraph 2 (b) he had sought to reflect the traditional theory, reaffirmed in most modern statements of the doctrine and apparently taken for granted by the Permanent Court of International Justice in the *Free Zones of Upper Savoy and the District of Gex* case,¹ that, for the doctrine of *rebus sic stantibus* to apply, the change must have occurred in circumstances which formed part of the original basis of the treaty. The question of how substantial or radical the change must be was a different one and was expressed in the word “essential” at the beginning of paragraph 2.

8. In paragraph 2 (c) he had attempted to give further definition to an “essential” change. Views on that

¹ P.C.I.J., Series A/B, No. 46.

paragraph had again differed and some members seemed to think that sub-paragraph (ii) went too far and would provide a means for parties to free themselves from treaty obligations which had become too onerous. That provision might either be omitted or made more rigorous. There, perhaps, the objections could be more easily overcome by re-drafting.

9. Turning next to the major problem dealt with in paragraph 6, he said that opinion in the Commission was divided as to whether the application of the doctrine of *rebus sic stantibus* created a right to terminate or a right to seek revision and an obligation on the other party to negotiate in good faith. It seemed to him clear that the majority held to the former opinion, though recognizing that in practice invocation of the doctrine often led to revision. From the practical point of view, the divergence was perhaps not as significant as it might seem at first sight, particularly if the procedural requirements contemplated in articles 23, 24 and 25 were borne in mind. Clearly, if one of the parties alleged a change in circumstances, discussions were likely to ensue on whether revision would be appropriate, and it would only be in the last resort, if the parties failed to agree on the possibility of revision and one of them proved unwilling to accept any kind of independent appreciation of the question, that a unilateral right of termination would become exercisable.

10. The possibility of termination was a necessary element in the doctrine of *rebus sic stantibus*, since to oblige one of the parties to maintain a treaty because it had failed to persuade the other to revise it would be to place one at the mercy of the other's intransigence and would be contrary to the doctrine. However, he agreed with Mr. Tunkin that the application of the doctrine must be properly circumscribed with the necessary safeguards. The difference in the views which had emerged in the Commission should perhaps not cause undue concern, because it might be possible to solve the problems involved when considering the procedural clauses in the subsequent articles.

11. There had been a fundamental disagreement concerning paragraph 3, which some members strongly opposed and others regarded as essential, but an effort should certainly be made by the Drafting Committee to see whether a generally acceptable formula could be arrived at. Some members, notably Mr. Yasseen, had criticized that paragraph for being too absolute and because it would create difficulties in respect of treaties of alliance or similar agreements. That particular problem would not have come up if the Commission had followed his suggestion that article 17 should contain a provision on an implied right of termination for such treaties. It was conceivable that in certain types of treaty a change of policy could be regarded as a change in circumstances affecting the possibility of continued execution.

12. He had been criticized for being unduly influenced in paragraph 4, in the matter of error, by the decision of the International Court in the *Temple of Preah Vihear* case.² That was not so, and the provisions contained in

paragraphs 4 (a) and 4 (b) had appeared in his predecessor's draft.³ Moreover, there was certainly considerable authority for the principle in paragraph 4 (b) in the jurisprudence of international and national tribunals, it being recognized that a delay in putting forward a plea of changed circumstances might prejudice the right to do so. The Permanent Court had made it clear in the *Free Zones* case that when, after the change in circumstances had become perceptible, there had been considerable delay before the doctrine was invoked, that must be regarded as a strong indication that the change had not been regarded as an essential change of circumstances or had not been so fundamental as to render the treaty incapable of application. The problem was at bottom the same as that for which provision had been made in article 4 and could perhaps be covered in that article.

13. Objections had been raised to paragraph 4 (b) because it might prevent a party from invoking changes in circumstances to which it had perhaps contributed by actions that were perfectly lawful in themselves, even under the provisions of the treaty. Certainly such a situation could arise and there had been some suggestion that it had arisen in the *Free Zones* case. The provision might not perhaps be an essential one to include in article 22; but it would be worth while for the Drafting Committee to try to devise a more acceptable text.

14. He had not anticipated that paragraph 4 (c) would be regarded as anything but harmless and had been considerably startled by Mr. Yasseen's contention that such a provision would be contrary to international law because the principle of *rebus sic stantibus* was a rule of *jus cogens* from which the parties could not derogate (694th meeting, para. 59). Personally, he considered that the parties would be well advised to provide for a change of circumstances in the treaty itself, if that could be effectively done, and that such provision would in no way run counter to the doctrine. As far as he could judge, the Commission as a whole did not subscribe to Mr. Yasseen's view.

15. He attached considerable importance to paragraph 5. In drafting the first two sub-paragraphs he had had very much in mind the *Bremen v. Prussia* case of 1925,⁴ concerning a transfer of territory with certain conditions attached as to its use as a fishing port. In such a situation it seemed unjust to allow a party to retain the territory and reject the special stipulations which had accompanied its acquisition. Some members had contended that paragraph 5 (b) went too far and that its content was adequately covered by paragraph 5 (a); it had also been suggested that in the latter paragraph the words "or a grant of territorial rights" should be deleted. That solution would be acceptable.

16. On the other hand, he was not at all convinced that the reasons put forward by those who radically opposed paragraph 5 as a whole were valid. They argued

³ *Yearbook of the International Law Commission, 1957*, United Nations publication (Sales No.: 1957.V.5, Vol. II), p. 33.

⁴ *Annual Digest of Public International Law Cases, 1925-6*, case No. 266.

² *I.C.J. Reports, 1962*, pp. 6 ff.

that the paragraph was unnecessary because once a treaty had produced its effects nothing could undo the territorial dispositions carried out under its terms. That view might be theoretically correct, but it would be quite illusory to imagine that energetic attempts to reopen the question of such dispositions would not be made on the basis of the doctrine of *rebus sic stantibus*. Mr. Ago's observations on that subject at the previous meeting had been extremely pertinent.

17. Moreover, although a territorial settlement might have been executed under the relevant clauses, such a treaty often contained continuing rights and obligations which would continue to apply; in any case the treaty would retain its importance as a title to the territory. At the same time he wished to make it perfectly clear that it had never been his intention to suggest that a territorial settlement was not in itself susceptible of change — by appropriate procedures.

18. A good deal had been said in that connexion about the principle of self-determination. That principle might be invoked on the political plane as a special and even legal justification for carrying out territorial changes, but it ought not to be introduced as an element in the quite distinct doctrine of treaty law about changes of circumstances affecting the validity of a treaty. There was great force in Mr. Ago's warning about the danger of providing an easy way to disturb existing territorial arrangements, and he agreed with Mr. Tunkin that the issue was just as likely to arise between new States as between new and old States. If too wide an application of the *rebus sic stantibus* doctrine were allowed in such cases, a serious cause of international friction might be created. Perhaps the differences of view to which the paragraph had given rise in the Commission might at least in some measure be met by changes in the wording.

19. Paragraph 5(c) should be omitted from article 22 as he would now be preparing a general provision on the constituent instruments of international organizations.

20. The best course would be to refer article 22 to the Drafting Committee, and he hoped it would prove possible to prepare a new text which would go a long way towards reconciling the opinions that had emerged during the discussion, it being of course understood that no member was yet committed on any provision of the article.

21. The CHAIRMAN suggested that the procedure advocated by the Special Rapporteur should be followed.
It was so agreed.

22. The CHAIRMAN invited the Commission to resume consideration of article 21.

ARTICLE 21 (DISSOLUTION OF A TREATY IN CONSEQUENCE OF A SUPERVENING IMPOSSIBILITY OR ILLEGALITY OF PERFORMANCE) (*resumed from the 693rd meeting*)

23. Mr. PAREDES said that, as he had pointed out at a previous meeting, article 21 dealt with three, or perhaps four, distinct matters, each one of which deserved an article to itself.

24. The extinction of the international personality of one of the parties to a treaty — the subject-matter of paragraph 1 — could take place in different ways. One was where a political entity disappeared without leaving any successor. Such cases, although rare, were not entirely unknown and could occur as a result of a natural catastrophe or of a war which destroyed a whole region and people; in fact humanity was at present threatened with precisely that type of disaster unless nuclear weapons were banned. In the event of physical disappearance, any treaty entered into by the State in question would also disappear without the need for any declaration or claim.

25. Another way in which extinction could take place was when a State disappeared as a result of its incorporation in another State or of its partition among several States. Cases of that type raised grave issues of state succession and related directly to that topic, but those issues should also be considered in connexion with the law of treaties. Incidentally, he noted that no consideration had been given to the question of the rights and duties of the successors of a State that had disappeared — a question bound up with the most important consequences of the event under discussion.

26. With regard to paragraph 2(a), it seemed to him that the complete and permanent disappearance or destruction of the subject-matter of the treaty would involve its termination without any need for denunciation; that would be the case even if the purpose of the treaty was to ensure the maintenance of the subject-matter. Consequently, he could not support the proviso in the paragraph. To take as an illustration the hypothetical case of a treaty by which several States jointly undertook to maintain a maritime station on an island, if the island disappeared under the sea, the obligations under the treaty could not possibly endure.

27. He supported the provisions in paragraph 4 and noted the Special Rapporteur's intention of making them into a separate article. He suggested, however, that the right to call for the termination of the treaty in the case contemplated should belong not only to the parties to the treaty, but to any international person; to make it open to the whole international community to demand the termination of a treaty which violated a rule of *jus cogens* would be consistent with present-day aspirations towards international co-operation.

28. Mr. TABIBI said that article 21 was in every respect as important as article 22. Like that article, it dealt with a question of determination arising from events outside the treaty itself and completely independent of the will of the parties.

29. It was important to retain the provisions of article 21 in the draft, because such events as the supervening illegality of a treaty, a change in circumstances which made performance impossible, and the disappearance of a regime were daily occurrences.

30. From an examination of the commentaries prepared by the present and the previous special rapporteurs, it was clear that both agreed that a change of circumstances established a juridical basis for the termination of a treaty.

31. With regard to the various provisions of the article, paragraph 1 should be retained, although it dealt with the succession to treaties. It was not always possible to draw a clear distinction between the law of treaties and state succession; in fact, many writers did not separate the two. The Commission itself, when it came to examine the topic of state succession, might find that many of the articles it had considered on the essential validity of treaties could be incorporated in the law of state succession.

32. Paragraphs 2 and 3 constituted the core of the article and should be retained subject to certain modifications. Like Mr. Briggs and Mr. Castrén, he disliked the expression "to call for the termination"; nor did he like the expression "after its entry into force", because some treaties did not come into operation until some time after their entry into force.

33. In connexion with paragraph 2(b), Mr. Rosenne had drawn an analogy with the judgement of the International Court of Justice in the *South-West Africa* cases.⁵ In fact, while it was the League of Nations and not the United Nations that had been a party to the original mandate agreement with the Government of the Union of South Africa, the relevant fact was that the League of Nations had acted on behalf of a community of nations. That community had endured, notwithstanding the disappearance of the League, which was the formal party to the agreement. Hence no analogy could be drawn between that case and the disappearance of a party to a treaty.

34. Lastly, he fully agreed with the content of paragraph 4, dealing with *jus cogens*, but did not think it should be retained in the context of article 21. It could be omitted without affecting the scope of article 21, and the Drafting Committee should be invited to incorporate the idea it contained in article 13, which was the appropriate place.

35. He approved of the cautious wording of paragraph 3, which was intended to safeguard the stability of treaties. In the absence of a general system of compulsory jurisdiction, it was not advisable to permit the annulment of a treaty solely on the basis of an allegation by one of the parties that performance had become impossible.

36. Mr. VERDROSS, referring to his earlier comment on the last two lines of paragraph 1 (a) (693rd meeting, para. 52) said that it was not really correct to speak of the extinction of a party to a treaty by means contrary to the provisions of the Charter of the United Nations, for a State which had been annexed in breach of the Charter remained in existence, inasmuch as the annexation was void. If the Commission wished to retain the idea for practical reasons, it would be better to say "provided always that the *occupation* and *annexation* of such party were not brought about by means contrary to the provisions of the Charter of the United Nations."

37. Secondly, the case contemplated in paragraph 1 (b) was not really one of impossibility of performance, but one in which the *rebus sic stantibus* clause was

obviously applicable. He agreed with the Special Rapporteur that article 21 should be separate from article 22, but that being so, article 21 should deal only with cases in which performance of a treaty was impossible, not with those in which it was possible, but would have serious or even dangerous consequences.

38. It was not enough to state in paragraph 2 that, if performance of a treaty had become impossible, it was open to any party to call for its termination; for the treaty ceased to exist immediately by reason of the absolute impossibility of performance.

39. He fully approved of paragraph 3, but thought that paragraph 4 was open to the same criticism as paragraph 2. If the establishment of a new rule of international law having the character of *jus cogens* rendered the performance of a treaty illegal, in that case too, the treaty came to an end as soon as the new rule was established, by virtue of the rule *lex posterior derogat priori*. That being so, it could not be said that it was open to any party to call for termination of the treaty.

40. Mr. LACHS said that, in view of the discussion on article 22, he would not press his suggestion for the amalgamation of articles 21 and 22; he would, however, preface his remarks with an observation on article 22.

41. The discussion on that article had shown that the approach to the doctrine of *rebus sic stantibus*, both in legal writings and in state practice, had hitherto been rather confused. In order, therefore, to confine that doctrine to its true function, it was essential to formulate all the other articles in the most precise and specific terms, so as to safeguard the rights of the parties to the utmost.

42. With regard to article 21, he shared the views of those members who were in favour of deleting paragraph 1, the provisions of which were really part of the law of state succession. Article 21 should deal only with impossibility of performance.

43. He had some doubts about the reference to the "disappearance of a legal arrangement" in paragraph 2 (b). It was very difficult to determine whether, in a particular instance, such disappearance was in fact complete and permanent. For example, in 1921 the United Kingdom Government had declared that it considered terminated certain bilateral treaties relating to the suppression of the slave trade, because the slave trade no longer existed. Thirty-five years later, however, at the time of the conclusion of the 1956 Convention on Slavery, the United Kingdom Government had declared that, in pursuance of its obligations under other treaties, it would continue to patrol the Persian Gulf for the purpose of suppressing the slave trade, thereby indicating that it considered the object of those older treaties as not having disappeared.

44. Moreover, it was difficult to say that the disappearance of a legal régime, also referred to in paragraph 2 (b), implied the disappearance of the rights and obligations resulting from that régime. In the case of South West Africa, although the question of the succession of the United Nations to the League of Nations had

⁵ *I.C.J. Reports*, 1962, pp. 319 ff.

been settled only imperfectly, it could not be alleged that, following the disappearance of the mandates system, the Union of South Africa was freed from all obligations in the matter; those obligations endured. Of course, if the principle of self-determination were applied, the question would have to be viewed in a different light: the new nation would take over all rights and obligations by virtue of state succession.

45. Whatever decision was taken on Mr. Tabibi's proposal to transfer to article 13 the idea contained in paragraph 4, the provisions of that paragraph required to be strengthened. If a new rule of *jus cogens* came into operation and a treaty conflicted with it, the treaty was terminated by the automatic operation of the rule; it was not appropriate to suggest, as was done in paragraph 4, merely that it was open to any party to call for the termination of the treaty. There was a marked difference between that situation and the case of physical impossibility of performance, in which the parties could be allowed freedom of choice. A treaty which became void for illegality was terminated as a result of an objective phenomenon independent of the will of the parties.

46. Mr. ELIAS observed that paragraph 7 of the commentary made it clear that the effect of war on treaties was excluded altogether, not only from the draft articles, but also from the entire report; he thought, however, that a provision on so vital a question should be included in article 21, which dealt with impossibility of performance. Any rule in the matter would be complicated by the number of necessary exceptions and qualifications, but the effort was well worth making.

47. With regard to paragraph 1, he had serious doubts about the advisability of dealing with state succession in an article on impossibility or illegality of performance. Quite apart from the fact that the International Law Commission was to deal with state succession as a separate topic, a change in the parties to a treaty hardly provided an illuminating example of impossibility of performance.

48. The practice of the United Nations in regard to changes, amalgamations and partitions of States clearly showed that such events had not always automatically led to impossibility of performance of treaties. Until the Commission had the provisions on state succession before it, he could not agree to the inclusion of paragraph 1 of article 21.

49. Paragraph 2(b) anticipated paragraph 4 to some extent. A change in municipal law often involved a change in the law of contract, and although similar instances were rare in the international field, it was perhaps appropriate to envisage the possibility. The idea contained in paragraph 2(b) could perhaps be incorporated in paragraph 4, if that paragraph were retained.

50. The principle of paragraph 3 had received general acceptance, but its formulation needed some adjustment. He did not believe that the relevant question was whether the cause of the impossibility of performance would be permanent; it was a matter of deter-

mining the character of the impossibility itself, and whether it was likely to last, regardless of its cause. The cause might cease, but its consequences endure. He was not satisfied with the expression "there is substantial doubt". It should be made clear whether the doubt had to be entertained by all the parties to the treaty, or by only one of the parties. Another question which deserved attention was who would initiate action in the matter. In the second sentence it should be made clear whether it was for the parties themselves or for the court to determine whether the impossibility of performance was permanent or not.

51. With regard to paragraph 4, Mr. Lachs had drawn a valid distinction between legal and physical impossibility. In the case of physical impossibility of performance, it could be left to the parties themselves to decide whether to end the treaty and make new arrangements. In the case of illegality, the treaty was automatically terminated by virtue of the provisions of earlier articles, especially articles 12 to 14.

52. Mr. ROSENNE, urging the retention of paragraph 1, said that it dealt with problems of treaty law that could arise independently of state succession. The opening words, which made it clear that all questions of state succession were deliberately excluded from the provisions of the paragraph, were necessary.

53. The provisions of sub-paragraph (b) were sufficient in themselves to warrant retention of the whole of paragraph 1; they should be read in the light of the last sentence of paragraph 4 of the commentary. Of immediate interest in that connexion was the 1962 judgement of the International Court of Justice in the *South West Africa* cases. In particular the joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice⁶ showed that the Court had been faced with the problem of whether a treaty could subsist without parties. Owing to article 37 of its statute, the Court had been required to examine whether the mandate was a "treaty or convention in force" and had found that the obligations of one of the parties continued although the other formal party to the treaty had disappeared. Personally, in the light of that decision he had serious reservations as to whether the disappearance of a party necessarily implied impossibility of performance. He therefore urged that paragraph 1 should be retained, preferably in the form of a separate article.

54. Finally, he wished to repeat the suggestion he had made during the discussion of article 22, that the draft should include at some point a provision on the effect of the severance of diplomatic relations on the implementation and execution of treaties. Severance of diplomatic relations did not contravene the Charter to the same extent as war.

55. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Elias, said that he was not in favour of dealing in the present draft with the effect of war on treaties, which was a question closely connected with such matters as the effects of the provisions of the

⁶ *I.C.J. Reports*, 1962, pp. 465-563.

Charter and the legality of war. It was for the Commission to consider whether it wished to include a special section on the effect of war on treaties.

56. Mr. Rosenne's suggestion that the draft should include a provision on the effect of the severance of diplomatic relations on treaties raised difficult questions. At the Commission's next session, he would be submitting a report on the application of treaties, and the question arose whether the matter should not rather be dealt with in that report. Many of the suggestions relating to state of necessity and *force majeure*, made during the discussion on the doctrine of *rebus sic stantibus*, probably belonged to the subject of application of treaties. In fact, the Commission might well not be satisfied with some of the provisions of the present draft until it could see both drafts together. At a later stage of the present session the Commission should consider whether the articles now being discussed ought to be submitted to governments before it had also examined the provisions on the application of treaties.

57. Mr. ROSENNE thanked the Special Rapporteur for his reply and said that he would be quite satisfied if the Commission considered the effect of the severance of diplomatic relations on treaties at its next session.

58. Mr. TUNKIN said that, although he did not think it advisable to retain paragraph 1, he would not press for its deletion. The rules contained in paragraph 1 (a) (i) for bilateral treaties, and in paragraph 1 (a) (ii) for multi-lateral treaties, could be provisionally accepted. They were very close to every-day practice and could well be considered as part of international law.

59. The language of paragraph 1, however, should be reconsidered. He could not accept the opening proviso "Subject to the rules governing State succession in the matter of treaties". A proviso of that kind would make it impossible for the future conference of plenipotentiaries on the law of treaties to consider article 21, because there would not yet be any convention on State succession.

60. He had already suggested that the provisions of paragraph 4 should be transferred to article 13. The effect of new rules of *jus cogens* should be the same as that of pre-existing rules. It was therefore essential that the language of the provisions concerning old and new rules should be the same and that the consequences stated should be the same. Article 13 made it clear that any treaty which came into conflict with a new rule of international law having the character of *jus cogens* would be void for illegality.

61. Mr. AGO said he maintained his view concerning paragraph 1; it did not lay down a rule of law but simply stated self-evident facts. The whole value of that paragraph lay in the phrase "Subject to the rules governing State succession in the matter of treaties", which Mr. Tunkin thought should be deleted. It might indeed be interesting to see what would be left of the rights established by a treaty in the event of succession, but that was a problem relating to State succession, which the Commission would examine in connexion with that

topic. The question of the extinction of a State by means contrary to the Charter was also foreign to the provisions of article 21.

62. On the other hand, the disappearance of the subject-matter and purpose of a treaty, with which paragraphs 2 and 3 were concerned, was really a problem of the termination of treaties. The drafting of those two paragraphs could no doubt be further improved, but the principle they stated was correct.

63. In paragraph 4, the Commission should be careful to avoid inconsistency with the rule it had laid down in article 13, namely, that the establishment of a new rule having the character of *jus cogens* at once voided a treaty embodying provisions conflicting with such a rule, even if the treaty had been concluded before the new rule was established. The statement in paragraph 4 that "It shall also be open to any party to call for the termination of a treaty" might seem ambiguous and was no longer consistent with the provision now adopted in article 13. Hence the text of paragraph 4 should be amended to bring it into line with the rule stated in article 13.

64. Mr. YASSEEN said he agreed with Mr. Ago's remarks on paragraph 1, and especially on sub-paragraph (a). Sub-paragraph (b) was really not appropriate in that place, since it dealt, not with impossibility of performance, but with change in circumstances; perhaps it could be inserted in article 22.

65. Paragraph 2 filled a need, and he was prepared to accept it, subject to drafting changes. For example, he thought it would be better to say that it was open to any party "to call for a declaration that a treaty was extinguished" rather than "to call for the termination of a treaty".

66. Paragraph 3 seemed very necessary, for although permanent impossibility of performance should terminate a treaty, temporary impossibility should only have the effect of suspending it.

67. He endorsed the principles set out in paragraph 4, but drew attention to Mr. Verdross's judicious criticism of the drafting: the point was not that a party could call for the termination of a treaty which conflicted with a *jus cogens* rule, but that the establishment of new *jus cogens* rules making a treaty illegal put an end to it immediately. The Drafting Committee should perhaps be left to decide where paragraph 4 could best be placed. Perhaps all the provisions concerning *jus cogens* could be combined in a single article; but it was also possible to distribute them among the appropriate articles.

68. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Ago that it would be preferable to delete the provisions of paragraph 1 entirely, mainly because there were conflicting views as to how the rules of State succession would apply; it was not possible for the Commission to prejudge questions of State succession or to discuss them at the present session. Moreover, as Mr. Ago had pointed out, if the opening proviso were dropped, paragraph 1 would lose all value.

69. With regard to paragraph 2, he agreed that the rule in sub-paragraph (a) was necessary. Sub-paragraph (b), however, appeared to a civilian lawyer to lack the character of generality necessary for a rule of law. To some extent, the question envisaged in paragraph 2 (b) was connected with that dealt with in paragraph 2 (c) (i) of article 22, relating to the frustration of the further realization of the object and purpose of the treaty. He therefore suggested that the Drafting Committee should be invited to consider whether the provisions of paragraph 2 (c) (i) should be transferred from article 22 to article 21.

70. There appeared to be general consent to the rule embodied in paragraph 2.

71. He noted the general agreement on the substance of paragraph 4 and the suggestion that it should be transferred to article 13. The Special Rapporteur has objected that article 13 referred to the validity of treaties rather than to their termination. His own suggestion was that article 13 and paragraph 4 of article 22 should be replaced by a provision in two parts, the proper place for which would be in section I, immediately after article 4. The provisions in question would thus be in their proper place and the logical difficulties which had been encountered would be overcome.

72. Mr. LIU observed that reference had been made to the case of South West Africa. The records of the San Francisco Conference showed that it had then been envisaged that all mandated territories would be placed under the trusteeship system, and by signing the Charter, the parties thereto had subscribed to that arrangement. In fact, apart from South West Africa, no difficulty had been encountered in carrying out the transfer from one system to another. But the case of South West Africa was not really relevant to the present issue; there was no conflict with paragraph 2 (b) because the legal arrangement concerned had been replaced by a new one.

73. Mr. EL-ERIAN said he agreed on the need to retain paragraph 1. He could not altogether subscribe to the Special Rapporteur's approach in paragraph 2 (b), however, and considered that Sir Gerald Fitzmaurice had been right to formulate the rule more broadly to cover any case of "supervising literal inapplicability arising from complete disappearance of the field of application of the treaty";⁷ that criterion seemed to him the correct one. As the Chairman had pointed out, the question was connected with paragraph 2 (c) (i) of article 22; for the disappearance of a legal arrangement or régime did not in itself result in the termination or dissolution of the treaty, but would do so if the effect of the change was such as to frustrate the further realization of the object and purpose of the treaty.

74. As the International Court had held in the *South West Africa* cases, international accountability had become part of the international legal order and the formal dissolution of the League of Nations in 1946 by no means meant that obligations, rights and duties

arising out of agreements to which it had been a party were extinguished. In bringing their cases before the International Court, Ethiopia and Liberia had relied on that view.

75. Mr. TABIBI said that except for the final proviso, paragraph 1 should be retained, because State succession could bring about changes that had a very significant effect upon the purposes of, and obligations arising from, a régime established by a treaty. Mr. Ago's objection that that paragraph had nothing to do with the two that followed was more pertinent to the question whether the extinction of a party in violation of the Charter involved the responsibility of a State. The answer was surely in the affirmative, but the proviso ought to be omitted.

76. He could see no objection, in principle, to analogous provisions appearing in a draft on the law of treaties and in a draft on state succession.

77. Mr. CASTRÉN said he had only one comment to make. Members had spoken of the automatic extinction of treaties whose performance had become impossible, and he fully agreed with that view if the impossibility was real, for in that case the treaty came to an end immediately. There were doubtful cases, however, in which the impossibility might be only temporary and the other party could contest its permanence. In such cases, it should be possible to resort to impartial adjudication and to apply the provisions of article 25.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that he would begin his summing up of the discussion on article 21 by considering paragraph 4. In the light of the Commission's decisions on article 13, it would be agreed by all that paragraph 4 would have to be reworded so as to make its provisions more positive and automatic; the only question which arose was that of the placing of the paragraph. His own view was that if article 13 remained in section II, dealing with the initial validity of treaties, then the provisions of paragraph 4, even if made into a separate article, would have to remain close to article 21 on logical grounds. The question of the termination of a treaty was different in its effects from that of initial validity.

79. The alternative course suggested by the Chairman provided a possible solution. He recalled, however, that when Mr. Rosenne had suggested that the whole matter of *jus cogens* should become a separate article, that suggestion had not been favoured by the Commission because of a reluctance to exaggerate the significance of *jus cogens*.

80. With regard to paragraph 1, there were two conflicting schools of thought concerning its retention. He himself held very strongly that unless it was possible to include a proviso along the lines of the opening words of sub-paragraph (a), the whole of the paragraph would become extremely misleading. A reservation of some kind regarding State succession would have to be embodied in sub-paragraph (a).

81. With regard to paragraph 1 (b), it was perhaps true to say that its contents were more closely connected

⁷ *Yearbook of the International Law Commission*, 1957, Vol. II (United Nations publication, Sales No.: 1957.V.5, Vol. II), p. 29.

with the *rebus sic stantibus* doctrine than with the remainder of article 21. However, its provisions properly followed those of paragraph 1 (a).

82. He had included paragraph 1 without any great enthusiasm, as he had explained in his commentary. He suggested that the Drafting Committee should be invited to endeavour to work out a formulation less open to objection and when that was submitted to the Commission a decision could be taken on whether to retain the paragraph or not.

83. There appeared to be no serious controversy regarding paragraph 2 (a), which envisaged cases that were not frequent in practice. He had included the words "after its entry into force" in the opening sentence of paragraph 2 in order to stress the distinction between a supervening impossibility of performance and an impossibility which had already existed at the time of the treaty's conclusion. An impossibility of performance which, unknown to the parties, had existed at the time of the treaty's conclusion would raise the question of error rather than that of impossibility of performance. But the words "after its entry into force" were admittedly superfluous.

84. In paragraph 2 (b), he had had in mind such cases as the dissolution of a customs union. Clearly, in a case of that type, a treaty with such a union would become impossible to perform. In view of some of the difficulties to which that paragraph might give rise, and to which certain members had referred, he suggested that the Drafting Committee should reconsider its provisions in the light of the discussion.

85. Lastly, paragraph 3 appeared to have given rise to no objections apart from points of drafting. Its provisions were rendered necessary by the presence of paragraph 2 (a).

86. The CHAIRMAN suggested that article 21 should be referred to the Drafting Committee with the request that it should make a recommendation on the placing of paragraph 4 and redraft paragraph 1 with a view to a final decision being taken by the Commission at a later stage.

It was so agreed.

The meeting rose at 12.55 p.m.

698th MEETING

Wednesday, 12 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to consider article 23 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

SECTION IV (PROCEDURE FOR ANNULLING, DENOUNCING, TERMINATING WITHDRAWING FROM OR SUSPENDING A TREATY AND THE SEVERANCE OF TREATY PROVISIONS)

ARTICLE 23 (AUTHORITY TO ANNUL, DENOUNCE, TERMINATE, WITHDRAW FROM OR SUSPEND A TREATY)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the article he had drafted referred back to the provisions of article 4 of Part I and stated that the rules laid down there applied, *mutatis mutandis*, to the authority of a representative to annul, denounce, terminate, withdraw from or suspend a treaty. Since termination by agreement was one of the methods of termination provided for in Section III, it was appropriate to include the provisions of sub-paragraph (b) which made the same rules applicable to the authority of a representative to consent to the act of another State annulling, denouncing, terminating, withdrawing from or suspending a treaty.

3. The main problem for the Commission was to decide whether to include in the draft a short article of the kind proposed, which in effect simply referred to article 4 of Part I, or to spell out the authority to annul, denounce, etc. in greater detail.

4. Mr. CASTRÉN said that, for the reasons stated by the Special Rapporteur, it would be useful and logical to include the article in the draft; he would confine himself to two comments of secondary importance.

5. It was right to say that the rules laid down in article 4 of Part I could only be applied *mutatis mutandis* to the cases contemplated in article 23: but perhaps it could be explained, by means of a few examples in the commentary, what that meant in practice.

6. Secondly, the article should perhaps mention not only the authority of representatives, but also that of organs of the State. It was true that article 4 of Part I referred only to representatives; but although the head of State appeared to be included in that category, he was, essentially, one of the principal organs of the State, responsible for performing important acts connected with the termination and suspension of treaties.

7. Mr. LACHS said he believed the reference to article 4 of Part I was fully justified, but he had some doubts regarding the enumeration of the various acts referred to in article 4 and now in article 23. Those acts could be divided into two groups: the first consisted of acts preparatory to the conclusion of a treaty, and comprised negotiation, drawing up and authentication; the second consisted of a series of acts which had definite legal effects, namely, signature, where ratification was not required, ratification, accession, approval and acceptance.

8. Sub-paragraph (a) referred to the termination of the treaty and listed a set of acts which had definite effects on the treaty, but none of them corresponded with the three acts preparatory to termination, namely, again, negotiation, drawing up and authentication. Thus, in the article as it stood, sub-paragraph (a) had no counterpart in the first part of the article, which referred to article 4.

9. The inclusion of those preparatory acts in sub-paragraph (a) might accordingly be justified, for besides being concluded, a treaty was also terminated on the basis of negotiation, before going on to the acts which had definite legal results; alternatively, the list in the first part of the article could be confined to those acts which had definite legal effects, namely, signature, ratification, accession, approval or acceptance.

10. Personally, he preferred the first alternative, because preparatory acts were needed both for the conclusion and for the termination of a treaty.

11. He believed that all that was needed was a drafting change, since the Special Rapporteur must have had all those things in mind.

12. He agreed with Mr. Castrén that it would be wise to include a reference to organs of the State.

13. Mr. ROSENNE said he was in general agreement with the views expressed by Mr. Castrén and Mr. Lachs. But irrespective of whether the list of acts in article 23 were retained or not, he wished to draw attention to the omission of any reference, either in that article or in article 4 of Part I, to one other aspect of the formal treaty-making power, namely, the authority to make objection to reservations.

14. It was possible that, ultimately, article 4 of Part I and article 23 might be combined in a general article governing the formal authority to perform various acts connected with the conclusion and termination of treaties.

15. He suggested that article 5 of Part II, which raised the question of organs of the State, should perhaps be associated with article 23.

16. Mr. de LUNA said he merely wished to remind the Commission that anything relating to the procedure for amendment, denunciation, termination, withdrawal from, or suspension of, a treaty raised exactly the same problem as the constitutionality of treaty-making powers and the international effects of a breach of internal law on that subject. Accordingly, either the article itself or the commentary should say what were the international effects of the national authority exercised by the organs in question.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the question of the connexion with article 5 of Part II raised by Mr. Rosenne would require some thought.

18. The other questions which had been raised were largely matters of drafting and he suggested that article 23 should be referred to the Drafting Committee with the comments made by members.

19. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to the course suggested by the Special Rapporteur.

It was so agreed.

20. The CHAIRMAN invited the Commission to consider article 24 (A/CN.4/156/Add.2).

ARTICLE 24 (TERMINATION, WITHDRAWAL OR SUSPENSION UNDER A RIGHT EXPRESSED OR IMPLIED IN THE TREATY)

21. Sir Humphrey WALDOCK, Special Rapporteur, said that article 24 was largely self-explanatory. It set out the procedure for the exercise of the power of termination in cases where that power was expressed or implied in the treaty itself. The question of the power to terminate a treaty on such grounds as a breach committed by another party, or the doctrine of *rebus sic stantibus*, was dealt with in article 25.

22. The object of both articles was to provide a regular procedure for carrying out acts connected with termination. He thought that both in the cases covered by article 24 and in those covered by article 25 it was useful to state the procedure in some detail.

23. Mr. YASSEEN said that article 24 was a useful article which regulated the procedure for giving notice. The Special Rapporteur had wisely provided in paragraph 3 for the possibility of revoking the notice before it had taken effect; that was a safeguard for the stability of treaties.

24. However, the article laid down dispositive rules, but did not prescribe indispensable formalities. In other words, non-observance of its provisions should not have the effect of voiding the notice.

25. Mr. TSURUOKA said he did not favour the provision in paragraph 3; he thought it unnecessary to state the idea expressed there. For example, a treaty might stipulate that on a specified date a party could give notice of its intention to terminate or withdraw from the treaty, such notice to take effect on the expiry of a period of six months. On the receipt of such notice the other party, believing that the treaty would be terminated in six months would make preparations and take appropriate measures. Then, just before the period expired, the State which had given notice of its intention to terminate the treaty might announce that it revoked its notice. All the preparations made by the other party would then have been in vain and it might suffer injury; but since the act was authorized it could hardly claim damages.

26. There was, in that provision, a certain lack of balance in the protection afforded to the legitimate interests of the two parties, and he thought that cases of that kind could be allowed to follow their natural course. The other party would consent to revocation of the notice if it considered that its own interests would benefit from the continued existence of the treaty. Consequently, the stability of the treaty would not suffer if paragraph 3 did not exist.

27. Mr. CASTRÉN said that the article was useful and, on the whole, well drafted.

28. He noted, however, that it contained three references to article 17, paragraph 3; he had already proposed that most of that paragraph should be deleted, and if his proposal were accepted, it would also be necessary to redraft article 24.

29. It was also open to question whether paragraph 1 (b) should be retained. It was sufficiently clear that the con-

ditions laid down in the treaty itself concerning the notice must be complied with. In any case, the article might first refer to those conditions and then add that, if the matter was not regulated in the treaty, notice must be given in conformity with the conditions laid down in sub-paragraphs (a), (c) and (d) of paragraph 1.

30. Mr. ELIAS said that article 24 was quite acceptable in principle, but its provisions were unduly elaborate. That applied particularly to paragraph 1; the idea it contained could be expressed much more succinctly.

31. In paragraph 2, he did not believe it was necessary to state that notice must be given through the diplomatic or other official channel. He realized that the Special Rapporteur was anxious to avoid any suggestion that, for example, a mere declaration on the floor of a national legislature had the effect of terminating a treaty, but of course, such a declaration would have no binding effect in international law unless formally communicated to the other party to the treaty.

32. He therefore suggested that paragraphs 1 and 2 should be replaced by the following text, which contained the sense of both paragraphs:

“ Where a treaty expressly or impliedly confers upon a party a right to terminate, withdraw from or suspend it, written notice to that effect specifying the operative date shall be given in due form to the other party or parties to it, either directly or through a Depositary, if there is one.”

33. Paragraph 3, which dealt with the right to revoke a notice of termination, withdrawal or suspension before the notice actually came into force, should be retained, but the Drafting Committee should be asked to re-examine its formulation. Personally, he thought that the right to revoke should be implicit in the power to give notice, unless the treaty itself provided otherwise.

34. With regard to the references to article 17, paragraph 3, he agreed with Mr. Castrén.

35. Mr. ROSENNE said he attached great importance to paragraph 3 of the commentary, which provided a guide to the understanding of the article.

36. With regard to the references to article 17, paragraph 3, he suggested that, in the opening sentence of paragraph 1, the words “ under article 17, paragraph 3, of this Part ” should be replaced by “ under these articles or other rules of international law ”. Apart from the changes which had been proposed in article 17, paragraph 3, it should be remembered that the convention on the law of treaties would not completely cover all international law on the subject. Grounds for termination or suspension of treaties existed other than those specified in the draft articles; an important one could arise under article 41 of the United Nations Charter.

37. In paragraph 1 (c), the words “ under article 17, paragraph 3 ” should be deleted. As explained in paragraph 2 of the commentary, the purpose of that subparagraph was to specify that the notice should indicate legal basis upon which the right to terminate or suspend the treaty was claimed. That legal basis need not necessarily be “ under article 17, paragraph 3 ”.

38. Mr. de LUNA said that, however paradoxical it might seem, he agreed both with Mr. Tsuruoka's and with Mr. Yasseen's comments on paragraph 3. Notice was a unilateral legal act which began to produce effects as soon as the other party received it. As Mr. Tsuruoka had said, the party receiving the notice would begin to make preparations for the treaty's termination, and might then be surprised to find the other party had unexpectedly reversed its decision. But — and in that respect he agreed with Mr. Yasseen — an occurrence of that kind would not adversely affect the treaty. For apart from very exceptional cases, the parties had the same rights in the matter of denunciation and the party which had received notice could therefore either itself denounce the treaty before the time-limit expired, or choose not to denounce it. For those reasons he thought that paragraph 3 should stand.

39. Mr. TSURUOKA said that Mr. de Luna had misunderstood him in supposing that both parties could denounce the treaty at any time. In the example he had given, one of the parties was unable to denounce the treaty because the time-limit was about to expire. If paragraph 3 were drafted in stricter terms, it would cause the party contemplating denunciation to consider the matter very carefully beforehand.

40. Mr. AGO said that the article laid down conditions that were essentially a matter of form and on the whole he supported them.

41. With regard to the reference to article 17, paragraph 3, which had been criticised by several members, he observed that no decision could be taken on it until the fate of that paragraph had been decided.

42. Apart from that, perhaps the Commission ought to limit the scope of article 24 to cases in which the right of termination, withdrawal or suspension was expressed or implied in the treaty as stated in the title, in which case it would be necessary to change the wording and omit the reference to article 17, paragraph 3.

43. Article 17, paragraph 3, was not in fact concerned with the interpretation of the treaty, but with a kind of presumption in regard to certain treaties, such as commercial treaties, in which the possibility of denunciation was presumed to exist. The power to terminate then existed more by operation of law than by an implied term of the treaty. If article 17, paragraph 3, were adopted as it stood, it would constitute an objective rule of international law which automatically conferred the right to denounce certain treaties. In his opinion, it would be preferable to include only cases in which the treaty itself provided for possible termination or in which that possibility could be inferred by interpreting the will of the parties. The reference to article 17, paragraph 3, would not then be necessary.

44. With regard to the point raised by Mr. Yasseen, he thought that provision should be made for the formalities he had mentioned. But what would happen if those formalities were not complied with? If they were regarded as necessary, a denunciation which failed to comply with them would be null and void. If, on the other hand, that result was not desired, it remained to be seen what value the rules laid down in the article

would have. They would, in fact, be in the nature of recommendations. It was therefore necessary to be quite clear about what was wanted, both as to the formalities and compliance with them, and as to the effect of non-compliance.

45. Mr. AMADO said he must again remind the Commission of his great concern that it should refrain from giving too much advice to States, which were infallibly guided by their own interest. He had been struck by the very pertinent remarks of the members who had spoken before him, but they all seemed to aim at formulating even the smallest details, and a fresh appeal for caution and moderation might not be out of place.

46. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that it was undesirable that the Commission should appear to be trying to teach States what to do; but at the same time it was essential not to overlook the abuses they had committed. The whole purpose of article 24 was to set out a regular procedure for denouncing treaties.

47. It had been suggested that some of the provisions of article 24 stated the obvious. Often it was appropriate to state what appeared to be self-evident, precisely because it was true. In any event, he noted that, at the previous session, the Commission had not been against incorporating in the draft provisions which were not less self-evident than those under consideration.

48. With regard to Mr. Elias' proposal for paragraphs 1 and 2, he agreed that it would be possible to shorten those paragraphs, but he was not in favour of combining them.

49. The main point of substance in article 24 was that embodied in paragraph 3. Mr. Tsuruoka's comment was based on the same considerations as the proviso included by the previous Special Rapporteur, which would have required the assent to the revocation of "any other party which, in consequence of the original notification of termination or withdrawal, has itself given such a notification or has otherwise changed its position".¹

50. The example given by Mr. Tsuruoka of one party giving notice of termination or withdrawal and the other party not being in a position to give such notice under the terms of the treaty, was an extremely unlikely one. If such a case were to occur, the party which had put itself in such a position by subscribing to the treaty, would have only itself to blame.

51. The situation envisaged by the previous Special Rapporteur was a less unlikely one. A party to a treaty upon receiving from another party notification of termination or withdrawal, might have decided that it did not wish to remain a party to the treaty in the absence of the other party and might have taken some steps to withdraw. The previous Special Rapporteur had thought it necessary to provide some protection for the interests of such a party.

52. However, as he had explained in the last sentence of paragraph 4 of his commentary, it was doubtful

whether the proviso in question was really necessary, for any other State which had followed the example of the first State in giving notice of termination or withdrawal would equally have the right to revoke the notice. Each party to the treaty had in its own hands the power to protect its interests. The provisions of paragraph 3 really seemed to him to follow inevitably from the fact that the treaty had fixed a period before which the notice of termination was not to be complete, and the discussion had indicated that they should be retained.

53. The point raised by Mr. Rosenne, although perhaps involving a slight element of substance, could be referred to the Drafting Committee with the other points raised during the discussion.

54. Mr. YASSEEN, referring to Mr. Ago's comments, said that conditions were sometimes laid down in law whose non-fulfilment was not necessarily followed by voidance, especially those formulated to ensure greater clarity and to avoid disputes.

55. Sub-paragraph (a) of paragraph 1 laid down that the notice must be in writing, which followed from the definition of a treaty already adopted. Sub-paragraph (b) required compliance with any conditions laid down in the treaty, and that was a matter which depended on the treaty itself. It might be thought that those two sub-paragraphs laid down peremptory conditions, but it was doubtful whether fulfilment of the conditions stated in sub-paragraphs (c) and (d) could be required on pain of nullity; for sub-paragraph (c) called for specification of the provision of the treaty under which the notice was given and sub-paragraph (d) for specification of the date.

56. Mr. TUNKIN said that while he found nothing objectionable in the provisions of article 24, some of them seemed unnecessary.

57. With regard to the question raised by Mr. Ago concerning the consequences of non-compliance, the article itself appeared somewhat vague. The probable reason for its lack of precision was that some of its provisions could hardly be considered as specific rules. Certainly, if the act referred to in paragraph 1 (a) were not performed by a competent representative, it would be null and void. As to the rule in paragraph 1 (b), it was perhaps already covered by the provisions of article 15 — a point which could be considered by the Drafting Committee.

58. The contents of paragraph 1 (c), although logical, were not indispensable in law. It would be an absurd piece of formalism to suggest that a notice of termination was void unless it specified the ground on which it was based.

59. As to paragraph 1 (d), it was obvious that the notice should be dated and that it should indicate the date upon which it took effect.

60. The contents of paragraph 2 were equally self-evident, and it was doubtful whether they were necessary. States communicated through official channels and not through private persons. That rule applied

¹ *Yearbook of the International Law Commission*, 1957, Vol. II (United Nations publication, Sales No.: 1957.V.5, Vol. II), p. 34, article 26, para. 9.

to the whole of the law of treaties, not merely to the subject matter of article 24.

61. Paragraph 3 embodied the only rule of significance in the article. It was important to include in the draft a provision on the right to revoke notice of termination, withdrawal or suspension.

62. Mr. AGO said that, like Mr. Yasseen and Mr. Tunkin, he doubted whether non-observance of some of the provisions in paragraph 1 should be regarded as necessarily voiding the notice; that applied even to the provision requiring the notice to be in writing. The four sub-paragraphs of paragraph 1 were preceded by the words "a notice... in order to be effective, must...". The problem was therefore one of substance, not of form.

63. Mr. LIU said that article 24 was a logical sequel to article 23 and although some of its provisions might appear self-evident and might be already covered by implication in other articles, it had the merit of laying down a regular procedure for terminating or suspending a treaty. The structure proposed by the Special Rapporteur ought to be maintained and little would be left of the article if paragraphs 1 and 2 were omitted.

64. Sir Humphrey WALDOCK, Special Rapporteur, said it was desirable that some of the provisions of paragraph 1 should be made obligatory in order to regularise the procedure for termination, withdrawal or suspension, in the interests of protecting the stability of treaties. There was perhaps a difference between the conditions laid down in sub-paragraphs (a) and (b) and those in sub-paragraphs (c) and (d). The last two sub-paragraphs could be drafted in the form of a recommendation.

65. The act of communication being a definite juridical act, he was also strongly of the opinion that the requirements in paragraph 2 should be obligatory. Similar provisions had been laid down in article 19 of Part I in regard to reservation.

66. The CHAIRMAN suggested that article 24 should be referred to the Drafting Committee; the Commission could decide on any outstanding question of substance when it had had a new text before it.

It was so agreed.

67. The CHAIRMAN invited the Special Rapporteur to introduce article 25 (A/CN.4/156/Add.2).

ARTICLE 25 (ANNULMENT, DENUNCIATION, TERMINATION OR SUSPENSION OF TREATY OBLIGATIONS UNDER A RIGHT ARISING BY OPERATION OF LAW)

68. Sir Humphrey WALDOCK, Special Rapporteur, said that, having given a full explanation in the commentary, he need not say much by way of introduction. During the discussion of earlier articles, members had clearly linked the application of the rules laid down in them with the procedural requirements set out in article 25. The purpose of the article was to establish a regular procedure for effecting the annulment, denunciation, termination or suspension of a treaty, which

was all the more necessary in the present article, where the grounds for doing so were connected with essential validity, breach or a change in circumstances which might require an interpretation of the facts that could give rise to serious controversies.

69. In paragraphs 1 to 3 he had set out the conditions to be fulfilled by the party claiming the right to annul, denounce, terminate or suspend, including that of having to make a full statement of the grounds upon which the claim was based. Paragraphs 4 to 7 dealt with the case in which an objection was raised to the claim, whether on a ground of fact or of law. The right of unilateral action by the claimant party had to some extent been made dependent on the willingness of the other party or parties to have the matter investigated by negotiations between the parties or, failing agreement, by referring the dispute to enquiry, mediation, conciliation, arbitration or judicial settlement. Perhaps those alternative procedures should be further extended so as to cover all the procedures mentioned in Article 33 of the Charter. He had explained in the commentary why he considered it necessary to provide for a wide range of alternative methods of settlement.

70. His purpose had not been to establish some form of compulsory jurisdiction, but to impose certain safeguards against States proceeding arbitrarily to terminate legal relations which they had voluntarily entered into with each other. It would not be unreasonable to regard unilateral annulment, denunciation, termination or suspension as arbitrary if the claimant were unwilling to have the matter considered on its merits. In his opinion, the draft would be incomplete without such a provision.

71. Mr. CASTRÉN said that article 25, though procedural, was a key article, a necessary and even essential complement of several other articles in the draft.

72. The Special Rapporteur had been guided by the writings of the leading authorities and, in particular, had adopted Sir Gerald Fitzmaurice's proposals, which he had tried to improve in certain respects. In many ways his draft constituted a genuine advance, but he had not, perhaps, succeeded in solving the problem entirely. For his ingeniously drafted article suffered from a serious gap, in paragraph 6, which might frustrate all the good intentions of the remainder by opening the door to arbitrary action. If the other party to the treaty chose to submit the dispute to some authority for purposes of enquiry, mediation or conciliation and that procedure failed to bring about a settlement, there would be a deadlock. The answer given by the Special Rapporteur in paragraph 16 of his commentary was not satisfactory because, while recognizing the difficulties which might arise in practice, he did not attempt to resolve them in the article.

73. It was the Commission's duty to propose a solution to meet all eventualities. He therefore suggested that it should be laid down that, if the procedures mentioned failed, the parties should submit the dispute to arbitration or judicial settlement. If the party that wished to amend or terminate the treaty refused to refer the matter to arbitration or judicial settlement, it would be bound

to continue to apply the treaty as it stood. If it was the other party that was obstructive, then the treaty, or the disputed provision, could be denounced unilaterally.

74. So far as the form of the article was concerned, he thought that in paragraph 1, article 17 should be added to the list of articles to which the procedure set out in article 25 applied. Paragraph 1(b) provided that the notice given by a party claiming the right to annul, denounce or terminate a treaty must contain a full statement of the grounds upon which the claim was based and of the provision by which it was said to be justified. That statement should mention, in particular, the relevant provisions, if any, of the treaty in question. In addition a time-limit, perhaps two weeks, should be laid down at the end of the paragraph, for cases of special urgency.

75. Paragraph 2 could be deleted, since the general rule stated more fully in article 24, paragraph 2, was also applicable to the cases contemplated.

76. Similarly, the second sentence of paragraph 3 could be omitted and the introductory sentence of paragraph 4 abridged to read: "If, however, objection has been raised by any party, the claimant party must first . . .".

77. Paragraph 4(b) was not quite clear. The Special Rapporteur had probably intended to say that the State which wished to be released from the treaty obligations must, if the other party objected, offer to submit the dispute to any of the procedures mentioned in that sub-paragraph. As it stood, however, the provision might be interpreted to mean that it was sufficient to propose only one of those procedures.

78. In paragraph 5, the phrase "it shall be considered to have waived its objection" was unnecessary. It would be appropriate at that point, too, to fix a time-limit of less than three months for urgent cases — say two weeks, as in paragraph 1.

79. He did not approve of the provision in paragraph 6 under which performance of the obligations of the treaty could be suspended provisionally in pursuance of a decision or recommendation of the tribunal, organ or authority to which the dispute had been referred; for a recommendation could not have that effect, and the other organs should not be given such great powers as an arbitral tribunal or international court.

80. Mr. TUNKIN said that he wished to raise what might perhaps be regarded as a point of order. Article 25 contained two kinds of provisions: purely formal ones laying down the conditions to be fulfilled by a party wishing to exercise the right of annulment, denunciation, termination or suspension, and more important ones for regulating the settlement of disputes. Without prejudice to his general position concerning that latter question, which was well known, he considered that disputes might arise in connexion with any of the rules already formulated, including those contained in Part I, and those would no doubt appear in the Special Rapporteur's third report. In order to avoid repetitive discussion, it would be advisable to

postpone consideration of article 25 and take up provisions concerning the settlement of disputes at the end of the discussion at the next session. An article on that subject would in any case be placed at the end of the draft.

81. Mr. BRIGGS said that in his view it was important that the Commission should take up article 25 without delay; he, for one, had had to reserve his position on a number of earlier articles pending the decision on the structure of article 25. The conditions laid down in article 25 provided important safeguards for the exercise of certain substantive rights that had been discussed under sections II and III. The articles already referred to the Drafting Committee would remain somewhat meaningless unless some tentative conclusion at least were reached on article 25 at the present session.

82. The CHAIRMAN said he had not understood Mr. Tunkin as having formally proposed, on a point of order, that discussion of article 25 should be postponed, so the article was still before the Commission.

83. Mr. de LUNA supported Mr. Tunkin's view. As the Commission had deferred its decision on the final drafting of the articles considered at the present session which were related to article 25, it might just as well postpone consideration of article 25 until the next session, since that article was really general in scope. As Mr. Tunkin had not formally raised a point of order, the Commission could continue to discuss the article, though it would not be able to decide on the final form until it had concluded its examination of the draft convention, since all the previous work would be in vain if article 25 did not really provide a solution for all the problems raised in the draft.

84. Mr. TUNKIN pointed out that if an article on the settlement of disputes was included at all, it was usually placed at the end of a convention. In the present instance it would necessarily have to apply to the draft as a whole and it would therefore be more orderly to take up article 25 last.

85. Mr. TABIBI said it would be helpful to have a preliminary discussion on article 25 without formulating any rule or referring the article to the Drafting Committee; otherwise an incomplete text would have to be submitted to governments for comment and that might complicate matters. The decision on the article could be left till the next session.

86. Mr. GROS said he could hardly speak on the substance of article 25 so long as the Commission was still considering when it should be discussed. Acceptance of Mr. Tunkin's proposal would involve not merely postponing the discussion of article 25, but also deferring any final decision on the articles concerning the validity of treaties, which the Commission had examined and should adopt at the present session. Many members considered that, as the Special Rapporteur had said in paragraph 1 of his commentary, article 25 was a key article and a necessary supplement

to several preceding articles; they would therefore find it difficult to accept those articles as finally adopted if article 25 was not adopted.

87. If the Commission accepted Mr. Tunkin's proposal, some pragmatic means would have to be found of informing governments that the Commission had drafted several articles, but had not adopted them finally because article 25, the key article, was not discussed until 1964. He was in favour of adopting, at the present session, an article on the problems dealt with in article 25, which, like all the others, would be subject to revision.

88. With regard to the substance of the question, he was not convinced by the argument that article 25 was a final clause; it was not solely a matter of the settlement of disputes, for the Commission had studied the validity of treaties — in other words, the conditions under which States could dispute the validity of a treaty — and it had tried not to impair the binding character of treaties, for any weakening of that rule would lead to the right of unilateral denunciation and consequently to a veritable anarchy in international relations.

89. That being so, however, now that the Commission was reaching the end of the essential section on validity, it should suggest some means of preventing such legal anarchy. Article 25 was not a final clause concerning all the problems relating to the interpretation and application of treaties, but the key to certain very specific articles. In an international community which had not yet evolved a hierarchy of authorities, it was necessary to provide some means of avoiding arbitrary action, for the articles already drawn up might appear to some States to justify unilateral decisions that would not be subject to impartial examination by any authority.

90. He would therefore prefer members of the Commission to agree on some means of supervision. He realized that they did not all approve of the Special Rapporteur's text, even though he had provided a range of provisions which should enable every member to support at least some of the means proposed, such as conciliation or examination by an international organization. The Commission should accordingly discuss the substance, and if the majority decided in favour of postponement, it should postpone adoption of the articles on the validity of treaties as well as article 25, and communicate to governments, as a sort of preliminary draft, the articles already drawn up together with a note summing up the discussion on article 25.

91. Mr. PAREDES said he found the provisions of article 25 extremely satisfactory and wholly acceptable. Hitherto there had been great uncertainty as to how a dispute would be settled if a claim to terminate, withdraw from or suspend a treaty were contested by one of the parties, and the Special Rapporteur had made an important contribution to international law by showing a simple way to decide the issue. It might, however, prove necessary to add some further conditions in paragraph 1.

92. On the question of the procedure to be followed by the Commission, he agreed with Mr. Gros that

article 25 should be discussed, since it was one of the most important in the Special Rapporteur's second report and must affect the Commission's final conclusions on other articles.

93. Mr. de LUNA said that, after hearing the explanations given by Mr. Gros and Mr. Paredes, he agreed that the Commission should discuss article 25 and approve a provisional text, on the clear understanding that the text would not be finally adopted until consideration of the whole of the draft had been completed.

94. Mr. AGO said that article 25 had a first part which was the counterpart of article 24 and raised no special problem; but the present subject of discussion was the second part, which also related to all the matters concerning validity already considered in connexion with the previous articles and to some extent constituted their conclusion. If that second part were deleted, for example, all the provisions concerning the *clausula rebus sic stantibus* might be left in abeyance.

95. He thought it would be difficult to begin a discussion as Mr. Tabibi had suggested, in the knowledge that it would be purely academic. It would be better not to prejudge the outcome of the discussion.

96. The CHAIRMAN said he agreed with Mr. AGO that the Commission must continue consideration of article 25 without attempting to decide in advance what would be the final outcome of the discussion.

97. Sir Humphrey WALDOCK, Special Rapporteur, said he would be very reluctant to defer consideration of the important matters dealt with in article 25 until the next session, if only for the purely practical reason that the Commission would then be very fully occupied with the matters to be covered by his third report. That report would include, for example, the extremely troublesome question of the effect of treaties on third parties, which was likely to give rise to protracted discussion. It would be most helpful if the Commission could dispose of article 25 at the present session, even if only provisionally.

98. There was also a point of substance at stake. The question whether certain procedural checks, and if so what kind, were to be imposed on the application of the substantive rules laid down in sections II and III was quite separate from the question whether a special section, which would be applicable to the whole draft on the law of treaties, was to be included on the settlement of disputes such as those connected with responsibility and reparation for breach. The object of paragraphs 4-7 of article 25 was not to provide machinery for the settlement of disputes, but to provide procedural checks to prevent the arbitrary termination of treaty relations.

99. Mr. ROSENNE said he did not consider that article 25 could be classed as what was known as a disputes clause, which sometimes appeared in the general clauses of treaties, and of which a good example was article 36 of the Harvard Draft on the Law of Treaties.² Such a clause should certainly not be discussed at the

² *American Journal of International Law*, 1935, Vol. 29, Supplement, Part III, p. 665.

present juncture and perhaps not at all: it was really a matter for political bodies.

100. Article 25 was of an essentially different kind in that it established a special procedure for the termination of an existing treaty, and it accordingly formed an integral part of the sections already discussed by the Commission. Its application was not limited only to cases in which the *rebus sic stantibus* clause was invoked. It should perhaps be framed in a more flexible way and ought not to be concentrated so specifically on disputes.

101. The article was of the same kind as the procedural provisions attached to substantive rules in other drafts prepared by the Commission, for example, the draft convention on the elimination of future statelessness, the articles on the conservation of the living resources of the high seas, and those on the continental shelf. In article 29, paragraph 8, of Part I of the report on the law of treaties, the Commission had inserted a similar provision concerning the settlement of any difference arising between a State and a depositary; the use of the word "difference", rather than "dispute", was significant.³

102. Article 25 ought certainly to be discussed, but not with any preconceived idea as to what decision would finally be taken. On that point he could not agree with Mr. Tabibi. If the Commission found itself unable to reach a conclusion on article 25 it would have to consider whether it would then be possible to submit to governments for comment an article concerning the *rebus sic stantibus* doctrine, or indeed any of the articles so far discussed at the session. If something on the lines of article 25 did not accompany the other articles, they might give rise to some misconception.

103. It might simplify matters if the different elements in article 25 were taken separately. Paragraphs 1 and 2 could be taken together, and paragraphs 4, 5 and 6; paragraphs 3 and 7 should be dealt with separately.

104. Mr. TABIBI said that Mr. Ago seemed to be under a misapprehension. He (Mr. Tabibi) and Mr. Gros were, in fact, agreed on the need to discuss article 25, but without taking any final decision.

105. The CHAIRMAN pointed out that it was impossible to foresee the outcome of the discussion. In the meantime he proposed that the Commission should continue consideration of article 25.

106. Mr. AMADO proposed that the Commission should disregard previous proposals and discuss article 25 thoroughly. The outcome of that discussion would enable it to see whether Mr. Tunkin's apprehensions were justified and it could then either adopt his proposal or follow the procedure suggested by Mr. Gros.

107. Mr. TUNKIN said he had no objection to article 25 being discussed, after which the Commission could decide how to deal with it.

It was so agreed.

The meeting rose at 12.50 p.m.

699th MEETING

Thursday, 13 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 25 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

ARTICLE 25 (ANNULMENT, DENUNCIATION, TERMINATION OR SUSPENSION OF TREATY OBLIGATIONS UNDER A RIGHT ARISING BY OPERATION OF LAW) (*continued*)

2. Mr. TUNKIN said that the essence of the rule laid down in article 25 was that a party could not exercise the right to terminate or withdraw from a treaty unless it obtained the consent of the other party or parties, or a decision by an arbitral tribunal or the International Court of Justice. The article was intended to cover all types of treaty, including those imposed by force, and the choice of the means of settling a dispute was left entirely in the hands of the party or parties which had not claimed the right to terminate.

3. The essence of a rule of law could not be judged if it were completely removed from the context of its social application and effects, so that two technically similar legal norms in two domestic systems might in fact be different. The content of article 25 must therefore be examined against the background of the contemporary situation.

4. Among the many treaties in existence, there were a number which were a heritage of the colonial system or had recently been imposed by the colonial Powers on new States. As the new States matured and as formal independence was transformed into real independence, the social forces working for peace were bound to rebel against certain treaties concluded earlier. Where subervient governments had given way to strong ones, the effect of article 25 would be to place obstacles in the path of States when they sought to free themselves from onerous and unjust treaties by invoking the rights laid down in some of the articles already discussed. It was hardly likely that the States responsible for having imposed such treaties would be willing to dissolve them. If the claimant State's suggestion of arbitration were rejected, its only recourse would be to bring the matter before the International Court of Justice.

5. His comments should not be taken to mean that he minimised the importance of arbitral procedure or of the International Court; what was objectionable in the article was that it obliged the parties to accept a compulsory jurisdiction in every instance. There was no escaping the fact that barely forty out of 111 States Members of the United Nations had accepted the Court's jurisdiction and many had done so with important reservations. Among the reasons for the unwillingness of

³ *Official Records of the General Assembly, seventeenth session, Supplement No. 9, p. 28.*

so many States to accept the Court's jurisdiction was the uncertainty surrounding many rules of international law and their objections to the present composition of the Court. Yet article 25 would have to be applied to cases in which, for good reasons, the injured party had not accepted the compulsory jurisdiction of the Court.

6. The insertion of such an article, on the ground that without it no draft convention on the law of treaties could be drawn up, would be detrimental to the development of international law and would create new sources of international tension. No-one could be unaware of the reasons why the Commission's draft Convention on Arbitral Procedure was reposing in the archives of the United Nations. To give more recent examples, the compulsory jurisdiction clause had not been included in the Vienna Convention on Diplomatic Relations, but had been embodied in a separate protocol, and the same course had been followed with the Convention on Consular Relations. Admittedly, articles on compulsory jurisdiction had been included in the Convention on Fishing and Conservation of the Living Resources of the High Seas¹ in the teeth of strong opposition, but the ultimate fate of that Convention was still unknown and the inclusion of those articles had certainly been instrumental in deterring many States from ratifying it.

7. The settlement of disputes was an entirely separate branch of international law which certainly needed to be developed, and there were means of doing so, but it must be dealt with separately. The codification and progressive development of other branches of law should not be made dependent on the acceptance by States of compulsory jurisdiction.

8. Mr. AGO said he fully understood Mr. Tunkin's position, although he himself was a firm supporter of the compulsory jurisdiction of the International Court of Justice. It would indeed be unrealistic to expect the Commission to make codification of the law of treaties depend on acceptance of that jurisdiction. When the Commission came to consider means for the settlement of disputes arising over the application of the rules constituting the body of treaty law, it would probably have to resort once again to a separate optional protocol.

9. In the case of article 25, however, the problem was somewhat different; the Special Rapporteur did not recommend recourse to the compulsory jurisdiction of the Court. Mr. Tunkin was quite right in thinking that, in the matter of the validity of treaties, no loophole should be left for the State wishing to maintain the treaty. Having adopted a rule such as that of the nullity of a treaty obtained by force or fraud, the Commission should certainly not approve a provision which would keep a treaty in force for the sole reason that the State wishing to maintain it would not yield. But it should not take the opposite course either, for the party asking for termination was just as likely to be in the wrong.

10. If he had correctly understood the system proposed by the Special Rapporteur, the State wishing to end a

treaty began by notifying the other party of its intention; the other party might either not reply — in which case the notice automatically took effect — or formulate an objection. In the latter case, the State which wished to end the treaty entered into negotiations and, if no agreement was reached, offered to submit the dispute to some means of pacific settlement agreed by the parties. There was no question of recourse to the International Court of Justice or of compulsory jurisdiction. If the other party totally refused the offer, its refusal would be deemed to constitute a waiver of its earlier objection.

11. Whether one favoured the system proposed by the Special Rapporteur or not, it could not, in any case, be said to impose the jurisdiction of the Court.

12. Mr. TUNKIN said that, although what Mr. Ago had said was correct in theory, in practice the States interested in keeping certain treaties in existence would also be in favour of submitting disputes to the International Court. The procedure proposed in article 25 must be examined in the light of how it would operate.

13. Mr. GROS said that, if his interpretation was correct, the provisions of paragraph 4 (b) gave the claimant State an absolutely free choice among the various procedures listed — inquiry, mediation, conciliation, arbitration or judicial settlement. Since those were neither cumulative nor successive procedures, the claimant State might propose only conciliation. But conciliation entailed no obligation. In the hypothetical case considered by Mr. Tunkin, in which a State wished to maintain an unjust treaty, that procedure would lead to a report on the situation as a whole, which would not be binding on either party. Consequently, it seemed that the Special Rapporteur had left a kind of loophole there, which was causing Mr. Tunkin concern, but that there was no provision for compulsory jurisdiction in article 25.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Gros had correctly interpreted his intention that the injured State, on behalf of which Mr. Tunkin had spoken, should be free to choose the procedure it proposed for the settlement of a dispute. Among the procedures contemplated in paragraph 4 (b) were conciliation and reference of the dispute to the Security Council or the General Assembly.

15. One object of article 25 was to put the *bona fides* of the claimant State to the test, for history was full of examples of the rights laid down in sections II and III of the draft being seriously abused by States seeking to release themselves, on flimsy grounds, from obligations which had become inconvenient.

16. He had made it very clear in the commentary that he was not proposing any kind of compulsory jurisdiction clause, and he was certainly not proposing to insert one in his third report, which was to be discussed at the next session, for the very reason given by Mr. Tunkin, namely, that such a course would not be practicable at the present stage of codification of international law. A similar consideration had guided the Commission at its previous session.

17. On the other hand, he had taken the view that article 25 was concerned with the special case of a State

¹ United Nations Conference on the Law of the Sea, Geneva, 1958, *Official Records*, Vol. II, pp. 139-141.

which had established, in most cases voluntarily, a legal relationship with another State by treaty, but subsequently asserted that the relationship no longer existed or declared its intention to terminate the treaty. In such a situation there was a pre-eminent need, first, for consultation between the parties, and then, if there was a difference of view between them, for some procedure to resolve that difference before unilateral action was taken. The system he was proposing was certainly not intended to place in an impasse the claimant State with a genuine case for terminating or annulling a treaty on any of the grounds laid down in sections II and III.

18. The article called for careful drafting as the matter was a delicate one, and his text was perhaps not fully adequate. Possibly in paragraph 4 (b) he should have followed more closely the language of Article 33 of the Charter. But he did regard it as vitally important to lay down certain procedural checks on the exercise of the rights in question.

19. Mr. VERDROSS said he did not quite understand Mr. Tunkin's concern. Paragraph 4 (b) did not recognize the principle of compulsory jurisdiction, but only dealt with the choice between various means of pacific settlement, among which were arbitration and judicial settlement. It did no more than repeat the rule in Article 33 of the Charter, which required the parties to any dispute, the continuance of which was likely to endanger the maintenance of international peace and security, to seek, first of all, "a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". In order to allay Mr. Tunkin's anxiety perhaps it should be provided that, failing agreement, the dispute should be submitted to one of the bodies referred to in Article 33 of the Charter.

20. Mr. TUNKIN said he welcomed the Special Rapporteur's assurance that he had not intended to introduce into article 25 any requirement to submit a dispute to compulsory jurisdiction, either of the International Court or of any other body. That being so, the Commission was faced with a much less serious problem, namely, the redrafting of the article.

21. Mr. ROSENNE said that, in view of the turn which the discussion had taken, he would not touch on certain general problems arising out of article 25, but would confine himself to commenting on the text itself.

22. As he had already urged at the previous meeting, article 25 should be retained so as to lay down a procedure for changes that were almost inevitable in treaty relations between States. It was also needed because the Commission was not solely engaged on codification, but was also proposing a number of rules *de lege ferenda*. Without such an article he doubted whether it would be possible to transmit the articles so far discussed at the present session to the General Assembly and to governments.

23. He had three general criticisms to make of the Special Rapporteur's text. First, it placed too much emphasis on the possibility of disputes; the technical definition of a "dispute" carried a pejorative tinge and

it would be inappropriate for the Commission to assume *a priori* that every situation in which a claim was made to annul, denounce, terminate, withdraw from or suspend a treaty would give rise to a formal dispute between the parties.

24. Secondly, the obligation on all the parties to negotiate with each other in good faith in the event of such a right being invoked was not sufficiently emphasized in paragraph 4 (a), as the most appropriate point of departure for a settlement. That obligation was implicit in many of the articles already discussed; the provisions of article 25 were intended to reinforce it and to prevent one party from being placed at the mercy of others unwilling to comply with the requirements laid down.

25. Thirdly, the article had been formulated in excessively rigid terms and ought to be more supple. The proposal by Mr. Verdross concerning paragraph 4 (b) deserved serious consideration.

26. Without having any strong views on the matter, he wondered whether it was desirable to restrict the application of paragraph 1 to the provisions of the articles mentioned. He would have thought that its application extended to all cases in which the voidability of a treaty was at issue, and it might only be possible to determine whether a treaty was void by more direct reference to the general law on the pacific settlement of disputes.

27. Paragraph 1 (b) seemed to have been too much inspired by certain of the Rules of the International Court, yet without wholly following them. In its present form it was too formal; it could be simplified and confined to a requirement that the notice should state the grounds on which the claim was being made.

28. It was premature to anticipate in paragraph 1 (d) that the right of the claimant State would be contested; it would suffice if the other party were required to specify within a reasonable period what its attitude would be towards the action proposed.

29. In paragraphs 3 and 4 the expression "claimant party", drawn from the language of litigation, was inappropriate and some better term should be found.

30. In paragraphs 4 (b), 6 and 7, the word "difference" should be substituted for the word "dispute".

31. It was paragraph 7, however, that caused him most concern. As he saw it, there were three possible cases. The first was that mentioned in paragraph 7, in which the treaty itself contained a clause on the settlement of disputes. Such a clause could, however, refer to methods of settlement other than arbitration or submission to the International Court of Justice; in fact, he knew of a number of treaties which contained disputes clauses providing for other methods of settlement. The article to be adopted should not impair the efficacy of such clauses.

32. The second case was that in which both parties had recognized the compulsory jurisdiction of the International Court of Justice under Article 36 (2) of its Statute, which specifically referred to "all legal disputes concerning the interpretation of a treaty". In order to cover that case, at least the commentary should say whether priority ought not to be given to the jurisdiction of the

International Court of Justice, which the parties had already recognized under Article 36 (2).

33. The third case was that in which the two parties were bound by a treaty for the pacific settlement of bilateral disputes. In that case also, the commentary should make it clear that such a treaty would apply to the settlement of the dispute if negotiations failed.

34. He could not subscribe to the view that a dispute relating to the application or interpretation of a treaty was inherently different from any other dispute, or that it was in some way more amenable to judicial settlement. That view appeared to have attained considerable prominence at the Hague Conference of 1907. It was essential to consider the realities underlying a dispute; most disputes could be reduced to a question of interpretation of treaties, but that did not make them any more amenable to judicial settlement.

35. He shared Mr. Tunkin's view regarding the present fairly general hesitation to resort to the International Court of Justice. Whatever the outcome of the present discussion, he for one would not be able to support a clause providing for the compulsory jurisdiction of the International Court to the exclusion of other methods of settlement. Such a provision would not be in line with the Charter, which only imposed an obligation to settle disputes by peaceful means.

36. The CHAIRMAN, speaking as a member of the Commission, observed that, according to Mr. Gros, the claimant State was entitled to choose the particular means of peaceful settlement to be employed. That would result in an undue advantage to the claimant State, which might propose a method of settlement unacceptable to the other party. Following that party's refusal of the method proposed to it, the claimant State would then assert that it had the right to denounce the treaty unilaterally. Such a result should follow only if the other party refused to agree to any of the methods of settlement and not merely to the particular method selected by the claimant State.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that the difficult question raised by the Chairman recalled the historic differences regarding arbitration and judicial settlement and the problem of agreeing on a tribunal to adjudicate a dispute.

38. Paragraph 4(b) perhaps needed redrafting in order to bring it into line with the language of the Charter, but the intention had been that, if the claimant party proposed a form of conciliation, say by a United Nations organ, and the other party rejected it out of hand, the claimant party would be entitled to release itself unilaterally from its obligations under the treaty. It was important to note the adjective "impartial" which appeared before the words "tribunal, organ or authority"; the intention was that there should be a proper offer of an impartial method of settling the question.

39. He agreed with Mr. Rosenne that it would be better to refer to a "difference" than to a "dispute".

40. The CHAIRMAN, speaking as a member of the Commission, pointed out that when the claimant State offered conciliation, the other party might refuse that

method of settlement but express its willingness to submit the matter to the International Court of Justice. Would it then be possible for the claimant State unilaterally to release itself from its obligations ?

41. Mr. BARTOŠ said that, although he was in favour of the compulsory jurisdiction of the International Court of Justice, he thought that to provide for such an obligation in the draft would be going beyond the provisions of the Charter, of which the Statute of the Court was an integral part. A distinction should be made between a general compulsory jurisdiction clause or an optional jurisdiction which had become compulsory because it was embodied in a treaty, and the procedural rules governing the application of instruments. Paragraph 4(b) was based on the principle that all disputes should be settled by peaceful means, as recommended in several passages in the United Nations Charter. There was no reason, therefore, why the article should not provide that States had a duty to resort to amicable settlement, even if they had not ratified the Revised General Act.²

42. He agreed with Mr. Tunkin, however, on the need to find a formula which would remove all ambiguity concerning compulsory jurisdiction. Provided that the Drafting Committee could manage to work out such a formula, he was in favour of including it in the draft at the present session, rather than deferring the matter until 1964.

43. The Drafting Committee might also consider whether the procedure laid down in article 25 ought not to be followed where a treaty might be regarded as void under one of the provisions of articles 10, 15, 16, 17 or 18. That question also arose in connexion with all the other articles. A State must not be granted a right of unilateral denunciation or be entitled to adjudicate its own case; the other party must be given adequate guarantees.

44. In addition, paragraph 1 should specify whether the notice of the claim must always be in writing or whether oral communication by an authorized representative would suffice. At all events, it was common practice to make such a communication by an oral declaration, which was always followed by a memorandum in writing.

45. Continental jurists would be reluctant to accept the formula in paragraph 2, which was peculiar to British diplomatic practice. The paragraph should therefore be amended.

46. So far as the rest of the article was concerned, the main problem was that of the period during which the various phases of the procedure — often very lengthy — were being carried out. During that period, was a State which claimed the right to annul a treaty bound to regard it as being in force *in toto* and to apply it, or could it consider the treaty as provisionally suspended while the procedure was being carried out ? He could accept the proposed text only if it included a provision for the treaty's provisional suspension *ipso jure* during the procedure.

47. If one party had proposed a method of peaceful settlement and the other party had rejected it but proposed

² United Nations *Treaty Series*, Vol. 71, pp. 102 ff.

another method, that could hardly be regarded as outright rejection, since the other party had already entered into negotiations.

48. During the negotiations between the parties to choose a means of settlement, the treaty should be suspended *ipso facto*. If the negotiations came to nothing and the parties failed to agree before the expiry of the specified period, they should be bound by a clause providing for judicial settlement. But if it proved impossible within a further period, fixed in advance by the general rule, to find a jurisdiction which both parties recognized, the treaty must be regarded as terminated. That might seem an unduly radical solution, but unless it was adopted, the treaty would have to be regarded as suspended indefinitely, a solution which had little to recommend it.

49. On the whole, the principles on which article 25 were based seemed acceptable, subject to substantive changes in the text proposed.

50. Mr. AGO, reverting to the very pertinent question raised by the Chairman, said he thought the only solution lay in a compromise. If one party proposed conciliation when the question did not lend itself to that method of settlement at all, and the other party offered to accept any method of judicial settlement, it could not be held that there had been a rejection. On the other hand — and he well understood the concern of some members of the Commission — the other State could not be allowed to reject any procedure other than recourse to the International Court of Justice, for that would amount to introducing the idea of compulsory jurisdiction, which was precisely what the Commission wished to avoid for the time being. It should be specified that one of the parties should offer the other recourse, not to one means of pacific settlement only, but to a choice of different means, and that the other party should adopt the same attitude.

51. The Drafting Committee could easily solve that problem and also deal with the questions raised by Mr. Bartoš. It would be better not to prolong a theoretical discussion on article 25, but to make a practical examination of the solutions that could be accepted.

52. Mr. de LUNA said he was in favour of universal compulsory jurisdiction but he had no illusions on the subject, even if it proved possible to change certain aspects of the present situation referred to by Mr. Tunkin, namely, the membership of the International Court and certain rules of international law. Evolution towards compulsory jurisdiction was like an exponential curve, which constantly approached a straight line without ever reaching it. Apart from the bad conscience of certain States in particular cases, such as war, there were, as Mr. Rosenne had rightly pointed out, political problems in international disputes. When a dispute was political, what was sought was not the application of the law, but a change in it.

53. In the case of article 20, however, it was important that a solution should be found. The procedure proposed by the Special Rapporteur, with the points added by Mr. Ago and Mr. Gros, seemed to offer an equitable

solution, and indeed the only possible one if the alternative of automatic unilateral denunciation was to be avoided. But what would happen if, in conformity with article 25, the parties agreed to an inquiry or submitted their difference to some international authority? The Special Rapporteur did not mention what would happen then, but it was obvious that arbitration proceedings would follow. A solution would not be provided by the inquiry, which would only produce a report on the facts.

54. It was therefore necessary to specify, for example, that preference would be given to the party willing to conform to the decision of the mediator or the recommendation of the body seized of the matter; the reference to "inquiry" should be deleted. Like Mr. Ago, he favoured a compromise solution.

55. Mr. TABIBI said that the cautious language of article 25 was intended to prevent the security of treaties from being upset by unilateral denunciation. The Commission must remember that the provisions of the article were based on Chapter VI, and in particular Article 33, of the Charter, by which all States Members of the United Nations were bound.

56. But like Mr. Tunkin, he was concerned about the way the proposed procedure would work in practice. A number of provisions had already been adopted by the Commission for the purpose of safeguarding the rights of injured parties to treaties, particularly the *ius cogens* provisions of article 13. The provisions of article 25 might be used to disrupt the rules and detract from the safeguards for injured parties contained in other articles.

57. One matter of great importance in the whole process of termination and denunciation of treaties was the time factor. For instance, the treaties concluded by Afghanistan during the nineteenth century with a number of other countries, including the United Kingdom, had been entered into by the then rulers of Afghanistan at a time when the country was occupied by British troops and the people were not even aware of what was being done. Afghanistan had attempted to revise its treaties with the United Kingdom by negotiation, but some forty years of negotiations had, for political reasons, led to no result, despite India's attainment of independence in 1947.

58. The provisions of paragraph 1 allowed three months for a reply to the claimant State, but no time-limit was set for negotiation. Experience had shown that it took an extremely long time to agree on a mode of settlement in such cases. In fact, if the parties were unable to agree on a mode of settlement, the only remedy was resort to the International Court of Justice.

59. Personally, he strongly supported the compulsory jurisdiction of the International Court. Judicial machinery was essential to the implementation of international law. But it must be recognized that there was a certain reluctance to submit cases to the International Court. He had the greatest respect for the personal merits of the judges, but the present composition of the Court was naturally not acceptable to a great many countries. The election of the judges was not consistent with the

Statute of the Court, which did not provide that the five permanent members of the Security Council were entitled to permanent seats on the International Court as well. Another serious deficiency was the over-representation of Europe and the under-representation of Asia and Africa, to which the injured parties generally belonged. The fact that the European judges were men of outstanding qualifications in international law was acknowledged by all, but it was also essential that judges of the International Court should be aware of the feelings of peoples in all the regions of the world and understand the background of the situations with which they had to deal.

60. There again the time factor was important. To take one example, Liberia and Ethiopia had initiated proceedings in the International Court concerning South West Africa, but the cases were likely to continue for many years.

61. The deficiencies of the Court were so apparent that the question of revising its Statute had been before the General Assembly for some time, but unfortunately, because the Statute was part of the United Nations Charter, its revision would prove difficult.

62. In the last analysis, the provisions of article 25 implied the compulsory jurisdiction of the International Court of Justice, because the other means of settlement mentioned in the article were not compulsory; and when those other means failed, there was no remedy left but resort to the International Court.

63. It was essential to reconcile the need to ensure the stability of treaties with the need to safeguard the rights of injured parties. Those rights were protected by other articles of the draft, with which the provisions of article 25 should not conflict.

64. He agreed with Mr. Bartoš that the machinery of provisional suspension provided in paragraph 6 could offer a remedy where negotiations failed. If the treaty were regarded as provisionally suspended following the failure of negotiations, the rights of the injured party would be protected pending settlement of the issue.

65. Another advantage of that remedy was that it would force the parties to come to terms quickly; the party that was in the wrong would be induced to do so by the suspension of the treaty pending recourse to some means of peaceful settlement. Experience showed that the offending party would not readily admit that it had been at fault. For instance, years after the 1956 invasion of Egypt, the aggressors still would not admit that they had been in the wrong.

66. Mr. YASSEEN said that the formulation of principles should not be subordinated to acceptance of the compulsory jurisdiction of the International Court. The settlement of disputes was a separate problem, which should not hold up the development of normative rules of international law.

67. However, there was a deadlock in regard to article 25, for it dealt with the annulment of treaties when there were conflicting interests. To allow unilateral denunciation or annulment would be to favour the claimant party over the other party. What then should

be done? To require the agreement of both parties for termination or annulment would be to place the claimant party at the mercy of the other party, and that would be equally arbitrary.

68. It therefore became necessary to bring in a third party, as an impartial body to which the dispute could be referred. But while the settlement should not be arbitrarily made to depend on one or other of the parties, the Commission should not on that account take another arbitrary course by making it depend on the acceptance of compulsory jurisdiction. He was not opposed to the Court's jurisdiction — quite the contrary; but he must point out that in the present state of the international order, the majority of States did not seem willing to accept the compulsory jurisdiction of the International Court of Justice.

69. He would not go into detail, but there were sound reasons why most States did not accept the jurisdiction of the Court and why most of those which had accepted it had made reservations that were tantamount to non-acceptance. There was a psychological problem involved; the establishment of precise rules of international law and a more judicious allocation of seats on the Court might facilitate its solution. For example, Iraq had signed the optional Protocol concerning the compulsory settlement of disputes adopted at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities, although it did not generally accept the compulsory jurisdiction of the Court. It was the formulation of clear and precise rules on diplomatic relations which had made it possible for Iraq to accept that jurisdiction in a particular field.

70. In the present circumstances, the Special Rapporteur's draft was preferable to that of his predecessor, which had made the application of the corresponding articles dependent on the acceptance of arbitration or judicial settlement. The present Special Rapporteur suggested recourse to all the means of pacific settlement of disputes mentioned in Article 33 of the United Nations Charter. Inquiry, too, could sometimes be useful, since facts showing coercion or error might be found, and the findings could be used for the benefit of the injured party.

71. He endorsed the Chairman's objection that the machinery provided for in article 25 might in some cases involve imposing the compulsory jurisdiction of the Court, but it was satisfactory to note that the Special Rapporteur had no wish to do so.

72. The Drafting Committee would have the difficult and important task of reconciling three requirements: the solution must not depend on the claimant State; it must not depend on the party interested in preserving the treaty; and compulsory jurisdiction must not be imposed on the parties for the settlement of the dispute.

73. Mr. AMADO said that as the discussion had ranged so far afield, he would like to remind the Commission that, although everyone desired the establishment of a compulsory jurisdiction by which all disputes could be settled, perfection was not of this world.

74. Mr. Tunkin had opened the debate with some very judicious comments on a peculiarly difficult aspect of

the problem. He himself had been extremely interested to hear an exposition of the general principles which mankind rightly aspired to enforce; but the Commission had to solve an urgent problem.

75. Mr. Verdross had shown the way, which was that laid down in the Charter. Article 33 provided that "the parties to any dispute... shall... seek a solution...". But in article 25, paragraph 4 (b) of the Special Rapporteur's draft, the search was abandoned in favour of an offer to refer the dispute to "an impartial tribunal, organ or authority." He therefore proposed that paragraph 4 (a) should be amended to read:

"seek to arrive at an agreement with the other party or parties on the measures specified in the notice or on the means of reaching a settlement of the dispute."

76. Mr. BRIGGS said that he interpreted the provisions of paragraph 4 (b), which were probably the key provisions of the whole article, in the same manner as the Special Rapporteur.

77. Article 25 fell far short of establishing compulsory jurisdiction and to him that was a matter for regret. His own preference would have been for a system like that proposed by the previous Special Rapporteur, under which the State claiming the right to annul, repudiate, denounce or suspend a treaty must offer to submit the matter to an appropriate tribunal to be agreed upon between the parties or, failing such agreement, to the International Court of Justice.³

78. The present Special Rapporteur, however, had not put forward any such system of compulsory jurisdiction, but had included in his article the requirement that the claimant party must show good faith by expressing a willingness to submit the matter to some means of peaceful settlement.

79. He attached great importance to the retention of article 25, even in the absence of a provision for the compulsory jurisdiction of the International Court, since without such an article, the draft on the law of treaties would be of little value and hardly worth submitting to governments.

80. As Mr. Rosenne had pointed out, many of the provisions of the draft articles were in the nature of progressive development rather than codification of international law. In some instances, the draft articles conferred rights of denunciation and unilateral release from treaty obligations which did not at present exist in international law. It was essential that those innovations should be hedged about with safeguards, and that was the purpose of article 25.

81. He was much concerned about the point made by the Chairman, that if a claimant party proposed conciliation the other party could reply that, since the dispute concerned a legal question, it was not willing to accept that mode of settlement, but was fully prepared to submit the dispute to the International Court of Justice. Was that a rejection of an offer? Would a right of unilateral

action by the claimant State follow from such a disagreement on methods of settlement? Some light had been thrown on that difficult question by Mr. Bartoš and Mr. Ago, but one of the main difficulties was the time factor, since negotiations for a settlement might drag on for a very long time.

The meeting rose at 12.45 p.m.

700th MEETING

Friday, 14 June 1963, at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 25 in section IV of the Special Rapporteur's second report. (A/CN.4/156/Add.2).

ARTICLE 25 (ANNULMENT, DENUNCIATION, TERMINATION OR SUSPENSION OF TREATY OBLIGATIONS UNDER A RIGHT ARISING BY OPERATION OF LAW) (continued)

2. Mr. EL-ERIAN said the replies given by the Special Rapporteur to the question put by members had made it possible to isolate those general problems which could only complicate the Commission's work on article 25. It was now agreed that the Commission was not discussing the general question of the settlement of disputes or a final clause on that subject, such as it had discussed in connexion with the draft on arbitral procedure and certain other drafts. Article 25 related to the question of unilateral denunciation of treaties. Some check on unilateral denunciation had to be provided, but in so doing it was essential to avoid getting involved in the question of compulsory jurisdiction by establishing too rigid a procedure for the settlement of disputes.

3. The article was formulated in very general terms. Its provisions applied not only to the unilateral denunciation of a treaty by one of the parties on the ground of a change in the circumstances or a breach by another party, but also to annulment, suspension, and withdrawal on constitutional grounds, fraud, error, coercion, illegality *ab initio* and supervening illegality. The wide range of those provisions made it essential that the rule established should be a flexible one.

4. As he had already had occasion to point out, there was a close relationship between the development of substantive rules of international law and that of methods of pacific settlement of disputes. Neither should be subordinated to the other; the adoption of substantive rules of international law should not be made dependent on a certain formula for the settlement of disputes. But the converse was also true; the settlement of disputes

³ Yearbook of the International Law Commission, 1958, Vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 29, article 23, para. 3.

should not be made dependent on agreement on certain substantive rules. Work on the development of both subjects should be parallel.

5. The problem of methods of pacific settlement of disputes was a complex one and all international lawyers looked forward to the establishment of effective machinery for the purpose. Political realities must be considered, however, as well as the present stage of development of the institutions for pacific settlement. The United Nations Charter contained carefully balanced provisions on the subject, of which Article 33 and the optional clause on the compulsory jurisdiction of the International Court of Justice were particularly noteworthy. Any attempt to interfere with that delicate balance could only be harmful.

6. With regard to the various provisions of article 25, the approach adopted in paragraph 1 was satisfactory; it was inspired by the Hague Conventions and by the approach to the problem of the use of force in the League of Nations Covenant.

7. Paragraph 4 set out the checks on unilateral claims. Sub-paragraph (a) stated that the parties must seek to arrive at an agreement by negotiation, while in the event of failure, sub-paragraph (b) provided that other means of pacific settlement should be tried. The question arose, however, what would happen if no agreement were reached on the choice of method. He did not think it was possible to find a completely water-tight solution; in fact, anything of the kind would probably involve abolishing the right of unilateral denunciation altogether.

8. It had been admitted that, in certain exceptional circumstances, there existed a right of unilateral denunciation after due compliance with certain procedures and with due regard for certain safeguards. If that right were made dependent on agreement by the respondent party, or on adjudication by a particular organ, it would cease to exist for practical purposes.

9. Consequently, he could not accept paragraphs 5 and 6 in their present form and he hoped the Drafting Committee would formulate a more satisfactory text. As the provisions now stood, if matters reached a deadlock, the treaty remained binding — it was not even suspended. During the discussion on the doctrine of *rebus sic stantibus*, Mr. Briggs had suggested provisional suspension subject to definitive judicial determination. In the case of a treaty void for illegality because of a breach of a *jus cogens* rule, paragraphs 5 and 6 as they stood could have the result that the claimant party could not even suspend the operation of the treaty.

10. It would not serve any useful purpose to discuss at great length whether the rule in article 25 constituted an existing rule of law. Both in the Commission and in the two Conferences on the Law of the Sea, there had been an exhaustive discussion on whether the three-mile limit was a rule of international law. The real question was whether it was a good rule or a bad rule, and because the Commission had not settled that question, the task of the Conferences on the Law of the Sea had been rendered more difficult. For the same reason, and particularly because many of the provisions being

adopted on the law of treaties constituted progressive development of international law, the emphasis should not be on what the rules were, but on what the rules should be.

11. Mr. ELIAS said that the discussion had centred largely on the question whether compulsory jurisdiction was acceptable or not. Personally, he would have welcomed a detailed discussion on certain other points which seemed to him equally deserving of attention.

12. One was the implications of paragraphs 1 (c) and 1 (d), while another concerned paragraph 3 and the reasons which, rightly in his opinion, had led the Special Rapporteur to adopt a different approach from that of the previous special rapporteur in the corresponding provision of his draft. A third was the point raised by Mr. Bartoš, to which Mr. El-Erian had also referred, namely, the possible suspension of the treaty pending the settlement of the questions at issue.

13. Paragraph 7 was in the nature of a *sui generis* provision. The principle which it embodied appeared to him unexceptionable, but it would be desirable to examine more closely the proposed formulation, and also the question whether certain qualifications should not be introduced.

14. He noted with concern that important matters of principle were being referred to the Drafting Committee, which was gradually becoming a sort of Executive Committee of the Commission.

15. Mr. TSURUOKA thought it was true to say that all the members of the Commission were in favour of international jurisdiction and recognized the moral and legal principle that no one could take the law into his own hands. He welcomed that unanimity, for a contrary attitude could have disastrous consequences. History offered the example of a case whose consequences had been particularly tragic: the case of Japan, which had formerly been suspicious of any international jurisdiction. Only at the cost of a crushing defeat had it changed its attitude. Since then, Japan had had no distrust of international tribunals, still less of the International Court of Justice. It welcomed, in particular, the permanent presence on the Court of distinguished representatives of the Soviet legal system. It might, moreover, be questioned whether, in the course of their forty years' history, the Permanent Court of International Justice or the International Court of Justice had ever been so partial or incompetent as to warrant distrust. And if they had, it would surely be better to try to dispel such distrust than merely to note it.

16. He agreed with those members who regarded article 25 as the key article of a series of provisions concerning the essential validity of treaties, which offered an effective and at the same time equitable safeguard for the order of conventional international law.

17. He approved of paragraphs 1 and 2, but would make a few comments on them later in connexion with article 24, paragraph 3.

18. He suggested that in the first sentence of paragraph 3, the words "shall be free to carry out", should be replaced by the words "shall carry out"; that amendment would

have the advantage of avoiding the uncertainty which might arise through indecision or inaction on the part of the claimant party; it would also be justified by the principle of estoppel if article 4 was adopted.

19. With regard to paragraph 4, if recourse to international arbitration was accepted, the question of the compulsory jurisdiction of the Court did not arise — in fact it was excluded. Again, in view of the essentially legal nature of the problem, he would prefer, though he would not press the point, that the “impartial... organ or authority” should be confined to arbitration and the Court.

20. Paragraph 4 made no provision for the case in which the claimant party, after the failure of negotiations, did not offer the other party the possibility of recourse to an impartial authority. In his view, the notice ceased to be valid in such a case.

21. Apart from those points, he approved of the Special Rapporteur's text.

22. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the Special Rapporteur and with the majority of the members on the need for a specific article on denunciation procedure. Without an article offering some guarantee of impartial or third party determination of the grounds on which a State sought to invalidate or denounce a treaty, the Commission's draft would be doomed.

23. Whether the proposed rules constituted *lex lata* or *lex ferenda* it was indisputable that the articles adopted at the present session were enlarging or developing the law on termination and invalidity of treaties. That process would inevitably increase and encourage claims from States which were dissatisfied with certain treaties and wished to be released from them. In some cases, that change would be a useful and healthy development, but at the same time there would also be an increase in claims made in bad faith. It was therefore necessary to provide safeguards in order to prevent unfounded assertions, if the Commission wished to avoid encouraging violations of the principle *nemo iudex in causa sua*, which was an existing rule of international law.

24. With regard to the practical provisions to be embodied in the article, he fully agreed with the pragmatic and realistic approach adopted by the Special Rapporteur. He also endorsed the view expressed in paragraph 6 of the commentary that the ideal solution would be to make all cases of invalidity subject either to the compulsory jurisdiction of the International Court of Justice or to compulsory arbitration, but that, having regard to the difficulties which proposals for compulsory jurisdiction had encountered at the Geneva Conference of 1958 on the Law of the Sea, it did not seem possible to adopt that solution. He wished, however, to place on record his own support for the compulsory jurisdiction of the International Court of Justice and compulsory arbitration as the ideal solution.

25. With regard to paragraph 4 (b), on which he had put a question to the Special Rapporteur at the previous meeting (para. 40), it was understood that the Drafting Committee would try to find a text which met that

difficulty. Personally, he must confess that he had not been satisfied with the answers given. In his view, the answer must be based on the provisions of the United Nations Charter, particularly Articles 11, 33 and 36. Article 33 laid down that the parties to any dispute should seek a solution by peaceful means of their own choice. Thus, the selection of the method of settlement had to be made by agreement between the parties and no party was entitled to impose a particular method of settlement which might give it some special advantage. The claimant State was not entitled, under the Charter, to select a particular method of settlement, and paragraph 4 (b) of article 25 should not be interpreted as giving it the right to release itself from its obligations under the treaty if the offer of a particular method were not accepted by the respondent party. On the other hand, neither could the respondent party impose a particular method of settlement which it might regard as more favourable to its own interests. Consequently, the respondent State should not be given, as it was under paragraph 4 (b), the right to reject the offer by the claimant State and to confront the claimant State with the alternative of choosing a method of settlement suitable to the respondent State or remaining bound by the treaty; that would be contrary to the principle of equal rights of States, laid down in the Charter.

26. The theory of the Charter was that every dispute must have what Article 26, paragraph 1, termed “appropriate procedures or methods of adjustment”; in other words, the method selected should be adequate to provide a peaceful settlement of the kind of dispute which had arisen. If a disagreement arose over the choice of procedures, there must clearly be a second round of negotiations for the purpose of agreeing on a method of settlement. Failing such agreement, the parties would have to refer the dispute to the General Assembly or the Security Council, or to the appropriate regional body.

27. There appeared to be a gap in paragraph 4 (b), for it omitted any reference to regional arrangements. That omission could raise *a contrario* doubts regarding the competence of regional bodies, a result which he was certain was not intended by the Special Rapporteur.

28. Article 36, paragraph 3, of the Charter provided that “legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court”, and of course the kind of dispute that could arise concerning the validity or termination of a treaty would, in the majority of cases, be a “legal dispute”. In making that point he was not trying to introduce compulsory jurisdiction by the back door. Article 36 provided that legal disputes should be referred to the Court in accordance with the provisions of the Statute of the Court; that meant that the jurisdiction of the Court must be accepted voluntarily by an *ad hoc* agreement after the dispute had arisen.

29. If a State started a legal dispute concerning the validity or the termination of a treaty, the least that could be required, to enable it to obtain release from the treaty, was that it should be prepared to accept adjudication of the legal dispute by an impartial third party.

Accordingly, he could not agree with Mr. Ago's reply to the question he had asked at the previous meeting (para. 40) that, if the respondent State offered to submit the dispute to the Court only, the claimant State would be entitled to release itself from its obligations. If such an offer was accompanied by an expression of willingness to have appropriate procedure recommended by a competent organ, which might well be the Court, it should not be considered as a reply releasing the claimant State from its treaty obligations.

30. In his opinion, the offer by the claimant State of a particular mode of settlement should be met by the respondent State with an expression of a willingness to have the dispute submitted to the competent organ — the Security Council, the General Assembly or a regional body — for consideration and recommendation of the most appropriate procedure for settlement. That could not be regarded as a refusal and as entitling the claimant State to release itself from its obligations. Such entitlement should only follow if the respondent party showed itself unwilling to submit the dispute to the appropriate mode of settlement.

31. Mr. CASTRÉN said that he agreed with the judicious observations just made by the Chairman. The reason why he had asked to speak again was that article 25 was of such vital importance; the Commission had to take a position on certain fundamental principles of international law and settle questions of great practical importance.

32. The discussion had shown that there were some gaps in the draft and obscurities which might give rise to different interpretations. Although some members were theoretically in favour of compulsory jurisdiction, they nevertheless thought it necessary to be realistic and avoid introducing that method of settlement into the draft. That attitude was understandable and he therefore wished to draw attention once again to the proposal he had made in his previous statement (698th meeting, para. 73): a solution should be sought which was at the same time capable of application in practice and in conformity with the rule of law.

33. As Mr. Yasseen had pointed out, one of the parties to a treaty should not be favoured at the expense of the others, for it was impossible to tell beforehand whether the parties were acting in good faith. Only a neutral and impartial body was in a position to give an objective reply. As the parties had the right to challenge the findings or to reject the proposals of a commission of inquiry, mediation or conciliation, the claimant party was entitled to propose a more effective method, namely, arbitration or judicial settlement, if it wished to press its claim. The other party was in no way bound to accept that offer, but rejection would give the claimant party the right to denounce the treaty or, in some cases, to declare it void. If the other party accepted the offer, there was no problem.

34. There remained the case in which the claimant party was not prepared to resort to arbitration or judicial settlement. It then had no right to denounce or annul the treaty, for such action could lead to anarchy in international relations. Of the alternatives — unilateral

change or maintenance of an existing situation — the *status quo* was to be preferred. That was the position under Article 14 of the United Nations Charter. If the General Assembly itself, the principal organ of the United Nations, could not, against the will of the parties, alter a treaty which had created a situation regarded as unsatisfactory, how could one party to a treaty be given the right to do so?

35. Again, Chapter IV of the Charter, on the pacific settlement of disputes, only laid down that the parties should seek a solution by negotiation and that if they failed to agree the Security Council should recommend more effective procedures. That system might not be satisfactory, but it was certainly preferable to a resort to force.

36. The Special Rapporteur's commentary on article 22, concerning the *clausu a rebus sic stantibus*, showed that although the clause had not usually been rejected in State practice, States had always reacted very strongly against the unilateral denunciation of treaties.

37. Some members had been critical of judicial settlement. But even though the composition of the International Court of Justice, its Statute and its rules of procedure might not meet everyone's wishes, there always remained the more flexible procedure of arbitration.

38. He accepted Mr. Tabibi's proposal that a time-limit be set for carrying out the various acts provided for in paragraph 4.

39. Mr. GROS said he wished to express his opinion on an important problem which had been raised at the previous meeting and which Mr. Tsuruoka had taken up again at the present meeting, namely, the situation regarding acceptance of the jurisdiction of the International Court of Justice.

40. Various reasons had been put forward to explain why the International Court's jurisdiction was at present accepted by only a small number of States; one of those reasons had been its composition. From a purely legal point of view, in the light of Article 26, paragraph 2, of the Statute of the Court, which provided that the Court might at any time form a chamber for dealing with a particular case and that the number of judges to constitute such a chamber should be determined by the Court with the approval of the parties, and in the light of Article 28, it seemed difficult to affirm that one respected the competence and impartiality of all the judges, and at the same time to criticise the composition of the Court; for among the judges the States concerned could certainly find at least three to whom such criticism did not apply. States could decide the composition of the chamber as they wished, and if some of them were both advocates of international jurisdiction and uneasy about the present composition of the Court, it was surprising that Article 26, paragraph 2, of the Statute had never once been invoked since the Court existed. He therefore challenged the explanation that the present position in regard to acceptances of international jurisdiction by States was due to the composition of the Court.

41. The Commission might perhaps succeed in remedying the situation by a different approach to the difficulties.

Admittedly, many States were reluctant to accept the Court's jurisdiction, and several had made important reservations. The French Government's reservation, in particular, had been criticized, but it had since been modified. To anyone concerned with the advancement of international law, it was evident that those problems were constantly evolving. Leaving aside the psychological and political reasons for the situation, with which the Commission was not concerned, it could be said that one of the main legal reasons was the existence of some measure of uncertainty regarding the substantive rules; the other was that in relations between States all matters were not necessarily within the competence of the Court. The latter point had been discussed by the Rapporteur to the Institut de Droit International in 1959.¹

42. That situation was not peculiar to public international law, however. For instance, States had widely different conceptions of day-to-day economic and technical relations, and international commercial arbitration worked satisfactorily between States which managed to agree on the rules of law applicable and the appointment of an impartial judge. The socialist States concluded with foreign firms contracts for the building of factories or supply of goods which included provisions for the settlement of disputes by international arbitral tribunals belonging neither to the socialist State nor to the State of the foreign firm (for example, the tribunals appointed by the Arbitral Institute of the Stockholm Chamber of Commerce). When a dispute was brought before the Stockholm arbitral tribunal it could apply the rules laid down in the contract, and, if there were gaps, the generally recognized principles of commercial law, if the contract referred to them. Thus it was possible to agree both on a judge and on the law applicable in economic relations between States.

43. That was precisely what the Commission was endeavouring to do in public international law for relations between States. It was trying to draw up substantive rules acceptable to all the States in the international community. The first part of the task was to reach agreement on the rules of law. He saw no reason why it should not be possible to make parallel progress on the question of choosing a judge and on that of international commercial arbitration.

44. With regard to article 25, he associated himself with the Chairman's views. It would be inconceivable for a draft by the Commission to go less far than Article 33 of the United Nations Charter. The solution should accordingly be found by bringing article 25 into conformity with the methods of settlement recognized by the Charter.

45. Mr. TUNKIN said that he would not revert to the general problem of compulsory jurisdiction, since it was agreed that there was no intention of introducing it into article 25, whether in the form of compulsory arbitration or of the compulsory jurisdiction of the International Court of Justice. No doubt the Drafting Committee would find a form of words consonant with that idea.

¹ *Annuaire de l'Institut de Droit International*, 1959, Vol. II, pp. 57 ff.

46. Before discussing the provisions of article 25, he wished to refer to the observations made by Mr. Gros. It was sometimes suggested by the advocates of compulsory jurisdiction that they were the real champions of the progressive development of international law, and that those who did not think it advisable to press for compulsory judicial settlement at the present stage of international relations were against such development. But that was not the case. By endeavouring to make the acceptance of judicial settlement a condition for the acceptance of substantive rules of law, the advocates of compulsory jurisdiction, however good their intentions, were acting in a manner detrimental to the progress of international law. Means of peaceful settlement of disputes should be further developed, but the progress of other branches of international law should not be made dependent on the development of that particular branch. Many States did not accept compulsory judicial settlement and had good reasons for that attitude.

47. With regard to the provisions of article 25, it would be an improvement if paragraphs 1 and 2 were shortened. They laid too much stress on such elementary ideas as the requirement that the notice must be in writing.

48. He agreed with the Chairman and Mr. Verdross that paragraph 4 (a) should be redrafted on the lines of Article 33 of the Charter.

49. Paragraph 6 certainly needed amendment, perhaps on the lines suggested by Mr. Tabibi, with a time-limit for carrying out the settlement procedure, whichever method might be chosen. He agreed with Mr. El-Erian that after expiry of the time-limit the claimant party should be entitled to take action, since otherwise the other party or parties would have been placed in an unduly favourable position.

50. If article 25 was to be made generally applicable to all the provisions in the draft it would have to be worded with great care. However, he had understood Mr. Rosenne to suggest that its provisions would apply only in cases in which the voidability and not the voidance of the treaty was at issue.

51. With regard to paragraph 7, he agreed that the provisions of article 25 should not apply if the treaty itself provided for the settlement of disputes arising out of its interpretation or application. That would be fully consonant with certain provisions in Part I of the draft.

52. If article 25 were framed in that manner it would include certain provisions *de lege ferenda*, according to which a claimant party would only be able to act unilaterally after failure to settle a dispute by means jointly agreed between the parties. In the absence of such a procedure the Commission would be driven to provide for some form of compulsory jurisdiction which, as he had said, would be both unacceptable and inadvisable at the present stage.

53. Mr. de LUNA said that although he agreed with the substance of Mr. Tsuruoka's view, he did not think that the words "organ or authority" should be deleted from sub-paragraph 4 (b). As Sir Hersch Lauterpacht had very aptly observed, even if a compulsory jurisdic-

tion should some day come to be universally recognized, it would probably be an illusion to suppose that that would greatly diminish all danger to peace and international security. Compulsory jurisdiction would not ensure effective settlement of the most serious disputes, which were mostly political. He would, therefore, suggest that the provisions of Article 33 of the United Nations Charter should be added to paragraph 4 (b), but that provision should also be made for the settlement of disputes which did not threaten international peace and security, such as a dispute about the termination of a commercial treaty.

54. Sir Humphrey WALDOCK, Special Rapporteur, said there seemed to be general agreement on the need to include in article 25 provisions — though somewhat modified — on the lines of those he had included in paragraphs 4, 5 and 6, but without imposing upon the parties the obligation to refer differences to compulsory jurisdiction. Some members seemed to have come round to that view with regret and would have preferred to go further in the direction of compulsory jurisdiction. As he had explained in the commentary, that had never been his intention, not because he was opposed to the principle, but because the present climate of opinion had to be taken into account. He should also add that his view had not been prompted by any lack of confidence in the International Court of Justice. Admittedly certain international developments might call for changes in the Court, but those were political questions with which the Commission need not concern itself.

55. In seeking to devise procedural checks on a claimant party to prevent arbitrary unilateral denunciations of a treaty, he had been directly inspired by the procedures enumerated in Article 33 of the Charter, but he had not followed that wording exactly because the Article was expressly concerned with disputes likely to endanger the maintenance of international peace and security. His hesitation to do so did not appear to be shared by other members and he was willing to bring paragraph 4 (b) more closely into line with Article 33 and also to make a reference to regional bodies, as suggested by the Chairman, though in fact he had not overlooked that point, which was covered by the reference to an authority.

56. In recognition of the fact that the parties could not be forced to accept a particular means of settling their dispute, he had proposed that the choice should be made by agreement between them.

57. In paragraph 4 he had come up against the classical difficulty confronting anyone drafting a provision on the peaceful settlement of disputes: how an international jurisdiction was to be established. Perhaps in some respects the drafting of article 25 had been a little loose, but that had been partly deliberate. Though it was highly desirable that the parties should arrive at a definite settlement if a claim were contested, that might not always prove possible in practice, and rather than aim at the achievement of a perfect system for the settlement of disputes, the Commission should be mainly concerned to go as far as possible in supplying proper safeguards for the

application of the rules laid down in the draft, which would prevent unilateral denunciations out of hand.

58. Among the kind of eventualities it was not easy to provide for was a disagreement between the parties occurring after some particular means of settlement had been initiated; for example, they might be unable to agree on the terms of a *compromis*. Or it might be difficult to determine whether an objecting State had in fact declined to follow a particular means of settlement or not.

59. He disagreed with the view that either the claimant or the objecting party would be helpless in the event of failure to reach agreement on a means of settling the dispute, because it was always open to either of them to refer the matter to the Security Council or the General Assembly.

60. Nor was it correct to assume, as had been done by some members, that the claimant would necessarily be the injured party. In fact, the claimant might well be trying to force termination on the other party on invalid grounds.

61. While appreciating the reasons why some members wished to set a time-limit in paragraph 6, he pointed out that the procedure for settlement of a dispute might be lengthy and it would be undesirable to introduce a kind of guillotine whereby, if it had not been concluded within the specified period, the claimant State would be entitled to take unilateral action.

62. Contrary to the opinion expressed by some members, who seemed to favour a more or less general right of suspension, he feared that that might encourage claimant States, after making their notification, to raise difficulties about the procedure to be followed for the settlement of the dispute and then at once resort to suspension, after which the possibility of reaching a settlement would be greatly diminished. In paragraph 6 he had provided for a right of suspension, but only by agreement between the parties or in pursuance of a decision or recommendation by the tribunal or authority to which the dispute had been referred. Mr. Castrén had criticised his reference to a recommendation because it might not have binding effect, but that had been inserted to cover cases in which a dispute was referred to the Security Council or the General Assembly.

63. Mr. Rosenne had raised the question of what should be the scope of article 25 and whether it ought to be made applicable to all the rules stated in sections II and III. In fact, he had specified the particular articles because in some cases article 25 might not be applicable: for example, when termination took place in accordance with a right of notice laid down in the treaty itself, though even in those circumstances disputes could arise if the right to give notice of termination were made conditional on the existence of certain circumstances or the occurrence of an event. It might be argued that article 25 was not applicable when the right to terminate was invoked on grounds that the treaty was in conflict with *jus cogens*, because that would render it automatically void in accordance with the view taken by the Commission on article 13, but even such a case might raise serious issues of law because of a difference of opinion as to what

was or was not *jus cogens*. Perhaps article 25 should be made generally applicable to all the provisions in the draft.

64. He had not commented on all of the important points raised during the discussion, but they would be of undoubted assistance to the Drafting Committee.

65. Mr. EL-ERIAN said he wished to dispel any impression that he had argued in favour of an unqualified right to denounce treaties unilaterally. In fact, he believed that safeguards against abuse were very necessary and agreed with the arguments put forward by the Special Rapporteur in paragraph 5 of his commentary.

66. Mr. ROSENNE said he was strongly of the opinion that it was impossible to generalize by contending that disputes over the interpretation and application of treaties were inherently justiciable, either by the International Court, or by arbitration, nor could he subscribe to the view expressed by some members that the ultimate ideal was compulsory jurisdiction by the International Court over every international dispute.

67. The problems of compulsory international jurisdiction and of the composition of a permanent international judicial organ were very perplexing and had troubled lawyers for many years. The pertinent comments of some members about the composition of the International Court were, of course, directed to the problems facing the Security Council and the General Assembly when electing the judges, and not to individuals.

68. Much had been said about the need to examine article 25 in the context of present-day realities, and when the Commission resumed consideration of the article after it had been revised by the Drafting Committee, it would do well to resist the temptation to classify States in a few groups possessing identical aims. In fact, there were many kinds of treaty concluded between different types of State and States in one or other of the groups, and there was no reason to assume that it would necessarily be only new States which would regard themselves as the injured party and wish to terminate a treaty in accordance with the procedure laid down in article 25. The task facing the Commission was to try to balance rights and duties in a general way so as to serve the needs of the international community in all conceivable circumstances and for a long period of time.

69. Mr. TABIBI said he was anxious that his statement at the previous meeting (paras. 55-65), should not be construed as in any way reflecting on the judges or standing of the International Court, which had already made a great contribution to the cause of peace. A memorandum being submitted by Afghanistan to the Secretary-General of the United Nations testified to his Government's belief that the compulsory jurisdiction of the Court should be extended in the interests of the development of international law. What he had wished to point out was that, as at present constituted, the Court did not include enough judges from the countries most likely to be the injured parties in proceedings, who were familiar both with the social and political background against which the cases must be judged, and

with the legal systems applied in those countries. Members of the Commission would not be unaware that the General Assembly had decided to study the position of the International Court.

70. The CHAIRMAN suggested that article 25 be referred to the Drafting Committee in the light of the discussion.

It was so agreed.

71. The CHAIRMAN invited the Commission to revert to section I of the Special Rapporteur's second report (A/CN.4/156) and take up article 3.

ARTICLE 3 (PROCEDURAL RESTRICTIONS ON THE EXERCISE OF A RIGHT TO AVOID OR DENOUNCE A TREATY)

72. Sir Humphrey WALDOCK, Special Rapporteur, explained that the purpose of article 3 was to draw the Commission's attention to the fact that procedural provisions were to be laid down in section IV of his report. That had been necessary because section IV had not been submitted at the same time as sections II and III.

73. Mr. YASSEEN said that article 3 could certainly serve as an introduction to the debate on the articles concerned with the validity of treaties, but as the Commission had already adopted, even if only provisionally, the articles dealing with the appropriate procedure, the article was no longer necessary.

74. Mr. CASTRÉN said he agreed with Mr. Yasseen. The procedural restrictions on the exercise of a right to avoid or denounce a treaty were undoubtedly important, but they were clearly set out in section IV, and it must be assumed, or even required, that States applying an international convention would study all its clauses.

75. Mr. de LUNA agreed with Mr. Yasseen and Mr. Castrén.

76. Mr. ROSENNE said that article 3 was unnecessary, but its contents could be transferred to the commentary on article 2.

It was so agreed.

Reply from Mr. Kanga

77. Mr. LIANG, Secretary to the Commission, announced that a reply had been received to the Chairman's telegram asking Mr. Kanga whether he would be taking part in the Commission's deliberations. Mr. Kanga expressed his regret at being prevented from attending the session as a result of the dates of certain international conferences. He asked to be kept informed of the Commission's progress and expressed his keen interest in its work and in its efforts to promote justice and a better understanding between nations.

The meeting rose at 11.50 a.m.

701st MEETING

Monday, 17 June 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

1. The CHAIRMAN invited the Commission to consider article 4 in section I of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 4 (LOSS OF A RIGHT TO AVOID OR DENOUNCE A TREATY THROUGH WAIVER OR PRECLUSION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 4 dealt with the question of preclusion — the case in which a party having a right to avoid or denounce a treaty disqualified itself by its subsequent acts from exercising that right. The question had arisen in connexion with other articles and the Commission had decided to deal with it when it came to consider article 4.

3. As he had pointed out in the commentary, the rule on the subject had a broader application than the law of treaties. However, the purpose of article 4 was to deal with its specific application to such matters as invalidity on grounds of error and termination of a treaty following upon its breach; perhaps the article was also applicable in connexion with the doctrine of *rebus sic stantibus*. The fact a State remained inactive would, in the cases covered by article 4, entitle the other party to assume that the treaty was still in force. The provisions of the article were intended to prevent a State from suddenly making a claim, after a great many years, for the purpose of evading a treaty it found inconvenient for other reasons.

4. In drafting article 4, he had had some doubts regarding the inclusion of the provisions contained in sub-paragraph (b), which might not work in certain cases. As sub-paragraph (c) was couched in general terms, it would also cover the case dealt with in sub-paragraph (b) if it were decided to drop that sub-paragraph.

5. Mr. PAREDES said that there were a number of points to be considered in connexion with article 4. In the first place, the opening paragraph provided that: "A right to avoid or denounce a treaty . . . shall not be exercisable if, after becoming aware of the fact creating such a right, the State concerned (a) shall have waived the right;". With regard to that paragraph, it should be made absolutely clear that the rule applied only to valid treaties being avoided or denounced on supervening grounds, but not to treaties which were void *ab initio* and had therefore never existed. The latter treaties could not be affirmed or adjusted by any means except the conclusion of a new treaty without the defects of the former one, as had been stated at length during some of the previous meetings.

6. Secondly, the waiver provided for in sub-paragraph (a) was an express waiver, as the Special Rapporteur had pointed out in his commentary; consequently the word "expressly" was needed in the text to prevent it being interpreted as referring to any waiver, even a tacit one. It should also be stated that the waiver could only take effect when there had been a change in the circumstances creating the right, for otherwise a strong State might be able to exert a decisive influence to secure a waiver.

7. He therefore suggested that sub-paragraph (a) be redrafted to read: "(a) shall have expressly waived the right, following a change in the circumstances which gave rise to it;".

8. He thought sub-paragraph (b) was entirely correct, since no one should benefit to the detriment of others. Sub-paragraph (c), on the other hand, was not satisfactory, since its vagueness left the way open for every kind of controversy and the most capricious interpretations: it was always possible to find an act or omission of which to accuse the claimant, in order to refute his claim. The acts or omissions which were sufficient to extinguish the legitimate right, should be more clearly defined.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Paredes' remarks had reminded him of the need to take into account the provisions adopted by the Commission on the subjects of *ius cogens* and coercion; the provisions of article 4 did not apply to those particular grounds of invalidity.

10. With regard to sub-paragraph (c), he did not think it would be wise to attempt to define the law on preclusion more precisely, because it was largely a matter to be decided by the particular circumstances of each case. It would be better, in article 4, to safeguard the right in general terms.

11. Mr. YASSEEN said that in his introductory remarks the Special Rapporteur had brought into relief a point which had remained rather in the background. The principle of the effects of a contradiction between a State's earlier conduct or statements and its claims in an international dispute could be regarded as a general principle of law; it was known and applied in international case-law, as was shown not only by the judgments of the International Court of Justice in the cases of the *Arbitral Award made by the King of Spain*¹ and the *Temple of Preah Vihear*,² but also by many other judgments and arbitral awards.

12. The principle was clearly well founded, and it should be embodied in the draft, for it would prevent disputes and safeguard the stability of treaties. But the necessary particulars should be added, for the scope of the principle extended beyond the limits of the article itself. Its application raised no doubt in cases of error or fraud, but it was not applicable in the case of personal coercion against a State's representative or of pressure on the State itself.

¹ *I.C.J. Reports*, 1960, pp. 213-214.

² *I.C.J. Reports*, 1962, pp. 23-32.

13. The principle was naturally not applicable in the case of a treaty that was void through being contrary to a *jus cogens* rule. The Special Rapporteur was also of that opinion. On the other hand, he did not yet appear to have formed any definite opinion in regard to the principle of *rebus sic stantibus*. That principle was surely one of *jus cogens* and could be invoked whenever the conditions for its application were present. He did not think that preclusion, depending on delay or changes of circumstances, caused a State to lose the right to invoke the principle *rebus sic stantibus*.

14. Mr. Bartoš had asked very pertinently a few days previously whether a State could be blamed for being tolerant; to ask that question was to answer it. In his (Mr. Yasseen's) opinion if, for reasons which might be of various kinds, a State did not, for some time, invoke the *rebus sic stantibus* principle to release itself from a treaty which was no longer in keeping with the realities of international life, it should not on that account be deprived of the right to invoke that principle later.

15. To sum up, he subscribed to the principle on which the article was based, but its scope should be adequately restricted. In his view, the principle could not apply if there was coercion, if the treaty was void or non-existent, or if the *rebus sic stantibus* rule was invoked.

16. Mr. de LUNA said he had some doubts about article 4. With regard to the terminology, the French term "*forclusion*" and the English term "*estoppel*" seemed to have been treated as equivalent, but that was not quite correct. In Roman law countries "*forclusion*" was merely a particular form of "*déchéance*" (lapse), which occurred when the expiry of a time-limit set by the law barred performance. Contrary to the case of *estoppel*, that time-limit was usually made applicable by an act of another person.

17. Sub-paragraph (a), in which the right to avoid or denounce a treaty was extinguished by an explicit waiver, raised no special problems.

18. He would not dwell, either, on sub-paragraph (b) or on the first part of sub-paragraph (c) where the idea of *estoppel* was introduced.

19. But two problems arose in connexion with the second part of sub-paragraph (c): the effects in international law of omission to exercise a right for a protracted period and the effects of "silence" — two concepts which were similar but must not be confused. The result of not exercising the right to denounce the validity of a treaty for a long time was that the right lapsed by virtue of an objective norm of international law.

20. "Silence" might mean several things: indifference, disapproval, or approval. But it was clear that none of those three possibilities was absolute in international law. The true meaning of the silence had to be deduced from the particular circumstances. The main problem in regard to the omission with which the second part of sub-paragraph (c) was concerned, was when and in what circumstances silence should have the legal effect of recognition of the treaty's validity or of a waiver of any future challenge of its validity. Consequently the silence must be a qualified silence to which an objective

rule of international law would ascribe the capacity to produce the results in question. At that point the concept of good faith, the cardinal principle of international law, intervened; hence the maxim *qui tacet consentire videtur si loqui debuisset ac potuisset*, which explained how the principle of good faith applied to such silence.

21. The doctrine therefore required fulfilment of three conditions: knowledge of the event concerning which silence was observed, a legal interest in that event, and the expiry of a reasonable period.

22. The Special Rapporteur was to be congratulated on his draft, but the second part of sub-paragraph (c) should be made more explicit in order to avoid confused situations likely to give rise to disputes. That was all the more necessary because the current trend in international law was to leave as little room as possible for uncertainty and ambiguity.

23. Mr. TSURUOKA said that he supported the ideas set out in article 4, but he had a few comments to make.

24. First, a question of terminology might arise, especially in the commentary, because of the use of the words "*preclusion*" and "*estoppel*". For although the idea expressed in article 4 was generally recognized in international law, to draw on the internal legal systems of particular countries might be a cause of error. It would therefore be better to state the idea explicitly.

25. Secondly, the provisions of the article were intended to apply to some articles in sections II and III, but not to others. In his view, article 4 applied to articles 5, 6, 7, 8 and 11, as adopted by the Drafting Committee, and to articles 20, 21 and 22. On the other hand it did not apply to articles 12, 13, 15 and 16, as adopted by the Drafting Committee, or to articles 17, 18 and 19. That list showed that his views were very close to Mr. de Luna's and somewhat different from those of Mr. Yasseen.

26. With regard to the question raised by Mr. de Luna, he cited the case of an error which was discovered after a treaty had been applied by both parties for ten years; if one of the parties then asked for the annulment of the treaty on the ground of error, unnecessary complications would ensue. That was, of course, an extreme case, but one that must be considered when drafting an article like the one under discussion.

27. The article should therefore be supplemented, if possible, by another paragraph, stating that the rights provided for in the articles he had mentioned were extinguished after a certain time, or alternatively, that after a reasonable period had elapsed the parties could not claim to exercise the rights conferred by those articles. The words "reasonable period" should not cause too much uncertainty for cases of that sort would, finally, be settled by an impartial authority under article 25. But if it was difficult to add a new paragraph, it could be explained in the commentary that the facts creating the rights referred to were usually known without much delay.

28. Mr. CASTRÉN said that, in principle, he favoured the inclusion of a provision on the lines of article 4. Sub-paragraph (a) he accepted without comment. The

other two sub-paragraphs were based in part on the findings of the International Court of Justice in two recent cases, which the Special Rapporteur had tried to generalize.

29. He had, perhaps, gone a little too far, as other members had already pointed out, for there were a number of exceptions that ought to be taken into account. Furthermore, the rules proposed by the Special Rapporteur were open to different interpretations, but for the moment, he had no specific proposal to make.

30. Sub-paragraph (b) should be omitted. The provisions of the article could not be applied as they stood to all the other articles in sections II and III of the draft. It might be better to specify which articles they did apply to. The Special Rapporteur had mentioned some of them in his introductory statement, and Mr. Tsuruoka had listed them, but the list should be discussed carefully as opinions differed on certain points.

31. Mr. VERDROSS said he would speak only on the waiving of rights under a treaty in general. There were two distinct cases: that in which a party waived one or more of the rights deriving from a treaty, and that in which it waived all those rights. In the first case, the treaty remained in force, but in the second it was terminated and ceased to exist. For example, after the 1914-1918 war, Germany had waived all its rights under the Treaty of Brest-Litovsk; it had been declared in a judicial ruling that, as a consequence, the right to denounce the treaty had lapsed.

32. Accordingly, section III should perhaps also deal with the case of a State which waived all its rights under a treaty. That was merely a suggestion for the Drafting Committee.

33. Mr. BRIGGS said he supported the principle embodied in article 4, subject to the exceptions which had been suggested by the Special Rapporteur himself, namely, the omission of sub-paragraph (b) and the non-applicability of the article to treaties which would be void because of violation of a rule of *jus cogens*.

34. With reference to the remarks made by Mr. de Luna and Mr. Tsuruoka regarding the term "estoppel", he commended the Special Rapporteur for not having used that term in the text of the article and urged that the same course should be followed in the commentary. In a recent article Lord McNair had pointed out that "estoppel", in the sense in which the term was understood in the common law systems, was little used in international law. In the case of *The Arbitral Award made by the King of Spain*, in which he had acted as counsel for one of the parties, the French term "*forclusion*", used in an oral statement, had been translated, in the English version of the provisional verbatim record of the proceedings, as "estoppel" — a mis-translation he had been obliged to correct because of the implications of the term to lawyers accustomed to the restrictive rules of English and American law.

35. He could not support the suggestion by Mr. Paredes that the qualification "expressly" should be inserted before the word "waived" in sub-paragraph (a). The intention to waive a right of the type under discussion

could well be implied by the behaviour of the party concerned.

36. Like the Special Rapporteur, he favoured the omission of sub-paragraph (b) but perhaps not for the same reasons. He found its provisions too limited, because they applied only to cases in which a party had accepted benefits or enforced obligations under the treaty. There were cases in which a State should be precluded by its previous conduct or admissions from later adopting a contrary position. The omission of sub-paragraph (b) would necessitate the deletion of the word "otherwise" in sub-paragraph (c).

37. He did not favour the suggestion that sub-paragraph (c) should be made more explicit; there were many acts or omissions on any of which it would be legitimate to base preclusion. The statement of the principle was therefore sufficient.

38. Lastly, he did not support the proposal to delete the words "or omissions". The omission to protest at the appropriate time was one of the points that had arisen in the case of *The Arbitral Award made by the King of Spain*.

39. Mr. ROSENNE said that, under the definition of a treaty adopted by the Commission in Part I, article 1, paragraph 1 (a), a treaty was an international agreement "governed by international law". Many rules of international law therefore came into play in connexion with treaties, so that although the Commission was at present dealing only with the law of treaties and not with other branches of international law, it should take those other branches into account and indicate their particular applications to the law of treaties. The provisions of article 4 were acceptable, since they reflected general rules of international law and attempted to apply them to the law of treaties.

40. In the opening sentence of the article, the term "fact" could hardly be taken as meaning any fact, however insignificant or remotely related to the matter under discussion; it should be understood in the sense in which it was used in article 61 of the Statute of the International Court, where it had to be of such a nature as to be a decisive factor.

41. Sub-paragraph (b) dealt with two entirely different aspects of the application of the general principle to the law of treaties. The second part, which referred to the enforcement of obligations under the treaty, was particularly useful and should be retained; he had been surprised to hear the Special Rapporteur suggest that the whole of sub-paragraph (b) could be dropped.

42. He had some doubts about the provisions of sub-paragraph (c), which was in a sense an attempt to codify the general law of evidence in international law. He suggested the deletion of the words "by its own acts or omissions" and also of the words "as against any other party or parties". It was a matter for determination in each individual case whether the general principle was applicable and how far it was applicable.

43. The greatest care would therefore be needed in drafting the provisions of article 4. The Drafting Committee should consider retaining the second part of

sub-paragraph (b) and continuing it with sub-paragraph (c), omitting the word "otherwise" and the passages he had suggested should be deleted.

44. It should be made clear that article 4 applied only to the matters dealt with in Part II; he could not agree to its application to any of the matters dealt with in Part I, such as the law of reservations and the exercise of depositary functions. He attached particular importance to that point because of the broad wording of paragraph 2 of the commentary.

45. He reserved his position regarding the use of the term "essential" before the word "validity" in sub-paragraph (c), for the reasons he had given at the 676th meeting (paras. 8-10).

46. As to the scope of the article, its provisions should apply to cases in which denunciation was permitted, but not to cases in which the treaty was void *ab initio*; perhaps they should also apply to the suspension of a treaty or part of a treaty.

47. With regard to procedure, the Commission should consider whether the waiver mentioned in sub-paragraph (a) must be a formal waiver brought within the scope of article 4 of Part I, or whether an implicit waiver should also be recognized; it seemed that cases of implicit waiver were covered by sub-paragraphs (b) and (c), while sub-paragraph (a) related to express waiver.

48. Referring to the question of terminology, he said that "preclusion" and "estoppel" were technical terms which had different meanings in different legal systems, sometimes connected with the peculiarities of the law of evidence. The practice of the International Court, however, and contemporary doctrine, showed that international lawyers tended not to give any technical connotation to those terms, but used them indiscriminately, giving both of them the same meaning in international law. He therefore favoured the use of the term "preclusion" in the text of the article, but had no objection to the term "estoppel" being used in brackets in the commentary after the corresponding French term. Neither term should be defined in any detail.

49. Mr. AGO observed that article 4, the principle of which was generally accepted by the Commission, might present a few minor drafting problems but no serious problems of substance. His comments were therefore addressed mainly to the Drafting Committee.

50. One member had criticized the term "fact" in the third line. Clearly, it must not be divorced from its context; it must be a "fact" sufficiently serious to give one party the right to avoid or denounce the treaty. Perhaps the plural would be more appropriate; the singular 'was appropriate enough in the case of fraud, error, or resort to force, but less so in other cases. That was a difficulty which the Drafting Committee would have to resolve, possibly using different terms.

51. With regard to sub-paragraph (a), he agreed with those members who considered it preferable not to speak of an express waiver; for the waiver might be inferred from the conduct of a State. But it should perhaps be specified that the waiver must be valid and

freely given. For example, if a State had been induced by force to conclude a treaty, it might happen that its waiver of the right to plead defective consent by reason of the use of force had also been secured by duress. In such a case, the waiver was itself vitiated and did not entail loss of the right to claim that the treaty was void.

52. Like the Special Rapporteur, he thought it would be better to combine sub-paragraphs (b) and (c). The acceptance of certain benefits under the treaty, like the enforcement of obligations under it, was only an example of acts or omissions which debarred the party concerned from claiming that the treaty was void. The two sub-paragraphs in question could accordingly be replaced by a single clause covering that idea.

53. To avoid the use of terms such as "estoppel" or even "forclusion", he suggested the wording: "shall have acted, or refrained from acting, in a way which debars it from asserting that the treaty lacks essential validity or, as the case may be, that it is not still in force". That wording would meet every possible case, would avoid the use of a term of doubtful meaning, and would emphasize that the essential element was, precisely, the fact that the State's own conduct conflicted with the plea of nullity of the treaty.

54. The principle underlying article 4 was perfectly acceptable, and he therefore proposed that the text of the article should be referred to the Drafting Committee for redrafting in more precise language.

55. Mr. ELIAS said that all members agreed that the principle embodied in article 4 was generally acceptable.

56. Some definite decision should be reached, however, concerning the terms "preclusion" and "estoppel". Unless the term "estoppel" was used, article 4 would not have, for lawyers of the common law systems, the precision which its importance required. If a precise term of English law were replaced by some general descriptive term the draft would be unsatisfactory and vague. The texts in the various languages should refer to doctrines with which their respective readers were familiar. Terms should be used in their accepted sense so that their meaning was clear to lawyers of the Common Law systems reading the English text, and to civil lawyers reading the other texts.

57. The question whether the rule in article 4 was a rule of substantive law or a rule of evidence was not of any great importance because, in English, the term "estoppel" had been defined as a rule, not necessarily a procedural rule, which precluded a party from making a claim that was in contradiction with its own previous representations or conduct. The question of the nature of the rule, would, however, affect the placing of article 4; if it was a substantive rule, the article was in its right place in section I, but if it was a purely procedural rule, the article should be moved to a position near articles 22 to 25.

58. Since the rule was one of general application, it was appropriate to restrict it in the manner proposed by the Special Rapporteur in article 4. The scope of its application still remained to be determined. The

Special Rapporteur had rightly pointed out that it did not apply to cases of invalidity on grounds of coercion or of conflict with a rule of *jus cogens*, and Mr. Yasseen had suggested that it would not apply in *rebus sic stantibus* cases; perhaps there were other cases as well.

59. With regard to the suggestion that sub-paragraphs (b) and (c) should be combined he agreed with Mr. Briggs that sub-paragraph (b) and the word "otherwise" in sub-paragraph (c) should be deleted. The case envisaged in sub-paragraph (b) was only a particular instance of the general principle stated in sub-paragraph (c).

60. The article should be redrafted in the form of two separate paragraphs, the first dealing with estoppel and the second with the question of waiver covered in sub-paragraph (a).

61. Mr. TUNKIN said he found the draft of article 4 generally acceptable, though its precise formulation presented considerable difficulties. For example, as Mr. de Luna had rightly pointed out, there could be different forms of silence on the part of a State.

62. Sub-paragraph (a) raised no important problems.

63. Perhaps there was some advantage in retaining sub-paragraph (b) as a useful illustration of the kind of situation in which the right to avoid or denounce would not be exercisable, though it must not be drafted in such a way as to lend itself to excessively wide interpretation. It was conceivable that a State, though aware of the existence of the right to avoid or denounce a treaty, might be unable to avail itself of that right because of certain special circumstances.

64. As to terminology, it would be undesirable to refer, even in the commentary, to the principle of estoppel, which was peculiar to Anglo-Saxon municipal law. It was inappropriate to apply to international law, which was formed in a different manner and for a different purpose, concepts belonging to municipal law. In that connexion, Judge Alfaro had made some enlightening comments in his separate opinion on the case concerning the *Temple of Preah Vihear*, in a passage which read:

"However, when compared with definitions and comments contained in Anglo-American legal texts, we cannot fail to recognize that while the principle, as above enunciated, underlies the Anglo-Saxon doctrine of estoppel, there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features of the municipal system. It thus results that in some international cases the decision may have nothing in common with the Anglo-Saxon estoppel, while at the same time notions may be found in the latter that are manifestly extraneous to international practice and jurisprudence."³

65. Article 4 would only be acceptable if, as the Special Rapporteur had already agreed, it were not made appli-

cable to treaties terminated on grounds of conflict with *jus cogens* or concluded under duress.

66. Mr. BARTOŠ said that if the principle underlying the text submitted by the Special Rapporteur were accepted, the first question which arose was that of the overriding force of *jus cogens*: should acts committed by States in breach of *jus cogens* rules be disregarded?

67. He approved of the introduction of the principle of "estoppel", though he was not quite sure that the French word "*forclusion*" was its exact equivalent. The principle was based on good faith and its effect was to debar a party which had waived its rights under a treaty and shown itself satisfied with the situation created, from deciding at some particular time to claim a ground for avoidance which it had known of but had not previously invoked.

68. First of all, waiver of the right to denounce a treaty needed to be defined; as Mr. Ago had pointed out it must be freely expressed, and he himself would add that it must be conscious, for even a tacit waiver could be recognized.

69. If a State had waived its right to avoid or denounce a treaty, could it claim that right later? Apart from *jus cogens* rules, there were some cases in which a question of international ethics might be involved. A party to a treaty which had freely waived its right to denounce the treaty, could hardly afterwards plead some ground of nullity to justify a denunciation.

70. Sub-paragraph (b) raised a practical problem. Disputes had arisen in the past over the question whether benefits under a treaty had been accepted as such because they were provided for in the treaty, or whether they were the result of an obligation under a general rule of law. In particular, could certain clauses of a treaty be regarded as void separately? If a party to a treaty had accepted benefits under some of its clauses which were not void or voidable by reason of error or on any other ground and were therefore not in dispute between the parties, was that party debarred from exercising the right to ask for the annulment of the treaty? That question was closely bound up with the question of the severability of the clauses of a treaty for the purposes of denunciation.

71. As Mr. Tunkin had pointed out, a concatenation of circumstances might make it hard for a party to stop implementing an invalid treaty as soon as it became aware of the reason for its invalidity. Consequently, the fulfilment of obligations under a treaty could not be said invariably to bring the rule of estoppel into operation. The same question arose in connexion with the *rebus sic stantibus* rule. A State might, for instance, continue to implement a treaty despite a change in the circumstances, because it was trying to find means of preserving the contractual relations created by the treaty. Should it then be penalized for not having denounced the treaty immediately on becoming aware of the change in circumstances on which it could have based a plea of *rebus sic stantibus*?

72. The meaning of the terms "act" and "omission" must be defined. The drafting of an article such as

³ *I.C.J. Reports*, 1962, pp. 39 and 40.

article 4 called for great caution. The history of diplomacy showed that States had sometimes overlooked defective consent to a treaty and discussed its interpretation, but its validity had subsequently been contested. Even if it could be established that a State had been aware of the ground for avoidance, could its forbearance be regarded either as a waiver of its right to denounce or as a case in which the principle of estoppel applied? That was a difficult question in international law, and even in municipal law the courts were not always inclined to accept the rule of estoppel unreservedly. United States case-law had, in some cases, drawn a distinction between a waiver in the strict sense and mere toleration.

73. The question was whether the Commission wished to introduce the principle of estoppel into its draft in its entirety, or whether it wished to make that principle, which was a rule of equity rather than a rule of law, even stricter in international law than it was in municipal law. If so, it should ascertain to what extent the principle could be applied in the law of treaties.

74. Provided that *jus cogens* was fully respected, he thought the Special Rapporteur's draft could well be included in a convention on the law of treaties, but it needed recasting to make it applicable in practice.

75. Mr. LACHS said that on the whole he agreed with the principle underlying the article and considered that it should be embodied in the draft. His observations would be mainly concerned with how it ought to be formulated, though he would touch on the extent to which such a principle had relevance to the law of treaties.

76. He questioned whether the term "to avoid" which to the best of his belief, had no legal connotation in the context, should appear in the title of the article.

77. Sub-paragraph (a) embodied a generally recognized principle and was acceptable.

78. He agreed with Mr. Elias that the content of sub-paragraph (b), whether it was combined with sub-paragraph (c) or not, should be retained, because it described the most typical way in which States manifested their relationship under a treaty, though some thought would have to be given to the point raised by Mr. Bartoš as to how it would apply if there was any question of the severance of certain provisions of a treaty. There had been instances of States deriving every possible benefit from a treaty and then attempting to denounce it when the time came to fulfil the obligations it imposed. That kind of action must certainly be prevented if the treaty had been freely entered into.

79. Sub-paragraph (c) would have to be carefully drafted and in particular it would be necessary to arrive at a narrower conception of silence than that favoured by Mr. Ago. He agreed with Mr. de Luna that the silence of a State could be open to many different interpretations.

80. He hoped that the reference to essential validity could be omitted, since otherwise a definition would have to be given.

81. Mr. CADIEUX said he agreed with the Special Rapporteur's estimate of the value of sub-paragraph (b),

for three reasons. First, the general principle stated in sub-paragraph (c) covered the two examples given in sub-paragraph (b). All that was needed was appropriate wording. Secondly, if the two examples given in sub-paragraph (b), were retained, it would be necessary to make provision in the draft for a number of special cases, which might cause fairly serious difficulties. For example, it would be necessary to specify how long a party could continue to accept benefits under a treaty while seeking possible grounds for avoiding it. Thirdly, the reference to benefits under the treaty raised the question of the distinction between its essential and its secondary provisions, which involved a whole series of other problems.

82. The relationship between article 4 and the provisions concerning cases in which a party was automatically entitled to plead the nullity of a treaty should also be defined. It would accordingly be better not to make the wording too precise.

83. It was hard to decide in advance in what cases the principle of good faith could be introduced. Sub-paragraph (c) should therefore be drafted in general terms, without specifying particular cases.

84. The CHAIRMAN, speaking as a member of the Commission, said that he favoured the inclusion of article 4. The difficulties to which sub-paragraph (b) had given rise might be overcome by using the words "invokes the treaty either for the purpose of claiming rights or of enforcing obligations", which appeared in the second sentence of paragraph 4 of the commentary.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that there seemed to be general agreement on the idea underlying article 4 and on the need for such a provision in the draft.

86. With regard to terminology, it was perhaps necessary to point out that some judges of the International Court and some continental lawyers seemed to favour the Anglo-Saxon term "estoppel", although Judge Alfaro had avoided technical terms as not being appropriate in an international context. English lawyers frequently used the word "preclusion"—a more general term which embraced estoppel and probably something more. For Anglo-Saxon lawyers estoppel had a more technical and narrower connotation, which ought perhaps to commend itself to some members of the Commission. He had followed the language of the International Court in the *Temple* case when using the word "precluded" in the text of sub-paragraph (c), and had thought that it was general enough to be unobjectionable. However, article 4 could be drafted in general terms more on the lines contemplated by Mr. Ago, without using words that had a special connotation in particular systems of municipal law. He had never intended to introduce the Anglo-Saxon concept of estoppel, and had only mentioned it in parenthesis in the commentary.

87. It was generally agreed that the application of article 4 should be restricted to certain specific articles in the draft. It would have to be made clear, if there were any obscurity in the present wording, that the

State had acted in full awareness of the fact creating a right to denounce; otherwise the provisions of the article would not apply.

88. Mr. AGO had criticized the use of the term "fact" in the opening sentence of the article, but that was perhaps a matter of drafting and could be dealt with by the Drafting Committee.

89. Most members seemed to have rejected the suggestion that sub-paragraph (a) should be confined to express waivers, on the ground that that would be unduly restrictive because of the possibility of clearly implied waivers. On the other hand, he thought it would be appropriate to stipulate, as Mr. Ago had suggested, that the waiver must have been freely made.

90. He was not sure whether the Chairman's suggestion for redrafting sub-paragraph (b) would remove all the difficulties. He himself had suggested incorporating sub-paragraph (b) in sub-paragraph (c) for the same kind of reason as that given by Mr. Bartoš. As at present worded, sub-paragraph (b) might not always meet the case; for example, when there was some question of the severance of certain provisions. He had also been troubled by the kind of situation that could arise if there had been a breach of a treaty, when it would be clearly unreasonable to deprive a State of the right to denounce because it had tried to induce the other party to fulfil its obligations under the treaty. Thus some qualification of the wording used in sub-paragraph (b) would appear to be necessary. Perhaps some more general formulation could be devised by the Drafting Committee, combining sub-paragraphs (b) and (c).

91. As far as sub-paragraph (c) was concerned, he would have been content to retain the word "precluded" but if it was not generally acceptable, some other formulation might be devised to express the principle applied by the International Court in the *Temple* case and in the case of the *Arbitral Award made by the King of Spain*, as well as that emphasized by Judge Alfaro in his extremely interesting separate opinion. Again the matter was largely one of drafting.

92. An objection had been made to the reference to "essential validity" in sub-paragraph (c); the expression did appear in the title of section II and should be self-explanatory, but it could be replaced by an indication of the provisions to which article 4 related.

93. The point made by Mr. Verdross about the renunciation of certain rights under a treaty had come up during the discussion of some of the articles in section III concerning termination, and would have to be left aside for consideration at a later stage.

94. The CHAIRMAN suggested that article 4 be referred to the Drafting Committee in the light of the discussion.

It was so agreed.

The meeting rose at 6 p.m.

702nd MEETING

Tuesday, 18 June 1963, at 10 a.m.

Chairman: Mr Eduardo JIMÉNEZ de ARÉCHAGA

Succession of States and Governments: Report of the Sub-Committee (A/CN.4/160)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Chairman of the Sub-Committee on Succession of States and Governments to present the Sub-Committee's report (A/CN.4/160).

2. Mr. LACHS, Chairman of the Sub-Committee on Succession of States and Governments, said that the Sub-Committee had held a few preliminary meetings during the Commission's fourteenth session and had met again in January 1963. It was in compliance with the Commission's instructions of 26 June 1962 that he now submitted the Sub-Committee's report.

3. The results of the Sub-Committee's work were set out in the conclusions and recommendations contained in paragraphs 5 to 18. The Sub-Committee had reached its conclusions after very thorough discussion based on memoranda submitted by a number of its members. Before agreement could be reached, certain issues of substance and procedure had had to be settled.

4. The first of those issues had been whether succession of States and succession of governments should be treated as one topic or as two, and in the latter case, which should receive priority. It had been unanimously agreed that special attention should be given to problems arising out of the birth of new States and that issues connected with succession of Governments should be examined only in so far as was necessary to complement the study of what was regarded as the main subject. The Sub-Committee had then proceeded to consider the headings under which the subject should be studied, and from the much larger number originally contemplated, had reduced them to three. It had also made a detailed breakdown of the subject comprising four aspects. Special attention had been devoted to succession in relation to treaties and members of the Sub-Committee had dwelt at length on the general issue of universal and partial succession and on the types of treaty involved. The Commission's objective had been defined, in paragraph 8, as a survey and evaluation of the present state of the law and practice on succession, and the preparation of draft articles having regard to new developments in international law.

5. The Sub-Committee had also made certain procedural recommendations for co-ordinating the work of the Special Rapporteur on State succession and that of the Special Rapporteurs on the law of treaties, State responsibility and relations between States and inter-governmental organizations.

6. The Sub-Committee was grateful to the Secretariat for its valuable studies: "The succession of States in

relation to membership in the United Nations" (A/CN.4/149), "The succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (A/CN.4/150) and the "Digest of decisions of international tribunals relating to State succession" (A/CN.4/151). He hoped that, with the material that would be forthcoming from Governments in response to the requests addressed to them, further studies would be prepared by the Secretariat for 1964.

7. On all the issues to which he had already referred, the Sub-Committee had reached its decisions unanimously; there had, however, been differences of opinion on two points. The first was mentioned in paragraph 7 of the report and was merely a question of emphasis; the second, mentioned in paragraph 14, related to adjudicative procedures for the settlement of disputes. At its tenth meeting, held on 6 June 1963, the Sub-Committee had decided to leave the report as it stood.

8. He had unfortunately been prevented from attending the meetings held by the Sub-Committee in January 1963, when the work had been most ably directed by Mr. Castrén, the Acting Chairman. He thanked all the members of the Sub-Committee for their constructive co-operation.

9. There was no need to dwell on the importance of the topic of succession of States; it involved serious issues of the substitution, continuation, change and extinction of rights and duties. He was confident that the report he had presented would assist the Commission in dealing with the topic.

10. Mr. CASTRÉN praised Mr. Lach's report which was perfectly clear and complete. As the Commission could see, the Sub-Committee had not expressed any opinion on questions of substance; it had only produced a draft general plan of work outlining the scope of the subject and the approach to it, the objectives, questions of priority and the connexion between State succession and other subjects on the Commission's agenda. In conformity with its terms of reference, it had paid special attention to problems concerning the new States and to the development of international law in the matter of State succession. Opinion had been divided on some points and the future Special Rapporteur would have to consider whether the controversial issues should be examined.

11. Mr. VERDROSS, after congratulating the Chairman and Acting Chairman of the Sub-Committee on their work, said he would make only two comments. First, he considered that the work should be confined to succession of States, to the exclusion of succession of governments; for when governments changed, the State's international personality did not change, nor did its rights and duties. The problem of State succession arose only if a State ceased to exist or if a territory passed from one State to another. In the case of succession through revolution there might of course be analogous problems, but the analogy was remote and such cases should be studied separately.

12. Secondly, the problem of succession of States, which had been placed on the Commission's agenda on his own proposal, was the most controversial in general international law. For there was no continuous practice; the cases which had occurred were so different that it was difficult to find general rules, though admittedly it might be said that there were few established rules in international law. In that field more than in others, the future special rapporteur and the Commission would accordingly have to work on *lex ferenda* and find reasonable solutions that met the needs of modern international society.

13. Mr. EL-ERIAN said that he had already expressed his views on the substance on the topic of State succession during the meetings of the Sub-Committee; he would now comment briefly on the Sub-Committee's work. It was particularly encouraging and gratifying to note that the Sub-Committee had reached unanimous agreement on all questions, with the exception of one question of emphasis and one of procedure. It was his understanding that the Sub-Committee's conclusions constituted, to quote the words of Sir Humphrey Waldock during the discussion of the report of the Sub-Committee on State responsibility, "a general directive rather than a strait-jacket for the future Special Rapporteur" (686th meeting, para. 41). Sir Humphrey had added that his own experience was that thorough consideration of a topic was apt to reveal points which had not previously been contemplated. Those words applied equally well to the report on State succession. It was understood by all that the Sub-Committee's report was only a preliminary study and that the final form of the work would have to await a more detailed examination of the subject.

14. He would welcome the appointment, as Special Rapporteur, of Mr. Lachs, the Chairman of the Sub-Committee on Succession of States and Governments.

15. Mr. AGO congratulated the Sub-Committee on the excellent report before the Commission, and said that its preparatory work would facilitate the Commission's task. It was not possible to discuss the programme of work in detail at present, so he would confine himself to some immediate reactions on reading the report.

16. He fully approved of what was said about the scope of the subject and the approach to it, and the need to pay special attention to problems arising as a result of the birth of such an impressive number of new States. The problem of State succession had never been so important before, so far as its scope was concerned, but for all that he could not fully endorse Mr. Verdross's opinion. In its present-day form, the problem was perhaps not so very different from what it had been in former times.

17. Indeed, he was not at all sure that there had been any period in history during which the problem of State succession had not arisen at all. The history of the last two centuries was characterized by constant territorial changes, and hardly showed any long period that was free from problems of State succession. Before

stating that the Commission's work should be mainly *de lege ferenda*, it was therefore essential to go deeply into past practice. He was glad to note the Sub-Committee's proposal that the Secretariat should prepare a preliminary digest of State practice; that would bring out the elements of the existing situation. The Commission would then be able to do whatever was necessary in regard to the creation of new law.

18. With regard to questions of priority, he approved of the Sub-Committee's recommendation; he also thought it important to avoid overlapping, and gave two examples. Sub-paragraph (b), *ratione materiae*, (paragraph 15 of the report) contained a reference to torts; there might indeed be a problem of succession of States relating to a matter of international responsibility. On the other hand, in the application of the rules governing State succession there might be breaches of international obligations concerning the succession of States from which problems of responsibility might arise. Because the two topics were inter-related, he welcomed the Sub-Committee's proposal concerning close contact between the special rapporteurs.

19. The broad outline in paragraph 13 seemed to cover the whole of the subject-matter, but it might be questioned whether the order was logical, in particular that of items (i) and (ii). He quite understood that for practical reasons succession in respect of treaties had been put first, but from the point of view of system, the problem of succession in respect of rights and duties deriving from general rules of international law should have priority. In addition, it might be advisable at a later stage to distinguish between succession in respect of rights and duties resulting from general rules, and succession in respect of rights and duties deriving from very special sources, such as an international award.

20. The detailed breakdown of the subject contained some very interesting suggestions, but they, too, should be regarded as very general and provisional.

21. With regard to the origin of succession (paragraph 15 (a)), he doubted whether there were really any rules to be established; was it not rather a theoretical and systematic description of the difficult cases in which succession might occur that was required?

22. Some reservations might also be entered in regard to the *ratione materiae* section, where the list began with "treaties", which was hardly consistent with a distinction based on the rights and duties in question.

23. There were problems of succession which related to the substitution of one State for another in respect of truly international rights and duties, but there were others which related rather to the internal legal order of the new State — public property, nationality, and so on. That distinction should be made clearer.

24. In paragraph 15 (d), which concerned territorial effects, the distinction drawn was not very clear; no doubt it would become clearer when the subject was discussed.

25. Sir Humphrey WALDOCK said that he did not wish, at that stage, to comment in any detail on the

excellent report which had just been submitted — a report which gave the Commission the assurance that it would be able to carry out satisfactory work on a most difficult topic.

26. He agreed with Mr. Ago that the Commission should not, at the very outset of its work, try to persuade itself that it was dealing with a subject that was really quite different from what it had been in the past. There was a great deal of previous practice on State succession and the essential problems that now had to be faced were the same as they had been before. Of course there were some new aspects and a new spirit in international relations, and those matters would be taken into account in formulating the principles of State succession, but it would be wrong to regard what had happened in the past as no longer germane to the subject.

27. The topics of State succession and the law of treaties overlapped at a number of points. One was the not very important question of the extinction of a State; that was hardly likely to raise any major problems. Another was the articles on the application of treaties, which he would be submitting to the Commission at its next session, in particular the provisions on the territorial application of treaties, which touched upon State succession. His understanding was that, for the purposes of his next report, as, indeed, of the report which he had submitted at the present session, he must reserve for the Special Rapporteur on State succession all questions which were essentially concerned with that subject.

28. There were some points, however, on which co-ordination would be necessary. For example, he understood that the Sub-Committee on Succession of States and its Chairman had considered that, in connexion with State succession, it might be necessary to draw a distinction between various kinds of treaties — a distinction which the Commission had so far tried to avoid. Some co-ordination would therefore be necessary if the reports on the two topics were not to be out of line with one another.

29. The Commission would also have to arrange its future programme so as to allow for the possibility of having to reach decisions on the subject of succession to treaties before it had completed its work on the law of treaties, but it had ample time to do so as he would be submitting a further report at the next session and it would be some time before government comments were received. It was desirable that the question of succession to treaties should, in the interval, have reached an advanced stage before a decision was taken on the report on the Law of Treaties.

30. The report before the Commission was a valuable document which would be of great assistance to all concerned with the subject of State succession and would provide an excellent basis for the Commission's work.

31. Mr. BARTOŠ said that he had been a member of the Sub-Committee and had taken part in drafting its report, which he approved without reservation. He would like, however, to comment briefly on the exchange of views between Mr. Verdross and Mr. Ago. It was true

that *historia magistra vitae est*, but in history, as in all the social sciences, rules were not always absolute, because of the constant change in circumstances and conditions. Realities must not be ignored, but the international order, international *jus cogens*, had undergone so many changes that the nineteenth and the early twentieth century could not always be accepted as the only guide.

32. It was true that the emancipation of Latin America, the unification of Italy and Germany and the dissolution of the Austro-Hungarian and Ottoman empires had supplied so many examples and solutions in matters of State succession that they could not be overlooked. On the other hand, what had formerly been no more than political aspirations had since become rules of law. For example, the principle of nationhood had been transformed into the right of self-determination. Similarly, continuity and changes in the social order had formerly been bound up with established rights. Today, the political and social situation was such that, without abandoning what practice had confirmed, it was necessary to work out rules and solutions in keeping with the various existing situations. In their studies on State succession, the future special rapporteur and the Commission should accordingly devote much of their time to drafting provisions for the progressive development of international law.

33. In his own statements in the Sub-Committee he had spoken of treaties only in connexion with the emancipation of colonial peoples, but the special rapporteur and the Commission would have to solve many other important problems, both legal and political, and their task would not be easy. Naturally, their first duty would be to study the past, if only to discover how far it was possible to adopt, or necessary to abandon, what it offered in order to satisfy the real needs of the present international community.

34. Mr. YASSEEN congratulated the Sub-Committee on its report, which would provide a starting point for the future special rapporteur. He would confine himself to a few general comments. The report quite properly suggested that succession of States should be treated separately from succession of governments. He also approved of the proposal that the Special Rapporteur on succession of States should be entrusted with the important problem of succession to treaties.

35. In consequence of the phenomenon of decolonization and the emancipation of peoples in general, succession of States had acquired the greatest importance. It was debatable whether rules on the subject should be based solely on existing practice, or whether new conditions should also be taken into account. As Mr. Bartoš had said, there were some rules which must be studied and identified, if only to determine whether they were still applicable. But it was difficult to take rules applicable to former situations and apply them forthwith to a new phenomenon. Decolonization presupposed the existence of a strong party and a weak party. International Law was no longer what it had been in the past; the strong State could no longer impose its views, for it was required to respect the principles laid down

in the United Nations Charter; force was no longer a legitimate instrument of national policy.

36. It might be asked whether the Commission should aim at drafting a multilateral convention or a code on State succession. He himself would prefer a general convention, for it was necessary to safeguard the interests of weak States — former colonies and former mandated territories or protectorates.

37. Succession of States, especially in the sphere of decolonization or the emancipation of peoples, could give rise to unequal treaties concluded between parties which were unequal both in fact and in law. That inequality was shown by differences in legal status such as those between a colonizer and a colony, a mandate holder and a mandated territory or a protecting Power and a protectorate. A general convention on succession of States should, above all, prevent such inequality from leading to abuses or the exploitation of weak States by means of bilateral treaties.

38. Mr. de LUNA said that a significant change had taken place in the nature of the problem of succession of States and governments. The Latin American States, for example, on gaining their independence, had not adopted in international politics a totally different conception from that of their former metropolitan State, in other words, the conception of international law which had prevailed at the time.

39. But that was not exactly the case today, for international law had become more universal and, as Mr. Yasseen had said, the emancipation of the new States had produced new phenomena — recognition of the principle of the sovereign equality of States, of the right to self-determination which, incidentally, had older origins, and of the right to natural resources and economic independence, the outlawing of war and the concept of peaceful co-existence. When the Sixth Committee had wished to discuss peaceful co-existence in 1961, a large number of States had declined to accept the term, which, they claimed, had undesirable political overtones. But now the situation had changed. International law was clearly tending towards social justice among all nations. True, the old law of State succession, which had followed the private law rules of succession because the State had been regarded as the monarch's property, need not be rejected in its entirety. But nascent and as yet uncertain rules must be clarified, and there must be no hesitation in proposing the rules which the international community would need in the future. Both should be judged according to how they served the interests of the international community.

40. The CHAIRMAN, speaking as a member of the Commission, congratulated the members of the Sub-Committee on their valuable memoranda, which had helped to produce an admirable report. He was particularly interested in the method of work adopted by the Sub-Committee, which should prove useful both to the Commission and to scholars generally.

41. He agreed that priority should be given to the question of succession of States to treaties; in that connexion the excellent study by Mr. Bartoš was very

thought-provoking. He wished, however, to utter a word of warning, based on Latin-American experience. It was understandable that the initial reaction of a newly independent State should be to repudiate utterly all treaties entered into by the former metropolitan country. But after a century of independence, it had begun to be realized in Latin America that not all treaty inheritance was damaging; many of the treaties entered into by the old Spanish empire with other States in order to protect its possessions were now being invoked by the Latin American countries themselves in order, for example, to confirm historic rights over waters, rivers, territories and other forms of state domain. He did not know whether the same conditions applied in the new States, but if so, Latin American experience warranted advice against total repudiation.

42. By adopting the report before it the Commission, as in the case of the Sub-Committee on State Responsibility, would be approving the method of work, the scope of the subject and the approach; it would not be pre-judging any substantive issue.

43. He hoped that, after the Chairman of the Sub-Committee had wound up the debate, the Commission would be able to appoint the special rapporteur for succession of States.

44. Mr. LIANG, Secretary to the Commission, said he was glad the Sub-Committee attached so much importance to the contribution the Secretariat could make to the work of codifying the law on state succession. As would be seen from section II of the Sub-Committee's report, the Secretariat had been asked to prepare, if possible by the sixteenth session, first, an analytical re-statement of the material furnished by governments, secondly, a working paper covering the practice of the specialized agencies and other international organizations, and thirdly, a revised version of the "Digest of the Decisions of International Tribunals relating to State Succession" (A/CN.4/151).

45. As far as the first item was concerned, only twelve governments had so far furnished the material requested by the Secretariat following the preliminary discussion on state succession at the fourteenth session; two had replied that they had none to send. The time-limit for submission of the material had been set at 15 July and it had been suggested in the Sub-Committee that a reminder be sent to those governments which had not yet answered.

46. The work on the second item had been put in hand and he hoped it would be completed by the following session, but it would, of course, involve a good deal of correspondence and checking that would take a considerable amount of time.

47. He agreed with Mr. Ago that for the purpose of studying state succession it would be essential to assemble material on state practice and that the task should be carried out by the Secretariat. However, it would be well to bear in mind the point made by John Bassett Moore in the introduction to his *Digest of International Law*¹ about state practice not being as concrete as

might be expected. Moore cautioned his readers against taking everything in his Digest as state practice, and pointed out that it was necessary to distinguish carefully between evidence of state practice and state practice itself.

48. It would not be possible to cover the whole field in a digest if a reasonably exhaustive analysis was required, and the special rapporteur would have to inform the Secretariat of the intended scope of his report.

49. Mr. LACHS, speaking on behalf of the Sub-Committee, thanked the Commission for its appreciative comments on the report. As Mr. Ago had questioned the wisdom of the order of priorities suggested in paragraph 13, he should perhaps assure him that the question had been discussed at length in the Sub-Committee and that the conclusions reached had been the outcome of careful consideration.

50. Perhaps the matter of the consequences of international instruments for States and other beneficiaries, mentioned by Mr. Ago, had not been adequately covered, but it certainly had been raised in the Sub-Committee and borne in mind during its discussions.

51. Criticism of the break-down of the subject, particularly sub-paragraph (a) of paragraph 15, had perhaps been prompted by the erroneous assumption that the Sub-Committee had sought in that sub-paragraph to establish principles, whereas all it had done had been to list certain situations to be considered.

52. The inclusion of treaties in sub-paragraph (b) had been criticized on the ground that they had no place among the topics mentioned, but treaties could be considered from both the formal and the substantive point of view. That criticism impelled him to point out that it was impossible to avoid some overlapping in any kind of classification; there seemed to be no way of escaping a charge either of repetition or of omission. The list of subjects in sub-paragraph (b) should not be viewed too narrowly. The same considerations applied to sub-paragraph (d), regarding which Mr. Ago had answered his own question; the purpose of the study would be to examine the effects of succession from the territorial point of view.

53. It had been useful to hear the comments of the two special rapporteurs most closely concerned, namely, Mr. Ago and Sir Humphrey Waldock, who would have to work in close collaboration with the special rapporteur to be appointed on state succession. Sir Humphrey Waldock was quite right in thinking that some kind of timetable would have to be drawn up, particularly for those parts of their respective reports which covered much the same ground, though from a different standpoint.

54. He was glad that mention had been made of the important relationship between state practice and codification and progressive development, which of course had relevance to all topics dealt with by the Commission. Proper use must be made of the lessons of history, whether remote or recent, but without projecting them into the future, and just as rules deriving from the past

¹ Washington, Government Printing Office.

which could not be adequate for contemporary needs must be rejected, so, too, it was undesirable to codify what was not yet ripe.

55. Paragraph 8 of the Committee's report seemed to him to provide adequate guidance, and in arriving at that conclusion, the Sub-Committee had been greatly assisted by Mr. Castrén's valuable and interesting paper (A/CN.4/SC.2/WP.4). But of course the Sub-Committee had only put forward a set of guiding principles, which would inevitably have to be adjusted as the work proceeded and were not intended to restrict the Special Rapporteur's freedom. On the whole members of the Commission seemed to approve of the objectives stated, and their comments had been mainly directed to amplifying or rendering more precise the Sub-Committee's proposed outline of the work.

56. As only twelve governments had replied to the Secretariat's questionnaire, he suggested that the time-limit should be extended to 1 January 1964, since otherwise governments might regard themselves as exonerated from the obligation to furnish material.

57. Mr. AMADO welcomed the scientific rigor of Mr. Lachs' report and of the memoranda submitted by some members of the Commission. The writers had kept within the limits imposed by their knowledge of the facts, and had not yielded to the temptation, which had sometimes arisen since the Commission had been set up, to introduce considerations of ethics or good intentions.

58. The object of the report was to show the present state of jurisprudence and legal practice. That was no easy task; the memorandum submitted by Mr. Bartoš, for example, showed how complex the theory was.

59. The problem of the succession of States and governments lay not so much in relations between the successor State and the State which it succeeded, as in relations between the successor State and third parties; that was the most important aspect of the matter from the point of view of international law.

60. At the present time the problem was dominated by the historical upheaval of decolonization and the birth of new States. When Brazil had become independent, international life had been less complex. The United States had not yet played any part in international politics and the principle actors had been France and England. But now, when the process of decolonization was not yet quite complete, an entirely different problem arose for those seeking to codify the rules of law in face of that new phenomenon. Rules must be found which corresponded to the new development without conflicting with the rules of classical international law, and a system must be worked out which States could accept. He was confident that the Commission and its rapporteurs would be equal to that task. For the time being it was merely a matter of drawing up a table of contents — a list of questions to be taken up. The scope of the study should be limited, and the first report should therefore be a preliminary one defining the stages of the work.

61. There was one further practical point: it was difficult to see how the special rapporteurs could keep in close touch with one another and co-ordinate their work so

as to avoid overlapping, as recommended in paragraphs 11 and 12 of the report. He feared that such consultations might hardly be possible in practice.

62. The CHAIRMAN said it was clear from the Sub-Committee's report that it was not seeking to prejudice the final form the Special Rapporteur's study would take, but was simply giving him some general guidance which should suffice for the time being. Presumably all the necessary co-ordination between the Special Rapporteurs on the Law of Treaties, State Responsibility and State Succession could be arranged by correspondence or if the need arose, by special meetings, possibly immediately before the Commission's own sessions.

63. He suggested that, as it had done with the report of the Sub-Committee on State Responsibility, the Commission should approve the report on state succession on the understanding that it represented an outline programme of work without prejudice to the position of any member in regard to the substance of any of the questions mentioned in that programme, and that the outline would serve as a guide to the Special Rapporteur without, however, obliging him to adjust his work to it in every detail.

It was so agreed.

64. The CHAIRMAN suggested that, in accordance with Mr. Lachs' proposal, the time-limit for submission by governments of material concerning state succession should be extended to 1 January 1964.

It was so agreed.

65. The CHAIRMAN said that it remained for the Commission to appoint the Special Rapporteur for Succession of States and Governments. Mr. Lachs, Chairman of the Sub-Committee, had already been mentioned as the member best qualified to undertake the task.

Mr. Lachs was appointed Special Rapporteur on Succession of States and Governments by acclamation.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] *(continued)*

66. The CHAIRMAN invited the Commission to consider article 2 in section I of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 2 (THE PRESUMPTION IN FAVOUR OF THE VALIDITY OF A TREATY)

67. Sir Humphrey WALDOCK, Special Rapporteur, said that article 2 spoke for itself; because sections II and III were concerned with the grounds on which a treaty could be held to be either initially invalid or subsequently terminated, and because there had been many instances of one-sided or unjustified assertions of a right to be released from a treaty, it had seemed to him desirable to establish at the beginning of the draft that the presumption was always in favour of the validity of the treaty if it had been negotiated, concluded and

brought into force in accordance with the provisions of Part I. To some extent the article was of a formal character, but it did have a place in the draft.

68. He would have no objection to dropping the word "essential" in sub-paragraph (a), since the aspect of validity being dealt with was sufficiently explained by the reference to section II.

69. Mr. de LUNA, referring to the expression "essential validity" in sub-paragraph (a), said that a treaty might be non-existent, void or voidable, but in the matter of validity there was no half-way position: a treaty was either valid or it was not. A voidable treaty was binding so long as it had not been annulled in accordance with the procedure laid down in the rules of international law. He therefore proposed that the adjective "essential" should be deleted.

70. Mr. CASTRÉN thought that article 2 was unnecessary. He understood the intention of the Special Rapporteur who, with the sanctity of treaties in mind, had wished to establish a presumption in favour of the validity of treaties, as he explained in his commentary, but no one disputed that the validity of treaties was the rule, and their non-validity a very rare exception. Besides, the rule laid down in article 2 was immediately weakened by the two exceptions stated in sub-paragraphs (a) and (b). He thought it would suffice if the presumption in favour of the validity of treaties were mentioned in the introduction to Part II.

71. Mr. VERDROSS found the wording of article 2 too timid. For if a treaty did not lack essential validity and if it had not ceased to be in force under the rules set out in section III, it must be valid. One could not speak of a presumption of validity. If the article was to be retained, it should be explicitly stated that such treaties were valid.

72. Mr. CADIEUX proposed, as an intermediate solution, that only the first part of the article, stating the presumption of validity, should be retained, without mentioning the circumstances in which the validity of a treaty could be contested.

73. Mr. YASSEEN thought that article 2 was unnecessary, since its provisions followed quite clearly from the rules already accepted by the Commission.

74. Mr. TUNKIN agreed that article 2 was unnecessary. A treaty was either valid or it was not, and there could be no question of presumption, a proposition that belonged in a thesis on logic, but not in a set of legal rules. The point could be dealt with in the commentary.

75. The CHAIRMAN, speaking as a member of the Commission, said he found it difficult to admit that the principle of validity could be defined in terms of a presumption, a concept which in civil law referred to rules for dispensing with evidence. He was therefore in favour of deleting the article.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that perhaps the article had not been well drafted and should refer to section IV also, since it was concerned

with the procedure for establishing invalidity, but his purpose had been to indicate that the burden lay on the party wishing to contest the validity of a treaty. It was true that some authorities had put the principle of *pacta sunt servanda* at the beginning of their studies on the law of treaties, but the proper place for an article on that subject would be in his third report on the application of treaties.

77. Mr. ROSENNE said he shared the Special Rapporteur's desire to include such an article in the draft, so as to achieve the right balance.

78. Mr. AMADO said that Mr. Rosenne's argument did not convince him that article 2 was useful. The articles stated a truism, and moreover the notion of presumption could be held to be a dangerous one in law. He wished, however, to commend the conscientiousness of the Special Rapporteur, who in his desire to omit nothing had felt bound to include an article on that question in his draft.

79. Mr. GROS said that the Special Rapporteur's second statement had fully convinced him that article 2 was useful. If the Commission had discussed the articles in their logical order, taking article 2 after article 1, which contained the definitions, it would have seemed perfectly natural to state an essential principle after adopting those definitions. Even leaving aside the idea of presumption, the Commission would have found it natural to state the rule that a treaty was binding on the parties subject to the special provisions on the essential validity and termination of treaties contained in the subsequent articles. As the Special Rapporteur had stated, it might be necessary to repeat some obvious truths, even though they were self-evident to the members of the Commission. He was therefore in favour of retaining article 2, subject to the deletion of the words "presumed to be valid and".

80. Mr. BRIGGS said he had been convinced by the arguments put forward by the Special Rapporteur and Mr. Gros that something on the lines of article 2 must be retained, but as the former had already suggested, it should certainly make a reference to section IV. It did not seem to him from a reading of article 2 that validity was being made dependent on a presumption, as the Chairman appeared to think.

81. Mr. de LUNA supported the remarks of Mr. Gros and Mr. Briggs. The Commission could ask the Drafting Committee to re-word article 2 in the light of the discussion. As to deleting an article which stated a principle that was self-evident at least to the members of the Commission, he pointed out that codes contained a number of self-evident rules which it was nevertheless necessary to state in order to fill gaps. Moreover, experience had shown that however obvious they might be, such truths were contested. After all, bad faith was not always absent from international relations.

82. Mr. PAL considered that either the content of article 2 should be transferred to section IV, or the reference to a presumption should be deleted.

83. Mr. TUNKIN said that if article 2 were not omitted, the only course open to the Commission would be to state the principle *pacta sunt servanda*, in which case article 2 might read: "Every treaty entered into and brought into force in accordance with the provisions of Part I is valid and binding upon the parties unless etc." The title would also have to be amended to read: "The binding force of treaties."

84. Sir Humphrey WALDOCK, Special Rapporteur, said that article 2 was not concerned with the principle *pacta sunt servanda*, according to which the parties were bound to execute the treaty. There were various grounds on which a valid treaty that was in force need not be executed. Such cases would come within the compass of his next report.

85. Mr. AMADO thought article 2 amounted to stating that the international law of treaties was governed by the rule *pacta sunt servanda*. But why state a self-evident principle? He proposed that if article 2 were not deleted, because some members wished to retain it, the decision on the matter should at least be deferred until the next session.

86. Mr. TUNKIN said he would be able to accept article 2 if it were re-drafted to state that a treaty which was valid and in force was binding and must be observed by the parties.

87. Mr. TSURUOKA supported Mr. de Luna's proposal; he thought it was mainly a matter of drafting.

88. The CHAIRMAN suggested that article 2 be referred to the Drafting Committee for re-drafting. The Commission could then finally decide, on the basis of a new text, whether the article should be retained or not.

It was so agreed.

The meeting rose at 12.40 p.m.

703rd MEETING

Wednesday, 19 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] *(continued)*

1. The CHAIRMAN invited the Commission to resume consideration of article 14 in section II of the Special Rapporteur's second report (A/CN.4/156).

ARTICLE 14 (CONFLICT WITH A PRIOR TREATY) *(resumed from the 687th meeting)*

2. Sir Humphrey WALDOCK, Special Rapporteur, said it appeared from the earlier discussion of article 14 that the Commission was disposed to accept the view that a conflict with a prior treaty raised questions of

priority rather than of nullity. Some members had considered that article 14 belonged in Part III of his report because it was concerned with the interpretation of the two treaties, and that it should be considered at the next session.

3. He appreciated the reason why Mr. Tunkin had said that article 14 did not go far enough to cover treaties of a special type, some provisions of which might be of a nature similar to *jus cogens*, and had quoted the recent agreement on the neutrality of Laos¹ as an example. That type of treaty had been touched on in the commentary but, as he had pointed out, it did not raise the question of nullity so much as the question whether the parties intended to impose some limitation on their future capacity to conclude agreements on a particular matter, such as the neutralization of a territory or part of a territory.

4. After the Commission had postponed consideration of article 14, Mr. Pal and the Chairman had jointly proposed an amendment to paragraph 2 (a), adding the following sentence:

"Provided, however, that if the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty, of such a kind as to frustrate the object and purpose of the earlier treaty, then any party to it whose interests are seriously affected shall be entitled to invoke the nullity of the second treaty."

5. That was a substantial amendment, which would considerably change article 14 by introducing the possibility of the second treaty being nullified; and its application was not limited to a special kind of treaty. Such a general exception to the provision in paragraph 2 (a) seemed dangerously wide and would embrace, for example, ordinary commercial treaties. Attractive as the idea might seem that certain conflicts could entail nullity, he questioned whether it could be accepted at the present stage of development. It seemed fair to say that the amendment went beyond the provisions of the Charter, which provided only for the primacy of the Charter over other treaties, not for other treaties being nullified in the event of a conflict with the Charter.

6. The question on which the Commission must try to reach a conclusion was whether a case of conflict between two treaties should be regarded as essentially raising an issue of priority. If it was so regarded, and the later treaty did essentially violate obligations assumed under the earlier one, that would raise a question of responsibility, but the later treaty would not be nullified, as between the parties to it, so long as it was not contrary to *jus cogens*. Under article 14 in its present form, the parties to the later treaty remained under the obligation to execute the earlier one in respect of any of the parties to it which had not become parties to the later treaty.

7. Mr. PAL explained that the purpose of the amendment, which had been couched in cautious language, was to deal with cases in which the later treaty not only

¹ *Command papers*, H.M. Stationery Office, London, Cmd. 9239, pp. 18 ff.

conflicted with the earlier one, but its performance would result in a direct breach of the obligations assumed under the earlier one. In those cases the later treaty must be regarded as illegal and indicative of bad faith. During the earlier discussion of the article, he had quoted a passage from Oppenheim which substantiated that view (687th meeting, para. 57).

8. The amendment should meet the point made by some members during the previous discussion that in some instances conflict with an earlier treaty might raise the problem of the legality of the later instrument. If it were accepted, article 14 could remain in section II.

9. The CHAIRMAN, speaking as a member of the Commission, said that the authors of the joint amendment thought that the Special Rapporteur was right in proposing as a general rule that *inter se* agreements should be regarded as valid. The only purpose of the amendment was to provide for the exceptional case in which there had been a deliberate conspiracy to conclude a new treaty in breach of the earlier one. It had been inspired by provisions contained in the reports of the two previous special rapporteurs, but unlike them had been framed in the form, not of a rule, but of an exception, and was accordingly of restricted application; it was further qualified by the provision that the nullity of the second treaty could only be invoked if the party's interests were "seriously affected".

10. He had not been convinced by the Special Rapporteur's objection that the amendment went beyond the provisions of the Charter, because Article 103 of the Charter was concerned not so much with the question of conflicting obligations as with the difficulty of applying certain provisions of the Charter, for example, those calling for economic measures, if they conflicted with the terms of ordinary, perfectly valid agreements like commercial treaties. A similar problem had arisen during the period of the League of Nations, over the application of economic sanctions to Italy in 1936.

11. The fact that, in the event of a conflict between obligations, those of the Charter prevailed was not an argument for rejecting the principle that a treaty deliberately designed to call for action in direct breach of obligations assumed under an earlier treaty must be a nullity.

12. Mr. CADIEUX said that in principle he approved of the text proposed by the Special Rapporteur. His formulation of article 14 constituted an important contribution to the progressive development of international law in a field in which the rules of international law had to be reconciled with contemporary practice and needs. As Sir Gerald Fitzmaurice had said in his 1958 report, the right of some of the parties to a treaty to modify or supersede it by another treaty in their relations *inter se* was an instrument which States increasingly employed for changing a treaty situation in a desirable and perhaps necessary manner, in circumstances in which it would not be possible, or would be very difficult, to obtain the consent of all the States concerned.²

13. The Special Rapporteur had adopted his predecessor's idea and expressed it in a form which seemed not only to have received the approval of most of the Commission's members, but also to conform with the decisions of the Permanent Court of International Justice in the *Oscar Chinn*³ case and the *European Commission of the Danube* case.⁴

14. The rule proposed by the Special Rapporteur was a reasonable compromise between the need to safeguard the position of the parties to an earlier treaty and the desire to recognize the legitimate interests of the parties to a subsequent treaty, between respect for the principle *pacta sunt servanda* and the principle *res inter alios acta* and between respect for obligations contracted and freedom to contract other obligations.

15. With regard to the individual provisions of the article, like some other members of the Commission, he considered that paragraphs 1(a) and (b) were not essential and that paragraph 2(b)(ii) was of doubtful value, for as Mr. Ago had pointed out, a State party to the second treaty could hardly contest its validity by pleading conflict with a prior treaty. For the reasons given by earlier speakers, paragraph 3 could also be deleted.

16. He did not, however, take the view that article 14 as a whole was unnecessary. Such an article would be more appropriate in the section on the application of treaties, but for the moment the essential issue was not so much the placing of the article as the usefulness of the rule it stated, and its content.

17. He did not quite follow the argument that the parties to the first treaty would in certain cases be free to claim that the second was void, as seemed to be implied in the amendment proposed by Mr. Pal and the Chairman. The rule in paragraph 2 of the Special Rapporteur's draft protected the interests of the parties to the first treaty sufficiently; it recognized the priority of the first treaty and did not exclude the possibility that, in certain cases, the second treaty could be voided by a court in accordance with the provisions of paragraph 2(b)(i), because it conflicted with an overriding principle of international law or with a rule of *jus cogens* under article 13.

18. However, that particular problem might be dealt with in the commentary, without any need to amend the general terms used by the Special Rapporteur.

19. Mr. TUNKIN said that the earlier discussion on article 14 had usefully cleared the ground, but some points still needed to be elucidated. The amendment was concerned with a special case of conflict with a prior treaty, which should be dealt with separately. If a later treaty clearly violated an earlier one, that constituted a breach of the principle *pacta sunt servanda*, which was a rule of *jus cogens*, and it must therefore be regarded as void. The Special Rapporteur's draft was highly adequate to cover conflicts in general when the earlier obligation would take precedence, but it would not suffice to cover the special case he had mentioned; international in-

² *Yearbook of the International Law Commission, 1958, Vol. II* (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 43, para. 89 (b).

³ *P.C.I.J., Series A/B, No. 63.*

⁴ *P.C.I.J., Series B/14.*

struments could not be treated in the same way as private contracts. Both cases must be covered in the article.

20. Paragraph 3 (a) of the Special Rapporteur's text would presumably be omitted, as a special provision was to be prepared concerning the constituent instruments of international organization. Paragraph 3 (b) should be dropped because it served no useful purpose. Paragraph 4, on the other hand, was important and should be retained.

21. Mr. CASTREN said he had some difficulty in accepting the amendment proposed by Mr. Pal and the Chairman, while the Special Rapporteur's arguments had convinced him of the soundness of his views on several points.

22. Mr. Pal and Mr. Tunkin had distinguished between certain cases of conflict between the earlier treaty and the later treaty, and the amendment dealt with the case in which the interests of a party to the earlier treaty were seriously affected. All those distinctions were very subtle and relative and could accordingly give rise to subjective interpretations. For the time being he preferred the text proposed by the Special Rapporteur, which seemed to him clearer and more homogeneous.

23. Mr. TSURUOKA thought that the right context for article 14 would be the section dealing with the application of treaties or with their legal effects vis-à-vis third parties.

24. A problem arose when the later treaty was a multi-lateral treaty and some of the parties to the earlier treaty did not accept the later treaty, some of whose provisions completely changed the earlier one. Could those parties claim that the later treaty was void? For the time being it seemed to him wiser to follow existing practice and to apply, for the purpose of settling such disputes, the recognized principles of state responsibility.

25. Mr. ROSENNE said that Mr. Tunkin had helped to clarify the issues by pointing out that the problems which article 14 was intended to cover related to two entirely different situations. As far as the first was concerned, namely, a simple conflict between the obligations imposed by two different treaties, the consenses of opinion seemed to be moving towards the Special Rapporteur's proposal. With regard to the second situation, in which the implementation of the later treaty could constitute a real violation of the earlier treaty, not all the parties to which were parties to the later one, he presumed that Mr. Tunkin had in mind violations of a very definite and serious kind, similar to those which had been contemplated by Sir Hersch Lauterpacht. In his own opinion the two cases should be dealt with quite separately.

26. He also wished to reiterate with even greater emphasis the view he had expressed during the earlier discussion of the article (685th meeting, para. 59, and 687th meeting, para. 30), that problems of conflict which did not raise serious issues connected with the violation of a prior treaty should be discussed in connexion with an entirely separate part of the draft, namely,

that to be devoted to the application of treaties in the Special Rapporteur's third report. The Special Rapporteur should therefore be asked to reconsider that problem in the light of the present discussion and to present his revised conclusions at the sixteenth session.

27. The provisions concerning breach of a treaty already discussed by the Commission had been approached from a standpoint rather different from that adopted by the authors of the joint amendment and by Mr. Tunkin. The Commission had regarded a breach as giving rise to a right of the injured party to suspend or denounce the treaty, but, according to the example of the Laos agreement, what was desired in the present context was a right of quite a different character — namely, the right to insist on continued performance of the earlier treaty, even to the extent of requiring that the later treaty be regarded as void. Other examples should be considered, however, such as the Danube convention of 1948,⁵ which would also come within the scope of the Special Rapporteur's proposals for article 14.

28. One criticism that could be made of the amendment was that it failed to indicate how, or before what tribunal, the injured State could claim that its interests had been seriously affected by the later treaty. Since the hypothesis of the amendment was that the parties to the earlier treaty were not all parties to the later treaty, the provisions of article 25 could not apply. Sir Hersch Lauterpacht had proposed that the International Court should have compulsory jurisdiction over any dispute of that kind, but that was a solution which the Commission could not adopt. Nevertheless, means did exist — United Nations machinery and diplomatic procedures — for settling the kind of issues which might arise.

29. A provision covering the point dealt with in the amendment and discussed by Mr. Tunkin would, of course, have to be brought into line with the provisions already discussed concerning the substantive and procedural aspects of breach. Article 25 might require considerable modification if it was to be made applicable to such a provision.

30. The CHAIRMAN said that the joint amendment would need only some small changes to bring it within the scope of article 25.

31. Mr. ROSENNE maintained that to achieve that result, article 25 itself would require substantial amendment.

32. Mr. de LUNA said it was merely a question of whether the right to claim the nullity of a later treaty should be recognized or not. It seemed that, in order to avoid the danger of international anarchy, the Commission was inclined not to accept the idea of the automatic invalidation of a treaty by the unilateral decision of one of the parties. But several speakers had shown that in certain cases the validity of treaties could be contested. He found the amendment submitted by Mr. Pal and the Chairman in every way preferable to the Special Rapporteur's text.

⁵ United Nations, *Treaty Series*, Vol. 33, pp. 197 ff.

33. But why not leave the parties to the earlier treaty free to choose either not to accede to the later treaty, or to conclude another treaty conflicting with the earlier treaty obligations, accepting, of course, all the possible consequences as to liability for damages to the other parties? States should not be granted less freedom than the parties to a contract in municipal law. It would therefore be better to deal with the matter in the part of the draft dealing with the application and interpretation of treaties, for even if certain cases of invalidity might be recognized, each case should be treated on its merits.
34. If the majority disagreed with that view, he would support the amendment, since it offered a simpler solution than the Special Rapporteur's text.
35. Mr. ELIAS said that during the earlier discussion he had pointed out that the article dealt with three cases, but not with the fourth, an admittedly rare case, in which the later treaty was concluded by parties entirely different from the parties to the earlier one (687th meeting, para. 36). As an example he had mentioned the conference held at Niamey in the Republic of the Niger, to consider arrangements for the development of the river Niger and the exploitation of its resources. The nine riparian States attending that conference had been former dependencies of France and the United Kingdom and the question had arisen whether, in a treaty establishing a River Niger Commission, they could provide for the abrogation, as far as they were concerned, of the 1885 and 1919 treaties which had established an international regime for the Niger. His remarks appeared to have been misconstrued as a request for advice, whereas his intention had been to draw attention to a case which merited consideration and to suggest that the Special Rapporteur should deal with it.
36. The Niamey Conference had been attended not only by the nine riparian States, but also by France and the United Kingdom, and by representatives of the International Bank, which would be providing financial assistance for the development schemes, and of the Office of Legal Affairs of the United Nations Secretariat. The Office of Legal Affairs had concurred in the view of the nine riparian States that the new treaty must be regarded as valid, even though it expressly abrogated an earlier treaty between other States.
37. The problem in that case was undoubtedly one of validity, and it deserved consideration because similar problems might arise later in connexion with the Congo or with rivers in South-East Asia.
38. Mr. YASSEEN said that on the whole he was inclined to accept the principle underlying article 14, namely, the priority of a certain obligation; but that did not mean that the sanction attached to it might not, if necessary, be modified.
39. The Special Rapporteur himself had contemplated the nullity of a treaty in certain exceptional cases. Should the sanction of nullity be applicable to the treaties to which the amendment proposed by Mr. Pal and the Chairman referred? Mr. Castrén thought it difficult to distinguish departures from the terms of a treaty from an actual breach. A breach was, in fact, no more than a departure from the terms of a treaty, but a departure so great as to involve a change which could be regarded as a difference in kind.
40. However difficult that distinction might be, it should not be impossible to differentiate between certain departures and a breach, especially one so specific as that contemplated in the amendment, namely, a breach that would frustrate the object and purpose of the earlier treaty. Mr. Castrén's objection did not seem justified. However, he (Mr. Yasseen) was not prepared to accept the amendment as it stood; there was one consideration that made him reluctant to accept it in the form in which it had been submitted: it might perhaps impede the development of international law, for its terms might equally well apply to general multilateral treaties, and that would be dangerous. If, for example, ten States had concluded an earlier treaty and six of them joined with eighty other States in concluding a general multilateral treaty which frustrated the object and purpose of the earlier treaty concluded by the ten States, could one of the four States which had not acceded to the later treaty be permitted to claim that the general multilateral treaty was invalid?
41. He was prepared to accept the proposed amendment, provided that it would not hinder the development of international law, of which general multilateral treaties were one of the principal elements.
42. Mr. BRIGGS said he had already pointed out during the earlier debate on article 14 that the Special Rapporteur's illuminating commentary convincingly demonstrated that conflict with a prior treaty did not raise any major issues of validity (685th meeting, para. 58). Hence there appeared to be no justification for leaving the content of article 14 in the section where it had been placed. The question of conflicting obligations under two treaties could best be dealt with in connexion with the application of treaties, which the Commission would consider at its next session.
43. There remained the problem dealt with in the joint amendment, which was peripheral and in any case was not necessarily one of nullity. In his view, the law of state responsibility would suffice for the intended purposes.
44. The whole question of article 14 should be postponed until the following session, and the Special Rapporteur should be asked to draft a new article relating to the application of treaties.
45. Mr. AGO said that during the first discussion he had expressed serious doubts about the need for article 14, which contained only provisions that were either superfluous or already embodied elsewhere in the draft (687th meeting, paras. 47-53). He would briefly recapitulate certain points.
46. It seemed particularly strange that paragraph 1 should state that, where the parties to a treaty were the same as the parties to an earlier treaty, the later treaty was not invalidated by a conflict between the two treaties. He did not see how such a problem could

even be raised. There was a specific rule on the subject: *lex posterior derogat priori*. Questions might arise as to the chronological sequence of the legal rules, or there might be problems of adjustment — and in that event it would be correct to say that the general rules of interpretation were applicable — but there was no need to mention them in the article, for what was quite certain was that no problem of validity arose in regard to the second treaty by reason of the existence of the first.

47. The case considered in paragraph 2 was more serious, but there again it seemed doubtful whether the provision was necessary. In paragraph 2 (b), the Special Rapporteur had envisaged two cases. Sub-paragraph (ii) dealt with the case in which, although the parties to successive treaties were not the same, the validity of the second treaty was nevertheless contested by a State which was a party to both treaties. That situation was practically the same as the case contemplated in paragraph 1, and the fact that the second treaty must take precedence was too obvious to need stating.

48. Paragraph 2 (b) (i) dealt with the contrary case, in which, according to the Special Rapporteur's text, the earlier treaty prevailed. But that was also obvious because, from the point of view of the State which was a party to the first treaty and not to the second, there was only one treaty.

49. In the case contemplated in paragraph 2, what was the status of the second treaty? He could not agree that the question of nullity arose in that case. If the second treaty contained provisions constituting an obvious breach of the first — which, according to the amendment proposed by the Chairman and Mr. Pal, must be a particularly serious breach — then its implementation could involve States which were parties to both treaties in international responsibility towards those which were parties only to the first treaty. There was then an international unlawful act. Another State, not a party to the first treaty, could invoke that responsibility and all its consequences, and could even claim that the second treaty should cease to exist; but it could not claim that the second treaty was void.

50. One case suggested by way of example was that in which some of the States parties to the first treaty had concluded the second treaty with other States not parties to the first. Why should the second treaty be void for those other States? For them, the question of responsibility did not even arise; it arose only for the States parties to the first treaty, which had violated it by concluding the second. There was only one case in which the question of nullity could arise: that in which the first treaty had effected the capacity of one of the States. Such a consequence was possible in the case of certain neutralization treaties, where the neutralized State would be deemed no longer to possess the capacity to conclude certain treaties, such as treaties of military alliance. But apart from those exceptional cases, the second treaty could not be considered void merely because, in concluding it, some of the parties had violated the provisions of a former treaty.

51. In saying that, he was not being any less severe in regard to the second treaty than other members of the Commission, since he was admitting not only the possibility of demanding its termination, but also other consequences following from the responsibility incurred in concluding it.

52. He did not think it possible to go so far as Mr. Tun-kin and assert that the nullity of the second treaty followed from the principle *pacta sunt servanda* because that was a principle of *jus cogens*; if that were so, then all rules of treaty law would become rules of *jus cogens*.

53. For all those reasons, he thought that paragraph 2 was out of place in section II. It was not necessary to deal with the problem referred to in paragraph 3 either, because everything concerning international organizations should come under a separate rule.

54. Thus there remained only the provision in paragraph 4, which really did concern validity and nullity. It was, indeed, certain that if the first treaty contained a rule of *jus cogens*, then the conclusion of another treaty departing from that rule constituted a ground for nullity. But should the rule be stated in the present context or elsewhere? It had been proposed, for example, that it should be placed after article 13, which concerned *jus cogens*. At all events, it was the only provision of the article which really did relate to the validity of the treaty.

55. Mr. BARTOŠ said he wished to make it clear at once that he was in favour of dropping the article for reasons lucidly explained by Mr. Ago. What was involved was a matter both of discipline — members of the international community were expected to fulfil their contractual obligations — and of freedom of action.

56. In the case of successive treaties concluded between the same parties there was no problem; so long as they did not derogate from *jus cogens* the parties were free to amend the treaty provisions. But where it was a question of changing the situation governed by a treaty, it was hardly possible to impose strict rules producing effects *erga omnes*, as in civil law. Like Mr. Ago, he thought that conduct conflicting with a prior obligation governed by the *pacta sunt servanda* rule was unlawful and raised a problem of international responsibility, which could have various consequences.

57. A party might, however, claim that the conclusion of a later treaty conflicting with prior obligations had been due to a change of circumstances. That was the main argument against a strict rule. There had been cases in which States had been compelled, sometimes to the detriment of prior obligations to certain parties, to change their position by reason of later treaties. During the liberation movement, for example, the development and progress of the liberated nations would have been impossible without new treaties which, strictly speaking, conflicted with preemptory norms.

58. On that point an analogy could be drawn with personal freedom. Individuals assumed obligations which conflicted with their earlier obligations, and could be held answerable for their conduct, together with any

accessories, if they had acted in bad faith. The *pacta sunt servanda* rule imposed an obligation to perform the contract faithfully, but it did not involve renouncing freedom of action.

59. He did not agree with Mr. Ago's view concerning the example of neutrality. If neutrality was imposed by a peremptory rule of international law or by a treaty of general interest, it was *jus cogens*, and the State concerned then lacked capacity to conclude another treaty conflicting with that almost absolute régime.

60. But the incapacity of a State to conclude treaties, established by treaty, was a very debatable matter. It might be recalled that Monaco and France had concluded a treaty under which the Principality of Monaco would be incorporated with France if the Grimaldi dynasty ceased to reign; and under a treaty between Haiti and the United States of America, Haiti could not become a protectorate of any country other than the United States. Those treaties had become obsolete by reason of the principles of the Charter—in particular, the independence of States and non-interference in the affairs of other States—and the only possible case to be considered was that of a strictly international régime. Thus, if the Free Territory of Trieste had become a State, it would have had to respect its territorial statute concerning neutralization, demilitarization, etc., for it would have been a buffer State established to avert disputes in a particular region. Such a situation should be disregarded, except in the case of a territorial régime forming an integral part of the general international régime, which had the force of *jus cogens*. In that case he would subscribe to Mr. Ago's view.

61. Mr. AGO explained that he had been speaking of neutralization, not of neutrality.

62. Mr. BARTOŠ thought that in that case, he and Mr. Ago were in agreement. In any event, the *pacta sunt servanda* rule could hardly be given the effect contemplated in the Special Rapporteur's text or in the amendment. The article should therefore be dropped, though the problem might be reconsidered in 1964.

63. Mr. TABIBI said he could support the provisions of paragraphs 1, 3 and 4 of article 14, but had serious doubts regarding paragraph 2. The question raised in paragraph 2 was closely connected with state responsibility, succession of States, validity and many other matters. The adoption of a strict rule might well lead to the anarchy it was hoped to prevent.

64. It was necessary to bear in mind the situation at the present time. Since the establishment of the United Nations, and particularly since the adoption of the General Assembly resolutions on the emancipation of peoples, it had become appropriate to regard a recent treaty as superseding an earlier treaty. Many old treaties belonged to the colonial era and should not be given precedence over more recent ones. Judging from the experience of his own country, he could safely say that provisions of the kind contained in paragraph 2 would create more problems than they solved. For those reasons, paragraph 2 should be deleted.

65. Mr. TUNKIN said that, after listening to the discussion, he had reached the conclusion that it would be preferable to postpone consideration of article 14; the Commission was not yet ready to adopt a suitable provision meeting the requirements of contemporary international law, and it would in any case have to revert to the matter during the second reading of the draft.

66. Mr. Ago had pointed out that the question of conflict with a prior treaty involved the responsibility of States. That was true, but conflict with a prior treaty could also involve questions of validity; state responsibility did not exclude nullity. For example, the breach of a treaty normally involved state responsibility, sometimes of a very grave kind warranting reference of the matter to the Security Council. Nevertheless, the Commission had considered that the breach of a treaty could have certain consequences affecting its validity.

67. The *pacta sunt servanda* rule had been mentioned, but he did not think it could be properly discussed in connexion with article 14. Like other members, he attached the greatest importance to the progress of international law and was opposed to anything that might hinder it. But the examples given in that connexion were not convincing and would be covered by other parts of the law of treaties.

68. The CHAIRMAN, speaking as a member of the Commission, said he was in favour of postponing consideration of article 14, even though postponement might prejudice the question whether nullity applied in certain cases.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that in view of the cleavage of opinion which had become apparent in the Commission, he supported the suggestion that consideration of article 14 be postponed until the next session, on the understanding that the position of members would be reserved.

70. His own views were very close to those of Mr. Ago. He could not agree with the suggestions of some members regarding *jus cogens*. It was dangerous to suggest that the *pacta sunt servanda* rule had the character of *jus cogens* with regard to the main clauses of a treaty, but not with regard to the other clauses; in fact, the *pacta sunt servanda* rule applied equally to all the clauses of a treaty. Moreover, if the Commission were to be consistent with the provisions it had adopted in article 13, then nullity must be automatic; it could not be left to the parties to invoke it. Such an approach would be too strict to apply to a case of conflict between treaty provisions.

71. With regard to the joint amendment, the position of States which were parties to the later treaty but not to the earlier one deserved more careful treatment than it was given in that proposal. As Mr. Ago had pointed out, the question arose whether the later treaty would be regarded as automatically void in regard to those parties which had not participated in the earlier treaty. That question raised the issue of knowledge; it would be difficult to apply the proposed provision on nullity without entering into the question whether the States

parties to the later treaty were aware of the existence of the earlier treaty and of the conflict between the two.

72. Other difficulties had been pointed out by Mr. Rosenne, who had pertinently asked how the nullity would be invoked. The provisions of article 25 on procedure would not be applicable and perhaps an additional paragraph would have to be introduced into that article to cover the situation.

73. Another question which arose was whether the party injured by the later treaty was entitled to object to its registration with the United Nations or to demand the cancellation of that registration if it had been effected.

74. He agreed with Mr. Ago regarding such cases as neutralization, which might give rise to a problem of capacity.

75. Generally speaking, the law of state responsibility covered the main requirements of the situation under discussion. Personally, he found the idea of nullity attractive from the academic point of view, but it did not reflect the present position in international law. The situation contemplated undoubtedly involved the international responsibility of the State. If that responsibility were made good, it could lead to cancellation of the treaty, but cancellation would be only one of the remedies applicable. In fact, cancellation might well prove impossible, because there were other parties involved whose acts might be necessary to dissolve the later treaty. The whole matter could really be best handled through the law of state responsibility and not by means of nullity.

76. It had been suggested that the joint amendment reflected the views of the two previous special rapporteurs. It was true that, in his first report, Sir Hersch Lauterpacht had adopted that approach, but in his second report he had narrowed his proposals considerably because he had realized that his original suggestion could have been a cause of serious embarrassment to the development of international legislation. Sir Gerald Fitzmaurice had started from the point of view embodied in article 14, suggesting that the sanction of nullity should apply only in special cases, and had drawn a distinction between different types of obligations. His position had in fact been much narrower than had perhaps been suggested during the present discussion.

77. In view of the desire expressed by a number of members, he would not object to postponement of the discussion of article 14 until the following session. There would be some advantage in that course, because certain matters needed further investigation. For example, even the provisions of paragraph 1, which did not appear to have given rise to any serious differences, raised the question of the effect of the cancellation on parties who were beneficiaries under the earlier treaty, but were not parties to the later one.

78. Mr. de LUNA said he wished to set the minds of certain members at rest with regard to the postponement.

79. The *pacta sunt servanda* rule had been mentioned, but that rule applied both to the earlier and to the later treaty, so that the problem was only one of chronology.

80. The argument of *jus cogens* had been used, and the Special Rapporteur had himself said that it was difficult

to distinguish between clauses of a treaty which had the character of *jus cogens* and clauses which had not. There was no need to mention *jus cogens* in article 14, as it was amply covered in article 13. If a later treaty infringed a *jus cogens* obligation under an earlier treaty, the question of what rule would apply would be simple: if it was really a matter of *jus cogens*, article 13 would apply and article 14 was redundant.

81. To retain article 14 in the section on validity would be to build a veritable bastion of ultra-conservatism or even reaction in international law.

82. History showed that States imitated the national legislator who, in enacting new laws, amended or repealed earlier laws. That raised the thorny problem of the severability of articles.

83. In order to avoid resorting to revision or to the *rebus sic stantibus* clause, States often concluded treaties which conflicted with prior treaty obligations. If all the parties to the earlier treaty acceded to the later one, there was no problem; but when only some of them did so, it was found that in practice the States not parties to the later treaty were generally tolerant.

84. He therefore supported the Chairman's view.

85. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to postpone consideration of article 14 until the next session, without prejudice to the positions of members.

It was so agreed.

The meeting rose at 12.40 p.m.

704th MEETING

Thursday, 20 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Statement of the observer for the Asian-African Legal Consultative Committee

1. The CHAIRMAN, welcoming the observer for the Asian-African Legal Consultative Committee, Mr. Justice Thambiah, of the Supreme Court of Ceylon, said that his presence was evidence of the Committee's interest in the work of the International Law Commission; the fact that the Commission had been represented by an observer at the fourth and fifth sessions of the Asian-African Committee showed that the interest was mutual.

2. Mr. THAMBIAH, observer for the Asian-African Legal Consultative Committee, said he was pleased to extend, on behalf of the Committee, an invitation to the International Law Commission to be represented at the Committee's next session, to be held at Cairo for a period of two weeks starting on 15 February 1964.

3. The Commission's work was highly esteemed in the Asian and African countries. As a first step towards strengthening international law, it was necessary to

ensure that the rules of conduct to be observed by nations were such as to command universal respect. International law had often suffered from the fact that many of its rules were nebulous. There had also been a feeling in some of the Asian and African countries that international law was a product of the West and that many of its concepts needed re-examination in the light of the emergence of new nations. In order to strengthen international law, the existing rules should be re-examined and given shape by codification and progressive development, taking into account the views of the whole world community; it was precisely in that task that the International Law Commission was engaged. The Asian-African Legal Consultative Committee, which had been constituted as a regional organization with objectives similar to the International Law Commission, was most anxious to co-operate with the Commission and to present to it the considered views of the countries of Asia and Africa.

4. The Committee had been set up in 1956 as the "Asian Legal Consultative Committee", but its statutes and title had been amended in 1958 to provide for the participation of countries on the African continent; it now had nine members. Sessions of the Committee were usually held annually, the participating countries acting as host in rotation, while its day-to-day work was carried on by a secretariat at New Delhi, where each member government maintained a liaison officer.

5. A number of important questions of international law had been referred by various member governments to the Committee, which had been able to complete its work on a number of them, including the question of the functions, privileges and immunities of diplomatic agents. The Committee had also made considerable progress on a number of other questions, including that of the legality of nuclear tests. Among the subjects awaiting consideration were the Law of Treaties and state succession.

6. The United Nations had invited the Committee to be represented at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities and its recommendations on the subject of diplomatic immunities had been one of the basic documents before that Conference. The Committee had also been invited to be represented at the 1963 Vienna Conference on Consular Relations. It was asked from time to time by the United Nations to comment on United Nations resolutions relating to legal matters; it also maintained relations with the Arab League and with the International Institute for the Unification of Private Law.

7. The progressive development of international law, on which the Commission was engaged, could best be achieved through co-operation with regional organizations. Individual governments could certainly assist, but a regional organization could do so more effectively, because it had a secretariat which was engaged in that work exclusively. Regional organizations also provided a forum for discussion and enabled governments to formulate their views. Non-governmental organizations had played a useful role in the past in the elucidation and development of international law, and their recom-

mendations would always command respect as coming from independent expert bodies; but those recommendations tended to suffer from a lack of realism, since they did not necessarily reflect the views of governments, and in matters of international law it was the views of governments that were of paramount importance, since it was through the practice and usage of nations that international law was developed.

8. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee and said that the Commission would consider the invitation to send an observer to the Committee's next session when it came to deal with item 7 of its agenda: Co-operation with other bodies.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

9. The CHAIRMAN invited the Commission to consider the text of the articles proposed by the Drafting Committee for chapter II of Part II.

CHAPTER II (PRINCIPLES GOVERNING THE ESSENTIAL VALIDITY OF TREATIES)

ARTICLE 5 (PROVISIONS OF INTERNAL LAW REGARDING THE PROCEDURES FOR ENTERING INTO TREATIES)

10. Sir Humphrey WALDOCK, Special Rapporteur, said that before introducing article 5, as re-drafted by the Drafting Committee, he wished to draw attention to the decision taken by the Committee at its fifth meeting to replace the heading "Section" by "Chapter". Personally, he thought it would be both more practical and more elegant to retain the word "Section", because it had already been used in Part I, which the Commission had adopted at its previous session. Later, when the Commission came to consider the draft on the Law of Treaties as a whole, it could make a final choice between the two terms.

11. The title of chapter II had not been discussed by the Drafting Committee and remained the same as it had appeared in his report (A/CN.4/156). During the discussion, however, certain members had criticized the term "essential validity", and the title might perhaps be altered to "The validity of treaties", or if that seemed too broad, to something like "Grounds on which treaties may be invalidated".

12. Article 5 as proposed by the Drafting Committee read:

"Provisions of internal law regarding the procedures for entering into treaties"

"1. When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding the procedures

for entering into treaties has not been complied with shall not affect the consent expressed by its representative, unless the violation of its internal law was absolutely manifest.

"2. Except in the case of such a manifest violation of its internal law, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree."

13. During the discussion on article 5, which was one of the most important provisions of the whole draft, there had been a division of opinion, some members considering the rule to be that the authority in international law to give consent to a treaty should in principle prevail, others that consideration should also be given to the possibility that the organ which entered into the treaty might be completely lacking in competence under the constitution of the State concerned.

14. It had proved difficult to reconcile those two points of view and the Drafting Committee had finally adopted a formula stating the general proposition that, where the consent had been given by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the State concerned was bound, unless the violation of its internal law was absolutely manifest. That proposition was based on the authority of a number of distinguished jurists, including Lord McNair.

15. Paragraph 2 stated the consequences of the rule laid down in paragraph 1.

16. A number of provisions of the original article 5 had been dropped, following criticism during the discussion; paragraph 1 had been dropped as unnecessary, while paragraph 3(b) had been deleted because its provisions were not easy to reconcile with the general principle on which the draft was based.

17. The CHAIRMAN said that the Commission had to take a decision not only on article 5, but also on the wording of the general title of the group of articles 5 to 14, and on the choice between the terms "chapter" and "section". On the latter point, the Special Rapporteur had in effect appealed to the Commission from the decision of the Drafting Committee; he invited the Commission to vote on that point.

It was decided, by 19 votes to none with 1 abstention, to revert to the term "section" in place of "chapter".

18. Mr. PAL said that, from the point of view of drafting, the references in article 5 to consent being "expressed" by a representative were open to criticism. Article 5 referred to article 4 of Part I, but the provisions of that article should be construed by reference to articles 11 and 16 of Part I, which spoke not of consent being "expressed" but of acts the effect of which was to "establish the consent" of the State concerned. To be consistent, therefore, the Commission should avoid using such expressions as "consent expressed", "consent has been expressed" and "to express the consent".

19. Mr. CASTREN said he would confine his remarks to article 5 and leave it to the Drafting Committee to decide on the title of the section.

20. The new, shortened version of the article contained all the essential elements of the original text and was thus a real improvement; similarly, the new, more neutral title was preferable to the original one.

21. He had only two comments to make on the form. First, the reference in the last line of paragraph 1 to a violation that was "absolutely" manifest seemed unnecessary. Secondly, paragraph 2 did nothing more than state an obvious consequence of paragraph 1, and could therefore be omitted. If it was thought preferable to retain the substance, the two paragraphs might be combined by omitting paragraph 2 and inserting after the word "representative", in the penultimate line of paragraph 1, either the words "which may not be withdrawn unilaterally" or the words "which may not be withdrawn without the consent of the other parties to the treaty".

22. Mr. CADIEUX said that he accepted the Special Rapporteur's proposal for the title of the article.

23. For the title of the section, he proposed that instead of "Principles Governing the Essential Validity of Treaties", the title "Nullity of Treaties" should be adopted.

24. With regard to the text of the article, he wondered whether the Drafting Committee had special reasons for using the expression "shall not affect the consent" in the fifth line of paragraph 1, whereas the subsequent articles referred to invalidation of consent. If not, it might be advisable to say: "the fact that a provision of the internal law of the State regarding the procedures for entering into treaties has not been complied with shall not *invalidate* the consent . . ."

25. He had some doubts about the use of the word "absolutely" before "manifest" at the end of paragraph 1. The adverb was hardly appropriate, for it introduced an element of uncertainty into the text and gave it, in some respects, a subjective character.

26. Mr. YASSEEN said that his views on the article were well known, so he need not repeat what he had already said in defence of the principle of constitutionality. So far as form was concerned, the text submitted by the Drafting Committee was an advance, but the concession it made to the principle of constitutionality was not sufficient to safeguard democratic principles and the interests of peoples.

27. From that point of view the Special Rapporteur's text seemed preferable, though he had not found it satisfactory.

28. With regard to the wording of the article, he supported Mr. Castrén's proposal that the word "absolutely" should be deleted; even the requirement that a violation should be "manifest" seemed to him to go too far.

29. The CHAIRMAN, speaking as a member of the Commission, said that although, on the whole, he considered that the Drafting Committee had produced a set of excellently worded articles in compact form, he had his doubts about article 5. He did not believe that the division of opinion in the Committee had been

such as to require the compromise solution which the Drafting Committee had put forward. There was no justification for the concession implied by the inclusion of the proviso "unless the violation of its internal law was absolutely manifest", and that concession would be extended still further if the suggestion to delete the word "absolutely" were adopted. The majority of the Commission had been in favour of the internationalist approach and of the Special Rapporteur's original proposal taking the concept of ostensible authority into account.

30. He accordingly suggested that the final proviso of paragraph 1 be deleted, and also the initial proviso of paragraph 2. The two paragraphs could then be combined to read:

"When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the international law of the State regarding the procedures for entering into treaties has not been complied with shall not allow that State to withdraw the consent expressed by its representative unless the other parties to the treaty so agree."

31. The title of section II was acceptable, subject to the deletion of the adjective "essential."

32. Mr. de LUNA said the Drafting Committee had succeeded in eliminating almost all the controversial elements in the previous text. He was not entirely satisfied, however, with the compromise between the two opposing schools of thought, the one holding that constitutional limitations on the treaty-making power had no effect in international law, the other that any such constitutional limitation produced international effects. The Drafting Committee's position was reflected in the last two lines of paragraph 1, where it was stated that the internal law governing the formation of the will of a State with respect to its external acts "shall not affect the consent expressed by its representative, unless the violation of its internal law was absolutely manifest". Personally, he would have preferred a provision under which limitations imposed by internal constitutional law would produce no effects internationally.

33. If really necessary, he would be prepared to accept the solution proposed by the Drafting Committee, but not as drafted. For instance, what was the situation if a country's internal law was silent on the subject of the treaty-making power? A new State might not yet have a written constitution and not yet have evolved any customary constitutional law. Similarly, a coup d'état would be a breach of the earlier constitution. The expression "internal law" was used in the Drafting Committee's text; but what internal law was meant?

34. He agreed with Mr. Castrén and Mr. Cadieux that the word "absolutely" should be deleted. Either the Chairman's amendment should be adopted or the words "in force" should be inserted after the words "internal law".

35. Mr. TUNKIN said the Drafting Committee had adopted a compromise text for article 5, in the hope

that it would find unanimous acceptance; it had believed that to steer a middle course was the only way of taking into account the realities of international life. International law did not solve the problem of representation and of the powers of representatives; that problem was solved by internal law, and international law must accept internal law as a fact.

36. It had been suggested by Mr. de Luna that the Drafting Committee should have chosen between the internationalist approach and the constitutionalist approach. In fact, the discussion in the Drafting Committee had confirmed its members in the belief that article 5 would be unacceptable to States unless some intermediate solution were found. The solution adopted had been to take account of internal law only with respect to "the procedures for entering into treaties".

37. Thus not all limitations contained in internal law would be covered. For example, the authorities of a State could be expected to know of every condition that might be made by the parliament of a foreign State limiting the power of its president to enter into certain types of treaty. If such a requirement were to be imposed, it would involve studying the whole of the municipal law of the foreign State concerned.

38. Another important restriction was that the limitations imposed by internal law must be absolutely manifest. Unless disregard of such manifest limitations of internal law involved invalidity of a treaty in international law, the door would remain open for undesirable machinations.

39. Accordingly, for both theoretical and practical reasons, he urged the Commission to adopt the Drafting Committee's text.

40. Mr. BARTOŠ said that he wished to enter a reservation on the text of article 5, but he would not propose alternative wording. He would vote in favour of article 5 subject to that reservation.

41. He was still opposed to the reference to article 4 of Part I, for he remained opposed, as he had been the previous year, to any rule exempting so-called treaties in simplified form from the requirement of ratification. In his opinion, every treaty, whatever its form, should be ratified, for it was important to introduce an element of democracy into the practice and not to grant full freedom to diplomatic bureaucracy, which should be subject to political supervision.

42. He also wished to make a comment in his capacity as Chairman of the Drafting Committee. The Commission could not discuss suggestions made to the Drafting Committee, which was responsible for giving effect to the Commission's decisions of principle or specific decisions. He therefore urged members of the Commission to make specific observations which the Drafting Committee could take into consideration after the Commission had taken its decision.

43. Article 5 did not cover all the points, because the Drafting Committee had tried to find a formula acceptable to all its members; but the text should not be regarded as final, and the Commission was asked to express an opinion on it.

44. Mr. PAREDES said that he supported the text prepared by the Drafting Committee because it successfully reconciled two equally important principles: the security of international relations and observance of the main constitutional provisions of each country.

45. He thought it right that not every violation of the letter or the spirit of internal law should nullify the act of the negotiator, but only violations of provisions which were manifest and easily known, for they were undoubted rules which the most elementary prudence would require the negotiators to ascertain. In the daily life of nations and in their internal law, anyone making a contract with an agent made sure that he had proper powers to conclude it; in international life, in which much more important business was transacted, it was natural that negotiators should be required to verify each other's powers.

46. He thought it would be sufficient, however, to use the word "manifest" without the qualification "absolutely", which could be deleted.

47. He approved of the Drafting Committee's approach to the case in which both States agreed to cancel the treaty.

48. Mr. AMADO said that when he had spoken on the article earlier he had related the problem to the context of modern international life with its predominance of multilateral treaties and had pointed out that representatives to an international conference could hardly be searched to find out whether or not they were provided with full powers in due form.

49. Everything ultimately depended on an estimate of risks inherent in a treaty; but the really formidable difficulties to be feared were disposed of in paragraph 2, which provided that "a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree". He could not see any other solution. Practice showed that States agreed to the withdrawal of consent only in the event of a manifest violation. For those reasons, he approved of the text proposed.

50. Mr. BRIGGS said that in the Drafting Committee he had reserved the right to oppose the formulation of article 5.

51. He was opposed to the final proviso of paragraph 1 for two reasons. First, it would be extremely difficult to apply. He was certainly not prepared to say what constitutional provisions were "absolutely manifest" in the law of the United States and he questioned whether a foreign State could decide whether certain constitutional provisions had been applied.

52. His second reason was connected with the democratic processes in treaty-making. Those processes were concerned with the formulation of the will of the State. Where notification of the will of the State abroad and the expression of the consent of the State by its representative were concerned, it was a question of good faith in international relations.

53. For those reasons, he supported the amendment proposed by the Chairman in his capacity as a member of the Commission.

54. Mr. ROSENNE said that broadly speaking he shared the views put forward by Mr. Tunkin. He had been greatly impressed by the Special Rapporteur's summing-up of the discussion on the first reading (676th meeting, paras. 73-78), when he had said that although the preponderant weight of opinion in the Commission was clearly in favour of the international rather than the constitutional approach, accommodation must nevertheless be found for the minimum requirements of those who formed the constitutional approach. On that basis, the Drafting Committee had attempted to produce a reasonable compromise text. The question was whether it was workable, and in his opinion, it was. It contained adequate safeguards in respect both of the international requirement of reasonable stability and of the need to maintain proper domestic procedures in treaty-making.

55. He did not favour the deletion of the adverb "absolutely" before the word "manifest"; that adverb, or some other similar qualification, was necessary, if only for the reason that otherwise the legal adviser to a Foreign Ministry would be placed in the impossible position of having to set up something in the nature of a research institute on comparative constitutional law. Unless the operation of the final proviso of paragraph 1 were confined to cases in which the violation of internal law was absolutely manifest, a legal adviser would have to make a thorough investigation of foreign constitutional law before negotiating a bilateral or multilateral treaty.

56. Lastly, he supported the comments of Mr. Pal on the use of the word "expressed" and those of Mr. Cadieux on the words "shall not affect". However, those were drafting points and did not involve issues of principle.

57. Mr. CADIEUX said he would be glad if someone would explain the difference between "manifest" and "absolutely manifest".

58. Mr. AMADO said that he, too, did not share Mr. Rosenne's view on that point. The adjective "manifest" already expressed something positive, so that the word "absolutely" added nothing.

59. Mr. ELIAS said that the discussion had confirmed his apprehensions of the danger of referring articles to the Drafting Committee before the points at issue had been properly thrashed out and clarified in the Commission itself. The Drafting Committee's text seemed to represent the best compromise possible, however, and members must be prepared to make some sacrifice of individual opinion if general agreement was to be reached.

60. Perhaps Mr. Pal's point could be met by substituting the word "signified" for the word "expressed". If the full powers contained written authority for giving consent, then the agent of a State would not need to do so orally.

61. The phrase "by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority" seemed somewhat unwieldy; he would have thought it sufficient to refer to a competent or duly authorized representative.

62. The qualification "absolutely" was wholly unnecessary, because the word "manifest" could only mean "absolutely clear".

63. Mr. ROSENNE said the word "absolutely" was necessary and not tautologous because, as Mr. de Luna had pointed out, apart from the situation of States which had no written constitutions, some constitutions might either be silent, or only contain some very general provisions, concerning treaty-making procedures, in which case detailed regulations might only be found in jurisprudence or in legislative or administrative decisions and might not be easily accessible. In the interests of the stability of treaties and of international negotiations, any limitations on the treaty-making power must be easily ascertainable and a matter of common knowledge if they were to be effective on the international plane.

64. Mr. AGO said that the Drafting Committee had had to spend a great deal of time on article 5, concerning which opinion in the Commission had been divided between two diametrically opposed views. The Committee's text was not perfect, and he himself could only accept it provisionally, on the firm understanding that the Commission would be able to consider it further before the second reading. Apart from the fact that the search for a compromise did not permit of really satisfying either of the two conflicting opinions, the text contained a reference to article 4 of Part I intended to avoid the use of the words "possessing ostensible authority", originally used by the Special Rapporteur, which he (Mr. Ago) considered distinctly preferable. The purpose of article 4 was not to indicate the extent of the "ostensible" authority. But as that article would probably also have to be re-drafted, it would be useless to devote more time to the question at that stage.

65. He had considered the words "unless the violation of its internal law was absolutely manifest" to be superfluous, but as the text now referred to article 4 of Part I, it was important to attenuate the total disregard of internal law which would ensue.

66. The best course for the moment would be to make do with the Drafting Committee's text provisionally and reconsider it in 1964.

67. In his opinion the word "absolutely" did serve some purpose.

68. Mr. de LUNA said that in his earlier remarks he had been speaking not of States which had no constitution, but of States whose constitution contained no express provisions concerning the treaty-making power and whose government had nevertheless concluded a treaty.

69. He was not asking that his proposal should be put to the vote; he would be satisfied if the idea was mentioned in the commentary.

70. The CHAIRMAN said he would not press for a vote on his own proposal. It seemed that the only amendment on which opinion might be divided was the deletion of the word "absolutely" in paragraph 1.

71. Sir Humphrey WALDOCK, Special Rapporteur, said he sympathized with Mr. Pal's objections to the phrase "the consent expressed"; the Drafting Committee might be asked to consider substituting the word "signified" for the word "expressed", as suggested by Mr. Elias. He also saw some advantage in substituting the word "invalidate" for the word "affect", as advocated by some members, because it would make for greater precision.

72. The word "absolutely" had been inserted because he had been informed by French-speaking members of the Commission that neither the word "*manifeste*" nor the word "*évidente*" would be quite strong enough to render the sense of the English term "manifest". Another reason was to emphasize the exceptional character of the circumstances referred to in the final clause of paragraph 1. Personally, he saw no strong objection to retaining the word "absolutely".

73. Mr. CASTREN said that he would not insist on its deletion.

74. The CHAIRMAN put article 5 to the vote, subject to the drafting changes which the Special Rapporteur had accepted.

Article 5 was adopted by 18 votes to none with 3 abstentions

ARTICLE 6 (LACK OF AUTHORITY TO BIND THE STATE)

75. The CHAIRMAN said that the title of article 6, as proposed by the Drafting Committee, had been changed and the article now read:

"Lack of authority to bind the State

"1. If the representative of a State, who cannot be considered under the provisions of article 4 of Part I as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

"2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not affect the consent to the treaty expressed by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States."

76. Sir Humphrey WALDOCK, Special Rapporteur, said that apart from the omission of the provision in paragraph 1 (b) of the original text, the changes made in article 6 were essentially drafting changes. The Drafting Committee had been instructed to formulate the article in terms of validity, rather than of the authority of representatives, and not to refer to ostensible authority or to the repudiation of unauthorized acts.

77. Mr. LIU said that the provision contained in the new article would contribute little to the security of treaties and seemed hardly necessary. The contingency envisaged in paragraph 2 was hardly likely to arise in the modern world, where methods of communication between States and their representatives abroad were so rapid as to allow of day-to-day contact. It was difficult to go behind the full powers of a negotiator and he thought that their submission to a credentials committee, in the case of treaties negotiated at an international conference, would be tantamount to notifying the other States of the restrictions upon his authority.

78. Ample safeguards against a representative exceeding his powers already existed in other provisions of the draft and a further safeguard was provided by the process of ratification.

79. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Liu, said that the considerations he had put forward had been discussed by the Commission during the first reading (677th meeting), when it had been recognized that the case which article 6 was designed to cover, though likely to be rare, should nevertheless be provided for, especially in view of the emergence of many new States and the significant increase in the number of treaties of various types being drawn up.

80. Mr. CADIEUX said that, if the word "affect" was to be replaced by some other word in article 5, a corresponding change should be made in paragraph 2 of article 6.

It was so agreed.

Subject to that amendment, article 6 was adopted by 20 votes to none with one abstention.

ARTICLE 7 (FRAUD)

81. The CHAIRMAN said that the title of article 7, as proposed by the Drafting Committee, had been changed and the article now read:

"Fraud"

"If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty."

82. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had examined the proposals to combine all the original provisions concerning fraud and error in a single article, but had come to the conclusion, on grounds of logic and of substance, that fraud and error were so different in character that they ought to be kept separate.

83. In the original article 7 he had sought to provide a definition of fraud, and members would note how drastically the article had now been shortened, the Drafting Committee having decided that it was preferable to state the broad general rule without going into detail. It was generally recognized that instances of fraud were likely to be rare.

84. Mr. AMADO said he was prepared to accept the Drafting Committee's text of article 7, although he did not like the expression "*conduite frauduleuse*" (fraudulent conduct); he would prefer it to be replaced by the word "*dol*" (fraud).

85. Mr. de LUNA suggested that, to meet Mr. Amado's objection, the expression "*conduite frauduleuse*" should be replaced by the word "*fraude*", since the word "*dol*" was already used in the title.

86. Mr. YASSEEN said that the word "*dol*" should be retained in the text of the article, because the titles would eventually disappear. The meaning of that word was generally known.

87. Sir Humphrey WALDOCK, Special Rapporteur, explained that the Drafting Committee had been faced with a language difficulty in that the expression "*manœuvre frauduleuse*" could only be translated by "fraudulent conduct".

88. Mr. GROS pointed out that the concept of "*dol*" was taken from private law. To delete the expression "*conduite frauduleuse*" would be to delete the only definition given in the article. If the word "*dol*" was used by itself, the question of definition would always arise. But the original text had contained a definition and had specified that "*dol*" was to be understood to mean the making of false statements or representations of fact, or any other fraudulent action. The Drafting Committee had tried to simplify the language. The expression "*conduite frauduleuse*" (fraudulent conduct), used to describe the conduct of a State, covered all its bad intentions, false statements and any other fraudulent proceedings, whereas if the word "*fraude*" (fraud) had been used by itself it would have been necessary to specify what kind of "*fraude*" was meant.

89. Mr. YASSEEN said that either the word "*dol*" (fraud) should be retained, or a full definition should be given, covering every aspect of "*dol*". The expression "*conduite frauduleuse*" was not satisfactory in that respect. Even if article 7 could be accepted in its abridged form because, as the Special Rapporteur had explained, instances of fraud were rare, an incomplete definition could not be accepted.

90. Mr. GROS said that there had never been any question of dropping the word "*dol*", and the expression "*invoquer le dol*" (invoke the fraud) remained. The question was whether a definition of "*dol*" was or was not needed in the article. Several members had explained their views on the theory of "*dol*" at some length. The Drafting Committee's text was a compromise, and he hoped that the agreement reached would not be upset.

91. Mr. YASSEEN said that a definition of fraud should be given, but it should be a complete definition. The definition in article 7 was not complete and he would rather it were deleted.

92. Mr. de LUNA said he entirely agreed with Mr. Gros. The Drafting Committee's text should satisfy all the members of the Commission as it contained both the definition "*conduite frauduleuse*" (fraudulent conduct) and the word "*dol*" (fraud).

93. Mr. BARTOŠ said he was not wholly satisfied with the condensed formula which the Drafting Committee had had to adopt in order to secure the approval of its members. That formula was not practical, because it was too vague and did not define anything. He thought it should be accepted provisionally, however, as it was the only possible solution at present. The Commission could revert to it, if necessary, at later sessions, taking the comments of governments into account.

94. Mr. CASTREN said he agreed with Mr. Yasseen that there was no true definition in the text. Mr. Amado's proposal would be preferable. He suggested the wording "If a State has been induced to enter into a treaty by the *conduite dolosive*" (fraudulent conduct) of another contracting State, it may invoke that fact as invalidating its consent to be bound by the treaty."

95. Mr. ELIAS said that article 7 was acceptable, but he saw no reason for referring to "fraudulent conduct" instead of "fraud" which, as indicated by the title, was the subject of the article. If there were any need to define what was meant by fraud, that could be done in the commentary.

96. Mr. CADIEUX said he thought he could discern a difference in form and perhaps even in substance between the English and the French texts. The English seemed more consistent, whereas the French used first the term "*conduite frauduleuse*" and then the term "*dol*". With regard to the substance, the article's title in English was "Fraud" and that word was repeated in the body of the article, whereas the grounds that might be invoked as invalidating consent were given in the French text, not as "*conduite frauduleuse*" but as "*dol*", which had a wider connotation.

97. Mr. AGO said that the French translation of the Special Rapporteur's original draft had contained the expression "*manœuvres dolosives*", but the Commission had preferred the adjective "*frauduleuses*" and the Drafting Committee had decided to retain it.

98. Some speakers had criticized the expression "*conduite frauduleuse*" and had maintained that it should be replaced by the expression "*conduite dolosive*". But a careful examination of the text showed that it contained a sort of implicit definition of *dol* as fraudulent conduct designed to induce the other party to consent and without which its consent would not have been obtained. He urged the Commission to accept that the French text was the best that could be devised. To amend it might destroy the meaning, which it expressed satisfactorily.

99. Mr. ROSENNE said that in the Drafting Committee he had understood that the two texts were consistent, and he therefore feared that Mr. Castrén's amendment would throw them out of harmony. He had understood from the discussions in the Commission and the Drafting Committee that the connotation of the term "*dol*" by itself could be wider than "fraud", and that the necessary precision was provided by the expression "*conduite frauduleuse*".

100. Mr. GROS said he had already had occasion to state that he was against transferring concepts of private law into international law, because relations between States were quite different from relations between private persons. Article 7 was concerned with the conduct of the State, and for purely linguistic reasons he preferred the expression "*conduite frauduleuse*" to "*conduite dolosive*" in a context relating to States.

101. Sir Humphrey WALDOCK, Special Rapporteur, said that he had been assured by French-speaking members of the Commission that the texts prepared by the Drafting Committee in the two languages corresponded exactly.

102. On the general problem of terminology, he agreed with Mr. Gros that it would be unwise to assume that concepts applicable in private law would necessarily be relevant to international relations, though they would provide some broad indications of what was understood by "fraudulent conduct" and to that extent could be helpful. He did not see how the succinct text submitted by the Drafting Committee could be improved.

103. He did not share Mr. Elias' doubts about using the expression "fraudulent conduct" while referring elsewhere to "fraud".

104. Mr. PESSOU said that it might perhaps be wiser to defer the vote and to try to find a formula which would both respect the spirit of the proposed text and satisfy all members.

105. Mr. GROS said it was regrettable that some members of the Commission appeared to cast doubt on the conscientiousness of the Drafting Committee's examination of the text. The Drafting Committee's formulation was the result of much hard work, and he doubted whether it could be improved.

106. Mr. AMADO explained that he had not made a formal proposal and was willing to accept the text prepared by the Drafting Committee, whose ability and good faith could not, of course, be questioned.

Article 7 was adopted by 19 votes to none with 2 abstentions.

The meeting rose at 12.45 p.m.

705th MEETING

Friday, 21 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of the articles proposed by the Drafting Committee for section II.

ARTICLE 8 (ERROR)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that articles 8, 9 and 10 had been combined by the Drafting Committee in a single article 8, with the title "Error", which read:

"1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

"2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

"3. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error does not affect the validity of the treaty and articles 26 and 27 of Part I then apply."

3. It would be noted that the distinction between unilateral and mutual error, which had appeared in his original draft (A/CN.4/156), had been dropped. Paragraphs 1 and 2 dealt with the points covered in the original articles 8 and 9 and paragraph 1 had been drafted in broad terms without any attempt to provide a definition of error.

4. The rule formulated by the International Court of Justice in the *Temple of Preah Vihear* case¹ had been embodied in paragraph 2.

5. Although some members had been hesitant about including errors in the expression of an agreement, the Drafting Committee had come to the conclusion that they should be included and had accordingly added paragraph 3.

6. Mr. PAREDES, commenting on the Spanish text, said he found paragraph 1 rather ambiguous, or lacking in the necessary clarity. The Spanish word "presumía" (assumed) did not convey the idea of certainty, but of a hypothesis or unsubstantiated belief. To assume was not to know definitely; but what the authors of the article had in mind seemed to require the contracting parties to have full knowledge, whether correct or mistaken, as was shown by the wording of paragraph 2.

7. Paragraph 1 required a mere assumption which was a psychological criterion, even though it referred to facts, since it was based on a personal judgement; that judgement could be challenged in various ways according to the rules laid down in paragraph 2, which provided for three exceptions to the right to invoke an error.

8. The first exception was where the State injured by the error had contributed to the error by its own conduct. For example, a State might invite a neighbouring State to conclude a treaty allowing it to operate mines which it believed to be in its neighbour's territory, and then discover that they were in its own territory. Would

it be debarred from invoking the error because it had contributed thereto? The fact was that the vague formula "contributed by its own conduct to the error" left room for the most diverse charges and allegations of every kind.

9. The second exception was where the State could have avoided the error. What error of fact could not be avoided by a detailed and exhaustive study of the situation? Were States to be required to make a more exhaustive study of the facts and circumstances than anyone made for ordinary business transactions, however important they might be? That would be an obstacle to active international life and vigorous decisions and would frustrate the Commission's own aim of facilitating negotiations between nations. Moreover, it provided a ready argument for those who were unwilling to recognize the rights of the injured party.

10. The third exception was where the circumstances were such as to put the State on notice of a possible error. That meant that it was to be penalized not only for not having exhausted all the possible means of investigating the facts, but if for any reason it had omitted to take precautions to avoid the possibility of an error; for instance, because it did not possess the necessary financial resources for such investigations.

11. In his opinion paragraph 2 made it impossible to invoke an error in any circumstances whatsoever. That being so, it would be clearer and more concise, besides being more elegant, to lay down that consent could not be vitiated by error, though he advanced that consideration only as an argument *ad absurdum*.

12. He was therefore opposed to article 8 in its present form.

13. The CHAIRMAN said that the Spanish translation of the word "assumed" in paragraph 1 was obviously wrong; the Spanish text would be brought into line with the English.

14. Mr. ELIAS said that the new text of article 8 was generally acceptable, but he maintained the opinion he had expressed in the earlier discussion (678th and 680th meetings) and still considered paragraph 3 unnecessary; if it were retained, the words "shall not affect" should be substituted for the words "does not affect", and the word "shall" should be inserted before the words "then apply".

15. Sir Humphrey WALDOCK, Special Rapporteur, said that if the word "assumed" in paragraph 1 caused translation difficulties, the Drafting Committee might consider whether the word "believed" would be an acceptable and sufficiently precise alternative.

16. He would not have thought that article 8 was really open to the kind of objections raised by Mr. Paredes; moreover, broad agreement had been reached on certain procedural provisions which ought to provide a guarantee that the article would be applied in a reasonable way.

17. The amendments suggested by Mr. Elias were acceptable and could be referred to the Drafting Committee. The question whether or not paragraph 3 should be

¹ *I.C.J. Reports*, 1962, p. 26.

retained would have to be reconsidered during the discussion of articles 26 and 27.

18. The CHAIRMAN put article 8 to the vote, subject to the drafting changes proposed.

Article 8 was adopted by 18 votes to 1.

ARTICLE 11 (PERSONAL COERCION OF REPRESENTATIVES OF STATES)

19. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee for article 11 read:

“ If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.”

20. Rather than lay down that the consequence of coercion of representatives would be that the treaty was voidable, the Commission had wished to express the rule in terms of the consent in such circumstances being without legal effect.

21. As Mr. Pal had objected to the word “ expressed ” in paragraph 1 of article 5 (previous meeting, paragraph 18), perhaps the word “ expressing ” should be replaced by the word “ signifying ”.

22. Mr. PAREDES said that, as he had stressed during the previous discussion on vitiation of consent by coercion of the negotiators of a treaty (681st meeting, paras. 8 and 9), it was not only threats or use of force in respect of his personal interests which could affect a negotiator; threats against the security of the State could also coerce his will. The Commission could not, and should not, consider a national of a State to be so selfish that he cared only for his own interests and not for those of the country he represented. If the cities of his country were in grave danger of destruction, because that had been threatened and he knew that the enemy had the means to destroy them, the negotiator would feel as much constraint as in the case of personal danger or perhaps even more, and would thus lose his freedom of action, which was the ground for nullity of the act. The majority of members of the Commission seemed to have supported that view during the previous discussion, but he noted that it was not reflected in the new text of the article.

23. He would therefore vote against article 11.

24. Mr. VERDROSS said he found the text proposed by the Drafting Committee entirely satisfactory if, as he believed, it referred not only to coercion employed against the organ that ratified the treaty, but also to coercion of the negotiating organ, and if, in the latter case, a treaty signed under duress could not be validated by subsequent ratification.

25. Mr. CASTREN said that in general he approved of the new text of article 11. However, it mentioned only coercion of individual representatives of a State, whereas the original draft had also mentioned coercion

of members of a state organ. Had the Drafting Committee wished to assimilate that form of coercion to coercion of a State, which was dealt with in the next article ?

26. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that Mr. Paredes' comment raised the question which of the cases he had mentioned came under article 11 and which under article 12. Article 11 dealt with personal coercion of individuals by means of different kinds of threats, and article 12 with coercion of the State itself, which might, of course, take the form of coercion of representatives of state organs; there was thus some overlapping between the two articles.

27. On the point raised by Mr. Verdross, he thought that coercion of a ratifying organ should probably be regarded as coercion of the State, in the same way as coercion of a head of State for the purpose of inducing him to complete an instrument of ratification. That case could be mentioned in the commentary.

28. Mr. Castrén had raised what was essentially a drafting point. The Drafting Committee had not thought it necessary to include the reference to members of state organs which had appeared in the original title and text of article 11; it had reached the conclusion that the expression “ representatives of a State ” would cover both negotiating agents and members of state organs. The reason for that change could be explained in the commentary.

29. Mr. PAREDES, replying to the Special Rapporteur, said he fully appreciated the difference between the personal coercion of a representative dealt with in article 11 and the coercion of the State dealt with in article 12. What he had pointed out was that coercion of a representative by threatening to destroy the capital of his country could be just as effective as, or even more effective than, coercion by threats against his person, family or property.

30. The CHAIRMAN put article 11 to the vote, subject to the drafting change suggested by the Special Rapporteur.

Article 11 was adopted by 19 votes to 1.

ARTICLE 12 (COERCION OF A STATE BY THE ILLEGAL THREAT OR USE OF FORCE)

31. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee for article 12 read:

“ Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.”

The title had been amended to read “ Coercion of a State by the illegal threat or use of force ”.

32. There had been virtually unanimous agreement in the Commission on the need to include such a provision and to frame it in fairly broad terms. Opinion had been divided only on whether to restate explicitly the

provisions of article 2, paragraph 4, of the Charter or whether merely to refer in general terms to the principles of the Charter; after some discussion the Drafting Committee had decided to follow the latter course.

33. Mr. YASSEEN said he had noted a difference between the scope of the new article 12 and that of the new article 11: whereas article 11 condemned coercion in general, article 12 dealt with specific manifestations of coercion, namely, the illegal threat or use of force. He wondered whether that difference was intentional.

34. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Yasseen seemed to wish to go beyond the provisions of article 2, paragraph 4, of the Charter into the realm of interpretation of that article; he himself had concluded that that was not the Commission's desire. The nature of the coercion exercised against an individual and that exercised against a State was necessarily different and forms of pressure could be put on persons that could hardly be effective against States. Moreover, there were forms of pressure — economic pressure, for example — which might not come within the definition of force. The wording used in the new draft of article 12 left open the question of interpretation of what was meant by the threat or use of force. Of course, as practice developed, the way in which the relevant provisions of the Charter were interpreted would naturally have a bearing on the application of the article.

35. Mr. YASSEEN thought that article 12 did not cover coercion entirely. It merely applied to the conclusion of treaties the consequences of the condemnation of the threat or use of force already pronounced in the United Nations Charter. But it was necessary to condemn coercion in all its forms, for it could be exercised by means other than the use of force.

36. With a view to the stability of treaties, it would be more effective to condemn coercion in whatever form it might be manifested, whether by the use of force or by any other internationally unlawful act capable of compelling a State to yield and to conclude the treaty.

37. Mr. de LUNA said that, although the title of the article was perfectly clear, it might be advisable to specify in the text that the coercion referred to was coercion of a State, for otherwise it might be wondered whether the condemnation also applied when it was the representatives of the State who were threatened. That could easily be explained in the commentary, however.

38. With regard to the problem raised by Mr. Yasseen, it was true that coercion employed against the representatives of a State was contemplated in a general way, and that coercion of the State itself meant more particularly recourse to war. Article 12 did not fully cover all cases of coercion; in particular, it disregarded economic coercion, which might be important.

39. Admittedly, it would be desirable to find a sufficiently clear formula which, without impairing the stability of treaties, prohibited both the use of force and the threat of measures calculated to starve an entire population, for example. But since the Commission had not

yet succeeded in working out a formula meeting all those requirements, he was prepared to accept the text proposed by the Drafting Committee.

40. Mr. VERDROSS supported the Drafting Committee's text, the scope of which seemed to him very wide, since it referred not only to the use of force but also to threats, which covered all other cases.

41. He thought it very dangerous to depart from the text of the Charter, because the reader might wonder why the Commission had elected to do so. The article was intended to apply a principle of the Charter to the case of coercion employed to force a State to consent to the conclusion of a treaty. To state expressly that the principle derived from the Charter was in itself noteworthy, and if the Commission tried to go further, it might find itself on uncertain ground.

42. Mr. TABIBI said that article 12 was acceptable in its new form. It would hardly be practicable to enumerate all the different types of threat or use of force that could arise, including economic pressure and intensive propaganda, to which small countries were specially vulnerable. The wording adopted by the Drafting Committee was sufficiently comprehensive.

43. Mr. YASSEEN said that in his view the Commission's task was not to embody an article of the Charter in its draft convention, but to deal with coercion in general. It was all very well to refer to an article of the Charter on the use of force, but provision should also be made for the voiding of treaties obtained by forms of coercion other than the threat or use of force.

44. Mr. BARTOŠ approved of the content of the new text, but regretted that it was incomplete. He endorsed the comments made by Mr. Yasseen. He would not vote against the article, but would have to abstain.

45. Mr. YASSEEN suggested that in order to cover all cases of coercion completely, article 12 should be drafted in some such terms as the following, which he thought would obviate doubt and controversy:

“ Any treaty the conclusion of which was procured by the threat to commit an act contrary to international law or by the commission of such an act shall be void.”

46. The article as it stood added nothing to a rule already laid down in the Charter; and with it the Commission had not exhausted the whole question of coercion, for there remained some cases of coercion which did not come within the scope of the article. He would vote for the Drafting Committee's text although he did not think it complete, but would reserve his position on the remainder of the question of coercion.

47. Mr. BRIGGS asked whether the procedural provisions of article 25 would cover such articles as article 12, or whether the statement that in certain circumstances a treaty would be void was purely declaratory.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Briggs had raised a very pertinent point which he himself has hoped would be taken up in con-

nexion with article 25. Some discussion had taken place on the extent of the application of article 25, some members contending that it might not apply to all the articles and others maintaining that a dispute could arise as to the facts on almost any of the provisions in the draft. In the present instance, for example, the claim by one State that a treaty had been procured by force might be emphatically denied by another.

49. The CHAIRMAN pointed out that the Drafting Committee would be discussing the scope of article 25 when considering the text and would present its views on that matter to the Commission.

50. Mr. CASTREN agreed with Mr. Verdross that in article 12 the Commission should not depart from the wording of the Charter or give an interpretation of what was meant by force; it was only subject to that reservation that he could vote for the Drafting Committee's text.

51. Mr. GROS endorsed Mr. Castrén's remark.

52. Mr. PAREDES said he still maintained that there were other forms of coercion as serious as armed force or even more serious — forms of an economic or political nature which even if not expressly mentioned were understood to be covered by the new text of article 12, for it related to all moral or physical force or threat of its use, and made no exceptions. He would therefore vote for the article.

Article 12 was adopted by 19 votes to none with 1 abstention.

ARTICLE 13 (TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW FROM WHICH NO DEROGATION IS PERMITTED) (*ius cogens*)

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title of article 13 should be changed to "Treaties conflicting with a peremptory norm of general international law from which no derogation is permitted (*ius cogens*)" and that the text should read:

"A treaty is void if it conflicts with a peremptory norm of general international law from which no State is permitted to derogate and which can be modified only by a subsequent norm of general international law having the same character."

54. There had been some division of opinion in the Commission as to whether article 13 should contain some indication of what was meant by *ius cogens*. In his original draft he had given some examples of acts contrary to *ius cogens*, all of which were criminal under international law; but certain members, including Mr. Bartoš, had pointed out the danger of giving examples, even of the most obvious kind, because that might suggest that the article was concerned only with acts already recognized as criminal.

55. After deliberating on the matter, the Drafting Committee had come to the conclusion that it would be best to avoid detailed examples and to frame the

article in general terms, especially as the concept of *ius cogens* would be subject to further interpretation and extension as time went on. The text now presented to the Commission was the outcome of careful thought and had been by no means easy to draft.

56. Mr. VERDROSS fully approved of the Drafting Committee's text. The only comment he wished to make was that the words "from which no State is permitted to derogate" seemed superfluous, since that was how a rule of *ius cogens* was defined. He would not oppose the retention of these words, however, and would vote for the article.

57. The CHAIRMAN pointed out that no reference was made to *ius cogens* in the text of the article itself.

58. Mr. CASTREN said the title of the article was too long. He proposed that it be shortened by deleting the words "from which no derogation is permitted".

59. Mr. de LUNA said he approved of the text as it stood. In current usage, to say that a rule was peremptory meant that it was a rule of public order. But there were several kinds of peremptory norm; some peremptory norms bound the authorities responsible for applying penal laws and left them no discretion, whereas others allowed them some latitude. Peremptory norms from which no derogation was permitted were what was known as *ius cogens*. The specific qualification in the Drafting Committee's text was therefore necessary.

60. Mr. PESSOU said he agreed with Mr. de Luna. It might be considered that there were some rules of international public order which permitted of derogation. The phrase "from which no State is permitted to derogate" was not superfluous; it was needed to strengthen the idea expressed in the article and to remove all ambiguity.

61. Mr. ELIAS said that both the title and the text of the article should be accepted as they stood. If it were shortened, the title would be incomplete, and the discussion had shown only too well that the concept of *ius cogens* was by no means as clear as some members seemed to think. In order to bring out its imperative character, the words "A treaty is void", at the beginning of the article, should be changed to "A treaty shall be void".

62. Mr. YASSEEN said that the new text was too laconic, and several points still needed clearing up. Having been unable to define *ius cogens*, the Special Rapporteur had confined himself to giving a few examples, which was an excellent method. Some of the examples had been challenged, but that did not reduce the value of the method followed. The examples could be altered or a few others added; at all events, what was important was to show clearly what a rule of *ius cogens* was. The rule would thus be invested with great authority, and at the same time an application that justified it would be ensured.

63. He had difficulty in accepting the phrase "from which no State is permitted to derogate". For rules of international law, even if not rules of *ius cogens*,

permitted of no derogation; they could not be broken by any State. The point was that States should not be permitted to depart from the rule by means of international agreements.

64. The text was also unduly laconic in that it omitted a very useful paragraph of the draft submitted by the Special Rapporteur, concerning general multilateral treaties, which could derogate from rules of *jus cogens* by means of new rules of *jus cogens*. The Drafting Committee's text merely touched on the question; the Special Rapporteur's draft was much clearer and strongly emphasized the positive nature of concept of *jus cogens*.

65. Mr. ROSENNE said that during the earlier discussion of article 13, he had wondered whether that article should not be in some other part of the draft. He had come round to the view that, as reformulated by the Drafting Committee, it was in its proper place.

66. Mr. EL-ERIAN said he agreed with the comments made by Mr. Elias. It was important to define *jus cogens*. When the draft covenants on human rights were being considered in the Third Committee of the General Assembly, a long discussion had developed on the question whether the French concept of *ordre public* corresponded to what was known to English and American lawyers as "public policy"; that question had led to endless difficulties, which showed how essential it was to define *jus cogens*.

67. He could not subscribe to the view that all norms of general international law were peremptory in the sense of *jus cogens*. Some rules of international law which were laid down in particular international conventions took precedence over those contained in general international conventions, as was indicated by Article 38, paragraph 1 (a), of the Statute of the International Court of Justice.

68. The concept of *jus cogens* had originated with universal crimes like piracy and the slave trade, whose prohibition had long been regarded as a peremptory rule from which States were not permitted to derogate.

69. He was in favour of retaining the term "*jus cogens*" in brackets at the end of the title.

70. Mr. BARTOŠ explained that the Drafting Committee had been compelled to refrain from giving any definition of *jus cogens* whatever, because two-thirds of the Commission had been opposed to each formula proposed. The present discussion merely illustrated the difficulty of the problem.

71. Referring to Mr. Castrén's comment on the excessive length of the title of the article, he explained that the Drafting Committee's intention had been to give an explanation, not in the commentary, but in the text itself, so as to elicit a response from governments. The Special Rapporteur had even been asked by the Drafting Committee to stress the matter in his commentary with a view to discovering the reaction of States to the concept of *jus cogens* in international law—a concept hitherto regarded as belonging to so-called rational law rather than to positive law—and their views on the nature of a peremptory norm.

72. The Drafting Committee had also meant to make it clear that the article was concerned with universal international law; that was why the title referred to general international law, to the exclusion of regional international law. Thus it had been intentionally that the long title had been made still longer.

73. He associated himself with Mr. Yasseen's comments on international public order, in other words, on peremptory norms and derogation from them. The Drafting Committee had considered the matter and wondered whether derogation from peremptory norms should be dealt with in article 13, or rather in section III on the termination of treaties. Everyone was agreed that such a clause was necessary, and it would be discussed in connexion with section III of the draft; the clause would deal with the effects of changes in the order of the peremptory norms of general international law on the existing state of the law. The Drafting Committee had not neglected the problem; perhaps Mr. Yasseen and he should reserve the right to revert to it later.

74. Mr. TABIBI said he was fully satisfied with the work of the Drafting Committee, which had prepared a text for article 13 and an explanatory title in accordance with the Commission's instructions.

75. Mr. TUNKIN said that, like Mr. Yasseen, he attached considerable importance to paragraph 4 of the original draft article 13; but the point was covered by the concluding words of the text proposed by the Drafting Committee: "which can be modified only by a subsequent norm of general international law having the same character." The idea there was that if the treaty which conflicted with a *jus cogens* rule itself contained a new *jus cogens* rule it would of course not be void; the new *jus cogens* rule would simply replace the old.

76. With regard to the second point raised by Mr. Yasseen, the words "from which no State is permitted to derogate" were intended to mean "from which States cannot contract out". Perhaps the Drafting Committee should be asked to consider whether the term "to derogate from" could be construed as meaning "to violate"; if, as he believed, no such meaning could be read into the term, there would be no need to change it.

77. As to the title, he agreed that it could be shortened to read "Treaties conflicting with a peremptory norm of international law (*jus cogens*)". The words "from which no derogation is permitted" were not indispensable.

78. Mr. CASTREN said that he would not dwell on the question of the title, as Mr. Tunkin had already accepted his proposal; in any case titles were of no great significance, it was the text that counted. Nevertheless, the title as it stood was not really complete. To achieve perfection, it would be necessary to add the rest of the article and refer to norms which could be modified only by a subsequent norm of general international law having the same character. That would put the whole article in the title.

79. Mr. VERDROSS said he supported Mr. Yasseen's proposal. It was necessary to specify that no derogation

from a *jus cogens* rule was permissible by bilateral or multilateral treaties; only a general rule itself having the character of *jus cogens* could derogate from a *jus cogens* rule. He therefore proposed that the Drafting Committee should replace the words "no State is permitted to derogate" by the words "States are not permitted to derogate by bilateral or multilateral treaties", because one State could never derogate from a rule of international law.

80. Sir Humphrey WALDOCK said he agreed with Mr. Castrén and Mr. Tunkin on the shortening of the title.

81. He also agreed with Mr. Tunkin on the meaning of the expression "to derogate from". He suggested that the Drafting Committee should be asked to reconsider the wording of the passage "from which no State is permitted to derogate" with a view to making the meaning absolutely clear.

82. There appeared to be general agreement with regard to the rule itself and the only question which might require a vote was whether it was desirable to include some examples.

83. The CHAIRMAN said that a vote could be taken on the article, on the understanding that the title would be shortened as suggested by Mr. Castrén, and that the drafting points raised by Mr. Elias and Mr. Yasseen would be dealt with by the Drafting Committee.

84. He agreed that the use of the singular in the phrase "from which no State is permitted to derogate" could lead to misunderstanding.

85. Mr. ROSENNE suggested that the vote on article 13 should be deferred until a new text had been submitted by the Drafting Committee.

86. Mr. TUNKIN said he saw no reason for deferring a decision. The points that would be referred to the Drafting Committee were mere questions of drafting which would not affect the substance of the article. The Commission was therefore in a position to take a decision.

87. Mr. de LUNA said he agreed with Mr. Tunkin. It was not necessary to consider the article again.

88. Mr. BARTOŠ was in favour of voting on the principle of the article at once. The Drafting Committee could be asked to take account of the suggestions accepted by the Special Rapporteur, but there should be no further amendment of the text before another reading. The vote could be taken either on the proposed text of the article, or in two steps: first, to request the Drafting Committee to revise the text; and second, to approve the principle of the article, from which the Drafting Committee must not depart.

89. Mr. ROSENNE said he would not press for postponement of the vote.

Article 13 was adopted unanimously.

90. The CHAIRMAN invited the Commission to resume its first reading of the draft articles and to consider article 26 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

ARTICLE 26 (SEVERANCE OF TREATIES)

91. Sir Humphrey WALDOCK, Special Rapporteur, said that article 26 raised some difficult problems; that was why he had appended a rather elaborate commentary. The article dealt with the question whether in certain cases it was permissible, or perhaps even obligatory, to sever part of a treaty from the remainder. The cases contemplated were those in which a treaty had been found invalid under any of the provisions of section II, such as those on error or fraud, or in which it was sought to terminate a treaty under one of the rules in section III. With regard to the latter, the case of the termination of a treaty following upon its breach by one of the parties, dealt with in article 20, might well prove to be a special case, since the violation of its rights under the treaty could entitle the injured party to invoke the principle *inadimplenti non est adimplendum* and also the doctrine of reprisals. He drew attention, however, to the fact that an element of severance was already present in the provisions of article 20, under which it was possible for the injured party to denounce only the clause of the treaty which had been broken.

92. The matter had not received much attention from writers, though a short section was devoted to it by Lord McNair in his book *The Law of Treaties*. Nor was there much judicial authority on the subject. The question of severance had been taken up in their separate opinions, discussed in paragraphs 6 to 8 of the commentary, by two judges in the *Norwegian Loans*² and *Interhandel*³ cases, who, however, had not taken the same position.

93. A strong argument in favour of permitting the severance of treaty provisions was the desirability of saving the main provisions of the treaty as far as was legitimate; for example, an error, without being unsubstantial, might relate only to a particular section of a treaty. At the same time, the disappearance of a comparatively modest clause could affect the balance of the treaty as a whole.

94. Both Lord McNair and the authors of the Harvard Draft⁴ favoured the principle of severance and found that it was implied in some pronouncements of the International Court. To his mind, the decisions invoked did not seem to go beyond the statement that one part of a treaty could be independent of another. Moreover, all the passages cited referred to the interpretation of treaties. He was more impressed by the argument, put forward both by Lord McNair and by the authors of the Harvard Draft, that a multilateral treaty often dealt with a number of different subjects, one part of the treaty having little connexion with another. There again, however, it should be remembered that concessions made by a State in one part of the treaty might have been made in return for concessions made to that State in other parts.

² *I.C.J. Reports*, 1957, pp. 9 ff.

³ *I.C.J. Reports*, 1959, pp. 6 ff.

⁴ *American Journal of International Law*, 1935, Vol. 29, Supplement, Part III.

95. The main substance of article 26 was contained in paragraph 3. The provisions of paragraph 4 were especially relevant to the question whether the severance of a particular provision was permissive or obligatory.

96. Following the discussion on certain other provisions, he no longer favoured cross-reference to the articles on reservations. He therefore suggested that paragraph 4 (b) should be re-worded so as to omit the cross-reference; it would then be couched in direct terms and would refer to a provision which was not essential to the consent of the parties to the treaty.

97. Mr. CASTREN said that the article was based on a sound idea. The principle of the severability of treaties should be accepted within reasonable limits. He approved of the approach adopted and the proposals submitted by the Special Rapporteur, and would merely make a few comments on the form.

98. Paragraphs 1 and 2 might perhaps be made more specific by saying that a notice "must apply" or even "can apply only" to the treaty as a whole, instead of "shall apply" (*s'applique*); for a notice might relate to only one part or one provision of a treaty, which was precisely the case dealt with in paragraphs 3 and 4. Perhaps paragraphs 3 and 4 could be combined, since paragraph 3 dealt with a notice relating to part of a treaty and paragraph 4 with a notice relating to one particular provision; the difference was very small and often there was no difference. What was meant by "one part of a treaty"? Was it a chapter, a section or a sub-section? And did the word "provision" mean an article, a paragraph, a sub-paragraph or a sentence?

99. If paragraphs 3 and 4 were kept separate, it would be advisable to say "may be limited" instead of "shall be limited" in the opening words of paragraph 4. In any case, a single separate provision of a treaty might be so important that its breach by one of the parties gave the other party the right to denounce the whole treaty. But the latter party might merely denounce or suspend the provision in question.

100. Lastly, paragraph 4 (b) might be worded in the same way as paragraph 3 (a) (ii).

101. Mr. TUNKIN said that the wording of article 26 needed some adjustment if it was not to present the whole problem in a false light. For example, all four paragraphs spoke of "a notice framed" under either article 24 or article 25, which suggested that the problem was one of procedure. In fact, it was a problem of substance: it related not to the question of framing a notice, but to the right of a State to take certain action in the event of fraud or error, for example.

102. A comparison of the provisions of article 26 with those of article 24 showed that there was a good deal of repetition. He therefore suggested that consideration should be given to the possibility of combining the two articles and producing a more compact and elegant text.

103. Mr. ROSENNE said that as at present drafted, the provisions of article 26 referred to all the different processes in sections II and III, such as annulment

on various grounds, denunciation, termination, withdrawal and suspension. Those processes, however, were not all on the same footing. He therefore asked whether, as a matter of principle, the concept of severability would apply in regard to suspension in the same way and to the same effect as it would apply to the termination of a treaty or of participation in a treaty. The reason why he asked that question was that, in the case of termination or suspension of a treaty following upon its breach, there was a difference between suspension, which could be partial, and termination; and the question arose of the possible right of an injured State to choose between termination of the whole treaty and suspension of the whole or part of the treaty. Provision for a similar choice might have to be made elsewhere.

104. The Special Rapporteur's answer to that question could help the Commission to decide what would be the best rule in the matter. That was particularly important, because the rule that emerged from the Commission's discussions would probably be *de lege ferenda* and not *de lege lata*.

105. Sir Humphrey WALDOCK, Special Rapporteur, said that he regarded breach as a special case, for which special provision would perhaps have to be made.

106. In general, the question whether the principle of severance applied would depend largely on the nature of the treaty. It was particularly important in the case of modern treaties with a very large number of clauses. A classic example was the Treaty of Versailles, which dealt with a great variety of entirely different matters.

107. The possibility of severance existed in connexion with any of the principles on the basis of which one of the acts referred to in paragraphs 1 and 2 could be performed. He had deliberately raised the question of severance in connexion with the violation of a *jus cogens* rule in paragraph 5 of his commentary on article 13 (A/CN.4/156, page 51), where he had written:

"One point of view might be that any treaty having an illegal object should be totally void and lack all validity until reformed by the parties themselves in a way to cure it of the illegality. Having regard, however, to the relationships created by treaty and to the prejudice that might result from holding a treaty to be totally void by reason of a minor inconsistency with a *jus cogens* rule, it seems preferable to allow the severance of illegal provisions from a treaty in cases where they do not form part of the principal objects of the treaty and are clearly severable from the rest of its provisions."

Normally, the violation of a *jus cogens* rule would be on some secondary point; in the unlikely event of two or more States concluding a grossly illegal treaty, the instrument would probably never see the light of day.

108. With regard to the practice of the International Court, the *Norwegian Loans* and *Interhandel* cases, which were discussed in his commentary on article 26, were cases not of violation of *jus cogens* rules, but rather

of alleged conflict with the Statute of the International Court of Justice. However, the Court appeared to have regarded the provisions of the Statute as *jus cogens* for the parties to the case.

The meeting rose at 12.25 p.m.

706th MEETING

Monday, 24 June 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 26 in section IV of the Special Rapporteur's second report (A/CN.4/156/Add.2).

ARTICLE 26 (SEVERANCE OF TREATIES) (*continued*)

2. Mr. CADIEUX said there was no doubt that the principle of severability of treaties had received recognition in state practice case-law and doctrine. All that the Commission had to do, therefore, was to set the limits within which the principle should be applied; that was a matter of codification, but also of development of international law. It was clear, too, that the principle of severability touched on the essential validity of treaties, and that an article on the subject should be included in the draft.

3. The effect of the principle raised what was really a question of interpretation of the will of the contracting parties: it had to be determined whether one part or one provision of the treaty had been an essential motive for consent to be bound by the other parts or provisions. Severance could only be justified if the reply to that question was in the negative. That was the point of view that Sir Hersch Lauterpacht had adopted in the argument quoted by the Special Rapporteur in paragraph 6 of his commentary. If one part or one provision of a treaty was independent and self-contained, that was at least an indication that it might not have been an essential motive for consent. Similarly, if reservations to one part or one provision of a treaty were allowed, that was evidence that acceptance of that part or provision had not been essential.

4. That simple but fundamental principle was not perhaps expressed as clearly as it should be in the draft. He therefore suggested that paragraphs 3 and 4 of the article should be combined in a simplified form stressing the fundamental principle, which was to give effect to the intention of the contracting parties and to establish a presumption that, if one part or provision of a treaty was self-contained and independent of the rest of the treaty, it could be severed. If the contracting parties wished to bar that presumption, they could do so by appropriate provisions in the treaty.

5. Like the Special Rapporteur, he considered that severance should be accepted in the cases contemplated in paragraphs 3 (a) (ii) and 4 (b), and also in paragraph 3 (a) (i) unless an express clause or some other conclusive evidence establishing the contrary intention of the contracting parties rebutted the presumption.

6. The idea expressed in paragraph 1 should be retained, but since it placed a restriction on the principle of severability, the principle itself should be stated first.

7. With regard to the application of the principle of severability in the event of breach of a treaty, he thought there could be no severance if the breach was material. Article 20 laid down that a material breach of a treaty resulted from the setting aside of any provision to which reservations could not be made or failure to perform which was not compatible with the fulfilment of the object of the treaty. That being so, it seemed incompatible with the will of the parties that the principle of severability should be applicable in that case, since the result would be to isolate a provision which had been an essential ground for concluding the treaty. Application of the principle of severability would then enable the injured party to implement a treaty from which a material provision had been severed. That would be abandoning the very principle on which any rule concerning severance should be based. The injured party had certain rights under article 20; but it would not be justifiable to give it, under article 26, the right to apply a treaty differing substantially from the original treaty.

8. On the other hand, in the case of a breach that was not material, the principle of severability should apply; it would be going too far to give the injured party the right to denounce the whole treaty. Article 20 settled part of the question; article 26 should complement and confirm article 20.

9. Article 26 should be linked to article 25, for a party wishing to apply the principle of severability could not do so unilaterally.

10. Mr. PAL said that, like Mr. Tunkin, he did not find article 26 altogether acceptable in its present form. It seemed to deal mainly with the procedure to be followed when treaties had become vitiated in certain ways, without adequately enquiring whether the vitiation was partial and without specifying when the question of severability arose.

11. The correct approach would be to examine the articles already adopted which dealt with the operation of the various vitiating factors, in order to determine whether, under any of them, any of the vitiating factors could be said to affect only a part of a treaty. If they could, but only if they could, the question of severability would arise, and it would be necessary to determine whether, and to what extent, the vitiated treaty consisted of distinct parts that could be separated from each other so as to salvage the unaffected part or parts. The point of departure must, of course, be the general proposition, implied but not stated in paragraph 1 of article 26, that a treaty was normally indivisible. Paragraphs 3 and 4 might have to be re-drafted so as to set out the circumstances in which, and to

what extent, a treaty could be regarded as severable. In that connexion, it would have to be decided whether severability must be traced to the original intention of the parties, to be ascertained by interpretation of the terms of the treaty and the relevant circumstances, or would be determinable by means of an objective rule of law. In some systems of municipal law, for analogous purposes, severability of a contract was dependent on the express or implied intention of the parties.

12. The Special Rapporteur's draft contained a number of substantive principles: that a treaty was in principle indivisible unless there were express provisions as to its separability, in which case they prevailed; that part of a treaty might be severable if its provisions were self-contained and wholly independent of the remainder and provided that acceptance of it had not been made an express condition of the acceptance of other parts, either by a term in the treaty itself or during the negotiations; and that a provision in respect of which it was permissible to make reservations under article 18, paragraph 1, of Part I, was severable. Certainly that last condition was a valid test, for if clauses were made open to reservations it was a legitimate inference that the parties regarded them as severable.

13. The Commission had to consider not only severability, but also the question whether only part of the treaty was affected by the vitiating factor. The whole question of severability depended on the extent of the operation of the vitiating factors, as accepted by the Commission. It would be preferable to frame an objective rule of law to determine severability, in particular, in order to obviate the danger of the doctrine being transformed from a legal principle into a political weapon. Similar risks had been discussed in connexion with the doctrine of *rebus sic stantibus*. He was not in favour of introducing any pseudo-legal principle based on the "implied intention" of the parties.

14. In some municipal systems it was a generally accepted principle that only the injured party had the right to apply for the severance of certain clauses in a contract. Formerly, common law had allowed severance; but statute law had been stringent in the matter. More recently the distinction had disappeared, and the position now was that if legal clauses could be separated from illegal clauses the latter could be rejected separately. But if any part of the consideration was illegal then all the promises supported by it failed. Those rules, however, had always been found difficult to apply.

15. With regard to the articles, as at present drafted, under which the question of severance might arise, fraud under article 7 would vitiate the whole treaty; so would error under the new article 8 and coercion under the new articles 11 and 12; so that in none of those cases would the question of severance arise. Again, there could be no severance of treaties conflicting with a peremptory norm of general international law; under the new article 13, such treaties would be void *in toto*.

16. He would not comment on the possible applicability of article 16 to articles 21 and 22, as the revised

texts of those articles had not yet been submitted by the Drafting Committee.

17. In his opinion the right to demand the severance of treaty provisions could only belong to the injured party and that would have to be laid down in the article. It would be better to have a single article than to include provisions on severance in several articles, which would be unduly repetitive.

18. No final decision on article 26 could be reached until the Commission had before it the Drafting Committee's texts of all the articles in sections II and III.

19. Mr. ROSENNE said that the article presented considerable difficulties and at the present stage the Commission would do better to avoid making any pronouncement covering the whole problem of severance. It should confine itself to what was necessary for the purposes of the section dealing with validity and termination, and to dovetailing its conclusions with the decisions on Part I reached at the previous session. The questions of severance and severability could arise in connexion not only with the validity and termination, but also with the application and interpretation of treaties; they were discussed in the later context in much of the case law and legal writings. While the principle of severance was broadly accepted in both case law and doctrine, there were fundamental disagreements as to its scope and manner of application. Although there was admittedly a strong trend of opinion in favour of the thesis put forward by the Special Rapporteur, particularly the principle of paragraph 3 (a) (ii), nevertheless many authorities had pointed to the problems it could create. He had been particularly struck by a passage in which Rousseau drew attention to the almost insurmountable difficulties of assessing the relative importance of different provisions for different parties to a treaty.¹

20. Other difficulties to which the doctrine of severability gave rise were rather similar to those encountered by the Commission when discussing article 5. If the Special Rapporteur's thesis were accepted, it would be necessary to determine not only what had been expressed by the parties on the international plane to be essential, but also what had been material in forming the will of the State on the domestic plane, since legislatures often ratified unpopular treaties because of some particular provision they contained. That point had been emphasized by Sir Hersch Lauterpacht in the *Interhandel* case when he had warned against the impropriety of being "influenced by any speculation as to differing attitudes of the legislative and executive branches of the Government of the United States" concerning the Connally amendment, and had stressed that the written text alone must be regarded as representing the United States position.² He himself subscribed to that view and believed that any approach to the problem of severance would have to be based on the assumption that it was not possible to distinguish objec-

¹ Rousseau, C., *Principes généraux du droit international public*, Paris, 1944, livre 1^{er}, Les Traités, p. 540.

² *I.C.J. Reports*, 1959, p. 111.

tively between important and unimportant provisions of a treaty.

21. In considering article 26, the Commission should confine itself to the international aspects, without going into the domestic significance of the provisions of a treaty. Two new texts had recently been advanced in the *South West Africa* cases. The first had been put forward by Judge Jessup in his separate opinion in the passage reading:

“... the question which, if any, of the provisions of the Mandate did not survive cannot be tested by an inquiry whether this or that provision was ‘essential’ to the operation of the Mandate, or whether it was merely ‘important’ or ‘useful’ or, indeed, ‘inconsequential’; there is no objective standard which can be used to make such an appraisal. The question which can be answered is whether some provision or part of a provision became inoperable and if so whether that inoperable portion was so essential to the operation of the provision in question that the whole provision falls.”³

22. The second test was to be found in the joint dissenting opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, in the passages reading:

“... there is in fact no principle of international law which requires that because an instrument or institution survives or continues in existence, it must necessarily do so with respect to *all* its parts on a completely non-severable basis.

“... If an inspection of a particular clause shows that, although an instrument or institution survives as such, the clause concerned is no longer possible of performance, or can no longer be applied according to its terms (as is the case with Articles 6 and 7 of the Mandate) then the *prima facie* conclusion must be that although the instrument or institution otherwise remains intact, that particular clause is at an end.

“The only circumstances in which it might be possible to maintain the contrary, would be where the provision concerned was of so fundamental and essential a character that the instrument or institution could not function without it.”⁴

23. It was interesting to note that the judges, while accepting the principle of severability, had drawn precisely the opposite conclusions from it when applying it to the case in question. The Court, however, had not taken any firm position of principle on the issue of severance, and indeed had not needed to, because of the manner in which the case had been pleaded.

24. The Commission was not in a position, nor was it called upon, to choose between different theories of the doctrine of severability or the method of applying it, or to try to find a compromise between them; but it should perhaps be guided by the proposition, on which there was general agreement, that the application

of the doctrine in any given case must be the outcome of a full and possibly even minute consideration of all the relevant facts. Naturally severance implied some degree — perhaps a considerable degree — of revision, but that was essentially a political, not a judicial matter, as Rousseau had brought out in his instructive section on revision.⁵ Municipal concepts and practice relating to the severance of contract clauses could be of little real assistance.

25. As far as integration of article 26 with the provisions of Part I was concerned, he considered that its wording should follow as closely as possible that adopted for article 15, paragraph 1 (b). That would also be consistent with the approach adopted by Sir Gerald Fitzmaurice in article 26, paragraphs 7 and 8, and in paragraph 194 of the commentary in his second report.⁶ He had been impressed by the warning given in the latter paragraph against the possibility of effecting disguised unilateral reservations by partial termination, and would therefore answer in the negative the question put by the present Special Rapporteur, when introducing article 26 at the previous meeting (paras. 91-96) whether it should be made obligatory for the party seeking to exercise its rights under article 26 to sever the impugned provision.

26. In principle, all notices under articles 24 and 25 must be subject to the terms of the treaty itself and apply to the whole of it; but in the present context the expression “terms of the treaty itself” might be understood as referring both to the provisions regarding termination and to those regarding the extent of initial participation in the treaty under article 15, paragraph 1 (b), of Part I, but not to the provisions regarding reservations, which were dealt with in other articles of that part.

27. In his opinion the notices contemplated in articles 24 and 25 were essentially reasoned demands to negotiate and the sanction of causing the treaty to lapse only came into operation if the negotiations failed. The notice could be limited to one particular provision and consequential matters. The sanction applied in the event of complete failure of the negotiations must, in principle, result in the complete termination of the whole treaty or at any rate of a clearly defined part of the treaty, and not simply in the severance of a clause.

28. In regard to the question of a treaty being composed of separate parts, he had been disturbed by the reference to such a complex instrument as the Treaty of Versailles, parts of which might subsequently have been denounced, but which had surely not been regarded as severable when drawn up.

29. There were three exceptions to the general argument he had advanced. First, it seemed to be accepted that in the case of a breach, the injured State could invoke its rights in respect of the breached treaty in whole or in part, which was a particular application

⁵ *Op. cit.*, p. 615.

⁶ *Yearbook of the International Law Commission, 1957*, Vol. II (United Nations publication, Sales No.: 57.V.5, Vol. II), pp. 34 and 66.

³ *I.C.J. Reports*, 1962, p. 408.

⁴ *Ibid.*, pp. 517 and 518.

of the law of retaliation, retorsion or self-help. That situation ought to be covered in the provisions concerning breach.

30. The second exception was when a part of a treaty initially completely valid became invalid as a result of the subsequent emergence of a rule of *jus cogens*. In view of the great complexity of intertemporal law and of the way in which the character of treaties could change in the course of their execution, it might be desirable to consider recognizing the principle of severability *a priori* rather more freely in such cases; that would probably make for greater stability of treaties. Moreover, only a small number of treaties were likely to be tainted with that form of invalidity.

31. The third exception was the rare but possible case of a single clause having been introduced as a result of improper pressure on the representative of one of the parties; that situation was not covered by article 11, and it might be proper to allow severance of such a provision if the injured State so desired.

32. He suggested that the title of the article was too broad and gave promise of more than the contents would warrant: attention should be focused on the contents of the instruments effecting the termination and not on the broad principle implied by severance.

33. Paragraphs 1 and 2, subject to drafting changes, and if brought into line with article 15 of Part I, would be acceptable and useful.

34. Paragraphs 3 and 4 went a great deal too far if they were to apply equally to all the processes mentioned in article 25. However, the Commission should perhaps consider something a little more liberal in cases of temporary suspension, since that process seemed to be of a different character from those which put an end to a treaty or to a State's participation in a treaty.

35. If his views on the three exceptions were generally accepted, some cross-reference should be made to the questions of breach, subsequent invalidity as a result of a new *jus cogens* rule, and improper pressure upon an individual representative negotiating a treaty.

36. A general provision should also be inserted allowing the injured State some choice as to what action it wished to take in cases in which termination was envisaged in the draft articles; the possibility of suspension, including partial suspension, could be retained as an alternative to total termination.

37. It should also be made clear that the article would not apply to treaties falling under the provisions of articles 12 and 13, which were void *ab initio*.

38. Mr. BRIGGS said that article 26 would need some re-drafting and the Commission might not be able to reach a final decision until it had seen the new texts of the articles containing provisions on which article 26 would have a bearing.

39. There was enough practice to warrant an article following for the severance of treaty provisions, provided proper safeguards were included.

40. He was inclined to think that paragraphs 1 and 2, which could probably be combined, were too restrictive and that the opening phrase should be modified to read: "Unless the notice itself otherwise provides"; that would establish a presumption that a notice of termination, withdrawal or suspension, given under article 24 or 25, applied to the treaty as a whole.

41. On the other hand, a notice of termination of certain provisions only, under paragraphs 3 and 4, must be subject to the proviso "unless the treaty otherwise provides". But that right of termination could only be invoked in respect of separate provisions that were clearly independent of other provisions in the treaty, as had been provided in the Harvard Research Draft.⁷

42. It would be necessary for the Commission to discuss the scope of the application of article 26.

43. With regard to the commentary, commencing with paragraph 6, much of the Special Rapporteur's discussion of declarations of acceptance of the compulsory jurisdiction of the International Court did not seem entirely pertinent to the question of severability of treaty provisions.

44. Mr. de LUNA congratulated the Special Rapporteur on the choice he had made among the various schools of thought on the problem of the severability of treaties. Some writers had attached little weight to the judgements of the Permanent Court of International Justice in the *Free Zones* and *Wimbledon* cases, the Court's two advisory opinions relating to the International Labour Organisation, and the judgements of the International Court of Justice in the cases of the *Norwegian Loans*, *Interhandel* and *Reservations to the Genocide Convention*. As the Special Rapporteur had noted in paragraph 4 of his commentary, those pronouncements had been cited "as evidence of a general concept in international law of the separability of treaty provisions"; and he had added that a rule which, as in the Harvard Research Draft, would allow the severance of any "separate provision of a treaty if such provision is clearly independent of other provisions in the treaty" might be too broadly stated.

45. He (Mr. de Luna) would merely remind the Commission that the Permanent Court had stated in the *Wimbledon* case that: "The provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany . . . they would lose their *raison d'être*. . ."⁸

46. The new principle of the severability of international treaty obligations, especially in law-making treaties, must therefore be accepted, and it was a matter for satisfaction that the trend towards an international community law had prevailed over the liberal, individualistic and selfish international law of the nineteenth century. On the other hand, the opposite extreme represented by the Harvard Research Draft should be avoided.

⁷ *American Journal of International Law*, 1935, Vol. 29, Supplement, Part III, p. 663, article 30.

⁸ *P.C.I.J.*, Series A, No. 1, pp. 23-24.

47. In his arbitral award of 1888, in the dispute between Costa Rica and Nicaragua,⁹ President Cleveland had held that the 1858 treaty between those two States remained valid despite the non-performance of the guarantee clause by a third State, El Salvador, because that clause did not affect the essence of the treaty. In other words, the concept of the "essential provision" of a treaty had been invoked as support for severance.

48. He was in agreement with the Special Rapporteur on all the ideas embodied in article 26, though that did not mean that the drafting could not be improved. First, it would be better to begin by stating the general principle, which was that stated in paragraph 2, as the Special Rapporteur recognized in paragraph 12 of his commentary; the order of paragraphs 1 and 2 should accordingly be reversed. Secondly, it would be preferable to deal with the whole question of severance in a special article, rather than insert clauses relating to it in several articles. Thirdly, the Drafting Committee should simplify the article and eliminate the repetitions in paragraphs 3 and 4, which dealt with quite different cases, but settled them in the same way.

49. Finally, he agreed with Mr. Cadieux and Mr. Briggs that only presumptions of exceptions should be stated so that the parties would have a chance to rebut the presumption.

50. Mr. ELIAS said that the principle embodied in article 26 was acceptable, but as the discussion proceeded he was becoming increasingly convinced that the article belonged in the Special Rapporteur's third report, which was to be devoted to the application and interpretation of treaties.

51. Whatever decision was taken on the position of the article, it would certainly need to be greatly simplified and rearranged. It should first state the fundamental rule that normally a treaty was indivisible, and then indicate, by way of exception, the conditions under which severance was permissible. A provision of that kind would be extremely helpful to the International Court in cases where a treaty was either imprecise or did not make express provision for severance. As Lord McNair had maintained in his *Law of Treaties*, the severance of distinct and separate parts of a treaty was possible in certain circumstances.¹⁰ The problem became more difficult when provisions could not simply be cancelled by striking them out.

52. Perhaps an analogy could be found with the kind of situation that arose in Federal States when the respective fields of competence of the Federal Government and the constituent States had to be determined under the provisions of a certain statute. But, of course, where treaties were concerned, the problems were far more intractable.

53. The Commission might not find it possible to reach a final conclusion on article 26 until it had had an opportunity of examining the Drafting Committee's revised texts of articles 24 and 25.

54. Mr. TABIBI said that the Commission was called upon to decide between adherence to the principle of the indivisibility of treaties and recognition of the severability of treaty provisions. The three main needs were to protect the injured party, to safeguard the stability of treaties, and to impose sanctions on the party committing a breach. In the light of those needs, all of which were important for the law of treaties, he could not support article 26, which afforded no protection to the injured party, did not safeguard the stability of treaties and did not provide any sanction against the offending party.

55. It was significant that such a leading authority on the contemporary law of treaties as Lord McNair was particularly guarded on the subject of severability. In consequence of the different views expressed by the various authorities, it would be very difficult to adopt any rule on the subject. He urged the Commission to uphold the principle of the unity of treaties and not to adopt the rule proposed in article 26.

56. The provisions of article 26 would have the additional disadvantage of opening the way for breach of treaties, particularly bilateral treaties; a party would, in certain circumstances, be able to invoke the principle of severance in order to terminate part of a treaty which it found onerous or inconvenient.

57. The pronouncements of the Permanent Court of International Justice, particularly in the *Free Zones* case, and the separate opinions of some of the judges of the International Court of Justice in the recent *South West Africa* cases could not really serve as a basis for the rule which it was proposed to embody in paragraphs 1 and 2 of article 26. The Treaty of Versailles was a special case; it was not a normal treaty and consisted of a number of different parts, each of which had a different purpose and in a sense constituted a separate treaty.

58. The Commission should not try to reconcile the principle of the indivisibility of treaties with severability, as was done in article 26; any such attempt could only lead to confusion.

59. Mr. AGO said he did not question the need to recognize that a treaty might not be voided or denounced *in toto*, especially if it was one that could be divided into different parts, or the need to recognize that a particular provision of a treaty might have lapsed. His doubts were prompted by a number of problems which should cause the Commission to weigh carefully all the consequences of the article it was about to adopt, and he would accordingly like some clarification on a number of points.

60. First, while the provisions of paragraph 3 (a), sub-paragraphs (i) and (ii), might be appropriate in the case of a multilateral treaty, they were perhaps questionable in the case of a bilateral treaty or a treaty concluded by a small number of countries, for it would be too easy for one of the parties to such a treaty simply to denounce a part or a clause of it which was inconvenient. In such a case, its partners would surely be entitled to claim — even if the condition were not an

⁹ Moore, J. B., *History and Digest of International Arbitrations*, Vol. II, pp. 1945 ff.

¹⁰ *Op. cit.*, chapter 28.

express one within the meaning of paragraph 3 (a) (ii) — that the treaty so amputated no longer interested them and to denounce its other provisions. To allow a State to release itself from certain parts of a treaty without the other signatories being able to intervene would certainly be giving it rather too much latitude.

61. Secondly, there was the question of the reference to article 18 of Part I, to which Mr. Rosenne had already alluded. In that article the Commission had indeed specified when reservations to a particular provision might appropriately be made. But would not the provisions of paragraph 4 amount to recognizing that reservations could be made in another form at any time, and would they not conflict with article 18 ?

62. Lastly, with regard to the question of a notice invoking a ground which related exclusively to one provision of a treaty, generally speaking the difficulties which the Commission was encountering seemed to be due to the fact that several different cases were dealt with in a single article on the severance of treaties. A provision of a treaty might have lapsed because its object had ceased to exist, or because it had become impossible to execute. That could happen, for example, to a clause referring to the jurisdiction of the Permanent Court of International Justice in a treaty of arbitration and judicial settlement between two States. If the two States concerned were not Members of the United Nations, and if, consequently, the jurisdiction of the Permanent Court of International Justice could not be held to have been transferred to the International Court of Justice, the clause in question would have lapsed because the Permanent Court no longer existed. In such a case, would it be necessary to provide that a notice must be addressed by one State to the other before the clause could lapse, or would it lapse automatically ? It might be asked whether, generally speaking, the question of giving notice to terminate a clause of a treaty should not arise only in cases of denunciation which really called for action on the part of the State concerned, and not in certain cases in which a clause was no longer applicable because of a material impossibility.

63. He would speak again at a later stage of the discussion on article 26.

64. Mr. YASSEEN said that the principle underlying article 26 was perfectly logical; moreover, it was confirmed by international practice. The drafting could certainly be improved, however.

65. The question of severability depended on the treaty itself. It was not possible to lay down an objective general rule that was applicable to all cases *in abstracto*. The treaty itself must be examined first. Of course, the decision rested with the parties to the treaty; since they were free to stipulate its indivisibility, they could also declare that it was severable.

66. The safeguards provided by the Special Rapporteur were satisfactory. First, he had referred to the express clauses of the treaty. Secondly, he had made the severability or indivisibility of the treaty depend on the admissibility or non-admissibility of reservations. That was a most ingenious idea; for once States allowed

reservations to an article, it could be held that the treaty could exist without that article, which was equivalent to recognizing that so far as that article was concerned the treaty was severable.

67. He was somewhat reluctant to accept the provision in paragraph 3 (a) (ii), however, because it put an express condition in the treaty itself on the same footing as a statement made during the negotiations. That raised a question relating to the method of interpretation. Would it always be possible to refer to the negotiations, even if statements made during those negotiations were not reflected in the text of the treaty ? That was a general question of interpretation; it was doubtful whether a statement made during the negotiations could be placed on the same footing as an express condition in the treaty. He himself could not accept that proposition. A treaty was a solemn instrument which had to be in writing; could it be supplemented or qualified by statements of which no trace appeared in the treaty ? He did not wish to go into the general question of *travaux préparatoires* as an aid to the interpretation of treaties, but he asked the Special Rapporteur to clarify that point.

68. Moreover, he could not see why the Special Rapporteur had not mentioned that paragraph 4 (b) also applied to a part of a treaty. A treaty could contain parts, complete in themselves, to which reservations were permitted. For example, in the case of the Commission's draft on Consular Intercourse and Immunities,¹¹ if had been held that the whole of the part relating to honorary consuls could be accepted or rejected. It might perhaps be possible to combine paragraphs 3 and 4, so as to provide the same safeguard in both cases.

69. A further drafting point was that in order to avoid ambiguity it would be better not to use the French word "*partie*", which could mean both a party to a treaty and a part of a treaty.

70. Mr. LACHS said the discussion had shown that the Commission was faced with a very serious problem, involving the basic dilemma of the severability or indivisibility of treaties.

71. The Special Rapporteur's approach to article 26 and his commentary were extremely illuminating; he had thrown light on recent trends and developments, which not so long ago would not have been discernible. And unless the general approach was to endeavour to discern the real historical trends of recent times, there would be no possibility of reaching a solution.

72. As he saw it, the idea underlying those trends was to try to save the treaty and to make it live longer than it would have done under the old rule of indivisibility; that would be a contribution to the development of peaceful relations and international co-operation. At the same time, however, it should not be made easy for a State to evade clauses of a treaty which it found too onerous, but which were essential to the treaty as a whole. Consequently, although he did not accept

¹¹ *Official Records of the General Assembly, Sixteenth Session, Supplement No. 9*, pp. 5 ff.

Mr. Tabibi's conclusion, he agreed with him that the Commission was faced with an exceedingly difficult problem.

73. In view of the clear contemporary tendency to try to avoid dissolution of the whole of a treaty, he accepted the principle embodied in the article. With regard to its formulation, however, he shared Mr. Ago's fear that the proposed provisions might enable States to continue making reservations throughout the life of the treaty. The rule stated in the article should be made subject to a number of conditions.

74. First, it should be conditioned by the rules of *jus cogens*, especially *jus cogens superveniens*. Secondly, it should be conditioned by the intention of the parties, which could be either expressed or presumed. Thirdly, it should be conditioned by the subject-matter of the treaty. And fourthly, the nature of the treaty should play a part: certain treaties, including the constituent instruments of international organizations and peace treaties, should never be severable. He doubted whether the Treaty of Versailles really provided an example of severability.

75. With regard to the position of the article, he had doubts about Mr. Elias' suggestion. Article 26 dealt with termination of a treaty in part and therefore logically followed the articles dealing with the termination of a treaty *in toto*.

76. With regard to the specific provisions of the article, he supported the suggestion that it should be re-drafted so as to state first the general principle of the indivisibility of treaties and then those exceptional cases in which severance of treaty provisions was possible.

77. With regard to the criteria for severability, he was not altogether satisfied with the formulation proposed in paragraph 3. In particular, the requirement in paragraph 3 (a) (i) that the provisions should be "self-contained and wholly independent of the remainder of the treaty" seemed too formal a criterion. It would be necessary to specify more clearly the circumstances in which severance was permissible.

78. The provisions of paragraph 4 should be on the same lines as those of paragraph 3 and reduce severability to its proper proportions.

79. Lastly, there was some merit in Mr. Rosenne's observation that the suspension of treaties could be viewed in a different light from their termination.

80. Mr. EL-ERIAN said he found the provisions of article 26 generally acceptable and the commentary excellent.

81. Like Mr. Briggs, he thought there should be no great difficulty in accepting the principle of severability. At the previous session, when considering the comparable problem of reservations, the Commission had found it possible to reconcile the principle of indivisibility of treaties with the practical considerations which militated in favour of their divisibility subject to certain safeguards.

82. He accepted the Special Rapporteur's general approach, which conceded the need for severance of trea-

ties in certain circumstances, and approved of his embodying in the article the generally accepted presumption that termination applied to the whole of a treaty.

83. One question that arose was what was meant by a "provision" of a treaty. His own view was that the term covered any part, any single article, any clause, any section or any paragraph which was independent of the rest of the treaty.

84. He noted that in paragraph 3 (a) the Special Rapporteur had adopted a twofold criterion of severability: first that the provisions of the severable part should be "self-contained and wholly independent of the remainder of the treaty"; and secondly, that acceptance of that part should not have been made "an express condition of the acceptance of other parts" of the treaty. The second criterion was very important because it showed that international law had moved away from the view of the very early writers, from Grotius onwards, who had regarded each article of a treaty as having the force of a condition, the non fulfilment of which would render the whole treaty void.

85. With regard to the first criterion proposed by the Special Rapporteur, it seemed an unduly rigid requirement that the severable part of the treaty should be "wholly independent" of the remainder. In the corresponding provision of the Harvard draft — article 30 — the expression used was "clearly independent". An alternative criterion could be derived from the Special Rapporteur's commentary, in which a provision of a treaty was regarded as independent if, by reason of its nature, purpose or origin, it could be separated, or from the idea suggested by the Harvard Research group of a provision which could be "terminated or suspended without necessarily disturbing the balance of rights and obligations established by the other provisions of the treaty".¹² He suggested that those ideas should be considered by the Drafting Committee with a view to elaborating on the concept of independence of a treaty provision.

86. The principle of severability had received some recognition. For instance, the Declaration of the London Naval Conference of 26 February 1909 contained an article 65, which stated that the provisions of the London Declaration "must be treated as a whole and cannot be separated",¹³ so that no signatory could ratify certain articles while rejecting others. Thus, as early as 1909, it had been found necessary to emphasize that a particular multilateral instrument was indivisible. Again, in *Karnuth v. United States* (1929),¹⁴ the Supreme Court of the United States of America had held that article III of the Jay Treaty of 1794 between Great Britain and the United States had been terminated by the outbreak of war between the two countries in 1812, but that article IX had not been terminated. The court had emphasized the different nature and purpose of the two articles.

¹² *American Journal of International Law*, 1935, Vol. 29, Supplement, Part III, pp. 1138-9.

¹³ Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements, Supplement, 1913 (Charles)*, Vol. III, p. 280.

¹⁴ 279 U.S. 231.

It was precisely that concept of the nature and purpose of the provision of a treaty which he suggested the Drafting Committee should take into consideration for the purpose of establishing criteria of severability.

87. Mr. LIU said that he upheld the principle of the integrity of treaties. Treaties were usually concluded as a result of mutual concessions by the parties, often after protracted negotiations; it was therefore difficult to imagine that a part of a treaty could be terminated separately without affecting the balance of the instrument as a whole. It would be prejudicial to the stability of treaties to allow States to denounce part of a treaty too freely.

88. He would not go so far as to say that all treaties were indivisible, but if article 26 were to be retained, it should first state the principle of indivisibility and then present the cases of severability as exceptions.

89. The CHAIRMAN, speaking as a member of the Commission, said that the question of the integrity of treaties as such related more to the application and the interpretation of treaties. The issue before the Commission was how the rule of the integrity of treaties was affected by the rules on termination and invalidity which the Commission had adopted, and to what extent partial invalidity and partial termination should be recognized.

90. He agreed with Mr. Ago that the difficulties which the Commission was encountering in connexion with article 26 might well arise from the fact that it was attempting to cover all, or almost all, the grounds for termination and invalidity by means of a single general provision. In fact an examination of the various articles would show that the principle of severability did not apply in all cases, and that where it did apply, it did not apply in the same way in all cases.

91. He would illustrate his remarks by briefly examining the various articles on termination and invalidity. The first was article 5, which dealt with the case in which a treaty violated the internal law of a State governing the procedure for entering into treaties; it seemed clear that article 5 would apply to the whole treaty and not to particular provisions. The same was true of articles 7, 8 and 11, which referred to the treaty-making process as such: fraud, error or coercion would vitiate the whole of the treaty.

92. Next, with regard to article 13 concerning rules of *jus cogens*, the principle of severability applied both to the termination of a treaty by a new rule of *jus cogens* and to the invalidity of a treaty by reason of violation of an existing rule of *jus cogens*. The principle applicable was part of international law and had effects similar to those of unconstitutionality in internal law. Only those provisions which conflicted with a rule of *jus cogens* were terminated or invalidated; those which were compatible with the *jus cogens* rule remained valid. Accordingly, he suggested that a specific provision on the subject should be included either in the articles dealing with *jus cogens* in both sections, or immediately after them.

93. With regard to article 15, which dealt with treaty provisions on termination by denunciation, he agreed with Mr. Ago that if a State attempted to denounce a part of the treaty where a right of partial denunciation was not specified in the treaty itself, the consent of the other party or parties should be required. The case would therefore be one of subsequent agreement and article 26 would not apply. Nor, in his opinion, would it apply in the cases specified in articles 18 and 19.

94. Article 30 dealt with the termination or suspension of a treaty following upon its breach and there, as suggested by the Special Rapporteur himself, a special provision on severability would be necessary.

95. Article 21, which dealt with the dissolution of a treaty owing to impossibility of performance, was not relevant to the issue; in the event of such impossibility, the question raised by article 21 was whether the treaty as a whole was extinguished or not.

96. Lastly, the provisions of article 26 would probably not be applicable to the case contemplated in article 22, which dealt with the doctrine of *rebus sic stantibus*.

97. He suggested that the approach should be changed. Instead of a general approach, the Commission should adopt the piecemeal method of dealing specifically with each of the various grounds of invalidity or termination in connexion with which the question of severance might arise.

98. Mr. TUNKIN said he preferred the general approach adopted by the Special Rapporteur, but thought that the article should state the principle of the indivisibility of treaties before proceeding to state the exceptions to that principle.

99. There were two possible approaches to the problem of severance: one was to make separate provision for severance in the various articles which were intended to be covered by the provisions of article 26; the other was to cover all eventualities by means of a general provision, which was the Special Rapporteur's approach.

100. Though he believed that it was possible to formulate a general provision, the various particular cases would have to be examined in order to see what the consequences of severance would be. He agreed with the Chairman that the position was not the same in regard to the different articles which article 26 was intended to cover. It might also be true that in some of the instances mentioned in the various articles, severance should not be permitted. However, he had doubts regarding some of the examples that had been given.

101. To take the case of violation of the provisions of internal law contemplated in article 5, if one of the clauses of a treaty conflicted with a provision of the internal law of a contracting State, the question would arise whether the clause in question was "self-contained and wholly independent of the remainder of the treaty", and whether its acceptance had not been made "an express condition of the acceptance of other parts". Could the State concerned abrogate the whole of the treaty or not?

707th MEETING

Tuesday, 25 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 26 in section IV of the Special Rapporteur's second report (A/CN.4/156.Add.2).

ARTICLE 26 (SEVERANCE OF TREATIES) (*continued*)

2. Mr. TSURUOKA said that the object of article 26 was to safeguard the existence of certain treaties through various vicissitudes; that was a legitimate object, even though the idea might be rather novel in international law. Nevertheless, he wondered whether article 26, as drafted, really achieved that object; and he rather doubted whether the principle of severability of treaties was yet sufficiently well established to be suitably formulated in the draft. The affirmation of an ill-defined principle might lead to confusion and abuses, for States might use it as a pretext for evading their obligations.

3. He shared the opinion of those who thought that article 26 raised questions relating to the application and interpretation of the treaty, rather than to its essential validity or termination. He hoped, therefore, that the Commission would defer consideration of severability until it could discuss the question in connexion with the application and interpretation of treaties.

4. Many members of the Commission would prefer, however, to retain article 26 in an improved form. If that point of view prevailed, he hoped that the Commission would adopt a very clear formula stating the presumption of indivisibility of the treaty and stipulating that the terms of the treaty itself prevailed over all other rules on that question. The exceptions should be set out in detail in the commentary, where it would be sufficient to refer to the practice of States and to the decisions of international tribunals, rather than in the article itself.

5. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that some members held that article 26 should be taken up at the next session, because it related to the subject of his third report — the application and interpretation of treaties. Admittedly, any acceptable theory of severance must have some regard for the intention of the parties, so that it would call for some degree of interpretation and might need to be considered in connexion with certain provisions in his next report; but he had inserted article 26 in its present place because it was closely connected with the substance of a number of articles in sections II and III.

6. For example, the Commission had found it impossible to consider the provisions concerning breach without some reference to the possibility of severance. It was

102. Some members had referred to the question of reservations. His own view was that reservations were a different matter altogether. A treaty could contain a clause prohibiting or allowing reservations either to the whole of the treaty or to certain clauses. A clause which allowed reservations constituted a consent to the making of reservations, given in advance by all the parties to the treaty. Where no such consent had been given in advance, the other parties could object to a reservation; by virtue of the principle of the sovereign equality of States, a reservation could not be imposed on another State. The position in the case contemplated in article 26 was totally different. If a State acquired, under that article, a right to abrogate a part of a treaty, the other State had no option but to accept the consequences; there was no action which it could take in the matter.

103. The position in the case contemplated in article 6 — lack of authority to bind the State — was similar to that considered in article 5.

104. In the case of fraud, dealt with in article 7, severance might in theory be considered as a sort of sanction: the clause obtained by fraud would be invalidated and the remainder of the treaty would be imposed upon the offending party. That approach, however, would be rather mechanical.

105. The position in the case of error, dealt with in the new article 8, was that the part of the treaty to which the error related might be self-contained and that its acceptance might not have been made an express condition of the acceptance of other parts of the treaty. But the elimination of one part of the treaty could still lead to a situation in which the balance of the treaty as a whole was upset.

106. The examples he had given did not show that it was impossible to sever part of a treaty from the remainder; they merely showed the inadequacy of the criteria set out in article 26, particularly paragraph 3(a)(ii). The acceptance of the part of the treaty to be severed might not have been made an express condition of the acceptance of other parts, and yet the very nature of the treaty might indicate that its various parts were closely linked; thus the whole balance of the treaty might be destroyed if part of it were removed. Some additional criteria should be introduced in the form of a reference to evident and very close connexions between the various parts of the treaty.

107. With regard to the drafting of the article, his views were broadly similar to those of Mr. Lachs: a statement of the principle of indivisibility should be followed by a statement of the exceptions to it. He also supported Mr. Brigg's suggestion that paragraphs 1 and 2 should be combined, and would himself suggest that the Drafting Committee should endeavour to combine paragraphs 3 and 4.

The meeting rose at 5.50 p.m.

more than a mere matter of interpretation to determine whether an error in a particular part of a treaty would only affect that part, or whether it would bring down the whole treaty. The point could be illustrated by the *Temple* case,¹ in which it had been alleged that an error had been made in a particular section of a boundary settlement. If the Court had held the error to have been established, could it have been bound also to hold that the error brought the whole treaty to nothing — an important treaty which affected a territorial situation, the exercise of jurisdiction and, perhaps, peace along the whole boundary? Was the whole treaty to be regarded as void and the parties put back to the original position in which they had been at the outset of the negotiations?

7. Article 26, though not essentially procedural, was connected with some of the procedural aspects of giving notice of termination, suspension or withdrawal, and that was another reason for his having placed it in section IV. Possibly that was not the happiest solution and it might be argued that a better place for it would be in section V, which was concerned with the legal effects of the nullity, avoidance or termination of a treaty. He had an open mind on the position of the article, which might be considered by the Drafting Committee.

8. Originally, he had inserted provisions concerning severance in a number of different articles dealing with essential validity and termination, but had finally abandoned that method in favour of a general article. In that connexion, the Chairman had pointed out that the principle of severability as a principle of the law was not applicable at all to article 15, nor perhaps to provisions concerning termination by subsequent agreement between the parties (previous meeting, para. 93). In fact, a distinction was made in article 26 between the various cases in which the right of severance might arise. Paragraph 1 was concerned with the case in which there could be no severance: where the right to terminate, withdraw from, or suspend the provisions of a treaty derived expressly or impliedly from the treaty itself and the parties had clearly contemplated that it would apply to the treaty as a whole. The case of termination by subsequent agreement where there was a clear intention to dissolve the treaty as a whole could also be covered in paragraph 1.

9. Where termination, withdrawal from, or suspension of treaty provisions was a consequence of a legal rule, as in cases of breach, fraud or coercion of an individual representative, in all of which one of the parties would have sustained injury in the sense of having been the victim of an illegal act, it might be necessary to allow a permissive right to sever at the election of the injured party. A similar approach had been adopted by the Drafting Committee in the provisions it was to submit concerning termination on breach.

10. The situation in the case of fraud was analogous: it was undesirable to face a party which had been deliberately deceived in regard to a certain clause with only

two possibilities: either to maintain or to denounce as a whole a treaty the general content of which it regarded as having value. The same kind of permissive right might be allowed when a particular provision had been inserted as the result of coercion of an individual agent, but the coercion had not substantially affected the negotiation of the rest of the treaty. Mr. Rosenne had mentioned that possibility though, of course, it was unlikely to be a common one.

11. He could not accept as justified the view put forward by some members, including Mr. Ago, that to allow such a permissive right of severance would be tantamount to admitting something like a right of reservation after the entry into force of a treaty, because it would give a party a general option to reject certain provisions by a subsequent act. In fact, the right was only contemplated if the other party had been responsible for fraud, breach or personal coercion of a representative.

12. In the case of what he might describe as the more accidental reasons for invalidity or termination, such as error, subsequent impossibility of performance, conflict with *jus cogens* and application of the doctrine of *rebus sic stantibus*, the problem would be to decide whether severance was to be obligatory or permissive. He had referred to that problem in the commentary because it had given him some trouble when drafting the article. If the right were made permissive in such cases and not conditional on agreement being reached between the parties, that might confer on one of them, perhaps the one which had failed to comply with its own constitutional provisions, a certain freedom of choice that came close to the right of making reservations. A carefully drafted article on severance would contribute to the stability of treaties, but he was inclined to believe that in cases of error, conflict with *jus cogens* and application of the doctrine of *rebus sic stantibus*, severance under certain conditions must be obligatory and not permissive, or else must be brought about by agreement between the parties; otherwise one party might be in a position to change the structure of a treaty without taking account of the other's interests.

13. The distinctions drawn in the article between the application of provisions concerning severance to different types of situation must be carried further. For instance special provisions were needed to cover termination by subsequent agreement and termination on breach or on the ground of fraud, which could be treated on more or less the same footing.

14. Paragraphs 3 and 4 should perhaps be confined to provisions dealing with error, subsequent impossibility of performance, conflict with *jus cogens* and the doctrine of *rebus sic stantibus*. Some members had suggested that, even as between that last group, different principles should apply. In his opinion the Commission should not be too hasty in excluding the possibility of severance when certain separate provisions of a treaty came into conflict with a new rule of *jus cogens*. Again, severance should also be permitted when the performance of certain obligations might become impossible as a result of a change in circumstances which did not materially affect the rest of the treaty.

¹ *I.C.J. Reports*, 1962, pp. 6 ff.

15. The fusion of paragraphs 3 and 4 had been suggested, but there might be a difference between severing part of a treaty and severing a single clause.

16. Something on the lines of paragraph 3, where he had sought to set out the conditions under which severance could be permitted, was necessary and perhaps some of the points raised during the discussion could be met by changes in its drafting.

17. The expression "self-contained" in paragraph 3(a)(i) had been criticized as being too formal, yet it seemed to convey the idea that the parties regarded part of a treaty as separate. That fact by itself was not enough to permit of its severance without the other conditions laid down in paragraph 3 being met.

18. The primary rule that must be stated was the integrity of treaties, for it was not to be easily assumed that consent was divisible. On the other hand, the grounds for invoking invalidity or for giving notice of termination might often relate only to a small portion of the treaty and it would then seem to be undesirable that the whole should be terminated.

19. Mr. BRIGGS asked the Special Rapporteur for further classification of the contemplated rule for obligatory severance of provisions in a treaty, for example, provisions vitiated by error according to the conditions set out in the Drafting Committee's text of article 8, paragraph 1. He asked that question because in a number of articles, the Commission had contemplated termination of the whole treaty in certain circumstances.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that severance on the ground of error might be permissible, subject to the conditions laid down in paragraph 3 of article 26, if the error did not undermine the consent of the parties to the whole treaty. The right of severance would then be limited to the part affected by error.

21. Mr. LACHS said that the Special Rapporteur's summing up had elucidated a number of points. There were many cases which illustrated the problems involved. He himself wished to draw attention to a situation that deserved careful consideration: that in which compulsory severance might ensue as a result of a new rule of *jus cogens*. He had in mind the Regulations annexed to the Hague Convention of 1907 on the Laws and Customs of War on Land.² Article 36 of those Regulations laid down that if the duration of an armistice was not defined, the belligerent parties could resume operations at any time, provided always that the enemy had been warned in accordance with the terms of the armistice. Articles 40 and 41 dealt with the consequences of violation of an armistice agreement. There was a difference between the decisions taken at the Hague Conference of 1899 and those taken at the Conference of 1907. The two Conventions adopted were still in force, but they had been concluded before war had been outlawed, so that the provisions he had mentioned, being contrary

to *jus cogens*, should be considered in the light of the law as it stood today.

22. Mr. ROSENNE said that the question put by Mr. Briggs prompted him to stress the importance of examining more closely the possible applicability of provisions on severance to different articles in the draft.

23. Mr. Lachs had given an extremely pertinent example, which had influenced the drafting of armistice agreements since the entry into force of the United Nations Charter.

24. He would welcome a further explanation from the Special Rapporteur as to whether, when speaking of compulsory severance, he was thinking of revision imposed by law, in the sense of a certain clause being struck out of a treaty, rather than of renewed negotiation between the parties — a view which it would be difficult to accept.

25. Mr. AGO agreed that it was sometimes useful to be able to terminate certain clauses of a treaty and retain the rest; but he thought it difficult to adopt a single provision on severance. It would be better to study the question in relation to each ground for nullity, for the problem differed greatly according whether certain grounds such as fraud or error were considered, or others such as incompatibility with a rule of *jus cogens* or the operation of the *rebus sic stantibus* clause.

26. He therefore suggested that the Commission should ask the Special Rapporteur to submit a fresh draft containing a series of articles treating the question separately for each of the different subjects, for it did not appear that the Commission could refer article 26 to the Drafting Committee at the present stage of the discussion.

27. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had drawn a distinction between two different cases. The first was that in which there could be said to be an offending party and the second was that in which none of the parties could be said to be either offending or injured. The position taken by the Special Rapporteur was that, in the first case, the injured party had an option with regard to severance. That might be acceptable in regard to termination on grounds of a breach committed by the offending party; for it was appropriate that in that case, the injured party should have the right, if it so desired, to demand partial termination of the treaty rather than complete termination.

28. He had some doubts, however, as to how the rule would apply where the treaty was rendered void by the coercion of individual negotiators or by fraud. For example, if two States entered into a treaty under which they exchanged certain possessions and consent to that treaty had been obtained by fraud, it was difficult to see how the injured party could refuse performance and at the same time demand the other party's compliance. The maxim *fraus omnia corrumpit* should apply and there should be no question of severance. The whole treaty was vitiated by fraud.

29. He agreed with the position taken by the Special Rapporteur regarding conflict with a rule of *jus cogens*,

² Scott, J. B., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press, pp. 107 ff.

but in his opinion it was not the theory of severance that applied. The real question was which particular provisions of the treaty came into conflict with the rule of *jus cogens*. The position was the same whether the treaty was void by reason of conflict with an existing rule of *jus cogens*, or was terminated because of a supervening rule of *jus cogens*. The rule was similar to that which applied in municipal law where a later law amended an earlier one, or where certain provisions of a law were unconstitutional: only those provisions which actually conflicted with the earlier ones, or which contravened the constitution, were terminated or invalidated.

30. With regard to the question of error, he agreed with Mr. Briggs. The provisions of article 8, as adopted by the Commission, related to substantial error; under the provisions of that article a treaty would be invalidated because of an error relating to the essential basis of consent. It was difficult to see how provisions of that kind could possibly be reconciled with the notion of severance; a substantial error would vitiate the whole of the treaty. As in municipal law, where the error was not a substantial one, it was merely rectified without affecting the validity of the treaty.

31. He had been interested to hear the Special Rapporteur's views on the distinction to be made between the various articles covered by the provisions of article 26, and his comment that it should be carried further.

32. He supported Mr. Ago's proposal that the Special Rapporteur should explore the question of severance with reference to each of the substantive articles and submit to the Commission one or more texts covering that question.

33. Mr. TSURUOKA said that the continuation of the discussion had confirmed his view that article 26 raised questions of application.

34. Paragraph 3, which permitted exceptions to the rule stated in the preceding paragraphs, was well drafted on the whole; but while sub-paragraph (a) (i) was not open to objection, that was not true of sub-paragraph (a) (ii). In international practice, where a non-essential part of the treaty was concerned, the matter would in most cases be settled without any difficulty, for instance, by revision of the treaty agreed between the parties. The Commission could not regulate the matter in every detail, and the case contemplated in paragraph 3 (a) (ii) would in fact occur so seldom that the omission of a rule dealing with it could not jeopardize the security of international relations.

35. Mr. YASSEEN said he agreed that the application of the principle of severance might differ with different cases of avoidance or termination of treaties; he therefore agreed with Mr. Ago that article 26 required further study.

36. Of course, article 26 was intended to make severance mandatory. If the parties agreed to delete a provision or group of provisions of the treaty, there was clearly no difficulty, since they could revise their treaty by agreement at any time. But the Chairman had asked whether severance could be compulsory when it benefited only one of the parties. He (Mr. Yasseen) believed that the

purpose of article 26 was to save whatever could be saved of a treaty by virtue of the treaty's own terms. If one party claimed that the whole treaty should be avoided, the other party should be able to oppose it by invoking article 26 and ask for severance, provided, of course, that severance was possible on a reasonable interpretation of the treaty itself.

37. Mr. de LUNA agreed with the Special Rapporteur that provision for severance, if properly formulated, would not be a danger, but would contribute to the stability of treaties.

38. As to the method to be adopted, he agreed with Mr. Tsuruoka that the Commission should not go into too much detail. It should, however, consider all the cases in which severance might apply, and he accordingly supported Mr. Ago's suggestion. When the Commission had the Special Rapporteur's fresh draft before it, it would be able to follow Mr. Tsuruoka's practical advice and eliminate certain cases.

39. Mr. PAL suggested that, before giving the Special Rapporteur the additional task proposed by Mr. Ago, the Commission should await the outcome of the Drafting Committee's work on all the articles from 5 to 22, in order to see which of them the provisions on severance would apply to. He would even go further and suggest that the articles should be examined by each member of the Commission individually.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not altogether agree with the Chairman's views. If there was an element of deceit in the presentation of a part of a treaty concerned with the settlement of certain major issues, it should be possible to cancel only the tainted part.

41. In applying the principle of severability to provisions of a treaty infringing a rule of *jus cogens*, special care would have to be taken to determine the relationship between those provisions and the rest of the treaty.

42. He was prepared to comply with Mr. Ago's request, provided there was a reasonably firm consensus of opinion that the problem of severance should be dealt with in his present report. One advantage of that course would be that it would elicit comments from governments.

43. There were arguments both for and against including provisions on severance in individual articles at the risk of some repetition; the same applied to their incorporation in a general article containing separate paragraphs dealing with the different situations to be covered. It might possibly be found appropriate to devote a separate section to severance, to follow section III. Another possibility would be to draft an article dealing with notice of termination, suspension or withdrawal from a treaty, stipulating that severance was not permissible unless the treaty itself so provided.

44. Mr. AGO, thanking the Special Rapporteur for accepting the additional task he had suggested, said that all members were convinced that the problem of severance was a delicate and important one and that it must be solved. Personally, he was still convinced that rather

than try to solve the problem in a single article or group of articles, the Commission should review the articles already considered, one by one, to see whether the whole question of severance could not be dealt with by slight amendments, to each of the articles in which it arose. The article on error (new article 8), for example, would certainly be improved if, instead of dealing only with error as a ground for invalidating the treaty as a whole, it also dealt with cases in which consent was vitiated with respect to only one part or one provision of the treaty. The Special Rapporteur would certainly be able to find the most satisfactory method.

45. The CHAIRMAN, thanking the Special Rapporteur for his willingness to undertake the proposed task, said it should be understood that he had complete discretion as to the manner in which he carried it out; the Commission as a whole favoured the inclusion of some provision on the important question of severance. If there were no objection, he would consider that Mr. Ago's suggestion was adopted, and that members reserved their individual positions.

It was so agreed.

SECTION V (LEGAL EFFECTS OF THE NULLITY, AVOIDANCE OR TERMINATION OF TREATY)

ARTICLE 27 (LEGAL EFFECTS OF THE NULLITY OR AVOIDANCE OF A TREATY)

46. Sir Humphrey WALDOCK, Special Rapporteur, said that section V dealt with the legal effects of the nullity, avoidance or termination of a treaty. It should be noted that no provision had been made for the legal effects of suspension. In fact, it might be difficult to state those legal effects except in terms of the obvious, but he would re-examine the point. It had been suggested to him by Mr. Rosenne that one possibility would be to include a definition of suspension in article 1, thereby obviating the need to deal with its legal effects.

47. Section V comprised two articles: article 27 on the legal effects of the nullity or avoidance of a treaty, and article 28 on the legal effect of the termination of a treaty. Both had been drafted before the Commission had considered the substantive articles and some re-drafting would be necessary in order to allow for the decisions taken on those articles.

48. With regard to article 27, if the exception stated in paragraph 2 (b) were accepted, it might be necessary to include other examples, such as that of a treaty vitiated by coercion.

49. Paragraph 3 embodied a logical provision, but one which could rarely be applied, because the situation contemplated was very unlikely to arise in the case of multilateral treaties.

50. Mr. CASTRÉN said he shared the Special Rapporteur's views on the substance of the article and would comment only on the form.

51. First, since according to paragraph 3 the provisions of article 27 were to apply *mutatis mutandis* to multi-

lateral treaties, paragraphs 1 and 2 should refer only to bilateral treaties.

52. Secondly, paragraph 2 (a), which stated an obvious truth, could be omitted. On the other hand, in paragraph 2 (b) it should perhaps be added that the article was without prejudice to the innocent party's right to claim for loss or damage arising out of fraudulent conduct, especially where it was not possible to restore that party to its previous position. It was true that, as the Special Rapporteur said in paragraph 1 of his commentary, article 27 did not deal with questions of responsibility, but that proviso was necessary in the article because it dealt with the legal effects of the nullity or avoidance of a treaty.

53. Mr. LACHS said he noted from the language of paragraphs 1 and 2 (b), particularly from the reference to restoration "as far as possible", that the Special Rapporteur conceded that it was not always possible to restore the *status quo ante*. Since redress and State responsibility were outside the scope of the subject, the question of the legal effects of nullity or avoidance of a treaty in those respects was not under discussion. However, it must be remembered that certain rights acquired and obligations assumed under the treaty might already have been honoured. He suggested that the words "shall cease to have any force or effect" in paragraph 2 should be amended to state that the acts performed would be treated in the same manner as if the treaty did not exist.

54. In paragraph 2 (b), he was not satisfied with the wording "in which case it may be required." The offending party in a case of fraud was under a duty to restore the other party as far as possible to its previous position. The need to include the proviso "as far as possible" already weakened the provision and he suggested that the words "may be required" should be replaced by "shall be required". On that point, he agreed broadly with Mr. Castrén, but pursued the idea to its logical conclusion.

55. Mr. VERDROSS said that, in principle, he approved of the text proposed by the Special Rapporteur; but if questions of reparation were not to be covered, the last part of paragraph 1, beginning with the words "and the States concerned", should be deleted.

56. Mr. YASSEEN said he had some difficulty in accepting certain expressions which rather mitigated the effects of nullity. For example, the phrase "as far as possible" in paragraph 1 should be deleted, for that condition was understood. If it was impossible to restore the previous position — and no one could be bound to do the impossible — other general theories, such as the theory of responsibility, would come into operation.

57. For the same reason he hesitated to accept paragraph 2 (b). The idea in that provision should be expressed in more categorical terms, the words "as far as possible" being deleted there also.

58. On the other hand, the expression "fraudulent acts", in the same paragraph, was much more appropriate than "fraudulent conduct", for fraud might be the result of a single act, not necessarily of conduct.

59. The CHAIRMAN, speaking as a member of the Commission, said that as the Commission had already adopted the articles on essential validity on second reading, it could now consider how the provisions of article 27 would apply to the cases contemplated in articles 5 to 13.

60. Paragraph 1, which referred to treaties void *ab initio*, covered the cases dealt with in article 12 on coercion of a State, and article 13 on violations of *jus cogens*. Some re-drafting would be needed to cover also the case contemplated in article 11 on personal coercion of representatives of States.

61. He had some doubts regarding the rule in paragraph 2. It was difficult to see how in such cases as the violation of a constitutional provision and substantial error, "any acts performed and any rights acquired pursuant to the treaty prior to its avoidance" could "retain their full force and effect". If, for example, a substantial error had been committed in determining a frontier, he failed to see how rights which had been granted in error could endure.

62. Mr. BARTOŠ said he wished to make certain reservations on the text of article 27, on practical rather than theoretical grounds.

63. First, it was very difficult, for practical purposes, to be categorical about the validity of acts performed in pursuance of a void or avoided treaty, even though according to the theoretical conceptions of nullity the answer was very simple: all such acts were without legal effect. Indeed, it was hardly possible to maintain that such acts should retain their legal force and effect, or to take the contrary view, for it could happen in practice that an act was more important than its legal basis.

64. Paragraph 2 stated that acts performed prior to the treaty's avoidance retained their full force and effect unless the parties otherwise agreed, though if the parties were not in dispute and if an amicable agreement could be expected, it might be supposed that such agreement could be reached fairly easily so long as there had been no breach of a *jus cogens* rule. But on the other hand it was very difficult to state categorically that the treaty remained in force. It would be necessary to examine whether the acts performed before the avoidance could be held to have been affected by it or not. The problem was rather similar to that of *bona fide* possession in private law, though in making that comparison he wished to rule out any analogy with private law, for relations between sovereign States raised problems different from those of private law.

65. Nor did he favour a radical solution in the opposite direction, making all situations created between the time of the treaty's conclusion and that of its avoidance null and void, for some situations might already have been consummated, or their consequences might be beyond repair. For if a very categorical position was to be taken, first the act — i.e. the treaty — should be avoided, then the consequences of the act, and lastly the situation created by the execution of the treaty. It might be asked whether a theoretically correct solution would contribute to the real needs of international life.

66. While he had no theoretical objection to the solution proposed by the Special Rapporteur, he was not certain that it was justified in practical life in all the situations that might result from the avoidance of a treaty.

67. With regard to treaties avoided as from a date subsequent to their entry into force, he was also somewhat hesitant. Some situations might have been created before the treaty was avoided, but their consequences might materialize afterwards. His reservation on that point was based on the idea that too radical a solution in either direction should be avoided.

68. In paragraph 1, the wording might be improved, but the idea expressed was correct. However, the idea of restoration was perhaps broader than that of a mere *restitutio in integrum*. The idea expressed by the words "restored as far as possible to their previous positions" was correct, for there were cases in which *restitutio in integrum* was not possible or not even useful. But the formula was dangerous, because States might use it as a pretext for claiming that it was impossible to make reparation. Accordingly, it should be strongly emphasized in the commentary, and also in the text of the article itself.

69. Restoration should be direct or indirect; in other words, in principle there should be restoration to the previous position, but where that was not possible there should be reparation, or replacement.

70. Mr. AGO said that article 27 dealt with a particularly delicate question, as it involved very important legal concepts. The terms used in stating the rule should therefore be carefully weighed.

71. Paragraph 1 dealt with the case of a treaty void *ab initio* and stated that any acts done in reliance upon the void instrument had no legal force or effect. But the treaty might have been executed at least in part. Acts might have been performed by a State which had — wrongly — believed itself bound to perform them under the treaty, though that was not really the case. If the treaty had been valid, such an act by the State — for example, the surrender of an object or a transfer of territory — would have been required for the performance of a legal duty of the State which had believed itself bound by the treaty. But once the treaty had been recognized as void, the act performed by that State became a purely gratuitous act. In that case, the State concerned could, in the example he had given, claim restoration of the object or territory transferred. Could it be said, even so, that the act performed as such, had had no legal effect? It could probably produce legal effects, even though they were of a different kind. Hence the term "legal effect" should be carefully considered.

72. The problem appeared in a different light if one considered an act performed by a State believing itself to have a right under the treaty. For example, if the treaty granted a right of passage, or of stationing troops, and the State had exercised that right, that would have been a perfectly lawful act if the treaty had been valid; it would have been the exercise of a subjective right. But in the event of nullity of the treaty, the act automatically

became unlawful. Thus the act had a legal effect, even though it was not of the same kind as it would have been if the treaty had been valid.

73. It was right to say that provision should be made for restoration of the position which would have existed if the treaty had not been concluded. It was equally right to say that, in certain cases, such restoration might be required in consequence of a responsibility. That was so if an act which would have been lawful if the treaty had been valid, had to be regarded as unlawful because the treaty was void. That raised a question of international responsibility, and the restoration was most certainly the consequence of a responsibility.

74. Conversely, when a State had believed itself bound to perform an act pursuant to the treaty it could claim *restitutio in integrum*, but no question of responsibility arose in that case, since there had been no unlawful act. The Special Rapporteur was therefore probably right in saying that a provision was needed to cover such cases.

75. Paragraph 2 dealt with the case of a treaty avoided as from a date subsequent to its entry into force and stated the rule that the rights and obligations of the parties ceased to have any force or effect after that date. There, too, the correctness of the terminology should be verified, for the rights and obligations of the parties ceased to exist. Another point to be considered was whether acts performed in the exercise of those rights or in fulfilment of those obligations had no legal effect. The same question arose as in the case of paragraph 1.

76. But there was a more important question, namely, whether such cases were really cases of avoidance as stated in the text. In certain cases considered previously, the nullity of the treaty followed automatically from the application of a general rule, for example, in the event of coercion of a State or breach of a *jus cogens* rule. That was not avoidance. In other cases, where there had been fraud or error, for example, nullity of the treaty could be claimed by the injured party. The party could plead that the fraud or error had vitiated consent. Even in that case, however, he did not think one could speak of avoidance; it was a ground of nullity that the injured party would plead, but when it did so successfully the nullity applied *ab initio*. That was the most interesting case contemplated by the Special Rapporteur, for it involved a beginning of execution of the treaty, which was later declared void.

77. To sum up, even in that case, it was not a matter of avoidance, but of nullity which was a nullity *ab initio*, even if it was not recognized until later. The Commission should therefore be careful not to confuse such nullity, which was recognized on the application of one of the parties, with avoidance, which would only produce its effect at a later date and which, generally speaking, was not easy to accept in international law.

78. Mr. TUNKIN said that Mr. Ago had drawn an important distinction, with regard to paragraph 1, between cases in which the duty to make restoration resulted from the nullity of the treaty and cases in which it resulted not from the nullity of the treaty, but from the illegal act itself.

79. The main difficulty, as far as he was concerned, arose in regard to paragraph 2, which was the most important provision of the article, although it might not appear so at first sight. He found the second sentence: "Any acts performed and any rights acquired pursuant to the treaty prior to its avoidance shall retain their full force and effect," altogether unacceptable. For example, if a treaty became void because it had come into conflict with a new rule of *jus cogens*, it could not be said that any rights acquired pursuant to it retained their full force and effect. The situations created under the treaty could themselves be of such a nature that the same rules of *jus cogens* which had invalidated the treaty, or perhaps other rules, would put an end to them. The position was that such rights might or might not be invalidated. The most that could be said was that the invalidity of the treaty did not automatically invalidate all the rights acquired pursuant to it.

80. A good example was provided by the situations created in former colonial countries that were contrary to contemporary international law. It was not possible to recognize that the treaties in question were now void and at the same time to maintain the full legal force of the situations created by those treaties; that would be going much too far. The situations in question might sometimes perhaps retain their legal force, but it was equally possible that they would be invalidated.

81. Mr. ROSENNE said that the purpose of article 27 was to give expression to two ideas which should not be very controversial. The first was that, in the case of a treaty which was void *ab initio*, any acts done in reliance upon it had no legal effect. Those acts had, of course, factual effects and the law should provide as far as possible that those effects should be undone. The purpose of paragraph 1 was, precisely, to state that idea.

82. The second idea, embodied in paragraph 2, related to a treaty avoided as from a date subsequent to its entry into force; from that date onward, the treaty could not produce new legal effects, but provision had to be made for legal effects lawfully produced by it prior to its avoidance.

83. The Special Rapporteur and Mr. Tunkin were probably agreed on the substance and the difficulty was largely one of drafting. The problem of what happened to a legal and factual situation after its legal basis had been altered was a very real one. To take one example, following the 1960 judgment of the International Court of Justice in the case between *Honduras and Nicaragua*,³ the Organization of American States had been faced with the problem of executing the judgment, and had had to make special arrangements for undoing the legal situation which had previously existed in the territory to be returned to Honduras. Those arrangements had been made partly by agreement between the parties and partly with outside assistance.

84. With regard to paragraph 2 (b), he could not support Mr. Lachs' suggestion that the words "may be required" should be replaced by "shall be required". The expression "may be required" corresponded to

³ *I.C.J. Reports*, 1960, pp. 192 ff.

the wording of article 7 on fraud, which provided that, where a State had been induced to enter into a treaty by the fraudulent conduct of another contracting State, "it may invoke the fraud as invalidating its consent to be bound by the treaty". The position was that fraud did not automatically end the treaty; it was open to the injured party to invoke the fraud as a ground for invalidity.

85. Paragraph 2 (b) also raised the question who would "require" the offending party to restore the other party to its previous position. An additional provision should be inserted giving the necessary powers to the organ having powers of decision under article 25. Unless such a provision were inserted, the organ in question might not be authorized to deal fully with that matter.

86. Articles 27 and 28 could only be accepted on the understanding that when the Commission came to consider, at its next session, the effects of treaties on third States, it would examine the position of third States with reference to the legal effects of the nullity, avoidance and termination of treaties.

87. Mr. YASSEEN thought that the main question raised by paragraph 2 was the fate of the acts performed and the situations created pursuant to the treaty before its avoidance; in other words, whether the avoidance operated retrospectively or as from its date.

88. He believed that a distinction could be made according to the grounds for avoidance, or more particularly, according to whether those grounds were concomitant with, or subsequent to, the conclusion of the treaty.

89. Where the grounds for avoidance were concomitant with the conclusion of the treaty, it could be held that the acts performed in pursuance of the treaty should not have been performed. Where the grounds for avoidance were subsequent, it could rightly be maintained that it had been possible to perform the treaty properly for a certain time; consequently, it was logical that acts performed before the subsequent grounds for avoidance had existed should remain valid. That was the case when there was a fundamental change of circumstances or a new rule of *jus cogens* supervened, which was incompatible with the treaty. On the basis of that criterion it was possible to say that in some cases avoidance took effect as from its date and in others retrospectively.

90. But then a further question arose: nullity declared for reasons subsequent to the treaty's conclusion might not only mean nullity of the treaty itself, but also preclude continuation of a situation created by the treaty. That would be an immediate effect, not only with respect to the treaty itself, but also with respect to the situation, which would have to cease as soon as the treaty was avoided.

91. Mr. VERDROSS observed that paragraph 2 referred to the avoidance, not the nullity of the treaty. A treaty could only be avoided by the agreement of the parties or by the decision of an organ whose competence had been recognized by those parties. Hence the avoidance could not be presumed to be retrospective. Everything depended on the terms of the instrument by which the treaty was avoided.

92. The CHAIRMAN, speaking as a member of the Commission, said that his doubts regarding paragraph 2 had been confirmed by the discussion.

93. Doubts had now arisen in his mind regarding paragraph 1. To take the example of a transfer of territory on the basis of a treaty which had been obtained by coercion, the treaty being void, any acts done in reliance upon it would, under paragraph 1, have no legal force or effect. But that solution would run counter to the recognized principle of international law that the *de facto* authorities of a territory could, for instance, levy taxes; for if paragraph 1 were applied as it stood, the State which recovered the territory would be entitled to levy the same taxes a second time.

94. Mr. BARTOŠ said that avoidance must be applied for, even if the grounds for it were *ex nunc*, not *ex tunc*. It was necessary to distinguish between the effect of the grounds for avoidance and the award in which the grounds invoked by the party wishing to invalidate the treaty were declared admissible.

95. Mr. AGO agreed with Mr. Verdross; the word "annulation" (avoidance) should not be used in paragraph 2, which dealt with cases of nullity, not of avoidance. The case he had referred to was one of real nullity *ab initio*, even if the nullity was established only later.

96. In international law avoidance, strictly speaking, could only result from agreement between the parties or an arbitral award; otherwise, it was not a case of avoidance, but of delayed nullity, which was precisely what occurred when a new rule of *jus cogens* supervened or performance became impossible owing to the disappearance of the object of the treaty, which made the treaty a nullity from that moment. That was not avoidance in the true sense of the term.

97. In deciding what formula to adopt, the Commission might perhaps be guided by Mr. Tunkin's proposal.

The meeting rose at 12.55 p.m.

708th MEETING

Wednesday, 26 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 27 in section V of the Special Rapporteur's second report (A/CN.4/156/Add.3).

ARTICLE 27 (LEGAL EFFECTS OF THE NULLITY OR AVOIDANCE OF A TREATY) (continued)

2. Mr. BARTOŠ said that a distinction should be made between instruments considered to be void *ab initio* and voidable instruments.

3. So far as the former were concerned, the general rule was that stated in paragraph 1 of the draft article, and on that point he shared the view of the Special Rapporteur. But even though, in law, instruments which were void were without legal effect *ab initio*, in practice there arose the question of acts performed between the time when the treaty entered into force and the time when nullity was invoked, whether or not through certain courts or organs. In such cases, although the rule required restoration to the previous position, such restoration was sometimes impossible, for the reasons he had explained at the previous meeting (paras. 65-69).

4. With regard to voidable treaties, which could be avoided either by agreement between the parties or by an arbitral award, the position was less clear, for the effects could be *ex nunc* or *ex tunc*. It was therefore very difficult to say in such a case that the position was the same as that contemplated in paragraph 1 of the article, even if the cause was such that its effects were *ex tunc*. Even in the case of a voidable treaty there could be effects *ab initio*, because the nullity of the acts did not necessarily begin at the moment when avoidance took place. A distinction should therefore be drawn between cases of avoidance, including even retrospective avoidance, and cases of nullity which must be declared to be nullity *ab initio*. It seemed that that point was not entirely clear in the article.

5. The Special Rapporteur had perhaps taken the view that in the first case, that of a treaty avoided *ex tunc*, paragraph 1 would be applicable. But there was another case: that in which the effects of avoidance were *ex nunc*. He therefore urged that a distinction should be made, in regard to voidable instruments, between cases in which the effects of avoidance were *ex nunc* and those in which they were *ex tunc*.

6. He shared the opinion of Mr. Verdross and Mr. Ago regarding the practical consequences, which were *de facto* rather than *de jure* consequences, but the importance even of *de facto* consequences must be taken into account in real life.

7. Mr. PAL said that no major difficulty appeared to have arisen in connexion with paragraph 1 of the article although it spoke of a treaty being "void *ab initio*", an expression which had not been used in any of the substantive articles. In that paragraph, he felt that it was not altogether correct to say that "any acts done in reliance upon the void instrument shall have no legal force or effect"; in fact, they might have some legal force, but not under the treaty itself. Again, such acts could have certain legal consequences. In the circumstances, it would be more correct to say that a treaty that was void *ab initio* could not create legal rights.

8. With regard to paragraph 2, he noted that the expression "a treaty avoided as from a date subsequent to its entry into force" was nowhere to be found in the earlier articles. In most of the articles which the Commission had adopted, it was provided that a treaty vitiated by one of the circumstances mentioned in those articles was void from its inception. The grounds stated in the various substantive articles mostly related to

the consent given to the treaty. If the consent was defective, there was no treaty at all. If the Commission wished to contemplate the possibility of the avoidance of a treaty from a certain date subsequent to its entry into force, by virtue perhaps of notice given to that effect, some provision would have to be included on the subject.

9. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that paragraph 2 had been intended to cover cases which had found expression in the original draft articles. For example, his original proposal for article 7, on fraud (A/CN.4/156), had contemplated a certain election for the injured party to avoid the treaty either *ab initio* or on the date of, or immediately after, the discovery of the fraud. One reason for that proposal had been that an element of choice was a familiar concept of English law. A much stronger reason, however, was that it was not always possible to undo altogether situations created under a treaty. Some treaties were contractual in character, others were legislative. Many treaties had consequences in internal law. Hence it was not easy simply to declare that a treaty was void *ab initio*. Moreover, even if it were possible to undo everything that had been done by virtue of the treaty, that might not be the most satisfactory solution for the injured party. That was why he had included provisions which made it possible for the injured party to decide whether it wished to void the treaty *ab initio*, or to cancel it as from a certain date. He had included provisions of the same type in the article on unilateral error induced by one of the parties, which had been discarded, and in the article on the personal coercion of representatives (A/CN.4/156, articles 9 and 11).

10. In the redrafting of the substantive articles by the Drafting Committee, those ideas had been dropped. For example, article 7, on fraud, merely stated that the injured party could invoke the fraud as invalidating its consent. The injured party was thus given a clear-cut choice between having no treaty at all and accepting the treaty into which it had been induced to enter by the fraudulent conduct of the offending party. He had some misgivings regarding the situation which would thus be created for the injured party. However, since the Commission had decided not to include the right of election of the injured party, the logical result was that there was no longer any scope for paragraph 2 of article 27.

11. In saying that, he was not overlooking the point raised by Mr. Ago and Mr. Tunkin regarding the possible cases of conflict with a new rule of *jus cogens* and of subsequent impossibility of performance. Those cases offered some scope for a rule of the kind stated in paragraph 2, but as they were cases of termination and therefore properly belonged to article 28, they did not justify the retention of that paragraph in article 27.

12. He noted the drafting points which had been raised regarding the use of the words "shall have no legal force or effect" in paragraph 1, and the words "as far as possible" in paragraphs 1 and 2 (b).

13. He suggested that article 27 be referred to the Drafting Committee on the understanding that para-

graph 2 would be dropped as no longer necessary in the light of the Commission's decisions on the substantive articles.

14. Mr. AGO said that the Special Rapporteur had just drawn attention to an essential point, which made him wonder whether the provisions of articles 27 and 28 should really be set out in two separate articles.

15. It was true, up to a point, that paragraph 2 of article 27 touched on the question of the termination of treaties, but there were nevertheless two cases to be considered which differed in some respects, even if they had similar effects. They were, first, treaties which became void as from a date different from that of their entry into force by virtue of a general rule, as in the event of impossibility of performance or the supervention of a new rule of *jus cogens*; and secondly, treaties which terminated by reason of a voluntary act of the parties, such as denunciation.

16. But as the Commission must concern itself mainly with the rights and obligations deriving from the treaty when it became void or was terminated in one way or another, there could hardly be said to be material for two separate articles. The question would be better regulated if the provisions were incorporated in a single article, provided that separate paragraphs were devoted to the case dealt with in paragraph 1 of article 27, and to the provisions in paragraph 2 of article 27 and in article 28.

17. Mr. de LUNA agreed with those observations, because articles 27 and 28 in fact dealt with the same problems, which were amenable to the same legal techniques. There were examples in international practice of the parties to a treaty agreeing that certain obligations deriving from the treaty should continue to be enforceable even after its termination or invalidation. In that case the parties agreed, in respect of those post-contractual obligations, on a guarantee against non-performance: that was the notion of *culpa post contractum*. Such a treaty left an obligation for the parties after its termination.

18. That example was applicable to the two cases considered in articles 27 and 28. Like Mr. Ago, he thought that the provisions of those two articles should be combined.

19. The CHAIRMAN said that the Commission would be in a better position to consider Mr. Ago's proposal to combine articles 27 and 28 when it had discussed article 28.

20. He invited members to comment on the Special Rapporteur's suggestion that article 27 should be referred to the Drafting Committee on the understanding that paragraph 2 would be dropped.

21. Mr. TUNKIN said that article 27 should be referred to the Drafting Committee without any instructions. He had his doubts regarding the deletion of paragraph 2 and thought that the whole matter would be clearer when the Commission had discussed article 28.

22. Mr. ROSENNE said that he too was in favour of referring the whole of article 27 to the Drafting Committee.

23. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 27 as a whole to the Drafting Committee, with the comments made during the discussion.

It was so agreed.

ARTICLE 28 (LEGAL EFFECT OF THE TERMINATION OF A TREATY)

24. Sir Humphrey WALDOCK, Special Rapporteur, said that the main principle of the article, which dealt with the legal effect of the termination of a treaty, was stated in paragraph 1.

25. The point raised regarding the expression "shall retain their full force and effect" used in article 27, paragraph 2, also had a bearing on the language of paragraph 1 (b) of article 28. It had been pointed out that the development of a new rule of *jus cogens* which terminated a treaty might also have some consequences for the rights previously acquired under that treaty. The preservation of all that had been done while the treaty was in force should not be laid down as an absolute rule. Paragraph 1 (b) would therefore have to be redrafted.

26. Mr. VERDROSS said that the principle of article 28 was self-evident. There could be no doubt that, if a treaty ceased to exist, the obligations arising from it also ceased to exist. But it hardly seemed possible to say "unless the treaty otherwise provides", for if the treaty had ceased to exist completely, it could not provide anything. If it was recognized that certain obligations deriving from the treaty still existed, it must be recognized that the provision of the treaty establishing them was still in force. Alternatively, the parties might have made a new treaty and agreed that certain rights and obligations under the earlier treaty should remain in force. Thus the substance of the provision was acceptable, even if self-evident, but the drafting should be amended.

27. Mr. AGO said that generally speaking he endorsed the principle underlying article 28; he wished to make only a few comments on what were mainly drafting points.

28. The word "*régulière*" in the French text seemed less suitable than the word "lawful" in the English text.

29. Referring to the particular point raised by Mr. Verdross, he said there were some multilateral treaties, particularly those which were the constituent instruments of international organizations, which provided that a State might withdraw from the organization, but that even after it had ceased to be a member it would continue to be bound during a specified period to fulfil certain obligations or comply with certain rules. No doubt, the Special Rapporteur had been thinking mainly of that case, and the phrase "unless the treaty otherwise provides" should be repeated in paragraph 2. The case seldom arose in connexion with a bilateral treaty, but was common with multilateral treaties.

30. Paragraph 3 was particularly important. The Special Rapporteur had probably wished to cover mainly codifying treaties, which merely re-affirmed general rules of international law. Obviously, the validity of such rules must be preserved at all costs; a State could not be allowed to withdraw from a general convention codifying a particular branch of law and to conclude that it was no longer bound by any obligation in that sphere, even one based on custom. The draft was not, perhaps, worded as clearly or as felicitously as it might have been, but it expressed an essential idea. The Drafting Committee should be able to arrive at an entirely satisfactory text by making a few drafting changes.

31. Mr. LACHS said that the Special Rapporteur had already noted that the problem of a supervening rule of *jus cogens* would necessitate some redrafting of the provisions of paragraph 1 (b). Personally, he would go further and suggest that the nature of the rights in question should be taken into account when considering the problem of their continued existence after the termination of the treaty. Some rights were permanent and were therefore not affected by the termination of the treaty; some were extinguished and were likewise not affected; but others were continuing and temporary and were bound to fall when the treaty itself fell.

32. He agreed with Mr. Ago that paragraph 3 embodied a very important principle of law. He suggested that the word "also" before "under international law" should be deleted, since it suggested that treaty provisions were superior to rules of *jus cogens* of general international law. In fact, rules of general international law took precedence, as was shown by such an important example as the preamble to the Hague Convention of 1907 on the Laws and Customs of War on Land. In that preamble, the contracting parties had declared that "in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."¹ It was thus made perfectly clear that, even if the Hague Convention were to fall, the rules of general international law would remain.

33. Mr. CASTRÉN said he did not quite understand the point raised by Mr. Verdross. A treaty could, of course, lay down the conditions for its termination, and, if it did, they should be observed. Possibly the drafting was not wholly satisfactory in that respect, and it might be better to say "unless the treaty provided otherwise". As to the form of the article, he must make the same observations as he had made in connexion with article 26, namely, that paragraph 1 should apply only to bilateral treaties, since paragraph 2 applied to multilateral treaties *mutatis mutandis*.

34. Mr. CADIEUX said he agreed with Mr. Verdross on the point he had raised, so far as ordinary bilateral or multilateral treaties were concerned: but a distinction should be made where the object of a multilateral treaty was to establish a mandatory rule of law, as for example in Article 2, paragraph 6, of the United Nations Charter. Even if a Member State withdrew from the United Nations, it must continue to respect the general principles of the Charter. In the other cases, it was hard to see how a treaty which no longer existed could regulate what happened later.

35. Mr. TUNKIN pointed out that articles 27 and 28 dealt with two different situations. In the cases contemplated in article 27, the treaty itself became void, most frequently because it was contrary to a rule of *jus cogens*; that was the case, for example, where a treaty had been imposed by force. In the cases contemplated in article 28, there was no defect in the treaty itself; it could continue, but it was the will of the parties to terminate it. He was not certain that it was possible to cover the two situations by one and the same rule. Perhaps the Drafting Committee could consider that point; the possibility of combining articles 27 and 28 would depend on its decision.

36. The contents of paragraph 3 were self-evident and were probably a matter of general interpretation. If a rule of international law imposed some obligation parallel to the treaty obligations, the obligation under general international law would continue in being. On the whole, he was inclined to doubt the necessity of including paragraph 3 in the draft, because its contents did not belong to the law of treaties.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that he had had doubts about including the word "also" in paragraph 3 and had now been convinced by Mr. Lachs that it should be dropped as unnecessary.

38. The point raised by Mr. Verdross concerning the opening words of paragraph 1, "Unless the treaty otherwise provides", seemed to be largely theoretical. He had been thinking of the provisions of general multilateral treaties on the situation arising upon the withdrawal of a party, where it was often laid down that the treaty as such would no longer be binding on the withdrawing party, but that at the same time certain obligations continued. Those obligations were derived from the original consent given by the party. The point was largely one of drafting and could be referred to the Drafting Committee.

39. Another point which was largely a matter of drafting had been raised by Mr. Castrén, who had criticized the omission, in paragraph 1 of article 28, as in paragraphs 1 and 2 of article 27, to qualify the treaties in question as "bilateral". In fact, paragraph 1 of article 28 would apply in principle not only to a bilateral treaty, but also to a multilateral treaty when the whole of it was terminated. The purpose of paragraph 3 was to deal with the case in which a particular State withdrew from a multilateral treaty.

40. The point raised by Mr. Tunkin could be referred to the Drafting Committee, as he had himself suggested.

¹ Scott, J. B., *The Hague Conventions and Declarations of 1899 and 1907*, 3rd edition, New York, 1918, Oxford University Press, pp. 101-102.

41. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 28 to the Drafting Committee together with article 27.

It was so agreed.

Articles submitted by the Drafting Committee (resumed from 705th meeting)

42. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 15 in section III.

ARTICLE 15 (TREATIES CONTAINING PROVISIONS REGARDING THEIR TERMINATION)

43. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had decided to drop the words "duration or" from the title and proposed a new text for article 15 which read:

"1. A treaty terminates:

"(a) on such date or on the expiry of such period as may be fixed in the treaty;

"(b) on the taking effect of a resolutive condition provided for in the treaty;

"(c) on the occurrence of any other event specified in the treaty as bringing it to an end.

"2. When a party to a bilateral treaty has given notice of denunciation in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

"3. (a) When a party to a multilateral treaty has given notice of denunciation or withdrawal in conformity with the terms of the treaty, the treaty ceases to apply to such party as from the date upon which the denunciation or withdrawal takes effect.

"(b) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force.

"(c) A multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force, unless the remaining parties shall so decide."

44. In accordance with the Commission's wishes the article had been considerably abbreviated. The Drafting Committee was aware that the provisions of paragraph 1 might be regarded as somewhat obvious, but nevertheless considered them necessary for the purposes of a draft convention on the law of treaties. The main points of substance were contained in paragraph 3; it would be remembered that some members of the Commission had attached special importance to the rule contained in paragraph 3 (c).

45. Mr. CASTRÉN observed that the Drafting Committee had redrafted all the articles in section II in a more concise and clearer form, while retaining the

essentials of the ideas and principles adopted by the Special Rapporteur in his draft; it had succeeded in condensing into a single, short sentence even very important articles, such as those dealing with the effects of fraud and coercion and those relating to *jus cogens*. But in the case of article 15, which, with one exception, contained only obvious truths, the Drafting Committee had considered it necessary to retain a fairly long text. In his opinion, the Committee could have shortened the original text further.

46. At the first reading of article 15 he had submitted a draft amendment consisting of two paragraphs which preserved the essentials of the text proposed by the Special Rapporteur (688th meeting, para. 9). That amendment had been supported by several members of the Commission, and he therefore re-introduced it.

47. The amendment read:

"1. The provisions of a treaty which relate to the duration or to the termination thereof for one or all of the parties shall be applicable subject to articles 18 to 22.

"2. A treaty shall not come to an end by reason only of the fact that the number of parties has fallen below the minimum number originally specified in the treaty for its entry into force, unless the States still parties to the treaty so decide."

Paragraph 1 was based on paragraph 1 of the original draft (A/CN.4/156/Add.1), to which he had added the phrase "for one or all of the parties" in order to cover all the cases that might arise, whether the treaty was bilateral or multilateral. Paragraph 2 corresponded in its entirety to the paragraph 3 (c) proposed by the Drafting Committee, which was the only provision of substance in the draft; the other provisions merely confirmed the rules deriving from the principle *pacta sunt servanda*.

48. Paragraph 3 (b) of the Drafting Committee's text merely stated what was already implied in paragraph 1 (c), which also applied to multilateral treaties.

49. He could not accept paragraph 1 of the Drafting Committee's text. The intention seemed to have been to give a complete list of the cases in which treaties containing provisions concerning their termination came to an end. But such treaties might terminate for other reasons, either under rules of general international law or by the common will of the parties. It therefore seemed necessary to include a cross-reference to articles 18 to 22 of the draft, as the Special Rapporteur had done in his original draft and he (Mr. Castrén) had done in his amendment.

50. Again, the text proposed by the Drafting Committee did not cover the case mentioned by the Special Rapporteur in paragraph 6 of his draft. The first line of the new article should accordingly be replaced by the words: "A treaty containing provisions regarding its termination terminates:". Admittedly, that was made clear in the title of the article, but the titles were only provisional and were not authoritative. Moreover, it often happened that they were deleted at the diplomatic con-

ference which settled the final text. In any case, the text of the articles should be sufficiently clear and complete to make it unnecessary to consult the titles.

51. Mr. VERDROSS said that he, too, found the redraft of article 15 incomplete in that it dealt solely with termination by virtue of clauses contained in the treaty itself, and disregarded cases in which the treaty terminated in conformity with rules of general international law.

52. Mr. YASSEEN said that the scope of article 15 was, in fact, limited to cases provided for in the treaty itself. He approved of the new text, which without being laconic was much shorter than the original draft. The only suggestion he wished to make was that the last clause in paragraph 3 (c), "unless the remaining parties shall so decide", should be deleted, since that condition was self-evident.

53. Mr. AGO pointed out that the second sort of cases mentioned by Mr. Verdross was dealt with in article 16. As its title indicated, article 15 dealt only with cases in which the treaty contained provisions regarding its termination; that being so, the article could hardly be more than descriptive. However, it was well to state certain obvious truths.

54. It was true that paragraph 3 (b) dealt with a specific case already covered by paragraph 1 (c), but its real purpose was to introduce paragraph 3 (c). The Commission might perhaps wish to combine sub-paragraphs (b) and (c) of paragraph 3 by linking them together with the word "however"; there would be no harm in deleting the last phrase in sub-paragraph (c).

55. He proposed that the words "given notice of", in paragraphs 2 and 3, should be replaced by the word "effected", because the treaty might prescribe other means than the giving of notice for making denunciation effective.

56. Mr. CASTRÉN said he still preferred the wording he had proposed. He could accept a text which stated the obvious but not a text with gaps. He could not vote for article 15 unless the wording of the title was incorporated in the body of the article and paragraph 1 was supplemented in the manner he had suggested.

57. Mr. ROSENNE said that, as the question of titles of articles had been mentioned, he would urge the Commission to bear in mind that the practice of diplomatic conferences in that regard was far from uniform and was largely influenced by political considerations. For example, it had been decided at the Conference on the Law of the Sea to omit the titles of articles and retain those of sections, but titles of articles had been included in the Vienna Convention on Consular Relations. The Commission should not seek to anticipate the final outcome in any given draft and should maintain its fairly consistent practice of including titles, because they were necessary to determine the scope and subject-matter of chapters, sections or articles and formed an integral part of the drafts which it submitted to the General Assembly and to governments. He could cer-

tainly not subscribe to the view that preambles and titles were of no importance; considerable importance had been attached to the preamble and headings of the United Nations Charter at the San Francisco Conference, which had taken a clear decision on the matter.

58. Mr. TUNKIN said he agreed with Mr. Castrén that the text of each article should be quite clear and self-contained, in case the title were eventually omitted; he therefore favoured the insertion of the words "which contains provisions regarding termination" after the words "A treaty", in the first line of paragraph 1.

59. He also shared Mr. Castrén's view that paragraph 1 was probably not exhaustive as to the manner in which a treaty might be terminated and that it would be useful to make that clear in the text.

60. Mr. BARTOŠ said that, although he intended to vote for article 15, he must emphasize that he did not approve of paragraph 3 (c). If the number of the parties to a general multilateral treaty fell below the number specified in the treaty as necessary for its entry into force, the treaty might still be valid as between the remaining parties if they so wished, but it would cease to be a general multilateral treaty.

61. The Drafting Committee's failure to include all the words of the title in the body of the article so as to make the provision quite clear was merely an oversight, which should be remedied.

62. Mr. Castrén's other proposal, namely, that paragraph 1 should also mention cases other than those referred to in sub-paragraphs (a), (b) and (c) was neither necessary nor feasible, in his opinion, for he did not see what other cases the article could apply to. But if there were such cases, the necessary additions should be made.

63. Mr. de LUNA considered that the titles and preambles of legal instruments were just as important as, if not more important than, the text itself: they threw light on the text and showed how it should be interpreted. That was especially true of constitutions. In the draft being prepared by the Commission the titles were inseparable from the text of the articles.

64. Mr. CADIEUX said that the essential point about the titles was that the Commission should be consistent throughout its draft. The question whether the wording of the titles and sub-titles should be incorporated in the articles was not only a matter of drafting, but might affect the substance. If the words in the title were added to the text of article 15, it would imply that the enumeration was exhaustive, which might have legal consequences. As he was not sure that the enumeration was complete, he would prefer to leave the text as it stood.

65. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Castrén's suggestion that the content of the title should be included in the opening phrase of paragraph 1, since there was no certainty that the title would be retained when the draft came before an international conference.

66. He hoped the Commission would indicate that the enumeration in paragraph 1 was incomplete, because treaties containing provisions regarding their termination could also be brought to an end in other ways, for example, as a result of a change in circumstances.
67. Mr. AGO thought the text would be improved if the words of the title were added. The article would then be certain to be understood, even if the title disappeared.
68. As to the question whether the enumeration in paragraph 1 was exhaustive or not, he really could not see what other case there could be in which a treaty terminated in conformity with one of its own provisions, since sub-paragraph (c) referred to "any other event specified in the treaty as bringing it to an end".
69. Sir Humphrey WALDOCK, Special Rapporteur, said he recognized that paragraph 1 was not exhaustive as far as all possible causes of extinction of a treaty under general international law were concerned; but he agreed with Mr. Ago that if it were limited, as the Drafting Committee had intended, to termination under clauses contained in the treaty itself, all the possibilities would have been covered.
70. He would feel hesitant about inserting at the beginning of the article some such proviso as "Subject to the provisions of the following articles", which Mr. Castrén perhaps had in mind, because those other articles might not cover every conceivable cause of termination under international law. There would be a greater danger in widening the scope of the article in that manner than in maintaining its present structure.
71. The amendment to the first phrase in paragraph 1 was quite acceptable and would be consistent with the Drafting Committee's wording for article 16.
72. The CHAIRMAN, speaking as a member of the Commission, said that it could be inferred from paragraph 1 as at present drafted that treaties containing provisions for their termination could not come to an end for reasons other than those provided for in them.
73. Mr. BRIGGS said he agreed that the meaning of each article must be perfectly clear from the text itself: it should not be necessary to rely on the title for its elucidation. It should be possible to omit the sub-paragraphs of paragraph 1, which could be worded in quite general terms.
74. Mr. AGO suggested that the difficulty mentioned by the Chairman could be overcome by slightly amending paragraph 1 to read: "A treaty which ceases to exist by virtue of a provision contained in the treaty itself terminates. . ."
75. Mr. EL-ERIAN said that the doubts he had expressed in the Drafting Committee about paragraph 1 (c) subsisted. He was still unable to understand what it meant and how it differed from a resolutive condition, which was the subject of the preceding sub-paragraph.
76. Mr. GROS supported the Drafting Committee's text, with the amendment accepted by the Special Rapporteur, namely the addition of the words "which contains provisions regarding termination" after the words "A treaty" in paragraph 1.
77. The articles in section III formed an integral whole, so there was no need to specify in article 15 that the article applied subject to general rules laid down later in the draft.
78. In reply to Mr. El-Erian's comment on paragraph 1 (c), he suggested that the word "event", which was not perhaps the best choice, should not be used, and that the provision should be replaced by some such formula as "or in any other manner contemplated in the treaty".
79. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 1 was open to the dangerous interpretation that certain grounds for termination, for instance, a change of circumstances, were not applicable to treaties containing provisions regarding their termination — a view put forward by certain writers, but not one which he supposed the Commission would wish to adopt. That objection could easily be met by some modification of the text on the lines suggested by Mr. Ago.
80. Mr. CASTRÉN thought that paragraph 1 would be greatly improved by the amendment suggested by Mr. Ago. If that amendment were accepted, he could support the article.
81. Mr. de LUNA strongly supported Mr. Gros' comment; there should not be too many cross-references between the articles, and it was evident that the provisions of article 15 could not prevail over rules of general international law.
82. Mr. AGO said that the enumeration in sub-paragraphs (a), (b) and (c) of paragraph 1 was useful because it specified the time when termination took place. Sub-paragraph (a) referred to a future event which was certain to occur and was determined in time, in other words a time-limit. Sub-paragraph (b) referred to a future event which was uncertain, in other words a condition. Sub-paragraph (c) referred to a future event which was certain to occur, but at an unknown date, for example, the death of a sovereign; it was, therefore, an important provision and should be retained.
83. Mr. YASSEEN said he agreed with Mr. El-Erian; either a time-limit or a condition must be stated. The example given by Mr. Ago was also one of a time-limit. Thus the first two sub-paragraphs of paragraph 1 seemed adequate. Nevertheless, although it was not necessary, sub-paragraph (c) might be useful if redrafted to read: "on the occurrence of any other ground for termination specified in the treaty".
84. Mr. CADIEUX said that some such wording for paragraph 1 (c) as had been suggested by Mr. Gros would be acceptable. Paragraph 1 could also be amended in the way Mr. Castrén wished.
85. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion seemed to have revealed a wide measure of agreement on the substance of article 15

and such divergences of view as had emerged related more to the way in which it was drafted.

86. He hoped that Mr. Gros would not press his amendment to paragraph 1 (c), as it would shift the emphasis from the temporal element of termination to its mode, which had not been the Drafting Committee's intention. Nor would he favour the replacement of that paragraph by the text proposed by Mr. Castrén during the first reading.

87. The amendment suggested by Mr. Ago to meet the point made by the Chairman would not alter the sense of the paragraph and he did not believe that anyone reading the article in the context of section III as a whole could possibly conclude that treaties containing provisions regarding their termination fell wholly outside the application of certain general provisions contained in the succeeding articles. Any such construction would be in defiance of the normal rules of interpretation. Perhaps the Drafting Committee could be relied on to make such changes as were necessary to cover the points raised during the discussion.

88. The CHAIRMAN suggested that, subject to drafting changes, the Commission might vote on article 15.

89. Mr. CASTRÉN, supported by Mr. YASSEEN, asked that the vote be postponed until the Commission had the Drafting Committee's new text before it; otherwise he would be obliged to abstain.

It was so agreed.

The meeting rose at 12.30 p.m.

709th MEETING

Thursday, 27 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] *(continued)*

Articles submitted by the Drafting Committee (continued)

1. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 16.

ARTICLE 16 (TREATIES CONTAINING NO PROVISIONS REGARDING THEIR TERMINATION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed, in replacement of articles 16 and 17, a new article 16 entitled "Treaties containing no provisions regarding their termination" which read:

"A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation

unless it appears from the nature of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties did not intend to exclude the possibility of denunciation or withdrawal. In the latter case a party may denounce or withdraw from the treaty upon giving to the other parties or to the Depository twelve months' notice to that effect."

3. The detailed article 17 he had originally put forward on the implied right of denunciation (A/CN.4/156/Add.1) had not commended itself to the Commission, in which two trends of opinion had emerged. Some members had been opposed to any article on the subject and others, while not in favour of anything as comprehensive as the original article 17, had thought it necessary to provide for the possibility of an implied right of denunciation or withdrawal when it could be inferred from the intention of the parties that those acts had not been excluded.

4. He emphasized that the Drafting Committee was not proposing that the intention of the Parties could be inferred solely from the nature of the treaty without having regard to the circumstances of its conclusion.

5. Consideration of the title of the article might be held over until the Commission came to consider the new text of article 15 which was to be prepared as a result of the discussion at the previous meeting.

6. Mr. VERDROSS proposed, first, that in the phrase "unless it appears from the nature of the treaty", the word "nature", whose meaning was debateable, should be replaced by the word "object".

7. Secondly, and more important, since article 16 was based on the very sound principle that such a treaty could not be denounced, the condition for derogation from that principle should be expressed in positive rather than negative form. He therefore proposed that the words "the parties did not intend to exclude" should be replaced by some such wording as "it was the intention of the parties to admit".

8. Mr. CADIEUX said he wished to make a few suggestions relating only to the form of the article, and apologized for raising questions which might perhaps already have been settled at the first reading or in the Drafting Committee.

9. First, it seemed to him that the idea expressed by the words "the statements of the parties" was already contained in the expression "the circumstances of its conclusion"; if it was desired to refer specifically to the statements of the parties, that could be done in the commentary.

10. Secondly, it would be better if the word "possibility", near the end of the first sentence, were replaced by "right" or "faculty".

11. Thirdly, the expression "In the latter case" at the beginning of the second sentence was not very felicitous; since in fact only one case was contemplated, it would be better to say simply "In that case".

12. Sir Humphrey WALDOCK, Special Rapporteur, explained that the phrase "statements of the parties"

was intended to denote not only statements made during the negotiations, but also later statements; the latter could be regarded as an element in subsequent conduct which, according to a well-known principle, had to be examined when interpreting intention.

13. Mr. CASTRÉN said that he could accept as it stood the new article 16, which was a distinct improvement on the former articles 16 and 17. Nevertheless, he would like to ask a few questions.

14. First, the word "and" before "from the circumstances" replaced the word "or" used in the corresponding sentence in the original article 17, paragraph 5. The new wording certainly reinforced the permanence of treaties, but it might be going too far to require both conditions to be fulfilled.

15. His second question concerned the commentary on article 16. Was it intended, as some members of the Commission had proposed, to give examples of permanent treaties and temporary treaties according to their nature and the circumstances of their conclusion? And if so, what examples would be given?

16. Lastly, article 16 in its new form introduced a new element as evidence of intention, namely, the statements of the parties. The idea was acceptable, but should it not be specified that the statements referred to were those made by all the parties during the negotiations or at the time of concluding the treaty? For statements made after that time could hardly be taken into consideration as well. Perhaps that could be made clear in the commentary.

17. Mr. LACHS said that the new article 16 was much clearer than the original article 17 and had the merit of brevity. He supported both the changes proposed by Mr. Verdross.

18. With regard to the time-limit, provision should be made for extending the period of twelve months where the nature of the rights and duties created by the treaty so required.

19. Mr. de LUNA approved of the new text in principle, but agreed with Mr. Verdross and Mr. Lachs that the condition for derogation should be drafted in positive form. The essential question was whether the treaty's silence on the possibility of termination meant that the parties intended the treaty to be perpetual or, on the contrary, to be terminable. In some cases it was manifest that the parties did not wish to permit denunciation or withdrawal. In other cases, chiefly in commercial treaties, which were of an essentially temporary nature, he was inclined to believe that there was already an international norm according to which the silence of the treaty meant that denunciation and withdrawal were possible.

20. Another question regarding article 16 to which he attached particular importance was that of the possible effects of constitutional limitations on the expression of the will of States concerning the termination of a treaty. The effects of such limitations had been taken into account in connexion with the conclusion of treaties, and it was equally essential to mention them in the section dealing with termination.

21. Mr. YASSEEN said that the text proposed by the Drafting Committee for article 16 was a cautious attempt to meet a real need of international law. The important point of the article was that among other factors determining the possibility of denouncing a treaty it included the circumstances of the treaty's conclusion. That was quite proper, and was consistent with the view he had expressed during the first reading, when he had stressed the need to give States an opportunity of reviewing their positions, especially where political treaties were concerned (689th meeting, paras. 30 and 31).

22. He supported Mr. Verdross's comment concerning the formulation of the derogation clause. Since the possibility of denunciation was to be based on the intention of the parties, that intention must be positive; it was not enough to say that denunciation must not have been excluded, it should be specified that the parties must have admitted the possibility of denunciation.

23. Mr. BRIGGS said he would be unable to vote in favour of article 16 because it ran counter to an existing principle of international law, namely, that the right of denunciation existed only if provided for in the treaty itself or by agreement between all the parties. The proposed conditions for inferring an intention to allow denunciation or withdrawal were extremely vague. If such a provision were nevertheless retained, he might find it more acceptable if the intention were described in positive form, as proposed by Mr. Verdross, and if the subsequent conduct of the parties were mentioned in place of the last condition.

24. Mr. PAREDES said he regretted that he could not accept the text proposed for article 16. He did not believe that there could be perpetual treaties, either against the will of the parties or by virtue of their decision.

25. Law-making treaties, in other words treaties which laid down general rules of law, could be of indefinite duration; other treaties, which had brought some legal proceeding to a conclusion and finally established a right, were accordingly final; but there were all the treaties establishing future relations between the parties which could not be carried on indefinitely — they could not be enforced in perpetuity. And that was so even if the parties had provided for the perpetuity of the treaty when concluding it. For a perpetual treaty would be a form of slavery which was intolerable in international life.

26. In internal law, the contracting of personal services for life was prohibited, because it was contrary to the great principle of the liberty of man. That applied even more strongly to nations, because their life was far longer. Mr. de Luna had referred to commercial treaties, but many other examples could be given of treaties under which the mutual relations of the parties changed with time, so that it became necessary to adopt amendments or terminate the treaties, even in spite of the agreement of the contracting parties expressed in the text of the instrument.

27. Mr. BARTOŠ said that although he was a member of the Drafting Committee, he would have to abstain from voting on article 16 because its formulation in

fact amounted to the adoption of an idea that the Commission had wished to reject: the existence of perpetual treaties. To say that if the parties had not intended to admit denunciation or withdrawal no party could denounce the treaty or withdraw from it, was surely to recognize the perpetuity of the treaty.

28. Mr. EL-ERIAN said that he too would have to abstain from voting on article 16, which he found unacceptable for the same reasons as the two previous speakers.

29. Sir Humphrey WALDOCK, Special Rapporteur, said it was clear that opinion in the Commission was divided; some members, including himself, favoured an article which went further in allowing an implied right of denunciation or withdrawal, while others believed that such a right did not exist at all. The Drafting Committee had probably been justified in its cautious approach.

30. He found both Mr. Verdross's suggestions acceptable and believed that the purpose of the second could be achieved by substituting some such wording as "intended to admit" or "contemplated" for the words "did not intend to exclude".

31. Perhaps the point made by Mr. Lachs, which had not previously been considered, could be referred to the Drafting Committee. Personally, he would hesitate to introduce a more complex provision concerning the length of the notice and would have thought twelve months ought to be sufficient for making any arrangements consequential on termination. Many modern treaties — treaties of a technical or commercial nature, for example — provided for even shorter periods of notice.

32. The drafting suggestions made by Mr. Cadioux seemed acceptable and could be referred to the Drafting Committee.

33. Mr. ROSENNE said he reserved his position concerning Mr. Verdross's proposal that the word "nature" should be replaced by the word "object".

34. Mr. TUNKIN said that, although he had no particular liking for the word "nature", he certainly could not support Mr. Verdross's amendment. Perhaps the word "character" might be a better alternative.

35. Mr. de LUNA suggested that the expression "nature of the object" should be used, rather than "nature" or "object" and that the word "possibility" should be replaced by the word "faculty".

36. Mr. BRIGGS said that there was no need to refer to either the nature or the object of the treaty.

37. The CHAIRMAN suggested that, as some of the amendments were of quite a substantial character, perhaps article 16 ought to be referred back to the Drafting Committee before a final decision was taken.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would need firmer guidance as to the Commission's wishes. Was he to

understand, for instance, that Mr. Verdross's second amendment had gained general support?

39. A decision would also have to be taken on whether or not the reference to the nature of the treaty was to be retained. He found Mr. Briggs's suggestion that it should be omitted quite unacceptable.

40. The CHAIRMAN said that the discussion had clearly shown that on the whole the Commission was in favour of the Drafting Committee's text and of Mr. Verdross's second amendment, and wished the Drafting Committee to consider some alternative to the word "nature". He therefore proposed that article 16 be referred back to the Drafting Committee in the light of the discussion.

It was so agreed.

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

41. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had amended the title of article 18 to read "Termination or suspension of the operation of treaties by agreement" and proposed a new text which read:

"1. A treaty may be terminated at any time by agreement of all parties. Such agreement may be embodied:

"(a) in an instrument drawn up in whatever form the parties shall decide;

"(b) in communications made by the parties to the Depositary or to each other.

"2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all parties, the consent of not less than two-thirds of all the States which drew up the treaty; however, after the expiry of X years the agreement only of the States parties to the treaty shall be necessary.

"3. The foregoing paragraphs also apply to the suspension of the operation of treaties."

42. The detailed original text of article 18 (A/CN.4/156/Add.1), setting out the different instances in which the parties might wish to suspend or terminate a treaty by agreement, had been severely abridged. The original paragraph 1 had been made to conform with certain parallel provisions in Part I of the draft, in which a distinction had been made between treaties drawn up at an international conference convened by an international organization, treaties drawn up within an international organization and treaties drawn up at a conference convened by the States concerned. After some discussion, the Drafting Committee had concluded that termination raised rather different issues from those dealt with in Part I, which would justify the simpler provision now presented in paragraph 2 of the new text, in which all types of multilateral treaty were placed on the same footing.

43. In considering that paragraph, the Commission should bear in mind that a special article was to be

inserted in section I, under which certain types of treaty concluded within an international organization would be excluded from the scope of the draft.

44. Mr. CADIEUX suggested two drafting amendments. First, in the title the word "subsequent" should be added before the word "agreement", since, as the draft stood, there might be some confusion between the titles of articles 15 and 18.

45. Secondly, the words "subject to the provisions of paragraph 2" should be added at the beginning of paragraph 1. The rule stated in paragraph 1 was not an absolute rule, for in the case contemplated in paragraph 2 the agreement of the parties was not sufficient, the consent of two-thirds of all the States which had drawn up the treaty being also required.

46. Mr. BARTOŠ said he intended to vote for article 18, but subject to a reservation on the words "in addition to the agreement of all the parties" in paragraph 2. That condition would be retrograde, inasmuch as it would allow a single party to impose a kind of veto on the will of all the others, even against the wishes of two-thirds of all the States which had drawn up the treaty. It would be a mistake to adopt such a rule, in spite of all the arguments which could be advanced in its favour, such as the sanctity of treaties, the protection of minorities, and the need for the consent of all States participating in the treaty. In his opinion the need to avoid any hindrance to the development of international law prevailed over all other considerations.

47. Mr. VERDROSS said he would vote for article 18, though in his opinion the agreement of all the parties was sufficient for the termination of a treaty. To require in addition the consent of two-thirds of all the States which had drawn up the treaty was certainly taking a position *de lege ferenda*.

48. Mr. LACHS said that on the whole the new text of article 18 was acceptable; he supported Mr. Cadieux's second amendment, which would show that paragraph 1 did not cover every type of treaty.

49. Perhaps the doubts expressed by Mr. Bartoš and Mr. Verdross concerning paragraph 2 would be removed if the period provided for at the end were not too long. It was only necessary to allow a reasonable interval for the completion of ratification processes, after which time it could be assumed that States which had taken part in the conclusion of the treaty and had not yet ratified it were no longer interested in doing so.

50. The Commission would have to take a separate decision on whether all the provisions concerning suspension should be incorporated in a single article.

51. Mr. de LUNA asked whether, in article 18, the Special Rapporteur contemplated the case of implied termination of a treaty resulting from important acts by the parties other than the conclusion of a subsequent treaty. He cited the decision of the Supreme Court of Germany in 1925 on the implicit termination of the Treaty of Brest-Litovsk, when the USSR had declared that it regarded the treaty as abrogated: that had been

simply a unilateral declaration, but it had been accepted by Germany.

52. It might be thought that that point could have been raised during the discussion of the preceding article, since many writers regarded the case as an instance of tacit agreement. Personally he took the view that it was not a case of a request for termination addressed by one of the parties to the other, but of an acceptance of a unilateral denunciation which had originally been irregular. The irregularity was cancelled by the conduct of the other party, which accepted it either by inaction or silence or by important positive acts. If that case was not covered by article 18, he thought a paragraph should be added on that point, which was of some importance. But he would not press his proposal to a vote.

53. Mr. ROSENNE said he agreed with Mr. Lachs concerning paragraph 2, but must warn against fixing too short a period. Recent experience with the conventions drawn up at the first Geneva Conference on the Law of the Sea and with the Vienna Convention on Diplomatic Relations had shown that ratification processes could be delayed by the knowledge that another international conference on a closely related topic was to be held in the near future.

54. With regard to paragraph 3, he was becoming more and more convinced that it would be a great step forward in the development of the law of treaties if the Commission could deal more thoroughly with suspension. He had been impressed by McNair's comment that the precise juridical status of the practice of retaliatory suspension of the operation of a provision following a breach was not clear.¹ Article 18 could be adopted on the understanding that the Commission might finally decide to transfer all, or as many as possible, of the provisions on suspension to one or two separate articles on that subject, and perhaps include a definition in article 1.

55. Sir Humphrey WALDOCK, Special Rapporteur, said that he could not accept Mr. Cadieux's first amendment, even though the word "subsequent" had appeared in his original text, because it had been deliberately omitted by the Drafting Committee. Mr. Cadieux's second amendment, was acceptable, however.

56. With regard to Mr. Lachs' comment on paragraph 2, the Commission had already decided to make no proposal on the period during which the consent of two-thirds of all the States which had drawn up the treaty would be necessary, because it wished to await the views of governments on what they would consider a reasonable period.

57. The general question of suspension had been discussed by the Drafting Committee, which had considered the possibility of defining the concept and of dealing with it either in a special article or in section V, which was concerned with the legal effects of nullity, avoidance or termination. It had been suggested that the right of suspension should be accorded as an alternative whenever the right of termination was recognized, but of course

¹ Law of Treaties, 1961, p. 573.

that would not be possible in cases of termination on grounds of conflict with *jus cogens* or because of a change of circumstances. He doubted whether it would ultimately be found desirable to group all the provisions concerning suspension together in a single article. For example, if paragraph 3 of the new text of article 18 were accepted, it would surely be preferable to keep it in its present context.

58. The comments made during the discussion concerning suspension would certainly be of assistance to the Drafting Committee in reconsidering the whole matter.

59. In answer to Mr. de Luna's question whether the new text of article 18 adequately covered the case of implied agreement to terminate, he said that he had provided for tacit agreement in paragraph 3 (c) of his original article. That reference had now been dropped, but the new text in paragraph 1 provided for various forms of agreement which might be held to cover implied agreement. For example, if one party communicated to another its desire that the treaty should be brought to an end, the other by its conduct, though perhaps not in any formal manner, might indicate that it had no objection. Perhaps it would be preferable not to make paragraph 1 any more specific than that, in order to avoid going into the many different kinds of circumstances that would have to be taken into account.

60. The CHAIRMAN, speaking as a member of the Commission, said it was clear from the second sentence of paragraph 1 that treaties might be terminated by the methods specified there, but not that they must be terminated by those methods, so that implied agreement was not excluded.

61. Mr. LACHS said he agreed with the Special Rapporteur that no proposal was necessary at the present stage concerning the length of the time-limit set in paragraph 2, but the attention of governments ought to be drawn to that point in the commentary.

62. Mr. TUNKIN, referring to Mr. Cadieux's first amendment, explained that the Drafting Committee had dropped the word "subsequent" from the title of article 18 on the ground that the article was concerned with a specific agreement on termination.

63. Mr. YASSEEN suggested that in paragraph 1 the words "by agreement of all the parties to that end" should be used, in order to show clearly that it did not refer to any subsequent treaty whatever, but only to a treaty whose object was to terminate the earlier treaty.

64. Mr. CADIEUX suggested that the Drafting Committee should be asked to examine the text of the article in order to prevent any misunderstanding.

65. The CHAIRMAN put to the vote the new text of article 18 with Mr. Cadieux's amendment to paragraph 1, adding the words "subject to the provisions of paragraph 2".

Article 18, thus amended, was adopted by 18 votes to none.

66. Mr. BARTOŠ, explaining his vote, said that he had voted for the article, subject to the reservation he had made.

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

67. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had slightly modified the title of article 19, of which the proposed new text read:

"1. A treaty shall be considered as having been impliedly terminated if all the parties to it, either with or without the addition of other States, enter into a further treaty relating to the same subject-matter and either:

"(a) the parties to the later treaty have indicated their intention that the matter should thereafter be governed by the later treaty; or

"(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

"2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty."

68. In his original draft of article 19 (A/CN.4/156/Add.1) he had dealt separately with the case in which the parties to both treaties were the same and the case in which not all the parties to the earlier treaty became parties to the later one.

69. The Commission had recognized during the discussion that paragraph 2 of his original text raised more complex problems of conflict with a previous treaty than paragraph 1, and was closely linked with article 14. It had decided to hold over article 14 for consideration at the next session in conjunction with the provisions on the interpretation and application of treaties (703rd meeting, para. 85).

70. The Drafting Committee had finally decided to retain the provisions of paragraph 1 of his original article 19, even though they touched on questions of application, because they did deal with a clear case of implied termination.

71. Mr. VERDROSS proposed that in paragraph 1 (a) the word "exclusively" should be inserted after the words "thereafter be governed"; that addition seemed to him necessary because, if it could be thought that the subject-matter was only partly governed by the later treaty, that treaty might be partly compatible with the earlier one.

72. Mr. YASSEEN said that paragraph 1 (a), as drafted, did not relate to implied agreement. If the parties had indicated their intention that the matter should thereafter be governed by the later treaty, that was a case of express termination, especially if, as Mr. Verdross proposed, the word "exclusively" were added.

73. Mr. CASTRÉN approved of the new text as to substance, but observed that the purpose of the article was to regulate only the mutual relations of States parties to the earlier and to the later treaty; and while that fact

was clear at the beginning of paragraph 1, sub-paragraph (a) only referred to the parties to the later treaty, which might give the impression that the States parties to the later treaty only would also have to be consulted concerning the termination of the earlier treaty. To avoid that possible misunderstanding, either the word "later" in the first line of paragraph 1 (a) should be omitted, or else, for greater clarity, the parties to the earlier treaty should be mentioned.

74. Mr. ROSENNE said that he had given his reasons for being unable to support article 19 during the earlier discussion (691st meeting, paras. 8-16). He must now confirm the position he had then taken and record his dissent from article 19 in the form in which it had emerged from the Drafting Committee.

75. In so far as there was, in the cases covered by article 19, any element of termination by treaty, it was covered by the provisions of article 18, which were rather wider. Basically, the contents of article 19 raised questions of the interpretation and application of treaties.

76. He would abstain from voting on article 19 and reserve his position completely.

77. Mr. BARTOŠ, explaining his position on article 19, said that he would vote for the article, but had reservations concerning the condition that all the parties to the terminated treaty must be parties to the later treaty. That was a logical consequence of the position he had taken on article 18.

78. However, since the necessity of avoiding a vote by one State in the case of multilateral treaties had not yet been recognized in international law, he would merely enter a reservation, though he intended to revert to the matter when the Commission had examined the comments of governments.

79. Mr. TUNKIN said that caution was necessary when making provision for the implied termination of a treaty. However, the rule stated in article 19 was subject to the safeguards contained in paragraph 1 (a) and (b) and he could therefore support the article.

80. He could not support Mr. Verdross's suggestion that the word "exclusively" should be inserted after the word "governed" in paragraph 1 (a). That might suggest that it was intended to exclude general rules of international law.

81. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Tunkin's explanation of the Drafting Committee's intention. Mr. Yasseen's remarks provided an additional argument for not inserting the word "exclusively", although he was not prepared to go as far as Mr. Yasseen and say that the provisions of paragraph 1 (a) related to a case of express rather than implied termination. It was quite common, when the parties to a treaty concluded a second treaty on the same subject matter, to include in the second treaty a provision which expressly terminated the earlier treaty in whole or in part. There were other cases, however, in which, although the parties did not expressly state their intention to terminate the previous treaty, they nevertheless made it clear that they engaged in the new treaty with the idea of covering the whole of the subject-

matter of the old treaty. The contents of paragraph 1 (a) accordingly came within the scope of article 19.

82. With regard to the point raised by Mr. Castrén, the intention had been to refer in paragraph 1 (a) to States which were parties to both treaties.

83. Mr. VERDROSS said he acknowledged the soundness of Mr. Tunkin's comment concerning the addition of the word "exclusively". Perhaps the idea he (Mr. Verdross) had intended to express by that adverb could be conveyed by adding the word "whole" before the word "matter".

84. Mr. PAL said he found the word "impliedly", in the opening sentence of paragraph 1, superfluous; it would be sufficient to say that the treaty would be "considered as having been terminated".

85. Sir Humphrey WALDOCK, Special Rapporteur, said that although the point raised by Mr. Pal was valid, the word "impliedly" would do no harm and would lend additional emphasis to the intended meaning.

86. With regard to the suggestion made by Mr. Verdross, he had included the word "whole" before "matter" in paragraph 1 (a) of the original draft. The Drafting Committee had dropped the word as unnecessary but, if there were no objection, he was prepared to reintroduce it.

87. Mr. YASSEEN supported the proposal to amend paragraph 1 (a) so as to provide that the whole matter governed by the former treaty should also be governed by the new treaty; that would meet Mr. Tunkin's objection.

88. Mr. LACHS said he would not wish to see the word "impliedly" dropped; it was not uncommon for termination to be deduced from an instrument that had no direct formal link with the treaty it terminated. The case was quite different from that of a treaty which stated expressly that it would be terminated if another treaty was concluded on the same subject; for example, certain bilateral agreements on aerial navigation expressly provided that they would cease to be in force as soon as a multilateral treaty on aerial navigation was concluded.

89. Mr. CADIEUX was against reintroducing the word "whole" before "matter", because it would unduly restrict the scope of the rule.

90. Mr. BRIGGS said that he would vote in favour of article 19, although he would have preferred the Commission to examine it together with article 14 as a question of priority of conflicting treaty obligations, rather than of termination.

91. The CHAIRMAN put article 19 to the vote, on the understanding that the Drafting Committee would amend the opening words of paragraph 1 (a) so as to make it clear that the reference was to States that were parties to both treaties and that the word "whole" would be reinserted before the word "matter" in the same paragraph.

Article 19, thus amended, was adopted by 14 votes to none, with 1 abstention.

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

92. Sir Humphrey WALDOCK, Special Rapporteur, said that the title of article 20 had been slightly amended and the new text of the article proposed by the Drafting Committee read:

“ 1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground:

“ (a) for terminating the treaty; or

“ (b) for suspending the operation of the treaty in whole or in part.

“ 2. A material breach of a multilateral treaty by one of the parties entitles:

“ (a) any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

“ (b) the other parties by mutual agreement either:

“ (i) to apply to the defaulting State the suspension provided for in sub-paragraph (a); or

“ (ii) to terminate the treaty or to suspend its operation in whole or in part.

“ 3. For the purposes of the present article a material breach of a treaty by one of the parties consists in:

“ (a) the unfounded repudiation of the treaty; or

“ (b) the violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

“ 4. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

93. Article 20 dealt with matters of considerable importance. He had originally drafted more elaborate provisions, but in compliance with the wishes of members a shorter text had been prepared by the Drafting Committee.

94. Paragraph 1 dealt with the material breach of a bilateral treaty and provided the right to terminate the treaty or suspend its operation as a consequence of its breach. As far as suspension was concerned, an element of severance was introduced by the concluding words of paragraph 1 (b): “ in whole or in part ”. The matter had been discussed at some length, but it had been recognized that the injured party should have a certain election regarding the question whether suspension should relate to a particular part of the treaty or to the whole of it. There was no doubt that, whatever the Commission decided on the general question of severance, in the case of breach of a treaty the principle *inadimplenti non est adimplendum* and the principle of reprisals produced a situation which conferred the right to suspend the treaty either in whole or in part.

95. The possibility of severance was confined to cases of suspension. The Drafting Committee had considered

that the termination of only part of a treaty could upset its balance and had therefore decided not to extend the principle of severance to termination.

96. Paragraph 2 dealt with the material breach of a multilateral treaty, which had the same effects as the breach of a bilateral treaty. However, it raised the problem of the position of the general body of contracting parties in the face of a breach that constituted a serious disturbance of the régime of the treaty.

97. Paragraph 3 set out the definition of a “ material ” breach. The main provision was contained in sub-paragraph (b). It would be useful to retain sub-paragraph (a), however, because one form of material breach was the repudiation of a treaty, which made it manifest that the party concerned did not propose to observe the treaty in the future. He understood that, in French, the term “ *répudiation* ” was not very elegant and he would welcome any suggestions for a better word.

98. Mr. TUNKIN said that he was prepared to vote for article 20 although he was not altogether satisfied regarding the possible effects of the provisions of paragraph 2 (a) on general multilateral treaties. At his suggestion, the Drafting Committee had confined the effects of those provisions to suspension. That change represented an improvement, but even the possibility of suspending the operation of the whole of a treaty caused him concern. General multilateral treaties were often very extensive, and in his view they should be placed on the same footing, in regard to termination, as customary rules of international law. If a breach of a general multilateral treaty was committed, the problem of responsibility arose and there was a possibility of reprisals, but he would hesitate to say that there existed a right to suspend the treaty in whole or in part.

99. However, the provision was only being adopted in the first draft for submission to Governments, and he could accept it at that stage.

100. Mr. VERDROSS complimented the Drafting Committee on the new text of article 20, which was exceptionally well drafted. He would vote in favour of it.

101. Mr. BRIGGS said he shared Mr. Tunkin’s views on the effects of paragraph 2 (a) on general multilateral treaties.

102. He proposed that paragraph 1 (a) should be deleted. He did not believe that a material breach of a bilateral treaty by one party gave the other a multilateral right of termination; the most that should be allowed in such circumstances was suspension of the treaty.

103. Mr. de LUNA said that his opinion was diametrically opposed to that just expressed by Mr. Briggs. At the time when liberal ideas had prevailed in international law, the termination of a treaty in consequence of its breach had been accepted without question. Any breach had given the injured party the right to declare the treaty terminated.

104. The new communal international law, with its emphasis on safeguarding the stability of treaties, endeavoured to make a distinction between the suspension and the termination of a treaty. And it was clearly for the injured party, precisely because it had been injured, to decide whether it wished to suspend the treaty or not to accept it. For a breach of a treaty could so upset the balance of the obligations and rights deriving from the treaty that the injured party had no further advantage in adhering to it. That being so, it could not be obliged, against its will, to remain bound by the treaty.

105. Mr. ROSENNE opposed Mr. Briggs' proposal to delete paragraph 1 (a) for the reasons stated in paragraph 1 of the commentary on article 20 (A/CN.4/Add.1) namely, that "good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect".

106. Mr. CASTRÉN found the redraft of article 20 very satisfactory. He would vote for it, although, for the reasons mentioned by Mr. Tunkin, he still had some doubts on the question of general multilateral treaties.

107. Mr. LACHS said he shared the doubts expressed by Mr. Tunkin and Mr. Briggs regarding paragraph 2 (a). Multilateral treaties of a general character often consisted of many parts, some of which were not related to one another. Where the breach had no direct bearing on certain parts of the treaty, it would be excessive to provide for the suspension of the whole treaty. Such suspension would wrongfully release the party concerned from the observation of the other provisions of the treaty; moreover, it would deprive the parties of the benefits accruing from those parts of the treaty that were not affected by the breach.

108. In paragraph 2 (b), he was not altogether satisfied with the word "mutual" before the word "agreement"; the intention had apparently been to provide for unanimous agreement of the other parties concerned.

109. He also had some doubts about the use of the word "unfounded" before the word "repudiation" in paragraph 3 (a).

110. Mr. GROS, referring to Mr. Briggs' proposal, pointed out that paragraph 1 (a) did not give a State a discretionary right to terminate a treaty, but merely entitled it to invoke the breach of the treaty if the breach was a material one. If a really material breach occurred, a State could hardly be obliged to remain bound by a treaty which, as Mr. de Luna had well observed, might perhaps be of no further value to it. In all fairness, it was reasonable to allow the injured State such discretion and when the rule was considered in the context of all the articles adopted by the Commission, it did not appear open to abuses. If the existence and extent of the material breach were contested, there was a dispute to be settled and the State could not consider that it had been able to terminate the treaty unilaterally.

111. It was true that opinion in the Commission was divided on the methods of settlement of disputes to

be applied, but those difficulties were not peculiar to article 20. Mr. Lachs had said that a material breach of a multilateral treaty should not relieve a State of its obligations. But the provisions of article 20 only entitled a State to invoke the breach; there was no question of its being released from its obligations.

112. To the extent that members could agree on article 25, which laid down the procedures to be followed, some of the difficulties mentioned by Mr. Briggs should disappear, and that might perhaps enable him to accept the proposed new draft.

113. Mr. PAL, referring to the definition in paragraph 3 (b), said that non-compliance with financial obligations under Article 17 of the United Nations Charter could be regarded as the "violation of a provision which is essential to the effective execution of any of the objects or purposes" of the Charter. Since the Charter was a multilateral treaty, could paragraph 2 be held to apply, so that any other Member could "invoke the breach as a ground for suspending the operation" of the Charter "in whole or in part in the relations between itself and the defaulting State"?

114. The CHAIRMAN pointed out that the Commission had agreed to insert in the draft an article excluding from its application treaties which were the constituent instruments of international organizations. The Charter would thus be excluded from the application of article 20.

115. Mr. PAL said he was satisfied with that explanation so far as the Charter was concerned, but his example showed the danger of the provision in regard to multilateral treaties in general.

116. Mr. BRIGGS said that the sentence from the commentary quoted by Mr. Rosenne had little relevance to his proposal that paragraph 1 (a) should be deleted, because a State could still suspend the operation of the treaty under paragraph 1 (b). However, since there had been little support for his proposal, he withdrew it.

117. The CHAIRMAN, speaking as a member of the Commission, said that in considering the application of paragraph 2 (a) to general multilateral treaties, great importance should be attached to the final words, which made it clear that the operation of the treaty would be suspended only in the relations between the injured State and the defaulting State. The suspension did not affect the rights and interests of the other parties, which included the right to the general application of the treaty.

118. Sir Humphrey WALDOCK, Special Rapporteur, said that he had dwelt at length on the matter in the commentary. In fact, it was very difficult to separate general multilateral treaties from other multilateral treaties. Again, as he had pointed out during the earlier discussion, even treaties which established general norms of international law also contained procedural provisions such as clauses for arbitration or the judicial settlement of disputes. It would not be right to compel an injured State to remain in treaty relations with the

offending State under the treaty, including its purely contractual provisions. During the earlier discussion, he had also drawn attention to the fact that certain law-making conventions such as the Genocide Convention dealt with matters of general customary law, but were nevertheless subject to denunciation under certain conditions (693rd meeting, paras. 31-32).

119. He had much sympathy with the reservations which had been made by a number of members, but he thought the point was to some extent covered by the provisions of Article 28 (A/CN.4/156/Add.3), paragraph 3 of which, as amended at the previous meeting (para. 37), specified that the termination of a treaty in no way impaired the duty of a state "to fulfil any obligations embodied in the treaty which are binding upon it under international law independently of the treaty".

120. With regard to the drafting points raised by Mr. Lachs, in his original draft he had used the term "unlawful" instead of "unfounded". The intention in speaking of "mutual agreement" in paragraph 2 (b) had been to refer to the unanimous consent of the other parties.

121. The CHAIRMAN pointed out that suspension under paragraph 2 (b) (i) at least should not require unanimous consent.

122. Mr. BARTOŠ said that he wished to enter the same reservation to article 20 as he had made to the previous article. It was hard enough to grant States a virtual right of veto, but it would be even worse to enable them to act as *agent provocateur* in the international community by committing a breach which gave other States a pretext for denouncing the treaty to the detriment of those acting in good faith. He would therefore abstain from voting on article 20.

123. Mr. CADIEUX thought that where suspension was concerned the provisions of paragraph 2 (b) did not raise any difficulties when the States acted in concert, for the right granted in sub-paragraph (i) was one which they enjoyed individually in any case. It did not seem necessary in that instance to specify the minimum number of parties to a multilateral convention required for a decision, but the question of a majority or a specified number of parties might arise where the termination of a treaty was concerned.

124. Mr. YASSEEN thought that a State might be allowed to take the initiative in suspending the performance of a treaty, but that unanimity must be required for the termination of a general multilateral treaty. A separate paragraph should have been devoted to the latter case, stressing the need for unanimity.

125. Mr. de LUNA supported Mr. Bartoš's remarks, and fully agreed with Mr. Yasseen. In present or future international relations it was very easy for a small State which had no responsibility not only to act as *agent provocateur*, but also to break a treaty in order to serve the secrets interests of a great Power and provide it with an opportunity of starting the whole procedure for terminating the treaty.

126. Sir Humphrey WALDOCK, Special Rapporteur, said that the unanimity intended in paragraph 2 (b) did not include the State that had broken the treaty. He agreed that paragraph 2 (b) (i) was not strictly necessary, because each of the other parties concerned had the right to take the action specified in paragraph 2 (a). The provision was useful, however, because perhaps not all the parties could be regarded as injured parties and it was useful to emphasize their solidarity in the face of a serious breach.

127. Mr. TUNKIN suggested that the words "mutual agreement" in paragraph 2 (b) should be replaced by "common agreement", which would correspond to the expression "*d'un commun accord*", in the French text.

128. The CHAIRMAN put article 20 to the vote, on the understanding that the change just suggested by Mr. Tunkin would be made and that the Drafting Committee would endeavour to improve upon the words "unfounded" in paragraph 3 (a) and "*répudiation*" in the French text of the same paragraph.

Article 20 was adopted on that understanding by 12 votes to none with 5 abstentions.

The meeting rose at 1 p.m.

710th MEETING

Friday, 28 June 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

Articles submitted by the Drafting Committee (*continued*)

ARTICLE 21 (EXTINCTION OF A PARTY)

1. The CHAIRMAN invited the Commission to consider the Drafting Committee's decision to delete the provision on the extinction of a party which had formed the subject of paragraph 1 of the original draft article 21 (A/CN.4/156/Add.1).

2. Sir Humphrey WALDOCK, Special Rapporteur, said that his original article 21 had dealt with three distinct problems: the disappearance of one of the parties to a treaty, the disappearance of the subject-matter and supervening illegality of performance because of a new rule of *ius cogens*. The discussion on the first reading having shown the advisability of dealing with those three problems in separate articles, he had submitted to the Drafting Committee three draft articles, the first of which was entitled "Extinction of a party" and was numbered article 21.

3. In the Commission, there had been very little support for paragraph 1 of article 21, dealing with the extinction of a party. In the Drafting Committee, it had become

clear that it was not possible to draft a satisfactory article on the impossibility of performance resulting from such extinction without some reference to State succession. The Drafting Committee had accordingly decided to dispense with the provision he had submitted as the new article 21. That did not, of course, mean that the whole of the original article 21 had been deleted: the provisions on the other two problems it dealt with had been embodied in the articles 21 *bis* and 22 *bis* proposed by the Drafting Committee.

4. The CHAIRMAN said that, if there were no objections, he would consider that the Commission agreed to delete the provision on the extinction of a party contained in paragraph 1 of the original article 21.

It was so agreed.

ARTICLE 21 (*bis*) (SUPERVISING IMPOSSIBILITY OF PERFORMANCE)

5. Sir Humphrey WALDOCK, Special Rapporteur, said that the text of the new article 21 (*bis*) proposed by the Drafting Committee read:

"1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the complete and permanent disappearance of the subject-matter of the rights and obligations contained in the treaty.

"2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty."

6. The question of subsequent impossibility because of the disappearance of the subject-matter of the treaty had originally been dealt with in paragraphs 2 and 3 of article 21. Paragraph 1 of article 21 (*bis*) was shorter than paragraph 2 of the original article 21 and no longer drew any distinction between the disappearance of the physical subject-matter and the disappearance of a "legal arrangement or régime to which the rights and obligations established by the treaty directly relate". In view of the difficulties of interpretation to which the use of such terms as "legal arrangement" and "régime" could give rise, the Drafting Committee had decided to express the rule in broad terms covering the disappearance both of the physical subject-matter and of such metaphysical elements as a legal régime.

7. Paragraph 2 of article 21 (*bis*) was a shorter version of paragraph 3 of the original article 21.

8. Mr. PAREDES, commenting on the rule stated in paragraph 1, said he found the requirement of complete disappearance of the subject-matter unduly strict; for without disappearing completely, the subject-matter might deteriorate to such an extent that it no longer served the purpose for which it has been intended. For example, if a treaty was concluded for the international leasing of an island off which there were large stocks of fish or of other marine species in which a State was interested, and those stocks later greatly decreased or disappeared, should the treaty or the lease

nevertheless subsist? Or if a navigable river had ceased to be navigable owing to a great fall in the water level or because the current had become excessively swift, would the rights and obligations imposed or contracted in respect of navigation continue in being?

9. In the provision under discussion it would be sufficient to affirm the right to apply for termination of the treaty when its subject-matter no longer served the purposes intended by the parties on concluding the treaty or when performance had been impossible from the time it was first proposed.

10. Mr. LACHS said he supported the article as a whole, though careful attention should be given to the point raised by Mr. Paredes. Another example would be a treaty between two States conceding reciprocal fishing rights; stocks might be depleted in the waters of one State, but not in those of the other. In that case, the disappearance of the subject-matter would be complete only as far as one of the two parties was concerned, but it would have a decisive effect on the possibility of carrying out the treaty.

11. Mr. TUNKIN said he agreed that there appeared to be a gap in paragraph 1. In order to meet the point raised by Mr. Paredes to some extent, he suggested that the word "complete" and possibly also the word "permanent" should be deleted. If paragraph 1 merely stated that the impossibility resulted from the disappearance of the subject-matter, the provision, interpreted in the manner indicated by the Special Rapporteur, should prove generally satisfactory.

12. In paragraph 2, he suggested that the words "impossibility of performance" should be replaced by the words "disappearance of the subject-matter".

13. Mr. VERDROSS supported Mr. Tunkin's suggestion concerning paragraph 2; but he thought that as paragraph 1 referred to a treaty whose subject-matter had completely disappeared, it should not be said that a party could invoke the impossibility of performing the treaty, for with the complete disappearance of its subject-matter, the treaty automatically ceased to be in force.

14. Sir Humphrey WALDOCK, Special Rapporteur, said he could agree to the deletion of the word "complete"; he also suggested that the words "or destruction" should be added after the word "disappearance". Those two changes would cover a case in which the physical subject-matter did not actually disappear, but was so wrecked that it could not be restored; they should go some way towards meeting the point raised by Mr. Paredes.

15. He had been rather startled by the examples given of treaties relating to fisheries. Fish stocks disappeared or migrated for quite mysterious reasons; they could also be quickly exhausted by over-fishing. In fact depletion of fish stocks was so complex a subject that the Commission should hesitate to make it a reason for introducing qualifications into the article.

16. Although he agreed that the word "complete" was unduly strong and should be dropped, he urged

that the word “ permanent ” should be retained. It was a necessary element in the doctrine of subsequent impossibility that it could not be invoked as applying in a case of temporary impossibility; the impossibility had to be at least of long duration. An additional reason for retaining the word “ permanent ” was the contrast with the provisions of paragraph 2.

17. He could not agree with Mr. Verdross, who had criticized the formulation of paragraph 1 on the grounds that impossibility of performance should result in the *ipso facto* termination of the treaty, without the need for a party to invoke the impossibility. In fact, situations such as those contemplated in article 21 *bis* were not always uncontroversial and the whole purpose of the procedural articles was to deal with disputes that might arise in connexion with the substantive provisions; it was therefore necessary to provide that the interested party could invoke the impossibility of performance. It could not simply be stated that impossibility of performance terminated the treaty. Some safeguard would have to be introduced, however, to cover the situation in which a State did not take any steps because the impossibility of performance was self-evident. In those circumstances, it should not be possible at a later stage to accuse the State of not complying with its obligations under the treaty, and the State should not be precluded from invoking impossibility of performance in reply to a belated claim of that nature.

18. Mr. LACHS said that he had mentioned fisheries merely by way of illustration; other examples could be given and the issue remained a very real one. However, he could accept the Special Rapporteur’s reasoning and he suggested that the whole matter should be made clear in the commentary.

19. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to the Special Rapporteur’s suggestion that the words “ complete and permanent disappearance of the subject-matter ” in paragraph 1 should be replaced by the words “ permanent disappearance or destruction of the subject-matter ”.

It was so agreed.

20. The CHAIRMAN asked for comments on Mr. Tunkin’s suggestion that the words “ impossibility of performance ” in paragraph 2 should be replaced by the words “ disappearance of the subject-matter ”.

21. Mr. PAREDES urged that the word “ performance ” should be retained. The expression “ impossibility of performance ” was much wider in scope than “ disappearance of the subject-matter ”. As had already been pointed out, performance might become impossible even though the subject matter subsisted, if it no longer served the purpose for which it was intended. If the text referred only to disappearance of the subject-matter, the scope of the article would be unduly limited.

22. Mr. BARTOŠ endorsed Mr. Paredes’ objection. Cases did indeed occur in practice in which performance became impossible owing to the disappearance, perhaps temporarily, of the subject-matter of the rights and

obligations of a treaty. For example, if a treaty between two States provided for the supply of certain quantities of electricity generated by means of a dam which was subsequently destroyed, performance of the treaty obligations would become impossible and there might be no certainty that the storage basin could be rebuilt. If, after some years, the storage basin was rebuilt and the generation of electricity resumed, would there be an obligation to resume the supply of electricity, or would the treaty have been terminated by the disappearance of its subject-matter? In the actual case he had in mind, during the negotiations between the States concerned, the experts had given no conclusive answer to the question whether the subject-matter should be considered to have disappeared and its destruction to be complete and irreparable, or whether the situation was a temporary one.

23. The crucial question about impossibility of performance was not the disappearance of the subject-matter but the circumstances of its disappearance. It was sometimes difficult to say whether impossibility of performance would be permanent or not.

24. Mr. CASTRÉN said he understood Mr. Paredes’ concern, and the explanations given by Mr. Bartoš had convinced him that the text proposed by the Drafting Committee should stand. Another reason was the need to use the same expression in both paragraphs of the article.

25. Mr. TUNKIN said he would not press his amendment to paragraph 2. The reference to “ impossibility of performance ” would give the provision a wider scope.

26. The CHAIRMAN said that in that case paragraph 2 would remain unchanged. He put article 21 *bis* to the vote with the amendment to paragraph 1 which had already been adopted.

Article 21 bis, thus amended, was adopted unanimously.

ARTICLE 22 (FUNDAMENTAL CHANGE OF CIRCUMSTANCES)

27. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by the Drafting Committee for article 22 read:

“ 1. Subject to the provisions of paragraphs 2 and 3, a change in the circumstances existing at the time when a treaty was entered into may not be invoked as a ground for terminating or withdrawing from the treaty.

“ 2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when a treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

“ (a) the existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

“ (b) the effect of the change is wholly to transform in an essential respect the character of the obligations undertaken in the treaty.

“ 3. Paragraph 2 does not apply:

“(a) to a treaty establishing a territorial settlement, or

“(b) to changes of circumstances for which the parties have made provision in the treaty itself.”

28. His original article 22 (A/CN.4/156/Add.1) had been entitled “The doctrine of *rebus sic stantibus*”; it had set out the rule in elaborate terms and in paragraphs 3, 4 and 5 had specified a number of exceptions. In an attempt to reconcile the different views expressed in the Commission, the Drafting Committee had produced a much shorter text in three paragraphs.

29. In paragraph 1, the negative formulation of the rule had been retained in deference to the wishes of the majority of the Commission; the purpose was to emphasize that it was not a normal rule, but an exceptional one.

30. Paragraph 2 stated the conditions under which the rule operated and had proved quite difficult to draft. Much of the substance of the original paragraph 2 had been retained, but the wording had been considerably simplified; the Drafting Committee had considered, in particular, the doubts expressed during the discussion as to whether sub-paragraphs (b) and (c) of the original paragraph 2 should be alternative or cumulative.

31. Paragraph 3 stated the exceptions to the rule; the first was that set out in sub-paragraph (a) which was intended to cover the cases mentioned in the original paragraph 5. The expression “territorial settlement” would cover ancillary rights arising from a transfer of territory.

32. Sub-paragraph (b) dealt with the case in which the treaty actually made provision for the change of circumstances. That exception had met with general approval, although he understood that Mr. Yasseen maintained his objection to it.

33. Mr. YASSEEN said that the draft prepared by the Drafting Committee was definitely more precise than the original text. He had, however, one general comment to make.

34. The principle *rebus sic stantibus* was a general rule of well-defined scope. It might be qualified by conditions and limitations, but there should be no hesitation in applying it once those conditions were fulfilled. Paragraph 1 of the text proposed by the Drafting Committee did not seem to reflect an attitude favourable to the application of that rule — quite the contrary.

35. In his opinion, paragraph 1 was not essential, for it did not really state a rule of law, but expressed a certain attitude towards the principle *rebus sic stantibus*. He therefore proposed that it should be deleted. Article 22 would then consist of two paragraphs only, paragraph 2 of the present text becoming paragraph 1 of the new version, which might read: “A fundamental change which occurs with regard to a fact or situation existing at the time when the treaty was entered into may be invoked as a ground for terminating or withdrawing from the treaty if:”.

36. In addition, the word “wholly” should be deleted from the present paragraph 2 (b), for it was sufficient

to say that the effect of the change was to transform the character of the obligations “in an essential respect”. It would be going too far to require a complete transformation; such a stipulation might preclude the application of the *rebus sic stantibus* rule.

37. Paragraph 3 (b) contained essential provisions which he did not consider to be incompatible with his position on the *rebus sic stantibus* principle, which he regarded as *jus cogens*. It was true that one of the conditions required for the application of the general theory of revision and of the *rebus sic stantibus* principle was that the change of circumstances must not have been foreseen at the time of concluding the treaty, but that did not mean that the principle could not be considered a rule of *jus cogens*.

38. Mr. CADIEUX said that the Drafting Committee was once again to be congratulated on its work. He approved of the principle set out in the new text, which he was quite willing to accept. He wished, however, to comment on various points in the article.

39. First, in paragraph 1, there was perhaps no need to refer to paragraph 3, which also stated the conditions under which the *rebus sic stantibus* principle did not apply. It would be sufficient to retain the reference to paragraph 2.

40. Secondly, the wording of paragraph 3 (b) could be simplified, while preserving the essential idea, if the words “for which the parties have made provision” were changed to “provided for”.

41. Thirdly, what was the relationship between article 22 and article 25, concerning procedure? Perhaps the Commission intended to include in article 25 a cross-reference to article 22. At all events, it was important to consider carefully the procedure that could be adopted for the settlement of disputes arising out of the interpretation of article 22, which could easily lead to abuses.

42. Mr. CASTRÉN said he was prepared to accept the simplified redraft of article 22 provided that the additional conditions laid down for the application of the article in the original text were satisfactorily laid down in article 4, which the Drafting Committee had not yet finished reviewing, and provided that article 25, for which the Commission had not yet adopted the final text, was recast so as to provide the necessary safeguards against unilateral and arbitrary denunciations.

43. With regard to the drafting of article 22, he proposed, first, that the adjective “fundamental” should be deleted from paragraph 2, as the idea was clear enough from sub-paragraphs (a) and (b); on the other hand there would be no harm in retaining it in the title.

44. Secondly, in paragraph 1, the reference to paragraph 3 should be deleted, since that paragraph, far from qualifying the main rule laid down in paragraph 1, actually affirmed it.

45. Mr. TABIBI thought the essential provision of the article was paragraph 2, which dealt with fundamental changes of circumstances; paragraph 1 did not contain any rule and should be dropped.

46. Paragraph 3, which stated exceptions, should also be deleted. Sub-paragraph (a) would except from the application of the rule a wide range of treaties which, in many parts of the world, were the decisive criterion for the doctrine of *rebus sic stantibus*; territorial settlements affected the fate of millions of human beings and to exclude them from the application of article 22 would undermine its provisions.

47. Sub-paragraph (b) made an exception of the case in which the parties had made provision for the change of circumstances in the treaty. That exception was not justified. The change in circumstances would affect the provision in question in the same way as the rest of the treaty.

48. The provisions of article 22 should be confined to those contained in paragraph 2.

49. Mr. BARTOŠ said he would not oppose the redraft of article 22 which, although not perfect, was at least the only text on which the Drafting Committee had been able to agree; but he wished to make a few comments on it.

50. The exact meaning of paragraph 3 (b) was not clear to him. Was it for the change of circumstances that the parties had made provision, or for the circumstances themselves? A general clause stating that a change of circumstances had no effect on a treaty was very dangerous. True, a saving clause specifying that no change of circumstances would affect the treaty was included in the international treaties of public law made by the International Bank for Reconstruction and Development and even in many treaties between strong and weak States. It might perhaps be accepted that certain changes of circumstances could be provided for by the parties, but the *rebus sic stantibus* rule was a rule of *jus cogens*, and it would be dangerous to adopt a text that might lend itself to the perhaps mistaken interpretation that derogations from the concept of the *rebus sic stantibus* rule as established *jus cogens* were permitted under contractual clauses in treaties.

51. He therefore reserved his position on that interpretation, though he would not rule out the possibility of the parties making provision for certain changes and even adopting subsidiary provisions to remedy situations caused by a change of circumstances, always provided that the parties to the treaty were aware not only of the changes in question, but also of their possible effects.

52. He also entered a reservation similar to that made by Mr. Tabibi concerning the meaning of paragraph 3 (a). Mr. Tabibi had put forward an idea which he (Mr. Bartoš) had himself gone into when the article had been discussed on the first reading (695th meeting, para. 64). But although the new text was less stringent and the concessions which had been made were quite reasonable, he still had doubts about the meaning of the expression "territorial settlement". If it meant the demarcation of frontiers, he was almost inclined to accept the idea on the principle of the territorial integrity of States, but if it was to be understood in its wider sense, he must make a reservation.

53. He agreed with Mr. Rosenne on the practical consequences of the application of the *rebus sic stantibus*

principle in case-law. The theory involved was not that the *rebus sic stantibus* rule must always prevail over the will expressed by the contracting parties at the time of concluding the treaty, and that no request for revision, or even temporary suspension, could ever be entertained. He was entirely opposed to such a view if it would preclude the practical solution that was essential in contemporary international relations, namely, to stop short of saying that the will of the parties no longer existed in all cases. That will had existed and the subject-matter of the treaty existed, but the circumstances had so changed that performance of treaty had become impossible under the former conditions; but it might be possible to maintain at least part of the treaty.

54. In modern practice States sought means to achieve the object laid down in a treaty by provisionally suspending its performance or by revision. That idea had been rejected by the Drafting Committee, and he was not asking for it to be taken up again; but he hoped the Special Rapporteur would mention in his report that some members had drawn the Commission's attention to that conception of the effects of the *rebus sic stantibus* principle, which differed from the conception of the majority, but would certainly be accepted in international law some day.

55. Mr. VERDROSS congratulated the Drafting Committee on having succeeded in formulating the most difficult article in the draft.

56. Paragraph 1 expressed a correct idea, but as Mr. Yasseen had observed, it was a statement of doctrine rather than a rule of law. He therefore proposed that it should be transferred to the commentary.

57. Paragraph 2 was the most important; the Drafting Committee had clearly stated the two cases in which a change of circumstances could be invoked as a ground for terminating a treaty. He proposed that the phrase "not foreseen by the parties" should be inserted in sub-paragraph (b) after the word "change". For if the change had been foreseen, sub-paragraph (a) would apply.

58. With regard to paragraph 3 (a), he agreed with Mr. Tabibi and Mr. Bartoš that no exception should be made for treaties establishing a territorial settlement. Perhaps the Drafting Committee had been thinking of territorial rights in regard to which the provision might be justified. But there was no reason why a treaty relating to territorial questions should not be subject to the same rule as other treaties. The Commission could therefore delete paragraph 3 (a).

59. Paragraph 3 (b) was correct, but it should have specified that the changes of circumstances contemplated were changes concerning which the parties had wished to bind themselves. Moreover, the words "in the treaty itself" should be deleted, for the changes in question might have been provided for elsewhere.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that the French translation of paragraph 3 (b) was not accurate: it did not render the precise meaning of the words "have made provision".

61. Mr. YASSEEN said that he understood paragraph 3 (b) in the sense explained by Mr. Bartoš. If the parties had foreseen the change of circumstances at the time of concluding the treaty, then the principle of *rebus sic stantibus* could not be invoked; hence he considered that the paragraph 3 (b) did not conflict with his conception of *jus cogens*. According to paragraph 3, paragraph 2 did not apply to changes for which provision had been made by the parties. The question whether the treaty contained provisions concerning the effects of the changes was quite a different matter. In the French text, paragraph 3 (b) could not be construed as authorizing the parties to incorporate in the treaty a clause exempting the treaty from the effect of any change in circumstances. Such a clause would be void because it would be incompatible with a *jus cogens* rule.

62. Mr. ROSENNE said he would have liked the Commission to insert the words "or suspending its operation" at the end of paragraph 1 and hoped that that point could be taken up when the whole question of suspension was re-considered.

63. He agreed with Mr. Castrén about the close inter-relationship between article 22 and articles 24 and 25.

64. The CHAIRMAN, speaking as a member of the Commission, said he supported article 22, which he found well-balanced.

65. He was not in favour of the deletion of either paragraph 1 or paragraph 3, both of which were necessary for the general structure of the article.

66. The word "fundamental" in paragraph 2 should be retained.

67. The reference to paragraph 3 in the opening proviso of paragraph 1 could be dropped.

68. Mr. PAREDES said it was essential to maintain the principle of *rebus sic stantibus* and to give it a very wide application in modern life, in which international relations were so stormy and subject to abrupt changes. The principle was based on a proper interpretation of the will of the parties which, in the case of fundamental changes, would not have concluded a treaty or would not have done so in the same terms if the circumstances had been those which arose later. In some cases, even when the contracting parties had foreseen the changes and accepted them in advance, that could not prevent the application of the *rebus sic stantibus* rule. He therefore supported the proposal to delete paragraph 3 (b).

69. In support of his argument he gave the example of a government which had come to power by a *coup d'état* and had concluded a treaty with a foreign government for moral and material support to restore it to power if ever the constitutional government was re-established. Would the guarantee clause be valid and would the foreign Power have to implement it if the constitutional government was re-established? He did not think so.

70. He supported the proposal to delete paragraph 1 because it was drafted in terms which entailed a general repudiation of the *rebus sic stantibus* rule.

71. He also supported the proposal to delete paragraph 3 (a). Treaties establishing territorial settlements involved not only questions of frontier demarcation, but also legal questions for the populations concerned and various economic matters. Consequently, the broad terms of paragraph 3 (a) were incompatible with various rights, such as the right of self-determination of peoples.

72. The *rebus sic stantibus* rule should have a much wider application than was provided for in article 22.

73. Mr. LACHS said that the Drafting Committee had succeeded in drafting a provision on an essential principle which ought to commend itself to the Commission. It was essential to strike a balance between respect for the stability of treaties and the need to take into account essential changes that fundamentally altered the character of a treaty. If the notion of change were interpreted too loosely, it might open the way for the kind of acts which had been witnessed during the period between the wars, when certain States, invoking the doctrine of *rebus sic stantibus*, had torn up or violated treaties. As an example, it was sufficient to mention Hitlerite Germany, whose behaviour could not be condoned.

74. He approved of the way in which the Drafting Committee had linked paragraphs 1 and 2, first establishing the principle that the mere passage of time did not affect a treaty and then laying down the conditions under which a fundamental change could be held to have occurred and could be a ground for termination or withdrawal.

75. Perhaps the wording of paragraph 1 could be strengthened by indicating that a change *per se* would not suffice as a ground for termination; that would bring out even more emphatically the need to preserve the stability of treaties.

76. He supported Mr. Cadieux's amendment deleting from paragraph 1 the reference to paragraph 3.

77. The word "fundamental" could be omitted from paragraph 2 and he also favoured the deletion of the word "wholly" in paragraph 2 (b), which was rendered unnecessary by the word "essential".

78. He fully sympathized with Mr. Tabibi's concern over paragraph 3 (a), but wondered whether it was relevant to the question of self-determination. States were freeing themselves from colonial subjection and were gaining independence in accordance with what had become a substantive rule of contemporary international law. Any treaty conflicting with that rule would come under the application of other articles of the draft, including article 22 *bis*.

79. He urged the Commission to accept paragraph 2 (a), which was reasonable and presented the matter in the proper perspective. Frontier settlements ought to be stabilized so as to prevent their being challenged on grounds of an essential change in circumstances, as had occurred during the thirties.

80. He hesitated to accept paragraph 3 (b), because it seemed to him unlikely that the parties could foresee changes of circumstances accurately at the time when a treaty was concluded.

81. Mr. TUNKIN said that the new text of article 22 was generally acceptable. The doctrine of *rebus sic stantibus* could not be regarded as a principle that took precedence over other rules of international law, nor should it be understood too widely; he was glad that the term itself had now been dropped because of the many different ways in which it had been defined.

82. In order to prevent any misunderstanding about the scope of paragraph 3(a), the word "frontiers" should be substituted for the words "a territorial settlement"; it would then be perfectly clear that no reference to such questions as the establishment of military bases was intended.

83. Paragraph 3(b) ought to be deleted because it was inconceivable that the parties could foresee changes of circumstances that would wholly transform the character of the obligations undertaken in the treaty.

84. Mr. GROS said that he shared Mr. Lachs' views on every point. Mr. Tunkin had also very clearly explained the spirit in which the Commission had decided to state what would be a rule of international law for the first time. There was already a doctrine on the effects of certain changes of circumstances and everyone knew how much harm it had done. Consequently, the Commission should not give the impression that it was encouraging the application of any such doctrine. The text proposed was clear and struck a balance between the need to maintain the stability of treaties and the need to take account of the effects of a fundamental change of circumstances, in certain cases. The Commission should take care not to disturb that balance by amendments to the article.

85. He could agree to the deletion of the word "wholly" in paragraph 2(b), but at the beginning of paragraph 2 he would prefer to retain the word "fundamental", which had been carefully considered and was one of the limitations that were essential in order to prevent abuses of the kind referred to during the discussion.

86. As Mr. Lachs had pointed out, paragraph 3(a) was most important and useful; perhaps there would be no objection to referring to a "frontier treaty" rather than to a "territorial settlement".

87. On the other hand, he parted company with Mr. Tunkin where paragraph 3(b) was concerned. There were, in practice, treaties which made provision for the possibility of fundamental changes during their execution. For instance, recent economic treaties contained provisions on the eventuality of "serious disequilibrium" or "fundamental disturbances" in a country's economic situation, which established remedial methods and procedures. If such provisions had not been included in the treaty, it might be claimed in such circumstances that a fundamental change had occurred; but where the treaty made provision for the change and prescribed the remedy, that remedy must be applied, not the general system of fundamental change of circumstances laid down in article 22.

88. Hence he could not vote for the article if paragraph 3 were deleted.

89. Mr. EL-ERIAN said that, faced with a difficult task, the Drafting Committee had produced a compromise between the obligation to safeguard the stability of treaties and the necessity of recognizing the realities of change.

90. Paragraph 1 made it clear that not every change in circumstances could be invoked as a ground for termination.

91. Paragraph 2 usefully emphasized the fundamental character of the change that could provide a ground for termination and then went on to define the two conditions that must be satisfied: the first was subjective and related to the will of the parties; the second, in paragraph 2(b), was objective; the idea of an implied clause had been dropped altogether.

92. The word "wholly" in paragraph 2(b) served no useful purpose and could be omitted.

93. In his opinion the purpose of paragraph 3(b) was not to eliminate any application of the rule of a change in circumstances; Mr. Gros' reading of that provision was surely the correct one.

94. Mr. BARTOŠ said he wished to make his position clear on certain points. The *rebus sic stantibus* rule existed, could be applied and had been applied; but it was not universally recognized. The Commission had wished, not to codify that rule, but rather to use its underlying idea to lay down a generally acceptable rule that would make for the progressive development of international law. The rule contemplated would not disrupt international law, but on the contrary would make an adjustment possible and was calculated to establish harmony between the facts and the law, so that when changes of fact occurred in the international order, their claims could not be denied by invoking the *pacta sunt servanda* rule.

95. He was at one with Mr. Lachs in stressing the link between articles 22 and 22 bis. A distinction should be made between the introduction of a new rule — where article 22 bis would apply — and the application, after the conclusion of the treaty, of a contractual rule which had existed at the time of its conclusion. In the latter case article 22 would apply, because a change of circumstances had supervened.

96. Mr. TABIBI said that no progress could be made in the development of international law unless the changes in international life were taken into account, though not to the detriment of the sanctity of treaties.

97. Contrary to what Mr. Lachs had said, he still maintained that paragraph 3(a) ran counter to the principle of self-determination. A number of treaties had in fact been annulled because of radical changes in circumstances. Such was the speed of change in the modern world that some treaties could lose their relevance to reality almost before the ink was dry.

98. His concern over the consequences of paragraph 3(a), which was shared by other members, could not be allayed by Mr. Tunkin's amendment, and the arguments advanced against his view had failed to convince him.

99. Mr. de LUNA warmly congratulated the Drafting Committee and endorsed the comments of Mr. Lachs, Mr. Tunkin and Mr. Gros. He had been particularly impressed by what Mr. Gros had said about paragraph 3 (b). By way of illustration, he referred to a treaty drafted in 1962 under the auspices of OECD on the protection of foreign property. Article 4 of that treaty established the *bona fide* obligation to guarantee the repatriation of property; it had given rise to lively discussion, as a result of which Greece had managed to secure the inclusion in the body of the treaty of a limitation originally in the commentary, under which the parties were required to honour that guarantee only so long as their balance of payments situation permitted them to do so within reason.

100. Mr. TUNKIN replying to Mr. Gros' comments, said that the deletion of paragraph 3 (b) would not mean that provisions concerning changes of circumstances included in the treaty itself would not apply, but that they would be subject to the conditions set out in paragraph 2. On the other hand, if paragraph 3 (b) were retained it would override the provisions of paragraph 2.

101. Mr. BRIGGS said he could not agree to the deletion of paragraph 1, because it was essential to state that a mere change in circumstances did not provide a legal basis for terminating a treaty.

102. In paragraph 2 (b), an objective criterion which had never formed part of the original doctrine of *rebus sic stantibus* had been combined with a subjective criterion.

103. He was opposed to deleting paragraph 3, which laid down exceptions to a rule that was being proposed by the Commission *de lege ferenda*. He agreed with Mr. Gros that there was no rule in existence whereby a fundamental change of circumstances could be invoked as a ground for termination, and he was inclined to think that even with the safeguards provided the article went too far, particularly since it made no provision for the reference of disputes to compulsory jurisdiction.

104. He endorsed Mr. Gros' comments on paragraph 3 (b).

105. The CHAIRMAN welcomed Mr. Stavropoulos, Legal Counsel of the United Nations.

106. Mr. STAVROPOULOS, Legal Counsel, said he was glad to have an opportunity of attending one of the Commission's meetings. It might perhaps be of interest to members, in the context of the illuminating discussion which was taking place on article 22, to know that during his long service with the United Nations he had been consulted on at least five occasions by representatives of governments which wished to invoke, in good faith, the doctrine of *rebus sic stantibus*. In each case the difficulty had been the lack of any precedent from which an objective criterion could be derived for determining whether the circumstances had in fact so changed that the government in question would be protected against a charge of taking arbitrary action.

The meeting rose at 1 p.m.

711th MEETING

Monday, 1 July 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (continued)

Articles submitted by the Drafting Committee (continued)

1. The CHAIRMAN invited the Commission to continue consideration of the new text proposed by the Drafting Committee for article 22 (previous meeting, para. 27).

ARTICLE 22 (FUNDAMENTAL CHANGE OF CIRCUMSTANCES) (continued)

2. Mr. PAL said that the proposed text was intended to meet the same requirements as the doctrine of *rebus sic stantibus*. That doctrine had originated as one of interpretation; it read into every treaty an implied clause providing that the treaty was concluded subject to the material conditions remaining the same: *omnis conventio intelligitur rebus sic stantibus*. The concept of the sanctity of treaties, as expressed in the maxim *pacta sunt servanda*, was primarily an instrument of rigid *status quo* policy, which, in its strict application, meant seeking to protect today, not the position of today, but the position of yesterday, despite the fact that material changes might have intervened. The doctrine of *rebus sic stantibus* had had to be introduced to serve the real purpose of law, which was to preserve today's way of life. It would be wrong to judge that doctrine only by the questionable assertions of the past.

3. Many recent treaties actually contained a clause providing that if, during the lifetime of the treaty, either party should consider that there had been a change in the basic assumptions underlying the agreement, it should be open to that party to set in motion the procedure for revision or termination of the treaty. Adjustment under such a provision would seem to be less difficult than under the proposed provisions of article 22, which appeared to have been unduly influenced by the fact that in the past there had been some abuse of the *rebus sic stantibus* doctrine. Personally, he thought that was a wrong approach and he accordingly supported those members who had proposed the deletion of paragraph 1 and the amendment of paragraph 2. The two paragraphs read together limited the doctrine to the point of abrogation.

4. He also supported the proposal to delete paragraph 3 (a), for the reasons given by Mr. Tabibi.

5. He was opposed to paragraph 3 (b), for the reasons given by Mr. Tunkin.

6. The provisions of article 22 should be confined to those contained in paragraph 2, with a number of drafting changes. First, the adjective "fundamental" before the word "change" in the first line should be dropped if sub-paragraph (b) were to be retained. That

sub-paragraph already purported fully to define the character of the change in terms of its effect on the obligations undertaken in the treaty. The additional qualification that the change must be a "fundamental" one would obviously add nothing, unless it was introduced with some sinister purpose.

7. It was difficult to understand what was meant by the expression "the character of the obligations" in paragraph 2 (b). Better wording should be found by drawing on the idea expressed in the concluding sentence of paragraph 14 of the commentary on article 22 in the Special Rapporteur's second report (A/CN.4/156/Add.1) that "... in determining the relation which the change of circumstances must have to the original treaty, the relevant consideration is rather the nature and extent of the effect upon the performance of the treaty obligations".

8. Mr. BRIGGS said that the proposed redraft of article 22 was a carefully balanced compromise which had been reached only after a long discussion in the Drafting Committee and as a result of mutual concessions. Naturally, the text did not satisfy him completely, but he thought it well expressed the conflicting views that had been put forward in the Commission. He would certainly not be prepared to accept an article limited to the contents of paragraph 2.

9. The opinions of the International Law Commission had considerable influence both on States and on United Nations organs, even if they were not embodied in a treaty. The Commission would therefore be shouldering a heavy responsibility if it adopted an article that seemed to encourage States to make a flood of claims based on changed circumstances.

10. He was firmly convinced that, under international law, the mere fact that the circumstances existing at the time of concluding a treaty had subsequently changed did not provide grounds for terminating or withdrawing from the treaty. It was therefore essential to retain paragraph 1 as it stood.

11. It was also essential to retain the expression "a fundamental change" in the opening sentence of paragraph 2, because that expression made it clear that the rule stated in paragraph 2 constituted an exception to the principle stated in paragraph 1 — an exception which applied only where a fundamental change had occurred and the conditions set out in sub-paragraphs (a) and (b) were fulfilled. It was absolutely necessary to specify those limitations, because nothing could be more certain than the fact that, as soon as a treaty was signed, changes began to occur in the circumstances existing at the time of its signature.

12. Mr. VERDROSS said he wished to withdraw the comments he had made at the previous meeting on paragraph 3 (b) (para. 59). He had been looking at the French text only, and what he had said would cease to be applicable if the French were brought more closely into line with the English.

13. He supported Mr. Tunkin's proposal that paragraph 3 (a) should be amended so as to refer to treaties "establishing frontiers" rather than to treaties "estab-

lishing a territorial settlement"; the latter expression was too broad.

14. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said there appeared to be general support for the substance of the rule, which was expressed in paragraph 2.

15. Some members, though not a majority, thought that the adjective "fundamental" at the beginning of paragraph 2 was unnecessary and perhaps undesirable; on the other hand, it was the general opinion that the adverb "wholly" should be deleted from paragraph 2 (b). He agreed with Mr. El-Erian that the word "fundamental" was useful, because it helped to contrast the provisions of paragraph 2 with those of paragraph 1. With regard to Mr. Pal's view that there was an element of repetition in the provisions of paragraph 2 (b), he explained that the purpose of those provisions was to give further definition to the somewhat subjective notion of a fundamental change. He was prepared to accept the deletion of the word "wholly" in paragraph 2 (b), but not of the word "fundamental" at the beginning of paragraph 2.

16. He agreed that there was a drafting difficulty with regard to the initial proviso of paragraph 1. He had included a reference to both paragraph 2 and paragraph 3 because the second of those paragraphs slightly qualified the first. He had thought that the reference would be more complete in that form, but suggested that the point should be left to the Drafting Committee.

17. A more material point was whether paragraph 1 should be couched in its present negative form. Some members had gone so far as to suggest that the whole paragraph should be deleted; others had urged its retention because it served to emphasize the exceptional character of the rule in paragraph 2. His own view was that paragraphs 1 and 2 balanced each other and served to safeguard the position of all the members of the Commission. Although he would prefer to retain the present text of paragraph 1, an intermediate solution would be to reword the paragraph to read:

"A change in the circumstances existing at the time when a treaty was entered into may only be invoked as a ground for terminating or withdrawing from the treaty in the conditions set forth in paragraphs 2 and 3".

That formulation would give a slightly less negative nuance to the text.

18. With regard to paragraph 3, he agreed that the criticisms of the drafting of sub-paragraph (a), in particular the use of the expression "a territorial settlement", were justified. In his original draft of paragraph 5 (a), he had referred to "stipulations of a treaty which effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights". The discussion had shown a clear wish on the part of the majority to avoid any reference to the grant of territorial rights and to limit the exception to treaties which either established a territorial boundary or actually transferred territory. Mr. Gros had pointed out the danger of

suggesting that territorial sovereignties could be upset and perhaps peace disturbed by invoking the doctrine of *rebus sic stantibus*. The Drafting Committee had therefore felt obliged to retain the exception in paragraph 3 (a).

19. If changes in territorial sovereignty were necessary, they would be brought about by other means and other procedures than the operation of the doctrine of *rebus sic stantibus*. He did not underestimate the political and legal importance of the principle of self-determination, even if its precise content was extremely difficult to define. He was not one of those who denied that it had any claim to be a legal concept; but it was not a concept which had any particular place in the law of treaties. On the contrary, those who advocated it regarded it as a general principle and one which concerned the rights of individuals and groups rather than of States. When a proper occasion arose for the application of the principle, it operated outside the law of treaties and it therefore seemed to him wrong to associate the principle in any particular way with the operation of article 22.

20. He supported the retention of paragraph 3 (a) on the understanding that it would be amended to state clearly that the reference was to treaties which effected boundary settlements or transfers of territory.

21. The difficulties which had arisen in connexion with paragraph 3 (b) were partly due to the unfortunate drafting of the French text, which did not make it clear that the case envisaged was one in which provision had actually been made for the consequences of the changes of circumstances. Perhaps the intended meaning would be made even clearer if the English text were reworded to read:

“(b) to changes of circumstances for the consequences of which the parties have made express provision in the treaty”.

The reference would then clearly be to cases in which the parties had not only foreseen the change of circumstances, but had expressly provided for its consequences.

22. It seemed to go without saying that the parties were always at liberty to make their own arrangements for changes which they had themselves foreseen.

23. He suggested that the whole of article 22 should be referred back to the Drafting Committee with instructions to prepare a new text for submission to the Commission.

24. Mr. TABIBI said that the Special Rapporteur's scholarly summing up had not dispelled his doubts regarding paragraph 3 (a). In particular, he was not convinced by the argument that application of the *rebus sic stantibus* doctrine could involve a danger to peace; for any attempt to keep a treaty in force against the wishes of a people would involve an even greater danger to peace.

25. The parties to a treaty always acted on behalf of their peoples and the fate of peoples could only be decided in accordance with the principle of self-deter-

mination. That principle had a direct bearing on all territorial settlements. Consequently, he could not support paragraph 3 (a). The text suggested by Mr. Tun-kin (previous meeting, para. 82) would be an improvement, but was still not satisfactory. Even a reference to frontier treaties would be too wide; a frontier treaty could cover anything from an agreement on the erection of boundary marks to a treaty on which the fate of millions of people depended. Even a treaty relating to military bases could come under the heading of frontier agreements. He accordingly urged that the provisions of paragraph 3 (a) should be re-examined in the light of the principle of self-determination.

26. The CHAIRMAN said that, if there were no objection, he would consider the Commission agreed to refer article 22 back to the Drafting Committee with instructions to prepare a new text in accordance with the Special Rapporteur's suggestions.

It was so agreed.

ARTICLE 22 *bis* (SUPERVENING ILLEGALITY OF PERFORMANCE)

27. Sir Humphrey WALDOCK, Special Rapporteur, said that article 22 *bis* replaced paragraph 4 of his original article 21 (A/CN.4/156/Add.1). The Drafting Committee had prepared a very brief formulation which read:

“A treaty becomes void and terminates if a new peremptory norm of general international law of the kind referred to in article 13 is established and the treaty conflicts with that norm.”

28. The Commission had on several occasions discussed the effect of a rule of *jus cogens* that came into existence after a treaty had been in force for some time. It had been agreed that the effect of such a rule would be to avoid or terminate the treaty. There had, however, been some difference of opinion on the placing of the provision. Some members had suggested that it should take the form of an additional paragraph in article 13; as Special Rapporteur, he did not favour that solution, because he wished to make it clear that in the case under discussion, the treaty had been initially valid and had only been invalidated subsequently by the supervening new rule of *jus cogens*. He preferred the solution adopted by the Drafting Committee, which was to deal with the matter in a separate article in the section on the termination of treaties.

29. The legal effects of termination under the provisions of article 22 *bis* would be considered by the Drafting Committee when it came to redraft articles 27 and 28.

30. Mr. PAREDES said that the expression “*norma perentoria*” (peremptory norm) in the Spanish text was not acceptable, because it meant the opposite to what the Drafting Committee had intended. The term “*perentorio*” was used in procedural law for the period allowed to the parties in which to exercise their rights, and on the expiry of which that faculty lapsed or was extinguished. But in the article under discussion the word

was used to qualify norms that were absolutely mandatory and remained in force indefinitely.

31. Mr. de LUNA fully endorsed Mr. Paredes' comment on the Spanish text.

32. The CHAIRMAN suggested that the difficulty could be overcome by using the expression "*norma imperativa*".

33. Mr. VERDROSS suggested that the words "becomes void and" should be deleted, so as to remove any idea of nullity *ex tunc*. Nullity *ex nunc*, on the other hand, was covered by the word "terminates".

34. Mr. CADIEUX thought it difficult to reach a decision of the substance of article 22 *bis* until the Commission had settled the terms of article 26, on the severance of treaties.

35. Mr. EL-ERIAN said he had been asked by Mr. Castrén, who had had to leave Geneva, to propose the deletion from article 22 *bis* of the words "becomes void and", as just suggested by Mr. Verdross. The article would then simply state that the treaty terminated if a new norm of *jus cogens* were established and the treaty conflicted with that norm; the effect would thus clearly be to terminate the treaty *ex nunc*. Any reference to the treaty being void would, in Mr. Castrén's opinion, suggest that the effect was *ex tunc*.

36. Mr. BARTOŠ said he approved of Mr. Verdross's suggestion in principle. A formula should be found which made it quite clear that the treaty lost its validity as soon as it conflicted with a new peremptory norm of general international law, but that it was not rendered void *ab initio* by the establishment of that norm.

37. The idea on which article 22 *bis* was based was not new; it had already been invoked several times in the United Nations. About fifteen years previously, when arguing that the treaty of alliance between Egypt and the United Kingdom¹ had ceased to be valid, the Egyptian representative to the Security Council had pleaded, *inter alia*, that the treaty had been concluded at a time when the conception of the independence and status of States had been different; even if, quite apart from the use of coercion, the treaty had been valid before the recognition of the right of peoples to self-determination and before the principle of the sovereign equality of States had been established by the Charter, it had lapsed when those principles had been proclaimed. In article 22 *bis* the Drafting Committee had accordingly endeavoured to express an idea which jurists had had in mind for fifteen years. If such a rule were accepted by governments it would be a great contribution to the development of international law.

38. Mr. YASSEEN said that the Commission's discussions had shown the evolutionary and dynamic character of *jus cogens*. Article 22 *bis* laid down how the establishment of a new rule of *jus cogens* would

affect an earlier treaty which was incompatible with that rule. It was correct to say that the reason why such a treaty terminated was that it became void from the moment the new rule was established. The expression "becomes void" was therefore useful in that it specified the nature of the sanction whose consequence was that the treaty terminated.

39. Mr. LACHS said that the difficulty could be met by a simple drafting change. The opening words of the article should be re-drafted to read: "A treaty becomes void and terminates as soon as ..." or "A treaty becomes void and terminates from the moment that ..." It would then be clear that the effects were *ex nunc* and not *ex tunc*.

40. Mr. YASSEEN thought it would be sufficient to replace the word "if", after "terminates", by the word "when".

41. Sir Humphrey WALDOCK, Special Rapporteur, said that the reason for using the expression "becomes void and terminates" was to make it clear that the treaty would cease to have effect from the date when the new rule of *jus cogens* was established.

42. He was doubtful about the suggestion that the word "if" should be replaced by some expression meaning "when". The use of the word "if" showed that the case contemplated in article 22 *bis* was somewhat exceptional.

43. The CHAIRMAN, speaking as a member of the Commission, said that in his view the case envisaged in article 22 *bis* was one of validity rather than of termination. The rights conferred under the treaty disappeared; in cases of termination, the rights conferred under the treaty would subsist. The provisions of article 22 *bis* should form a second paragraph in article 13. During the discussion of article 13 (633rd-685th meetings), several speakers had pointed out that the question of supervening illegality of performance was not one of termination, but of validity projected into the future.

44. He suggested that the provision should be inserted in article 13 and that the opening words should read: "A treaty becomes void and ceases to have effect if ..."

45. Mr. EL-ERIAN said that in the Drafting Committee he had suggested that the provision should open with the words: "A treaty shall be void and terminate ..." He was not at all certain that nullity would not operate *ab initio* in absolutely all cases, and that language would have avoided introducing the time element. However, the Drafting Committee had not adopted his suggestion.

46. He was grateful to Mr. Bartoš for explaining one of the reasons for the position taken by the Egyptian Government in 1947, when it had referred to the Security Council the question of the continued validity of the Anglo-Egyptian Treaty of 1936. The Egyptian case on that occasion had not been based on the doctrine of *rebus sic stantibus* alone; Egypt had also invoked the principle of the sovereign equality of States, laid

¹ League of Nations, *Treaty Series*, Vol. 173, pp. 402 ff.

down in Article 2, paragraph 1, of the Charter, when its representative to the Security Council had said:

“What could be more contrary to the principle of sovereign equality than the occupation in time of peace of the territory of a Member of the United Nations, without its consent, by the armed forces of another Member?”²

47. Sir Humphrey WALDOCK, Special Rapporteur, said he still considered that article 22 *bis* was in its proper place, because it must not be given retrospective effect. In re-drafting the articles contained in section V, he had found it more convenient to deal with the legal effects of the supervening illegality of performance in the article relating to termination than in that relating to invalidity.

48. The points raised during the discussion could be referred to the Drafting Committee, which might consider substituting some such wording as “if and when” for the words “and terminates if”.

49. The CHAIRMAN suggested that the Commission might take a vote on the article on the understanding that the Drafting Committee would make the necessary changes in wording to meet the points raised during the discussion.

50. Mr. CADIEUX said he could not vote on article 22 *bis* until the Commission had seen the re-draft of article 26.

51. The CHAIRMAN said that a vote at the present stage of the discussion would in no way prejudice the position of any member regarding the interrelationship between certain articles in the draft; that was a matter on which members would be free to comment once the revised text of the whole draft was before the Commission.

Article 22 bis was adopted, subject to drafting changes, by 19 votes to none.

Special Missions (A/CN.4/155)

[Item 5 of agenda]

52. The CHAIRMAN invited the Commission to discuss the topic of special missions and drew attention to the working paper prepared by the Secretariat (A/CN.4/155).

53. Mr. BARTOŠ congratulated the Secretariat on the document it had submitted. After a thorough study of the question of special missions he had found, like the Secretariat, that there were no specific and precise rules on the subject. Special missions and itinerant envoys were being increasingly used in international relations, however, though current business was still transacted by permanent missions. There were very few rules of international law which specifically concerned special missions, and few sources of law on which it was possible to rely. The Regulation of Vienna of

1815,³ article 3 of which referred to extraordinary missions, dealt only with their protocol aspect. Generally speaking, it had been concluded from its omission to deal with other aspects of the matter that special missions were governed by the rules of diplomatic law relating to permanent missions.

54. In his opinion, permanent missions and special missions differed both as to their functions and as to their nature, and it was impossible to apply the same rules to them. The League of Nations and later the United Nations had studied the question. When the Convention on the Privileges and Immunities of the United Nations had been drawn up, the question of how to deal with special missions had arisen, and it had been recognized that the basis of the approach would have to be the functional, not the representative, character of such missions.

55. International relations had developed to such an extent that it was necessary to make increasing use of special missions for settling political and technical questions and for consultations at the highest level. Permanent diplomacy was losing ground even at the political level and in bilateral negotiations. Another phenomenon had contributed to that change: formerly, a diplomat had only been expected to know protocol and be able to understand his country's interest. A career diplomat had not been required to have a profound knowledge of non-political problems concerning international relations. Today, on the other hand, many technical questions arose in international relations and special missions were indispensable for settling them.

56. The sources showed a total absence of historical continuity. Hitherto, certain special cases had been settled, but no general principles had been laid down. Generally speaking, the bodies which had studied the question of special missions had not done so thoroughly and had been content to say that there was an *ad hoc* diplomacy which was governed, in principle, by the rules applicable to permanent missions. The secretariat working paper noted that four broad principles appeared to be generally recognized, but that there was not sufficient material for codification of the rules applicable to special missions; it also showed that *ad hoc* diplomacy was becoming increasingly important and that governments were seeking rules to apply.

57. It was therefore important that the rules of a legal system applicable to special missions should be drawn up in detail. Such missions were no longer purely ceremonial; they worked parallel to the permanent missions and their activities sometimes merged with those of the permanent missions. Differences between permanent missions and special missions did exist, however, as could be seen from a number of examples. A study of international practice showed that certain general institutions had a different signification in the case of special missions. Among the institutions showing that difference were: the right to send *ad hoc* missions (prior agreement required); the task of the *ad hoc* mission

² Security Council, Official Records, second year, No. 70, 175th meeting, 5 August 1947, p. 1753.

³ Yearbook of the International Law Commission, 1958, Vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), pp. 93-94, footnote 29.

(fixed in advance and specified); the agrément (non-formal); declaration as *persona non grata*; accreditation to more than one State (simultaneous or successive; circular note; influence of relations between other States and former dealings); composition of the special mission (head of mission, alternate head, chargé d'affaires *ad interim*, number of members); classes and ranks of *ad hoc* diplomats (difference as compared with resident diplomats, precedence between members of *ad hoc* missions); mode of reception of an *ad hoc* mission (no protocol, no formal reception or delivery of full powers, collective, alternate or subsidiary powers); notification of arrival and departure (period of notice and notification of departure); special rules concerning the beginning and end of *ad hoc* missions, etc. That analysis led to the conclusion that special rules were necessary and existed in practice.

58. There were many kinds of special mission, for they might be concerned with political, economic, technical, immigration and other questions, and it depended on the particular nature of each mission whether its privileges and immunities were broad or restricted. For example, some permanent missions were not entitled to enter certain areas known as military zones, whereas some special missions, such as those concerned with the demarcation of frontiers, necessarily had to enter such areas. All those matters required thorough study before the rules needed by States could be drawn up.

59. Mr. CADIEUX said he was glad the subject had been placed on the agenda, for although it was not of very wide scope, it was assuming increasing importance as relations between countries multiplied. Traditional diplomatic methods often proved inadequate, and special missions had become essential to international life. They were so numerous and so diverse that their status could no longer be left uncertain. The Commission would be doing useful work if it offered States precise rules on the subject.

60. The Commission should first consider its approach to the task entrusted to it by the General Assembly. The simplest course might perhaps be to appoint a special rapporteur who, on the basis of the Secretariat's excellent working paper, would submit suggestions to the Commission on both substance and procedure. So far as substance was concerned, it would not be necessary to go over all the ground again. On the basis provided by the Vienna Convention of 1961, the special rapporteur should be able to work out certain rules which the Commission could examine at a later session. The procedure followed should be such that States could endorse the rules worked out by the Commission. As it was doubtful whether the subject was important enough to justify a conference, the Commission might consider submitting the results of its work to the Sixth Committee of the General Assembly.

61. Next the Commission should decide whether to deal with the question of conferences and congresses convened by States. As that question was similar to the one to be considered by the Special Rapporteur on relations between States and intergovernmental organizations, the Commission might ask him to deal

with both. Alternatively, it might ask the special rapporteur it appointed for special missions to deal also with conferences and congresses convened by States. He personally would prefer the first solution, as it would have the advantage of combining two subjects that were more genuinely interrelated.

62. Thirdly, the Commission should reaffirm the decision it had taken in 1960 to treat the case of itinerant envoys on the same footing as special missions.⁴

63. As to the form of the rules to be drawn up by the Commission, either a protocol supplementing the 1961 Convention or a separate convention might be suitable. The choice of the instrument would depend on the method adopted. If the whole subject was studied afresh, a convention would probably be required; but if, as he believed they would, the proposed rules contained only the specific provisions relating to special missions and for the rest referred to the rules in the Vienna Convention, then a protocol attached to that Convention would be more appropriate. The Commission could obviously not decide until it had received the special rapporteur's conclusions on the substance of the rules to be adopted and on questions of procedure.

64. Mr. TUNKIN said it was mainly owing to lack of time that the Vienna Conference on Diplomatic Intercourse and Immunities had not discussed the draft articles adopted by the Commission at its twelfth session⁵ and it would be quite wrong to conclude that it had rejected the Commission's approach or the substance of the articles.

65. The Commission ought to follow the procedure adopted for the law of treaties, state responsibility and state succession, and appoint a special rapporteur on special missions who would be given fairly precise instructions as to how he should handle the subject.

66. With regard to the scope of the study, the decision taken at the twelfth session to leave aside the question of the privileges and immunities of delegations to international conferences⁶ should be reaffirmed. There was, of course, a difference between conferences convened by international organizations and those convened by States, but the question belonged to what was now becoming a separate part of international law governing international conferences and called for special rules. The Commission could always reconsider its decision later.

67. The Commission should also maintain the decision taken at the twelfth session to cover itinerant envoys in its draft, because the same rules should apply to them as to special missions.

68. At the twelfth session, the Commission had considered that existing practice in some measure justified extending to special missions the privileges and immunities accorded to permanent missions, and the draft articles to be prepared might possibly take the form

⁴ *Yearbook of the International Law Commission, 1960*, Vol. II (United Nations publication, Sales No.: 60.V.1, Vol. II), p. 179, para. 34.

⁵ *Ibid.*, pp. 179-180.

⁶ *Ibid.*, p. 179, para. 33.

of an additional protocol to the Vienna Convention on Diplomatic Relations; but no final decision need be taken on that matter at present.

69. As to the substance of the articles, the special rapporteur should be guided by practical considerations and should refrain from going into too much detail about the functions and composition of special missions, which could be of very different kinds. Extremely detailed legal rules, which jurists were sometimes tempted to draw up, did not always facilitate relations between States and could even have the opposite effect.

70. Sir Humphrey WALDOCK said that, not having been a member of the Commission at its twelfth session, he had found the Secretariat's working paper particularly helpful in explaining the position. In general, he subscribed to the views expressed by the members who had spoken before him, but he would hesitate to exclude from the scope of the study the privileges and immunities of delegations to international conferences of the ordinary kind called by States, as distinct from those convened by, or held under the auspices of, international organizations. The matter should be studied by the special rapporteur at least in his first report.

71. He entirely agreed that a special rapporteur should be appointed to examine in detail which rules in the Vienna Convention on Diplomatic Relations would be applicable to special missions, as that would be a far more effective and quicker way of dealing with the subject than for the Commission to undertake the study itself. Moreover, he considered it essential to study the subject with a view to determining what rules were suitable for special missions, rather than simply to regard the rules of the Vienna Convention as being suitable, subject to a few exceptions. In considering those parts of the law affecting consuls which came nearest to the same rules in the Vienna Convention, he had been impressed by how closely the matter had had to be examined in order to see how a principle applicable to diplomats was suitable for consuls.

72. It was too early to form any definitive opinion as to what kind of instrument would be most suitable for the draft articles, and perhaps the special rapporteur should start on his task with no preconceived idea on that point.

73. It certainly seemed clear that States wished the Commission to complete its work on special missions as an important subject in its own right. It would be easier to decide how much time should be devoted to the subject when the Commission had received the special rapporteur's first report. Perhaps it would be feasible to hold a short special session on a subject of the scope of special missions.

74. Mr. TABIBI said that the Secretariat's working paper provided a useful review of the work already done by the Commission and the action taken at the General Assembly. He had also found the observations by Mr. Bartoš and Mr. Tunkin most illuminating. Like other members of the Sixth Committee, he considered that the subject of special missions was most important and that it was very necessary to draw up rules to pro-

tect such missions, which were of widely different kinds. On the whole it would be better not to include delegations to international conferences in the study, but to deal with them separately under the important branch of law covering international conferences.

75. A special rapporteur should be appointed at once and given instructions on the content of his first report, which could be submitted in 1964. Once the Commission had the report before it, it would be in a better position to decide whether the draft articles should be embodied in a protocol to the Vienna Convention or in a separate instrument. The special rapporteur should be asked for suggestions on that point.

76. Mr. ROSENNE said he much appreciated the extremely helpful working paper prepared by the Secretariat, paragraphs 47-51 of which were of particular interest with regard to the procedure to be followed. Although the terms of General Assembly resolution 1687 (XVI) requesting the Commission to study the subject of special missions "as soon as it considers it advisable" might justify postponement on the ground that the programme was already a heavy one, there were several cogent reasons for proceeding at once with the topic, besides those already mentioned by other speakers and in the secretariat paper.

77. The first reason was international in character. Since the conclusion of the two Vienna Conventions and in the light of the progress made on the law of treaties, more particularly with the introduction of article 4 in Part I, it was easier to discern what was needed to complete the law on the machinery of international intercourse. The subject of special missions was no longer merely an adjunct of the law of diplomatic relations; it could stand on its own. Special missions fulfilled a variety of functions, some diplomatic or quasi-consular in character; for example, they dealt with migration problems, many of which were now covered by the Vienna Conventions. But it was their special nature that needed emphasis and it was particularly important to remember that they could, and often did, operate when there was no diplomatic recognition between the receiving and the sending State. The legal framework in which special missions had their being and their functions called for a set of rules to regulate them.

78. The second reason was of a domestic order. The conclusion of the two Vienna Conventions had made it necessary for many countries to re-examine their law on privileges and immunities. In some countries, international treaties automatically became law on ratification, but in others, like his own, special legislation had to be prepared. The passage of such legislation or the parliamentary ratification of such treaties was not easy, as experience of the various international agreements concerning privileges and immunities had shown. The completion of the Commission's work on the topic of special missions would greatly assist governments and those responsible for drafting national legislation and would help to fill gaps in the law where special missions were concerned.

79. As to the scope of the study, in principle it ought to cover all official intercourse between States that took place outside the framework of normal permanent diplomatic or consular missions and of international organizations. Consideration should be given first to political, technical and administrative special missions, which varied widely in character and were growing in number. Purely ceremonial missions could be relegated to second place.

80. The Commission should maintain its decision to assimilate itinerant envoys to special missions.

81. From the remarks of the Secretary to the Commission at the 565th meeting,⁷ he inferred that the decision to exclude from the study questions concerning the privileges and immunities of delegates to congresses and conferences had been limited to meetings coming within the scope of conventions on privileges and immunities or host agreements. There were still a number of conferences that did not fall within that classification, and as Sir Humphrey Waldock had pointed out, it was important to distinguish between conferences that were convened by an international organization and those that were not, because immunity from judicial process in many countries derived from municipal law and would rest on a different international basis in the two cases. However, the question was not of great urgency and could be left aside until further progress had been made on other matters.

82. He agreed with Mr. Tunkin that it was essential to avoid going into great detail. The articles should be drafted as tersely as possible and be few in number. The draft could take other forms than those mentioned in paragraph 51 of the Secretariat's working paper, and all of them should be explored, bearing in mind the need for flexibility imposed by the nature of the subject itself.

83. Enough preparatory work had already been done with the report by Mr. Sandström, the Special Rapporteur for *ad hoc* diplomacy (A/CN.4/129), the Chairman's memorandum (A/CN.4/L.88), the secretariat working paper and the discussions in the Commission and the Sixth Committee. The discussions in the Sixth Committee and at the Vienna Conference on Diplomatic Intercourse and Immunities clearly showed that the Commission was expected to follow its usual procedure of appointing a special rapporteur to prepare draft articles with a commentary, which would be given two readings, the second taking place after the comments of governments had been received. He was therefore in favour of adopting that course and thought that the special rapporteur should be asked to submit the draft articles and commentary in time for the sixteenth session. It could be decided later when they would be discussed; in that connexion he had found Sir Humphrey Waldock's suggestion particularly interesting.

The meeting rose at 6 p.m.

712th MEETING

Tuesday, 2 July 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Special Missions (A/CN.4/155)

[Item 5 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of item 5 of the agenda: special missions.

2. Mr. BRIGGS said that the secretariat working paper (A/CN.4/155) had been useful in focusing the Commission's attention on the decision it was called upon to take. But except for paragraphs 5 and 6, it made little reference to state practice and consisted largely of an account of the opinions of writers. It was therefore desirable that the Commission should appoint a rapporteur at the present session to make a thorough study of state practice in the matter and a more profound juridical analysis of the problem of special missions.

3. With regard to Mr. Tunkin's suggestion that the Commission should give instructions to the Special Rapporteur, he thought that such instructions should be of a general character.

4. As to the scope of the subject, he supported the view expressed by the Commission in its report on its tenth session, that the study of *ad hoc* diplomacy should cover itinerant envoys, diplomatic conferences and special missions,¹ a view that had later been qualified by the decision not to deal with the privileges and immunities of delegates to congresses and conferences. He thought that the limitation should be confined to the question of privileges and immunities. The general question of delegates to international conferences might well come within the scope of the subject of *ad hoc* diplomacy; on that point, he would like to hear the views of Mr. El-Erian, the Special Rapporteur for relations between States and inter-governmental organizations.

5. If the topic of special missions overlapped with other topics, the special rapporteurs concerned should cooperate. In the case of state responsibility, the Commission had already decided that the special rapporteur should co-ordinate his work with that of the special rapporteurs for succession of States and the law of treaties.

6. With regard to the form of the draft — a question dealt with in paragraph 51 of the secretariat working paper — it would be premature to try to decide at that stage whether it should take the form of an additional protocol to the 1961 Vienna Convention on Diplomatic Relations or of a separate convention. The Commission should await the findings of the special rapporteur on special missions.

7. The Commission should certainly appoint a special rapporteur at its present session.

⁷ *Yearbook of the International Law Commission, 1960, Vol. I* (United Nations publication: Sales No.: 60.V.1, Vol. 1), p. 259, para. 13.

¹ *Yearbook of the International Law Commission, 1958, Vol. II* (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 89, para. 51.

8. Mr. YASSEEN said that when the Commission had resumed its study of special missions at its twelfth session in 1960, it had not followed its customary practice of submitting texts to governments for approval; it had finished its work hastily so as to be able to place a draft before the conference due to meet at Vienna the following year. The Sixth Committee of the General Assembly had adopted the same attitude. When the draft had been put before the Vienna Conference it had been decided that there was not enough time to study it. In fact, it might be thought that the Conference had been unwilling to accept the draft as the starting point for work that might lead to the adoption of a general convention. In the sub-committee appointed to consider the draft, it had been said that it did not cover all the aspects of the question; for although it contained one or two articles particularly concerned with special missions, for the rest it merely stated which of the rules on diplomatic missions in general applied to special missions and which did not.

9. The Commission might run into serious difficulties if it adopted the same method again. If it decided to deal with the question of special missions, it should do so separately. It should not, of course, overlook the results of the Vienna Conference; but neither should it be misled by the apparent resemblance between ordinary diplomatic missions and special missions, for in fact they were very different: for example, in the manner of their beginning and ending, and in the status of their members. Nevertheless, the rules which the Commission and the international community had established concerning permanent diplomacy should be taken advantage of. That was a difficult task, for which the Commission should follow its usual method and first appoint a special rapporteur.

10. The decision taken in 1960 not to distinguish between itinerant envoys and special missions should not be changed; an itinerant envoy was a person who performed successive special missions.

11. The rules to be drafted by the Commission should, he thought, be in the form of a separate convention. But it was too early to settle that question at present, and the Commission should leave some latitude to the future special rapporteur, who would be in a better position to give an opinion on it after he had made a thorough study of the subject.

12. Mr. LACHS said that special missions offered an interesting example of the historical development of diplomacy. They had provided the oldest form of diplomatic contact, one of the earliest examples in his own country's history being the special mission sent by the King of Poland to Queen Elizabeth I of England. Special missions had then given way to permanent missions, but they had now reappeared as an important additional instrument of diplomacy. It was therefore appropriate that the Commission should embark on a study of the subject, with a view to defining in proper legal form the status of the numerous travelling missions which dealt with so many problems in international relations.

13. In its study of the subject, the Commission would be greatly assisted by the secretariat working paper

and by the admirable exposition given by Mr. Bartoš at the opening of the discussion (previous meeting, paras. 53-58).

14. The experience of the Commission had shown the inadequacy of the general approach which consisted in applying, *mutatis mutandis*, the rules applicable to ordinary diplomatic relations. What was needed was an instrument containing all the essential provisions concerning the status of special missions; that was where the Vienna Convention on Diplomatic Relations could help. As had been rightly pointed out, however, it would be advisable not to go into too much detail, but to confine the study to the essential elements.

15. The scope of the subject should be restricted to special missions proper and should not include international conferences, whatever their nature or form. The topic of international conferences could be dealt with separately at a later stage by the appointment of a special rapporteur; for although it involved many problems connected with diplomatic privileges and immunities, by reason of its specific character, it also went beyond that subject.

16. It would be better not to prejudge the question of form. He himself would prefer an annex to the Vienna Convention, if only for the practical reason that all the provisions concerning diplomacy could then be embodied in a single volume. At a later stage, the instrument on international conferences could join the other two.

17. The Commission should appoint a special rapporteur and request him to submit a draft at the next session. There had been some discussion at the previous meeting on the urgency of the matter, but there were many reasons why a draft on special missions should be prepared without delay. One was that it would become part and parcel of the law of diplomatic relations which, without an instrument on special missions, would remain deficient. Another was that the other important topics on the agenda would engage the Commission's attention for a considerable time and it was in the interest of the continuity of its work to offer the results at regular intervals. It should be possible for the Commission to approve the draft at its next session.

18. At the close of the present discussion the essential points should be summarized in the form of an enumeration and approved by the Commission as a guide to the special rapporteur. The instructions to be given to the special rapporteur should be in general terms, but as precise as possible, and he should be requested to submit his report in time for the next session.

19. Mr. TSURUOKA said that, like Mr. Lachs, he supported the idea put forward by Mr. Tunkin; he hoped that the Commission would draft a convention which would be as simple and concise as possible. When he had been a government official, he had had occasion to observe that special missions were very frequently employed and generally raised no serious practical problems. Everything connected with their despatch, their reception and the privileges and immunities of

their members was usually regulated, sensibly and courteously, by the application of the *mutatis mutandis* formula.

20. Admittedly, it would be useful, and was even necessary, for the Commission to clear up specific points; but it should propose only very flexible rules, for practice showed that what was possible and usual in one country was not necessarily so in another; besides, a subject that was developing quickly should not be too narrowly circumscribed.

21. Mr. VERDROSS commended the Secretariat for having produced a working paper that would facilitate the task of the special rapporteur, and paid a tribute to Mr. Bartoš for his masterly exposition of the problem. He would not repeat what had been said by Mr. Tunkin, Mr. Yasseen and Mr. Lachs, but he thought the Commission should not unduly restrict the special rapporteur's freedom.

22. Mr. LIANG said that the working paper submitted by the Secretariat had been prepared for purposes of easy reference; it dealt mainly with the work of the International Law Commission and recorded the decisions taken by the Commission on the subject of special missions.

23. He now wished to add a few comments of his own regarding the scope of the subject. At the twelfth session, he had supported Mr. Jiménez de Aréchaga's proposals that the Commission's work on *ad hoc* diplomacy should be confined to special missions.² The view he had then expressed had been fully justified by subsequent discussions in the Commission as well as by the present discussion.

24. Paragraphs 48 and 49 of the secretariat working paper referred to the question of diplomatic conferences convened, not by international organizations, but by the governments of individual States. He was still convinced that the question of delegates to congresses and conferences, even those not convened by international organizations, lay outside the topic of special missions.

25. It was interesting to note that, when the topic had first been considered by the Commission, it had been called "*ad hoc* diplomacy"; but that term being rather vague, the Commission had acted wisely in subsequently limiting the topic to special missions, which would include itinerant envoys, since such envoys were charged with special missions.

26. The question of delegates to conferences convened by international organizations formed part of the subject of relations between States and intergovernmental organizations, for which Mr. El-Erian was Special Rapporteur; it would be advisable also to exclude from the subject of special missions the question of delegates to international conferences convened by individual States.

27. The history of the discussions in the United Nations on the subject of special missions showed that it was not to be treated as an appendix to the subject of per-

manent missions; it had developed into an independent, though closely allied subject.

28. Mr. Lachs had given some interesting particulars of the part which special missions had played in diplomacy and perhaps it would not be inappropriate to allude to the well-known diplomatic episodes connected with Lord Macartney's mission to China in the early nineteenth century, which had constituted an important step in the establishment of normal diplomatic relations between East and West.

29. It was noteworthy that special missions, after lapsing into secondary importance following the development of permanent missions, had now once more come to the fore. They were varied in character and not confined to diplomatic relations. It was not uncommon for a State to send a special envoy to smooth out certain matters which could not be adjusted by the permanent mission, or to negotiate on certain questions. Again, a special mission was occasionally sent to negotiate or conclude a specific treaty or convention. Those were further arguments for not approaching the subject of special missions as merely ancillary or subsidiary to that of permanent missions. Special missions often performed tasks which, because of their specialized personnel, they were better equipped to undertake than permanent diplomatic missions. The Commission had therefore been wise to initiate a more thorough study of special missions as such.

30. Like Mr. Tunkin, he had the impression that the Vienna Conference of 1961 had not criticized the work of the International Law Commission; it had simply realized that the subject of special missions deserved independent study and that it was not enough to associate it with diplomatic relations by means of the *mutatis mutandis* formula. The Conference, and subsequently the General Assembly, had expressed a desire for a full-length, detailed set of articles on the subject.

31. With regard to the material necessary for a more thorough study, he had noted Mr. Briggs' remark that the secretariat working paper gave only a summary of the teachings of publicists in the sense of Article 38, paragraph 1.d, of the Statute of the International Court of Justice. That was largely true, but it was a feature of the subject that there was a dearth of material on state practice. The discussion on the *rebus sic stantibus* clause had shown that there was practically nothing but doctrine on that subject; indeed, the only occasion on which it had been brought before the Permanent Court of International Justice had been that of the Chinese claim for the revision of a treaty with Belgium, but the *rebus sic stantibus* doctrine had not been put to the test because the case itself had not been decided by the Court. The lack of material on state practice was due to the fortunate circumstance that there had been very few disputes between States on the subject of special missions.

32. State practice could be deduced, however, not only from contentious cases, but also from the manner in which States organized special missions. For its work on diplomatic relations, the Commission had had before it the study of the Laws and Regulations regarding

² *Yearbook of the International Law Commission, 1960, Vol. I* (United Nations publication, Sales No.: 60.V.1, Vol. I), p. 259.

Diplomatic and Consular Privileges and Immunities prepared by the Secretariat.³ A study of the relevant provisions of municipal law would provide useful material for the study of special missions, just as it had done for permanent missions. It was pointed out in a footnote to paragraph 5 of the secretariat working paper that "the States of Latin America form the majority of States making express provision for the sending of special missions." A footnote to paragraph 4 of the same document contained a quotation from Hackworth's *Digest of International Law*, which had been prepared for the purpose of presenting the evidence of state practice.

33. Since it was undoubtedly true that, for the time being, there was insufficient material on state practice in the matter of special missions, it might be appropriate to send a circular to governments asking them for material on the subject. A number of governments had already included material on special missions in their replies to a questionnaire on the subject of diplomatic and consular relations, but it might still be possible to elicit additional information.

34. Reference had been made to the connexion between the topic of special missions and the Vienna Convention on Diplomatic Relations. That Convention would undoubtedly constitute an important source of material, but total assimilation would certainly not be possible. During the Commission's discussions on *ad hoc* diplomacy in 1960, Mr. Jiménez de Aréchaga had stated that, in his opinion, all the articles of the 1958 draft were applicable to special missions,⁴ except that the provisions of article 3 (Functions of a diplomatic mission) applied only within the scope of the specific tasks assigned to such mission.⁵ Special missions differed from permanent missions not only in character, but also in duration. Those differences justified separate treatment of the topic of special missions.

35. One important question regarding the privileges and immunities of special missions had not been previously covered: the question whether special missions which were not of a diplomatic character should be assimilated to diplomatic missions and given diplomatic privileges. That question would require a great deal of discussion of principle, but an examination of it would be extremely useful in present-day conditions. Special missions were no longer confined to diplomatic relations, but extended to cultural, economic and financial relations.

36. Mr. TUNKIN said that the main purpose of the discussion was to decide what instructions should be given to the future special rapporteur. Those instructions should give, first, an indication of the scope of the topic. In his view, it should cover special missions proper, but exclude international conferences. That did not, of course, mean that the special rapporteur would not be at liberty to submit proposals that had some bearing on certain types of conference. For the time being,

³ United Nations, *Legislative Series*, Vol. VII (United Nations publication, Sales No.: 58.V.3).

⁴ *Yearbook of the International Law Commission, 1960*, Vol. I (United Nations publication, Sales No.: 60.V.1, Vol. I), p. 258.

⁵ *Ibid.*, p. 270.

however, the topic should be confined to special missions properly so called.

37. With regard to the approach, the Special Rapporteur could draw on the Vienna Convention on Diplomatic Relations, but should bear in mind that special missions were a separate institution, and should be kept separate from permanent missions. His study would show how much the two subjects had in common, especially in the matter of privileges and immunities. In 1960, at the Commission's twelfth session, he (Mr. Tunkin) had been opposed to the general approach suggested, namely, that all the provisions of the 1958 draft on diplomatic relations should be regarded as applicable to special missions *mutatis mutandis*; he had urged that the Commission should examine the 1958 draft, article by article, in order to determine the extent to which each article was applicable to special missions. Unfortunately, however, the Commission had not had time to undertake such a thorough study of the problem.

38. As to the form to be adopted, it was clear that the draft would have to take the form of a set of articles which could refer, wherever appropriate, to the Vienna Convention on Diplomatic Relations.

39. A special rapporteur for the topic of special missions should be appointed immediately. The Commission was fortunate in having a member who was highly qualified for the task and who would be giving a set of lectures at the Academy of International Law at The Hague on that very subject.

40. With regard to the place of special missions in the Commission's programme of work, although in addition to the law of treaties, the Commission had under consideration the two important topics of state responsibility and succession of States, to which priority had been given by General Assembly resolutions 1686 (XVI) and 1765 (XVII), it had been decided at the previous session that a number of more limited topics should be taken up at the same time.⁶ When appointing a special rapporteur, therefore, the Commission should bear in mind that work on special missions could be done concurrently with work on the major topics he had mentioned.

41. Mr. AGO thought that the question of special missions was precisely the kind of limited, fairly well-defined topic the Commission could usefully study in the intervals between its work on much broader subjects. The Secretariat had prepared a very good working paper which plainly showed that the topic should be examined independently and restricted to special missions proper. It should not be associated with the subject of conferences and congresses convened by States, which was more bound up with that of conferences and congresses convened by international organizations. If, as a result of his work, the special rapporteur found that that delimitation was unsuitable, he could always inform the Commission so that it could rectify its error.

42. All members seemed to agree on the method, which would be to draft a small set of articles, some of which

⁶ *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, p. 33, para. 60.

might perhaps depart from the rules laid down by the Vienna Conference, whereas others would follow those rules. But, like Mr. Verdross, he hoped that the Commission would allow its special rapporteur ample latitude.

43. Mr. GROS agreed with Mr. Ago and Mr. Tunkin that the importance of the subject should not be exaggerated. Other members, on the contrary, appeared to think that the scope of the study should be widened; for example, some wished to include negotiators specially appointed to discuss certain technical questions. In his view, when a government strengthened an embassy by sending experts for some particular negotiation, it was not really sending a special mission; it was still the ambassador who directed the negotiation, even if his name did not appear on the list of negotiators. Thus many of the missions which some would describe as special missions were really subject to well established general rules.

44. It had also been said that many special missions had tasks which were not diplomatic. But the meaning of the expression "diplomatic missions", especially since the adoption of the 1961 Vienna Convention, was very broad. Even the discussion of technical matters involved relations between States; similarly, when negotiations were conducted to settle an incident, an effort was being made to improve relations between States. In both cases the negotiations were of a diplomatic character.

45. If he had understood Mr. Ago and Mr. Tunkin correctly, they saw no reason why the Commission should not take the 1961 Vienna Convention as a basis for its work, even if it had to adapt some of the rules to the case of special missions; he shared that view.

46. He also agreed with Mr. Tunkin that it would be better to leave aside the question of delegates to international conferences and that the best form for the Commission's proposals would be a draft protocol to supplement the 1961 Convention. But he thought that the Commission should leave the special rapporteur a good deal of latitude in drafting his report.

47. The work previously done by Mr. Sandström as the Commission's Special Rapporteur should not be underestimated; it provided an excellent starting point, and it was arguable that if the Vienna Conference had had more time, it could have reached a conclusion on the basis of Mr. Sandström's report (A/CN.4/129). Sir Gerald Fitzmaurice had also been right in suggesting that the provisions of the 1958 draft should apply to special missions *mutatis mutandis*.⁷

48. The rules to be drawn up concerning special missions could be considered at the next session on the basis of the report to be submitted to the Commission by the special rapporteur it would appoint.

49. Mr. CADIEUX endorsed the view that international conferences should be excluded from the terms of reference of the special rapporteur for special missions, but

pointed out that the Commission had already instructed the Special Rapporteur for relations between States and international organizations to consider certain kinds of conference.

50. In choosing its special rapporteurs the Commission should, of course, bear in mind the special qualifications of its members, but he hoped that in future it would also try to establish a sound geographical balance and an equitable distribution between the various legal systems they represented.

51. Sir Humphrey WALDOCK said that although he broadly agreed with Mr. Tunkin on the need to confine the study to special missions proper, it would not be wise to take a hasty decision to exclude international conferences entirely. He readily agreed that major international conferences should be excluded, but it was becoming increasingly common for a special mission to be entrusted with the discussion of an agreement on what he would call a plurilateral rather than a multilateral basis. Special missions of economic experts were sent to discuss questions of common policy and common interest for the purpose of drawing up a treaty or other form of agreement, and today that was not always done on a bilateral basis: it frequently involved a group of countries. Thus, while he would not object to the emphasis being placed on special missions proper, he would resist any exaggerated tendency to exclude all material that might be considered to relate to international conferences in the widest sense.

52. Mr. EL-ERIAN said that several speakers had referred to the possible relationship between the subject of special missions and the subject of relations between States and intergovernmental organizations, for which he was the Special Rapporteur. Mr. Briggs had asked whether, in his reports on relations between States and intergovernmental organizations, he proposed to deal with the general question of delegates to international conferences, and had drawn attention to the distinction between the special question of the privileges and immunities of delegates to conferences and the general question of the organization and procedure of conferences.

53. Paragraphs 111 and 112 of his first report (A/CN.4/161) were devoted to an analysis of the work of the League of Nations Committee of Experts for the Progressive Codification of International Law on the procedure of international conferences. He had also examined, in paragraphs 118 and 119, the preparatory work on the "method of work and procedure" of the first United Nations Conference on the Law of the Sea, undertaken by the United Nations Secretariat with the advice and assistance of a group of experts. The rules of procedure that had been drawn up had provided an excellent basis for the proceedings of the two Geneva Conferences on the Law of the Sea, the 1961 Vienna Conference on Diplomatic Intercourse and Immunities and the 1963 Vienna Conference on Consular Relations.

54. In his conclusion, in paragraph 178, he had given a broad outline of the subject, dividing it into three "self-contained and closely related groups of ques-

⁷ *Yearbook of the International Law Commission, 1960, Vol. I* (United Nations publication, Sales No.: 60.V.1, Vol. I), p. 259, para. 16.

tions", the second of which comprised privileges and immunities of international organizations, related questions of the institution of legation with respect to international organizations, and diplomatic conferences.

55. A distinction could be made between conferences convened by international organizations and conferences convened by individual States; it was also possible to separate the special question of the privileges and immunities of delegates from the general question of the organization and procedure of international conferences.

56. There was bound to be a certain amount of overlapping between the topic of special missions and other topics, but any decision taken by the Commission at that stage could only be tentative. The Special Rapporteur should be given discretion to study the topic and submit his conclusions to the Commission.

57. Like other members of the Commission, he looked forward to the valuable contribution which Mr. Bartoš could make to the study of special missions.

58. Mr. de LUNA said he agreed with the views expressed by Mr. Bartoš, the Secretary and Mr. Tunkin. The topic should be confined to special missions in the strict sense of the term; for it was true that the problems relating to the appointment and powers of delegates to international conferences were linked with all the other problems raised by conferences.

59. He endorsed Mr. Gros' comment concerning experts temporarily attached to an embassy for a particular negotiation. So long as relations between States were involved, such negotiators were responsible to the Ministry for Foreign Affairs alone and worked under the authority of the Ambassador.

60. Mr. LIANG, Secretary to the Commission, said he had been struck by Sir Humphrey Waldock's remarks; there was perhaps an undue tendency to think in terms of large conferences.

61. He was not altogether in agreement with some speakers regarding the position of special missions in relation to ambassadors. Sometimes a special mission was placed under the general control of the head of the permanent mission, but it was not at all uncommon for a special mission to be headed by another person when it dealt with matters which were not subject to the authority of the permanent diplomatic representatives. It was within his own experience as a member of the Chinese mission to the 1944 Conference at Dumbarton Oaks, which had prepared the draft treaty that had led to the United Nations Charter, that the Chinese Government had made a point of naming as head of its delegation an international lawyer of repute, rather than the head of its permanent mission to the United States.

62. The CHAIRMAN, speaking as a member of the Commission, said that he was in favour of a special rapporteur being appointed to study the question of special missions. The working paper prepared by the Secretariat was certainly extremely useful, but it was not altogether correct in paragraph 17, where it described the position he had taken on the question how far the 1958 draft on diplomatic intercourse and immunities

could be made applicable to special missions. He had not proposed that the same rules should be made applicable in a literal sense, but had favoured the formula proposed by Sir Gerald Fitzmaurice, whereby the provisions of the 1958 draft would be applied *mutatis mutandis* because there was no time at that stage for a detailed study of the subject.

63. In the memorandum he had submitted at the twelfth session he had criticized Mr. Sandström⁸ for implying in his report that special missions were exempt from the application of certain fundamental rules governing diplomatic intercourse, such as the need for the *agrément* of the receiving State. He had therefore been particularly interested by the view put forward by Mr. Bartoš at the previous meeting, that in fact special notice had to be given by the sending State of its intention to send a special mission to the receiving State.

64. The special rapporteur would have to go deeply into the whole subject and might find some of the conclusions reached at the twelfth session unacceptable. One of the reasons why the Commission had been unable to do full justice to the subject on that occasion had been that the discussions had taken place at the same time as the meetings of the Drafting Committee, so that five members had been unable to take part.

65. Speaking as Chairman, he said there was general agreement that arrangements for the study of the topic should be begun immediately by appointing a special rapporteur, who should be asked to submit draft articles, few in number, drawing where appropriate on the provisions of the Vienna Convention on Diplomatic Relations. The Commission evidently did not wish to decide at the present stage whether those articles should take the form of a protocol to the Vienna Convention, a set of rules for inclusion in a separate convention or some other possible alternative; on that point the special rapporteur should submit a recommendation. The draft articles should be formulated in a terse and concrete manner, without going into too much detail; in other words, they should be suitable for a convention rather than a code on the subject. There was also general agreement to reaffirm the 1960 decision that itinerant envoys should not be dealt with separately.

66. Most members also considered that, as decided in 1960, the question of the privileges and immunities of delegations to conferences convened by States should not be included within the scope of the draft.

67. Perhaps the question of the time when the report was to be submitted could be decided when the officers of the Commission, in consultation with its special rapporteurs, made their recommendations concerning the agenda for the fifteenth session.

68. He invited the Commission to confirm the appointment as Special Rapporteur of Mr. Bartoš, who was clearly the Commission's choice.

Mr. Bartoš was appointed Special Rapporteur on special missions by acclamation.

⁸ Yearbook of the International Law Commission, 1960, Vol. II (United Nations publication, Sales No.: 60.V.1, Vol. II), p. 116, para. 7.

69. Mr. BARTOŠ, after thanking the Commission for the confidence it had shown in him, said that in his view the scope of the subject should be restricted as much as possible. For lack of time, the Commission had been unable to decide between the two alternatives submitted by Mr. Sandström in his draft,⁹ and it might be well to go further into the subject.

70. First, with regard to the relationship between the draft articles on special missions and the 1961 Vienna Convention, the provisions of the Convention would serve as a basis for the work and should be followed as closely as possible, subject to allowance for the difference in nature between special missions and permanent missions. Depending on whether that difference was more or less pronounced, the draft might take the form either of a separate convention or of a protocol to the Vienna Convention. But it would be premature to draw conclusions on that point at present, for it could only be settled by the results of the proposed study.

71. A distinction should be drawn between *ad hoc* diplomacy and permanent diplomacy, so that it would be necessary to define the relationship between special missions and permanent missions. That point was not dealt with in the Vienna Convention, which related solely to diplomatic relations conducted through permanent missions.

72. Special missions should not be confused with permanent specialized missions, which were not only accredited to specialized agencies and regional organizations, but were also used in bilateral relations; for example, the United States missions responsible for implementing the Marshall Plan.

73. It would therefore be necessary to derive from the practice the rules applicable to special missions proper, whatever their size, and to follow the principles laid down by the Commission in 1960. The summary given by the Chairman would be very useful with regard to the directives to be followed.

74. Mr. de LUNA explained that he had not meant to say that all special missions were always under the authority of embassies, but that that was very often the case.

Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)) (A/CN.4/154, A/CN.4/159 and Add.1, A/CN.4/162)

[Item 2 of the agenda]

75. The CHAIRMAN invited the Commission to consider item 2 of the agenda and drew attention to the note by the Secretariat (A/CN.4/159).

76. Sir Humphrey WALDOCK, Special Rapporteur on the Law of Treaties, introducing his report on the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (A/CN.4/162), said that he had concentrated

his attention on the twenty-six treaties which had come into force. He had found that five of them had been deliberately closed to additional States and that the remaining twenty-one all contained clauses, framed in virtually identical terms, extending participation to any State not represented at the negotiating conference to which a copy of the treaty might be communicated by the Council of the League of Nations.

77. A rather similar situation had been encountered in connexion with the transfer of certain functions, notably those of depositary, from the League of Nations to the United Nations. Provisions concerning the functions of a depositary were comparable to participation clauses; both belonged to the final clauses which, as distinct from other provisions in a treaty, acquired a certain legal force before the treaty itself actually entered into force.

78. One possible method of extending participation to additional States was by means of a protocol of amendment. That method had been adopted in seven instances, but it could give rise to certain difficulties. One difficulty was that of establishing which States were actually parties if, during the intervening period, a succession of States had taken place; another was that protocols only came into force *inter se*, and if the number of ratifications was limited, the new participants would only enter into treaty relations with those parties to the original treaty which had subscribed to the protocol.

79. He had not been altogether clear about what was expected of the Commission by the General Assembly and had presumed that it should put forward certain considerations rather than attempt to reach a final conclusion. The simple solution he had outlined in his report was therefore suggested somewhat tentatively, but perhaps it would show that the constitutional difficulties discussed in the Sixth Committee were not as great as had been expected. What he envisaged was the General Assembly directing the Secretary-General to send copies of any treaties concluded under the auspices of the League of Nations to any Member of the United Nations, or any other State agreed upon by the designated organ. That organ might be the General Assembly or the Economic and Social Council, which had been given such functions under a number of treaties concluded within the United Nations. It would be necessary to call upon all Member States to use their good offices to secure the assent of non-member States to that procedure.

80. The alternative would be to consider some method of revision of existing treaties — which entailed its own difficulties — or a special form of resolution of the kind submitted by Australia, Ghana and Israel in the Sixth Committee (A/CN.4/162, para. 11).

81. He presumed that the Commission would have to devote a section of its report to the General Assembly to the question, so that it would have to decide whether to put forward the kind of solution he had in mind.

82. Mr. TABIBI congratulated the Special Rapporteur on his extremely valuable report and thanked the Secretariat for the useful summary it had prepared of the relevant discussion in the Sixth Committee. During that discussion he had opposed reference of the matter to

⁹ *Ibid.* pp. 112-115.

the Commission because it already had a heavy agenda and because he was anxious that the position it would finally take on state succession should not be prejudiced by a discussion on extended participation in treaties. As a body of jurists the Commission could hardly do otherwise than uphold the principle of the universality of treaties, and it had already indicated, in article 9 of Part I of its draft on the law of treaties,¹⁰ how they could be opened to the participation of additional States.

83. There could be no doubt that the law at present was that no treaty could be open to the participation of additional States except by express provision in the treaty itself or by the consent of the parties, and that new States had no automatic right of succession to rights and obligations under treaties concluded before they had acquired independence.

84. Perhaps the Commission should state in its report that it was in favour of solving the problem either by the depositary ascertaining the views of the parties, or by a resolution of the General Assembly concerning participation, which would call upon non-member States to give their assent to the accession of new States to existing treaties. It seemed that the method of an amending protocol had definite drawbacks and was not appropriate in all cases. Any other method would probably give rise to serious political difficulties.

85. Mr. BARTOŠ said he favoured a solution that would enable all States to accede to the treaties concluded under the auspices of the League of Nations, since they were treaties of general interest which created universal rules of international law.

86. The difficulties arose from the notion — mistaken, in his opinion — that all treaties, even treaties of general interest, were instruments *inter alios acta* to which third States could not accede unless provision was made for such accession in the treaty itself, or unless the States parties to the treaty consented. It was a matter in which the United Nations was in duty bound to act.

87. The resolutions and protocols concerning the transfer of the functions of the League of Nations to the United Nations set out certain rules of which the Special Rapporteur had made an admirable digest, but, with few exceptions, the power thus vested in the United Nations had not been exercised. Under General Assembly resolution 24 (I) it was possible to determine which organ of the United Nations was competent to assume the functions formerly exercised by organs of the League of Nations. Almost all States would be able to accede to a treaty concluded under the League's auspices, not merely those which had participated in drawing it up, but also those to which a copy of the treaty was communicated. Member States had agreed that the League of Nations Council should be empowered to communicate the texts of treaties to States for purposes of accession. In his opinion, that right of communication had not lapsed with the disso-

lution of the League of Nations Council; it was for the General Assembly of the United Nations to appoint an organ to take over that function, and the Sixth Committee could propose, for each individual treaty, a resolution to communicate the text to States with an invitation to accede. If progress was to be made in developing international law, accession must not be confined to treaties which, for some States at least, created general rules of international law.

88. There were several possible solutions. The simplest and most suitable was that proposed by the Special Rapporteur — namely, the adoption of a resolution inviting States to accede to a treaty.

89. Some conventions might perhaps require revision. In such cases, the procedure should be that already adopted for the groups of conventions on opium and dangerous drugs and on the suppression of the white slave traffic — namely, a protocol to be signed by all States. As that was an important question under the terms of the United Nations Charter, a two-thirds majority of the Members of the United Nations should be required for adoption of the resolution approving the protocol, though the protocol itself need not be signed by that majority. A better solution might perhaps be to adopt a resolution, and reserve recourse to a protocol for cases in which a treaty needed to be brought up to date. A third possible solution would be for the General Assembly to declare itself, by a resolution, competent to assume the functions of the League of Nations Council.

90. Under article 13 of the Charter, the General Assembly was enjoined to encourage the progressive development of international law and its codification. The Security Council was a special organ which did not correspond to the League of Nations Council in all respects, and which did not enjoy general competence in matters of international law. Some writers took the view that the Economic and Social Council could be asked to bring some of the conventions in question up to date, since many of them dealt with matters within its competence.

91. The Commission should present the General Assembly with an opinion definite enough to indicate means of enabling a larger number of States to accede in one way or another to the treaties concluded under League of Nations auspices without impairing the rights of the parties to those treaties. From a purely legal point of view they were not closed treaties, and suitable means should be sought to ensure that they served the purpose for which they had been concluded, namely, to establish rules of international law. If the treaties were capable of being applied by other States, the Commission, with its enlarged membership, should devise ways and means enabling those other States to accede to them. For how could the States which did not apply the treaties be reproached for breaches of general international law if they were refused accession to the treaties?

92. On that point he was, he thought, in agreement with the Special Rapporteur, and the solution he was

¹⁰ *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9, p. 11.*

proposing was not based on the rule *de lege ferenda* which the Commission had included in article 9 of Part I of its draft on the law of treaties, concerning the two-thirds majority prescribed for broadening state participation. It was based both on the general spirit of the Charter and on the need to develop international law. One of the purposes of the United Nations was international co-operation. The treaties they were discussing were to some extent the means of achieving that purpose, and it would be in keeping with the spirit of the Charter to seek extended participation in them by States.

93. Mr. LACHS asked whether all the multilateral agreements listed in the working paper prepared by the Secretariat for the Sixth Committee (A/CN.4/L.498) were still formally in force, or whether some had been amended, superseded or covered by subsequent agreements.

94. Sir Humphrey WALDOCK, Special Rapporteur, said that in his opinion the Commission was not called upon to review the multilateral treaties concluded under the auspices of the League of Nations in order to establish those in which the participation of additional States might usefully be considered. Some would probably be found to be outmoded, but the Commission's task was surely limited to the technical aspects of the problem.

95. Mr. LIANG, Secretary to the Commission, in reply to Mr. Lachs, said that treaties concluded under the auspices of the League of Nations which, owing to the disappearance of organs of the League, could no longer be applied, had been excluded from the list in the Secretariat's working paper.

96. As far as the others treaties were concerned, since he had started acting as depositary, the Secretary-General had in some cases received no instrument and in others only denunciations. Some of the agreements might have tacitly fallen into desuetude while others had been superseded by new treaty relations between the parties. Three of the conventions listed, namely, the Commission regarding the Measurement of Vessels Employed in Inland Navigation, the Agreement between Customs Authorities in order to Facilitate the Procedure in the Case of Undischarged or Lost Triptychs, and the Agreement Concerning the Preparation of a Transit Card for Emigrants, were regional in character and specifically designed to deal with European conditions, so it was doubtful whether they need be opened to the participation of new States in other parts of the world.

97. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that some regional treaties had been originally intended to be closed and contained no clause opening them to the participation of States outside the region.

The meeting rose at 1 p.m.

713th MEETING

Wednesday, 3 July 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)) (A/CN.4/154, A/CN.4/159 and Add.1, A/CN.4/162)

[Item 2 of the agenda] (*continued*)

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

2. Mr. PAL said he fully subscribed to the contents of the report (A/CN.4/162) by the Special Rapporteur on the law of treaties and to the way in which he had approached the question. The functions conferred on the Council of the League of Nations by the parties under the participation clauses in the twenty-one open treaties under consideration were not analogous to the functions of a depositary. Under section C of General Assembly resolution 24 (I), the General Assembly was itself to examine or would submit to the appropriate organ of the United Nations, "any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character." He wondered, therefore, whether the Commission would have to examine the twenty-one treaties in order to establish which of them would fall within the scope of that decision by the General Assembly.

3. In his opinion, article 9, paragraph 1 (b), in Part I of the draft on the law of treaties adopted at the previous session¹ stated the existing law on the subject. If that were so, it would seem that the United Nations could assume the functions previously discharged by the Council of the League under the participation clauses. The Commission must therefore give serious consideration to the solution suggested by the Special Rapporteur in paragraph 32 of his report. With some modifications that report would presumably form the basis of the section of the Commission's own report to be devoted to the matter.

4. Mr. YASSEEN said that during the discussion of the Commission's report in the Sixth Committee, speaking as the representative of Iraq, he had expressed doubts concerning the advisability of referring the question back to the Commission. He had expressed the view that, if the object was to find a formula consistent with the progressive development of international law, it would be better to wait for the Commission to complete its draft convention on the law of treaties.

5. The question of opening a closed treaty had been touched on in the Commission's 1962 draft. However,

¹ Official Records of the General Assembly, Seventeenth Session, Supplement No. 9, p. 11.

the issue was not how to make provision for a situation which might arise in the future, but how to remedy an existing situation.

6. If the question were approached from that point of view one possible solution would be to draft a clause giving retrospective effect to whatever provisions were adopted. But since no such rule had existed at the time when the States had concluded the treaties in question, it could not be the expression of their will.

7. If the Sixth Committee expected the Commission to tell it what solution was possible under existing international law—in other words, if it wanted an advisory opinion—then, as he had contended as a member of that Committee, it should have applied to the International Court of Justice. But if the intention was to solve the problem by means of an administrative arrangement, then the Sixth Committee, assisted by the Secretariat, could have done so.

8. At all events, since the question had been referred back to the Commission, it was faced with a specific situation—the case of some conventions concluded under the auspices of the League of Nations. That being so, the Commission should, as Mr. Lachs had pointed out at the previous meeting, first assess from the practical standpoint the extent of the question referred to it, on which the Sixth Committee had already spent a good deal of time; only thus could the Commission be sure that its efforts to settle the question were justified.

9. First, a list of the treaties still in force would have to be prepared. It would not, of course, include those which seemed to have been intended to be “closed”, but would consist of about twenty treaties of general interest containing a clause under which any State could accede if the Council of the League of Nations communicated a copy of the treaty to it. It was the dissolution of the Council that had changed those treaties into closed treaties.

10. According to the prevailing rules of international law, the solution would be to ask the States parties to the treaties, which had been closed or *quasi*-closed as a result of certain administrative difficulties, to agree unanimously that the treaties be opened to new States. True, the possibility of a “bilateral” procedure, that was to say, the establishment of a conventional link between some of the parties to a treaty and the States whose accession they agreed to, could not be ruled out. But that would not really be a complete solution.

11. In reality, the problem was simpler, and its most important aspect was that brought out in the last few lines of the Special Rapporteur's report, namely, the fact that it was mainly administrative. Since it was the disappearance of the Council of the League of Nations which had changed the treaties into closed treaties, the proper course would be to seek means of establishing an effective link between the organs of the League of Nations and those of the United Nations, and to consider whether one of the organs of the United Nations could assume the functions of the League Council. Some questions of succession between the League and the United Nations had already been settled in recent diplomatic history. The possibility of adopt-

ing a similar procedure in the case under consideration should be examined.

12. It did not seem advisable to seek partial solutions which might make it possible to establish bilateral links between some of the parties to the treaties and the States wishing to accede to them, but which might not be satisfactory.

13. Mr. TSURUOKA said that the first question to be settled was whether there was any genuine need for the Commission to solve the problem and whether the new States wished to accede to the multilateral treaties concluded under the auspices of the League of Nations. Japan, for example, which had participated, as a Member of the League, in the negotiation and drafting of those treaties, had ratified only four of them. It was open to question, therefore, whether the new States were truly interested in those treaties, which were already out of date; for the situation had changed since they had been concluded, especially with regard to the technical matters with which many of them were concerned.

14. Another point, which had already been raised by Mr. Yasseen, was the interpretation of the treaties, which so far was not within the Commission's terms of reference. Not merely one clause, but quite a number of articles, would have to be interpreted. Before the Commission could give the Sixth Committee an opinion, it would have to study the treaties thoroughly and ascertain which States were parties to them, and what their intentions were.

15. He was inclined to think that it would be best to recommend the Sixth Committee to ascertain the intentions of the new States and then to adopt an established procedure for treaty revision with the participation of all the States which had signed and ratified the treaties.

16. Mr. BRIGGS said that it was not for the Commission to pronounce on whether the question under discussion was urgent or which of the twenty-one treaties concerned were of general interest or which were obsolescent or obsolete. The Commission's task was very similar to that entrusted to it by General Assembly resolution 478 (V) when it had been asked to study the questions of reservations to multilateral conventions. It should direct itself to analysing the relative advantages of the possible methods of extending participation, rather than attempt to make a choice between them.

17. The Special Rapporteur had provided an admirable basis for the section on the matter that would have to be included in the Commission's own report, and for the purposes of that section the interesting suggestion in paragraph 32 should be elaborated further. Consideration should also be given to the method adopted in section I, paragraph 2, of General Assembly resolution 24 (I) of recording the assent of the parties to a procedure for adapting participation clauses so as to transfer certain functions from the League to the United Nations. As far as the organ designated to replace the Council of the League was concerned, he would prefer the General Assembly to the Security Council or the Economic and Social Council, but that was a matter for the Sixth Committee.

18. Mr. CADIEUX said that the Commission's instructions did not specify the particular legal points to be studied, nor did they recommend what special matters or problems should be considered. Manifestly, however, the Commission's main task must be to help the General Assembly to solve any legal problems which might arise in connexion with extended participation in general multilateral treaties concluded under the auspices of the League of Nations.

19. A number of points seemed well established, even if not wholly beyond dispute. First, it was recognized that the problem was important and that it had become particularly urgent as a result of the admission of many new States to the international community.

20. Secondly, the Commission's task was mainly general and abstract in nature rather than concrete and specific. It was known that the Secretary-General took the view that he could not accept signatures, ratifications or accessions to closed multilateral treaties concluded under the auspices of the League of Nations. His position in that matter was plainly set out in the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7). In addition, as the Special Rapporteur had noted, the General Assembly had asked the Commission to consider the legal and technical aspects, but not to consider how far any particular treaty might or might not still retain its usefulness.

21. Thirdly, the problem under consideration did not seem to have any direct link with that of state succession. Indeed, it arose precisely because the former metropolitan State was not a party to treaties to which a new State might wish to accede. Yet it had some aspects that were connected with state succession. For example, it might be asked whether a new State could ratify a treaty signed, but not ratified, by the State it had succeeded — a question raised in paragraph 151 of the memorandum on Succession of States in relation to general multilateral treaties of which the Secretary-General is the Depositary (A/CN.4/150). Still, although that particular question had some connexion with the more general problem before the Commission, it was a specific question which the Commission was not required to settle at that stage of its work.

22. Another aspect of the problem perhaps raised greater difficulties. As some new States might, by virtue of the principles governing succession, be bound by treaties concluded under the auspices of the League of Nations, it might be extremely difficult to draw up a list of the States which were parties to those treaties at present. That, however, was probably more a question of fact than a problem of state succession. One of the objects of the inquiry was to determine which countries regarded themselves as having become parties to treaties concluded under the auspices of the League of Nations by virtue of the rules governing state succession. That difficulty was common to both the methods proposed, however — the protocol method and the procedure suggested in the three-power draft resolution (A/CN.4/162, para. 11).

23. The only possible solution would be a procedure enabling the Secretariat to draw up a list — perhaps

by circulating a questionnaire — of the States at present parties to each of the twenty-one treaties regarded as still in force and which might still be "open". As the Special Rapporteur had pointed out, the amending protocols adopted by the United Nations sought to minimize the difficulty by making the entry into force of the amendments dependent on acceptance by a specified number rather than by the majority of the parties. That method should probably supplement one or other of the two procedures mentioned, but it had a drawback which reduced the usefulness of both.

24. Those points provided a general framework for the study to be undertaken by the Commission, and in the short time at its disposal it should not enquire into secondary matters, such as the question of reservations or whether the treaties should be opened to all States, not merely to States Members of the United Nations or of specialized agencies — matters which were not essential to the solution of the main problem.

25. Three methods had been proposed for opening treaties concluded under the auspices of the League of Nations. While recognizing the force of the Special Rapporteur's objections, he still thought, on balance, that the protocol method was the best. The Special Rapporteur's proposal constituted a new way of approaching and dealing with the problem and had much to recommend it. He apparently contemplated a procedure in two stages: first, the parties to the treaties concluded under the auspices of the League would have to consent to the substitution, in the participation clauses, of Members of the United Nations for Members of the League of Nations; and secondly, they would have to consent to the substitution of a designated organ of the United Nations for the Council of the League. It might perhaps be possible to achieve that object direct, in a single operation, by transferring to a United Nations organ the power formerly vested in the League Council to authorize States not Members of the League to accede to a treaty, simply by communicating a copy of the treaty to them. A substitution of that kind appeared to be consistent with the intention of the Members of the League of Nations that the twenty-one treaties should be "open".

26. The question then arose whether the United Nations had the capacity to substitute one of its own organs for the Council of the League. It might be held that it had that capacity by virtue of the resolutions adopted at the final session of the League Assembly, whereby the Members of the League undertook to assent to the steps to be taken by the General Assembly of the United Nations with regard to functions and powers belonging to the League under international agreements.² Resolution 24 (I) of the United Nations General Assembly, which was based on the League resolution, applied broadly to the particular problem before the Commission. In section B of that resolution, concerning instruments of a technical and non-political character, the General Assembly expressed its willingness "to take the necessary measures to ensure the continued exercise"

² *League of Nations Official Journal, Special Supplement No. 194*, Geneva, 1946, annex 27, p. 278.

of the functions and powers previously entrusted to the League. In section C of the same resolution the General Assembly had decided that it would itself examine "any request from the parties that the United Nations should assume the exercise of functions of powers entrusted to the League of Nations" by treaties or other instruments having a political character.

27. The procedure of entrusting the functions of the League Council to a United Nations organ would be simple and expeditious. It would avoid most of the disadvantages of the other two methods. If the Commission decided to recommend that procedure, it should refrain from making any suggestion concerning the United Nations organ to be substituted for the League Council. It should be left to the Sixth Committee, and finally to the General Assembly, to take what would be essentially a political decision, i.e., to designate the organ to operate within the legal framework proposed by the Commission.

28. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was required to give legal, not political advice as to what legal device could be adopted to achieve wider participation in general multilateral treaties concluded under the auspices of the League of Nations. It had not been asked to give an opinion on the desirability of opening the League treaties to the participation of new States or on the importance of such a step. Since interest in the matter had probably been largely inspired by the suggestion put forward in paragraph 10³ of the commentary on article 9 in Part I of the Commission's draft on the law of treaties that the opening of a treaty to accession by additional States did not necessitate the negotiation of a fresh treaty and that more expeditious procedures should be considered, it would hardly be consistent to recommend the traditional protocol of amendment as the only possibility, though it was perhaps the safest solution.

29. Practice, however, showed that the protocol method could be cumbersome and was liable to create legal imbroglis because, for example, the dates of entry into force of the protocol and of the amended treaty differed. The Commission should point out in its report that the method was unobjectionable from the legal point of view, but could cause practical difficulties.

30. The method suggested in the three-power draft resolution, which was still before the Sixth Committee, had certainly been inspired by the Commission's commentary on article 9 in Part I of its draft: the Secretary-General would have to ascertain from the parties to the relevant conventions whether they objected to the conventions being opened to any State Member of the United Nations or members of the specialized agencies. Although that method too might give rise to practical difficulties, such as uncertainty about which States were actually parties when there had been a succession of States, it was also legally quite admissible.

31. The Special Rapporteur on the law of treaties was to be commended for having found time to prepare

such an interesting and profound study, which gave proof of a bold legal imagination. The solution he had outlined, by means of the transfer of certain functions from the League of Nations to the United Nations, was legally admissible, though it might have come as a surprise to those who had been weighing up the pros and cons of protocols, as against a General Assembly resolution by which the express or tacit consent of the parties would be obtained.

32. The functions of a depositary conferred upon the League of Nations by the parties to treaties could, and had, been transferred to the United Nations by means of concurrent resolutions of the two bodies, without additional formal action by the parties, and there seemed no reason why the same procedure should not be applied to the function, previously performed by the League of Nations Council, of inviting further States to accede to a treaty by communicating a copy of the treaty to them. There was agreement among the original parties, inscribed in the treaties, that those treaties should be open to other States by a decision of a competent international organ, and the dissolution of the League was not sufficient to turn those open treaties into closed ones. The League of Nations Assembly had recommended governments "to facilitate in every way the assumption without interruption by the United Nations . . . of functions and powers which have been entrusted to the League of Nations under international agreements of a technical and non-political character . . ." ⁴ and the United Nations had agreed, by General Assembly resolution 24 (I), section B, "to take the necessary measures to ensure the continued exercise of these functions and powers . . ."

33. That view corresponded to the advisory opinion of the International Court of Justice on the *International Status of South-West Africa*, in which the Court had given an affirmative reply to the question whether "since the Council disappeared by the dissolution of the League . . . these supervisory functions are to be exercised by the new international organization created by the Charter."⁵ In that case doubts had arisen because the functions had been neither expressly transferred to the United Nations nor expressly assumed by it. But the concurrent resolutions of the League and the United Nations constituted a much clearer transfer and acceptance of functions and powers than the 1946 League resolution on mandates, on which the Court had based its advisory opinion.

34. But although he subscribed to the arguments set out in the Special Rapporteur's report, he did believe that in replying to the question put to it by the General Assembly, the Commission ought to take a more neutral and cautious position, comment on the three alternative methods, and explain some of the practical difficulties which the first two might entail. It ought to say that the safest and least objectionable method was that of an amending protocol, and that the procedure proposed in the three-power resolution would not conflict with legal principles; finally, it should suggest the possibility

³ *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, p. 12.

⁴ *League of Nations, Official Journal, Special Supplement No. 194*, loc. cit.

⁵ *I.C.J. Reports*, 1950, p. 136.

advanced by the Special Rapporteur of a United Nations organ assuming the functions formerly performed by the Council of the League.

35. Perhaps it would be wiser not to pursue the argument advanced by the Special Rapporteur in paragraph 30 of his report, about final clauses operating independently of constitutional processes; it was not essential to his main argument and was unlikely to commend itself to States.

36. Mr. LACHS said that the emergence of new States was having a great impact on various branches of international law and had revived interest in extending participation in multilateral treaties concluded under the auspices of the League of Nations. As the Special Rapporteur had pointed out in his illuminating report, the United Nations had already dealt with a number of treaties of particular interest to the international community by means of special procedure, and in almost all cases substantial amendments had been introduced to adapt the treaties to new conditions. Substantive and procedural matters had been settled at the same time. In some instances previous conventions had been entirely replaced by new instruments, such as the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery and the 1961 Single Convention on Narcotic Drugs.

37. The Commission's task was to give a legal opinion on how the remaining treaties concluded under the auspices of the League which were still in force, and participation in which was not closed, could be opened to additional States. The method outlined in the three-power draft resolution submitted to the Sixth Committee suffered from the weakness inherent in it as a recommendation possessing no binding force. Nor was it clear what the effect of giving such general authority to the Secretary-General would be. A number of other pertinent objections to that method had been raised in the Sixth Committee. The argument that it would be expeditious seemed hardly decisive in view of the fact that no great interest had been shown by States in acceding to the treaties in question since the transfer of certain functions of the League of Nations to the United Nations in 1946.

38. The procedure of a protocol of amendment, though free from certain kinds of legal uncertainty, also had its disadvantages and would need careful consideration. The views expressed by the legal counsel in the Sixth Committee as to the cases in which a protocol could be dispensed with had not clarified the issue.

39. The Special Rapporteur had discussed the legal status of final clauses which affected the operation of the treaty and which he suggested could possess legal force before the constitutional process of ratification had been completed. But it was obvious that once consent had been given, bringing the treaties into force, the final clauses would become an integral and inseparable part of the treaties.

40. The question of extended participation in multilateral treaties might have some bearing on issues of

state succession in that it could bring into question, for example, the status of signatories which, as a consequence of territorial changes, no longer qualified as parties; but he would not go so far as to say that the opinion offered by the Commission would in any way prejudice any rules it might ultimately adopt concerning state succession.

41. However, the principal issue involved was that to which he had referred in the question he had asked at the previous meeting (para. 93). He believed that most of the treaties listed in section A of the Secretariat's working paper (A/C.6/L.498) had been overtaken by events and needed to be replaced by more-up-to-date instruments, which was one of the reasons why they had aroused relatively little interest on the part of new States. Some might already have been superseded; for example, the 1925 Convention regarding the Measurement of Vessels Employed in Inland Navigation had been replaced by a convention with the same title concluded at Bangkok in 1956; the 1931 Convention on the Taxation of Foreign Motor Vehicles had been replaced by the 1956 Convention on the Taxation of Road Vehicles for Private Use in International Traffic; and the 1923 Convention relating to the simplification of Customs Formalities had been replaced by the 1954 Convention concerning Customs Facilities for Touring.

42. Although it might be argued that the question before the Commission was of a technical and legal character, the substantive aspects must not be overlooked, and as a codifying body the Commission should point out the need for bringing old treaties up to date. Nothing much would be gained and the prestige of the Commission would not be enhanced if the only result of its advice was one or two new accessions to old treaties. In addition to recommending the proper legal procedure to be followed, the Commission ought to recommend that the appropriate organs of the United Nations consider which treaties concluded under the auspices of the League of Nations should be modernized or replaced by new instruments, and that steps be taken to that end.

43. Mr. VERDROSS said that although the Commission's normal function was to advance international law, since the General Assembly had asked it for an opinion it should confine itself to saying what could be done under the existing law. It was very doubtful whether one could speak of the "succession" of the United Nations to the League of Nations, although the International Court of Justice had considered the question three times in connexion with the *South-West Africa* case and had answered it in the affirmative. In his opinion the only legally sound procedure was that followed by the General Assembly in 1949, when it had restored the General Act of Geneva, of 26 September 1928, to its original efficacy;⁶ the General Assembly could adopt a draft convention and submit it to States for ratification.

44. Another question, raised by Mr. Lachs, was whether the Commission could still recommend States to accede to conventions concluded under the auspices of the

⁶ General Assembly resolution 268 (III), section A.

League of Nations in the form in which they had been drawn up at the time. While giving an opinion on the legal procedure to be followed, the Commission could certainly add a suggestion on the lines proposed by Mr. Lachs.

45. Mr. TUNKIN said that Mr. Lachs had put the problem in proper focus by urging that the Commission should not take too narrow a view. The Commission had been asked to make recommendations; it was not called upon to make a choice between the various possible solutions. It should therefore state the possibilities, so as to enable the General Assembly to take a decision.

46. With regard to the question of the real extent of the problem, raised by Mr. Lachs and Mr. Tsuruoka, the Commission could recommend that the Secretariat be requested to make a closer study of all the conventions in the list it had submitted to the Sixth Committee and in particular to ascertain which of them were really in force. If there was any doubt on that point, the Secretariat would, of course, say so. Such a study was an essential preliminary to any decision in the matter.

47. Once it had been determined which of the conventions were still in force, the next question to be considered, in each case, was whether they were suited to present conditions. That question was not only one of expediency; it also involved legal problems.

48. Some fifty new States had gained their independence since the adoption of the conventions. It was not sufficient to give those States the simple alternative of acceding or not acceding; it should also be considered whether the conventions needed revision to bring them up to date. Such revision would have to be carried out with the participation of the new States. The possibility of making a recommendation on that point should be brought to the attention of the General Assembly.

49. If it was established that a particular convention did not require revision, the question remained how it could be made open to accession by the new States. His own view, based on the principle of the equality of States, which was a *jus cogens* rule of international law, was that whenever a treaty dealt with problems of general interest it should be open to accession by all States. No group of States was entitled to debar other States from participation in such a treaty.

50. In the present case the problem of participation was not difficult to solve and the study prepared by the Special Rapporteur was particularly helpful. That study indicated that, of the twenty-six treaties involved, no fewer than twenty-one contained a clause to the effect that the treaty would be open to participation by any State to which the Council of the League of Nations communicated a copy of the treaty for that purpose. That suggested a way of solving the problem; the competent organs of the United Nations could adopt resolutions permitting the transmission of copies of the treaties in question to all States, thus inviting them to accede. Such a solution would be consonant with the provisions of the treaties and also with the fundamental principles of international law.

51. Mr. de LUNA, referring to a point raised by Mr. Tsuruoka and Mr. Lachs, said that Japan was not the only country which had signed treaties without subsequently ratifying them. Spain and many other countries were in the same position. In most cases, the reason was either that governments had neglected to set in motion the ratification machinery required by the Constitution, or that they had been reluctant to study the possible repercussions of ratification on the State's interests and obligations. He was therefore rather sceptical about the results of the study referred to the Commission.

52. If a new State genuinely wished to accede to one of the treaties in question, it would be able to do so without great difficulty by applying to the parties for their consent. Even if certain organs of the League of Nations had exercised formal functions relating to the application of those treaties, that need not be an insurmountable obstacle if both old and new States showed good will.

53. In paragraphs 23, 28 and 30 of his report, the Special Rapporteur discussed constitutional obstacles to extended participation in the treaties. The Commission should not attach too much importance to that problem. States should be left to act as they wished, so as to overcome those obstacles in the manner they considered most appropriate. Those which sincerely wished to accede to a treaty would certainly find ways and means, both at the international and at the national level. The real aim of the Sixth Committee had been indirectly to encourage the new States to participate in the treaties in question, because it thought that their interest in those treaties needed stimulating. In view of the very small importance of the treaties, he was far from convinced that such encouragement was essential.

54. He agreed with everything the Chairman had said, except his suggestion that the Commission should offer the General Assembly a choice of the various possible methods. That would not be a felicitous innovation. The Sixth Committee, which would consider the matter, comprised representatives of over a hundred States; in such a large assembly, not composed exclusively of specialists in international law, debate might be so discursive as to lead to no conclusion. The Commission should therefore propose the specific solution it considered best; the Sixth Committee would be free to criticize it, to amend it or even, if need be, to consider others.

55. Mr. YASSEEN said he agreed with the Chairman that the Special Rapporteur's report could not, as it stood, constitute the Commission's reply to the General Assembly. The Commission should state what methods it considered possible under existing international law, but — and he was sorry to disagree with the Chairman on that point — it should also express its opinion on the relative merits of each method. It would be failing in its duty if it did not clearly state its preference for the method it considered the best.

56. Mr. LIANG said he would like to reply to the requests by some members for information of a tech-

nical character and to add a few observations based on material in the possession of the Secretariat which was not readily accessible to members of the Commission.

57. The more important conventions of an economic and technical character, but not of course those of a political character, concluded under the auspices of the League of Nations, had already been amended by protocols, all of which dealt mainly with the problem of extended participation. Seven such protocols had been approved by the General Assembly at various dates between 1946 and 1953; one amended a number of conventions and protocols on narcotics, while of the other six, two amended League treaties on the traffic in women and children, two related to obscene publications, one to economic statistics and one to slavery. All seven amended the old treaties so as to permit wider accession.

58. The Secretariat had examined the extent to which States had become parties to those seven protocols. It might be of interest to note that thirty-five States had become parties to the 1947 Protocol amending the Convention for the Suppression of the Traffic in Women and Children concluded at Geneva on 30 September 1921, while thirty-seven States had become parties to that Convention as amended by the Protocol, so that two States had become new parties to the amended Convention.

59. He agreed that it would be useful to make a survey of the extent to which the twenty-one conventions were still in force. In the past the Secretariat had followed the practice described in paragraph 149 of the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7) which read:

“149. It has sometimes been asked whether an agreement concluded under the auspices of the League of Nations is still in force. In such cases, the Secretary-General has replied referring either to the denunciations he has received or to the ratifications and accessions deposited, or to information submitted by the parties which indicates that the agreement is being applied.”

The fact that such answers had been given in the past might not rule out a more definite conclusion, though the difficulties of the subject should not be overlooked.

60. He also agreed with those members who thought that the subject-matter of the treaties under discussion should be examined in order to determine whether they had been superseded by later treaties.

61. With regard to the question which of the League of Nations treaties would attract the interest of States that had not been members of the League, enquiries had been made by some States regarding the status of the Geneva Convention and Protocols of 20 April 1929 for the Suppression of Counterfeiting Currency;⁷ an enquiry on the same point had been received from Interpol. Many of the other treaties were obsolete or obsolescent.

⁷ League of Nations, *Treaty Series*, Vol. 112, p. 371.

62. Some members had asked for information about the rules under which the United Nations took over functions and powers exercised under international agreements by the League of Nations, in accordance with the protocols relating to the transfer of those functions and powers to the United Nations. The governing resolution of the General Assembly was resolution 24 (I), which contained three separate decisions. Decision A dealt with functions of a purely secretarial character, including the depositary functions; the Secretary-General of the United Nations could continue those functions without any difficulty. Decision C related to functions under conventions of a political character and was not at issue in the present discussion. Decision B dealt with conventions of a technical and non-political character. It was in respect of those instruments that the General Assembly had adopted the protocols to which he had referred.

63. With regard to procedure it could be noted that the General Assembly had dealt with the question in 1948, after referring it to the Economic and Social Council. At its sixth session, the Council had adopted a resolution⁸ on the 1928 International Convention relating to Economic Statistics, on the basis of which the General Assembly had itself adopted a resolution to enable the United Nations to assume the functions previously exercised by the League of Nations.⁹

64. Since the General Assembly had so far invariably dealt with the matter by means of a protocol, he thought it would be proper to say that that procedure represented the established practice. It was, of course, a somewhat cumbersome method and there was nothing to prevent the General Assembly from adopting a simpler procedure if it saw fit. It would therefore be appropriate for the Commission to refer in its report to any procedure which amounted to an innovation, stating fully the arguments in its favour.

65. Mr. ROSENNE said that he had stated his general views on the subject at the last session in connexion with article 13 of Part I of the draft on the law of treaties. He had later had occasion to develop them, though not in his personal capacity. As representative of his country, together with the representatives of Australia and Ghana he had submitted a joint draft resolution (A.CN.4/162, para. 11) to the Sixth Committee of the General Assembly, which had been inspired by a passage in the report of the International Law Commission. The opinion of the joint sponsors and, indeed, of the legal counsel, had been that the Sixth Committee itself could deal with the question, but at the 750th meeting of the Committee, the sponsors had accepted a suggestion by the Italian representative that the International Law Commission should study the legal and technical aspects of the question pending reconsideration of the whole matter by the Sixth Committee.¹⁰ That suggestion had been accepted in order to allay the misgivings expressed

⁸ Economic and Social Council resolution 114 (VI).

⁹ General Assembly resolution 255 (III).

¹⁰ *Official Records of the General Assembly, Seventeenth Session, Sixth Committee, 750th meeting, paras. 14 and 23.*

by certain representatives and because many delegations had not had time to consider the matter thoroughly.

66. The present discussion and the report by the Special Rapporteur on the law of treaties would go a long way towards clarifying the issues. Since the matter was considered important by some States, even if only in regard to a few treaties, there was every justification for its being dealt with by organs of the United Nations.

67. Interpol had expressed an interest in the wider participation of States in the 1929 Convention for the Suppression of Counterfeiting Currency. At its thirty-first session, held in September 1962, the General Assembly of Interpol had adopted a resolution which opened with the paragraph:

“WHEREAS certain States may now be faced with difficulties of procedure in acceding to international conventions adopted while the League of Nations was in existence”

The resolution went on to invite the Secretary-General of Interpol “to transmit to the United Nations Assembly its desire that such accessions should be facilitated in so far as the conventions themselves tend towards the suppression of criminal activities”. While a certain amount of interest had been shown in the 1929 Convention for the Suppression of Counterfeiting Currency, and possibly in one or two other treaties, there was no reason to assume that any State would be interested in acceding to treaties that might be obsolescent or even obsolete.

68. The Special Rapporteur’s valuable report formed an excellent basis for the Commission’s own report to the General Assembly. He accepted the conclusions reached in paragraph 32 of the report, and agreed with those members who had suggested that the contents of that paragraph should be further developed.

69. He also supported the suggestion made by Mr. Lachs and Mr. Tunkin that a full examination of the conventions should be undertaken in order to determine which of them needed bringing up to date. A passage should be included in the report suggesting the possibility of adapting those conventions to present needs; but it should be borne in mind that the process would take time. It had not been possible to formulate a single convention on narcotic drugs until 1961; it had been necessary not only to rewrite the provisions of the existing conventions, but also to modernize and revise those provisions in the light of the scientific advances and social changes that had taken place since the conclusion of the earlier instruments. But setting that process in motion would not solve the immediate problem, for which, as had been pointed out by other speakers, several solutions were available. In his view, the solution in simplified form was both possible and desirable.

70. Mr. AGO said that he entirely agreed with the suggestions made by the Special Rapporteur in paragraph 32 of his report. The Commission might of course develop the ideas a little in order to express them better in its own report, but the method proposed for solving what was essentially a technical problem was perfectly adequate.

71. With reference to the matter raised by Mr. Lachs, he would agree to the Commission’s suggesting to the General Assembly that it draw the attention of the States parties to the treaties in question to the advisability of revising them. Only those States could take the initiative in the matter of revision. That was a substantive problem, but there was no reason why the Commission should not draw attention to it at the same time as it proposed a solution of the procedural problem.

72. Sir Humphrey WALDOCK, referring to the suggestion made by Mr. Lachs, said that in paragraph 4 of his report he had pointed out that some of the treaties “may have been overtaken by more modern treaties concluded during the period of the United Nations, while some others may have lost much of their interest for States with the lapse of time.” And he had concluded: “Accordingly, there may be a question of distinguishing between those treaties which it is useful and those which it is not useful to open to participation by new States.”

73. In preparing his report he had had the advantage of information from the Secretariat regarding some of the treaties. His own general view was that an examination of those treaties would reveal that only a small number of them deserved serious attention. The Sixth Committee of the General Assembly had been aware of that situation, since it had requested information on the subject from the Secretariat. In fact, he had felt encouraged to go thoroughly into the whole problem only because of the interest shown by certain States in acceding to the Convention for the Suppression of Counterfeiting Currency.

74. With regard to form, he had not underlined the legal aspects of the protocol formula because it had already been discussed by the Sixth Committee; the resolution formula had also received attention there; that was why he had concentrated on the simplified solution. There would be little difficulty in amending the text to take into account the suggestion made by several members that the Commission should put greater emphasis on the various possible methods of dealing with the problem.

75. To meet the wishes of certain members, he was prepared to soften the references to constitutional processes contained in the last sentence of paragraph 30 and in the first sentence of paragraph 31 of his report. He was also prepared to expand paragraph 32.

76. He could either submit an amended version of his report or leave it to the Drafting Committee, as the Commission desired.

77. The CHAIRMAN suggested that Sir Humphrey Waldock should be invited to amend his report in the light of the discussion; the Commission would deal with the revised text when it considered its final report.

It was so agreed.

The meeting rose at 1 p.m.

714th MEETING

Thursday, 4 July 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

(resumed from the 711th meeting)

ARTICLES SUBMITTED
BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the new text proposed by the Drafting Committee for article 23.

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

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had slightly amended the title of his original article 23 (A/CN.4/156/Add.2) and proposed a new text which read:

“The rules contained in article 4 of Part I relating to the authority to conclude a treaty also apply, *mutatis mutandis*, to the authority to denounce, terminate or withdraw from the treaty or to suspend its operation.”

3. The Drafting Committee had thus reduced the provisions of the article to a comparatively simple statement of the general principle that the claim must proceed from some authority competent to exercise the treaty-making power under the rules laid down in article 4 of Part I.

4. Mr. ROSENNE said that, as with other articles, some confusion might result from the reference to an article in Part I. It would be better to renumber the articles in Part II to make the numbering consecutive throughout the draft. No confusion would then be possible.

5. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that article 1 of Part II contained a definition of the term “Part I” as used in the draft articles, so that the meaning of any reference to an article in Part I would be clear. The Commission had decided that the draft articles on the law of treaties should consist of three separate sets of provisions.¹

6. Mr. ROSENNE said that his suggestion of consecutive numbering for all the articles was without prejudice to the Commission’s decision to divide the draft into three separate parts. The method of defining the term “Part I” seemed unnecessarily cumbersome, and it was not unlikely that in the final draft the article in Part II containing the definition would be omitted. In view of the numerous cross-references to articles in Parts I and II, there was much to be gained by unifying

the whole system of numbering so that no two articles had the same number and no confusion was possible.

7. The CHAIRMAN suggested that a decision on the numbering should be deferred until all the draft articles had been adopted. On that understanding, he put article 23 to the vote.

Article 23 was adopted by 15 votes to none, with 1 abstention.

8. Mr. PAREDES explained that he had abstained from voting on article 23 because the Spanish text was not yet available.

ARTICLE 24 (NOTICE OF TERMINATION, WITHDRAWAL OR SUSPENSION UNDER A RIGHT PROVIDED FOR IN THE TREATY)

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had slightly amended the title of article 24 and proposed a new text which read:

“1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated to every other party to the treaty either through the diplomatic or other official channel or through the depositary.

“2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect.”

10. That shorter version of what had been a more elaborate article specified, first, the need for an official communication of the notice of termination, withdrawal or suspension, and secondly, that unless the treaty otherwise provided, the notice could be revoked at any time before the date on which it took effect.

11. Mr. CADIEUX suggested that the word “any” should perhaps be added before the words “other official channel” in the English text of paragraph 1, for the sake of conformity with the French text.

12. Mr. TSURUOKA said that he would vote for the article as a whole, but he maintained the objection he had made at the first reading concerning the possibility of revoking the notice (698th meeting, paras. 25-26). The rule stated in paragraph 3 of the original draft was reproduced with little change in the new paragraph 2; it too generously accorded an additional right to the State which gave notice.

13. Mr. VERDROSS asked whether the final words of paragraph 2 should not be “is received” rather than “takes effect”.

14. Sir Humphrey WALDOCK, Special Rapporteur, replied that the words “takes effect” were correct.

15. Mr. ROSENNE said he had no objection to article 24, but it should contain some provision, along the lines of article 15, paragraph 1 (b), in Part I, to the effect that, unless the treaty itself expressly provided otherwise, a notice must apply to the treaty as a whole. The inclu-

¹ Official Records of the General Assembly, Seventeenth Session, Supplement No. 9, p. 3, para. 18.

sion of such a provision would not be necessary, however, if the Commission adopted an appropriate article on severance.

16. The CHAIRMAN put article 24 to the vote.

Article 24 was adopted unanimously.

ARTICLE 25 (PROCEDURE FOR ANNULLING, TERMINATING, WITHDRAWING FROM OR SUSPENDING THE APPLICATION OF A TREATY OTHERWISE THAN UNDER A RIGHT PROVIDED FOR IN THE TREATY)

17. Sir Humphrey WALDOCK (Special Rapporteur) pointed out that the original title of article 25, "Annulment, denunciation, termination or suspension of treaty obligations under a right arising by operation of law" had been re-drafted to read "Procedure for annulling, terminating, withdrawing from or suspending the application of a treaty otherwise than under a right provided for in the treaty". The new text proposed for the article read:

"1. A party invoking the nullity of a treaty, or a right to terminate, withdraw from or suspend a treaty otherwise than under a provision of the treaty shall be bound to notify the other party or parties of its claims. The notification must:

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

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

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

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

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

"5. Subject to article 4, the fact that a State may not have made any previous notification to the other party or parties should not prevent it from invoking the nullity of or the right to terminate a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty."

18. A comparison of the new text with his original draft (A/CN.4/156/Add.2) showed that there was a gap after the new paragraph 3, which corresponded to the old paragraph 4. At that point his original proposal had been that, where a dispute arose, the claimant party should in certain circumstances be granted a right

of suspension. The reason was that, if a settlement of the dispute had to be sought through one of the means indicated in Article 33 of the Charter, it might take a long time.

19. His proposal had met with opposition both from members who thought that it did not go far enough and from members who thought that any right of suspension was dangerous because a party, by blocking the negotiations, might make the suspension last indefinitely and thus confer upon itself a right of unilateral termination of the treaty.

20. He had therefore submitted to the Drafting Committee a new draft which widened the scope of the right of suspension, while at the same time attempting to avoid the danger of that right being transformed into a right of unilateral termination. His new draft had not gained the approval of the Drafting Committee, some members of which had thought that an undue restriction of the right of suspension in the event of a dispute could lead indirectly to some form of compulsory jurisdiction. In view of the profound and fundamental differences of opinion which had thus arisen, the Drafting Committee had reached the conclusion that the best course would be to provide that the parties must seek a solution by the means indicated in Article 33 of the Charter, and to stop there. A provision to that effect had accordingly been included as paragraph 3 of the new text.

21. If the parties were unable to agree on the choice of the means of settlement of the dispute or if they agreed, for example, on arbitration, but were unable to agree on the text of the *compromis*, under the new article each would have the right to resort to the General Assembly, the Security Council, the competent regional organization or other competent body under the Charter. In view of the division of opinion in the Commission and the strong objections to anything that might involve compulsory jurisdiction in any form, it was clear that the question of procedure could not be carried beyond the point reached at the end of the provisions of paragraph 3.

22. The Chairman had drawn his attention to an important point relating to the wording of the opening sentence of paragraph 1, which stated that "a party invoking the nullity of a treaty, or a right to terminate, withdraw from or suspend a treaty" must "notify the other party or parties of its claims". It was not clear how that provision would operate where a treaty was void because it violated a rule of *jus cogens*, or because it had been imposed on a State by coercion. Those two cases of nullity were provided for in articles 12 and 13.

23. His own assumption had been that article 25 would apply to all the substantive articles, both those which referred to nullity being invoked and articles 12 and 13, which expressly declared a treaty void because it had been imposed by coercion of a State or because it violated a rule of *jus cogens*.

24. The CHAIRMAN said that the point could be met by amending the opening words of the paragraph to read: "A party invoking under any of the provisions

of Part II the nullity of a treaty, or a right . . .” Such a formulation would be less open to interpretation.

25. Mr. de LUNA said he approved of the Drafting Committee’s text in principle. He was not sure that the addition proposed by the Chairman was necessary, since article 25 obviously applied to all cases governed by the articles in Part II. Even in the event of conflict with a rule of *jus cogens*, the preliminary question of the rights and obligations of the parties would have to be settled.

26. He suggested that, in the French text, commas should be inserted after the words “*application*” and “*traité*” in paragraph 1, after “*partie*” in paragraph 3, and after “*parties*” in paragraph 4.

27. Mr. CADIEUX thought that in the first sentence of paragraph 1 of the French text, the word “*démarche*” should be replaced by the word “*demande*”, which was used in paragraph 1 (a).

28. Mr. BRIGGS said it was desirable to examine whether any actual right to invoke nullity or invalidity, or to terminate, withdraw from or suspend a treaty, was conferred by any of the substantive articles. Article 5 laid down that the consent to be bound could be withdrawn because of a manifest violation of internal law, thereby establishing by implication a right, in substance, of unilateral termination by withdrawal. Under articles 7 and 8, fraud and error could be invoked, as invalidating consent to be bound. Articles 11, 12 and 13 established an implied right to invoke the nullity or invalidity of a treaty. Article 16 conferred an implied right of denunciation or withdrawal. Article 20 conferred the right to invoke a breach as a ground for terminating a treaty. Impossibility of performance could be invoked as a ground for termination under article 21 *bis*, and a fundamental change of circumstances under article 22, on the doctrine of *rebus sic stantibus*.

29. The question thus arose whether those substantive articles conferred a unilateral right of termination or withdrawal. Admittedly, the complaining party must give notice and must seek a settlement by the means specified in Article 33 of the Charter. But in the absence of a settlement, whether agreed or imposed by an impartial authority, he could not agree that there existed any unilateral right to terminate a treaty or to withdraw from it on the basis of mere allegations by one of the parties.

30. On that point the second and third sentences of paragraph 6 of the Special Rapporteur’s commentary on the original article 25 were very apposite. They read: “Some authorities and some States have almost seemed to maintain that in all cases annulment, denunciation or withdrawal from a treaty are inadmissible without the consent of the other parties. This presentation of the matter, understandable though it is in the absence of compulsory jurisdiction, subordinates the legal principles governing invalidity and termination of treaties entirely to the rule *pacta sunt servanda* and goes near to depriving them of legal significance.”

31. In fact, the reason why alleged rules on the validity and nullity of treaties had been largely deprived of legal significance was, precisely, the dilemma they presented. In the absence of either agreement of the parties or impartial determination of the existence of the alleged facts on which invalidity was claimed, the instrument, as negotiated, must be presumed to have entered into force. Any assertion that when it invoked the nullity of a treaty on such a basis as article 11, article 12 or article 13, a State was not thereby releasing itself from an obligation because no valid treaty had ever existed, was pure equivocation.

32. In the absence of an impartial determination that the treaty was null or void, there existed a mere *ex parte* allegation, and there could be no justification for conferring a right of unilateral denunciation on such a basis alone. That was particularly true where the party making the assertion was afraid to submit the issue to impartial determination. In that situation, article 25 merely provided that the party invoking nullity, termination or withdrawal must, first, make the appropriate notification and, secondly, seek a solution if objection were made.

33. The question then arose what was the legal situation where a dispute existed as to the facts, assuming, of course, that the parties were unable to settle the dispute. Did the substantive articles on fraud, error, breach, etc. confer a unilateral right to terminate or withdraw from the treaty, or did they merely set out rules to be applied by a court or organ having jurisdiction over the dispute?

34. If he could have concluded that, in the absence of more adequate procedural provisions under article 25, the substantive articles 5 to 22 left the existing international law intact, so that a State could not release itself from its international obligations without the consent of the other party, he would have been prepared to vote for the draft article. There was, however, a danger that the situation might be misinterpreted by those who were unaware of the Commission’s discussions. A State might claim that, having complied with the procedural requirements of article 25 and the dispute having remained unsettled, it could fall back on such provisions as article 11, article 12 or article 13, in order to declare that the treaty was void or terminated or to withdraw from it.

35. He could not accept such a solution, which would represent, not progressive development of international law, but a weakening of the *jus cogens* principle of *pacta sunt servanda*.

36. The Drafting Committee or the Commission itself should re-examine the provisions of article 25 and couch them in such terms as to make it clear that unilateral action was not permissible.

37. Mr. TUNKIN, replying to Mr. Briggs, said that there could be no problem about certain rights being conferred upon States by the substantive articles. Where there was an objective rule of law, there must also be substantive rights and obligations for States. Unless substantive rights existed, there could be no objective rule in the matter.

38. As to the extent of the effects of article 25, it was the clear intention of the Drafting Committee and of the Commission itself, as stated by the Special Rapporteur, that article 25 should not in any way imply compulsory arbitration or jurisdiction. The Drafting Committee had drafted an article which went no further in that respect than the United Nations Charter.
39. Mr. PAREDES said that as he had not yet received a Spanish text of article 25, his remarks must be treated as subject to reservation.
40. The article should draw a clear distinction between treaties that were void *ab initio*, treaties that were voidable, and treaties that were denounced.
41. Where a treaty was void, the State invoking nullity clearly regarded it as non-existent. Under a treaty which had never existed, nothing could be claimed of the parties. However, there should be some international authority to decide whether the allegation made by the claimant party was justified.
42. Where a treaty was claimed to have been voided by some circumstance supervening after its entry into force, any acts performed under it while it was valid should remain valid.
43. Lastly, where a party to a treaty claimed the right to terminate its obligations by reason of a change of circumstances, the treaty should continue to produce its effects until all the acts specified in article 25 have been performed.
44. Mr. PAL said that article 25 dealt only with procedure. The ultimate fate of any claim would necessarily depend on how far the claimant established the grounds on which his claim was based. He therefore suggested that the opening words of paragraph 1 should be amended to read: "A party asserting the nullity of a treaty or claiming to terminate, withdraw from or suspend . . ."
45. Mr. AGO stressed that article 25, which laid down a procedure, must obviously apply to all cases involving nullity. The Commission had made a distinction between cases in which nullity could only be envisaged on the initiative of one of the parties, and cases in which a cause of nullity operated automatically by virtue of an objective rule of law. The procedure contemplated should apply in both cases.
46. He could agree to the addition proposed by the chairman, though in his opinion the text must be understood in the same way even without that explanation.
47. He supported Mr. Pal's suggestion, which would avoid giving the impression that article 25 gave a party a right to terminate a treaty.
48. Like Mr. Tunkin, he believed that article 25 went just as far as it should and no further. It laid down the procedure to be followed by a State which wished to secure recognition of the nullity of a treaty. It then specified what happened if the other party made no objection. If, on the other hand, the other party did not agree, a dispute arose, and the Commission could only note that fact and say that the dispute, like any other dispute, must be settled by the peaceful means prescribed by the Charter.
49. The CHAIRMAN, speaking as a member of the Commission, said that the wording suggested by Mr. Pal seemed to clarify the point raised by Mr. Briggs, to which Mr. Ago had also referred.
50. Actually, the danger of misinterpretation envisaged by Mr. Briggs would not arise. There was a significant difference between paragraphs 2 and 3. Paragraph 2 provided that if no party made any objection, the claimant party was entitled to take certain steps. Paragraph 3, on the other hand, laid down that if there were an objection, the parties must seek a solution by the means indicated in Article 33 of the Charter. No right of unilateral action was ascertained in that paragraph.
51. Mr. ROSENNE said that in paragraph 5, the word "should" should be replaced by "shall".
52. Mr. TUNKIN stressed that any interpretation given to article 25 which might imply anything more than the obligations existing under the Charter would be without foundation.
53. Sir Humphrey WALDOCK, Special Rapporteur, said that the wording suggested by Mr. Pal would remove the difficulty to which Mr. Briggs had drawn attention, without altering the substance of the provision, but perhaps an even better wording would be "A party alleging the nullity of a treaty, or claiming a right to terminate, withdraw . . ." With that amendment, the article would embody the maximum that could be achieved on the subject.
54. Unlike Mr. Briggs, he believed that article 25 would be a valuable contribution to the progressive development of international law. It provided for an orderly procedure and laid down the obligation to take all possible steps to seek a solution by the means indicated in Article 33 of the Charter. He firmly believed that it would promote rather than impair the stability of treaties.
55. Mr. AGO said that paragraph 5 should be brought into line with paragraph 1, as amended, by changing the words "invoking the nullity" to "alleging the nullity" and the words "the right to terminate" to "claiming to terminate".
56. The CHAIRMAN put article 25 to the vote with the amendments proposed by Mr. Pal and the Special Rapporteur, Mr. Rosenne and Mr. Ago.
Article 25, thus amended, was adopted by 19 votes to none, with 1 abstention.
- ARTICLE 4 (LOSS OF A RIGHT TO ANNUL, TERMINATE OR WITHDRAW FROM A TREATY)
57. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title and text of article 4 (A/CN.4/156) be amended to read:
"Article 4: Loss of a right to annul, terminate or withdraw from a treaty
"A right to invoke the nullity of a treaty or to terminate or withdraw from a treaty in cases falling under

articles 5-8 and 20 and 22 shall no longer be exercisable if, after becoming aware of the facts giving rise to such right, the State concerned shall have:

“(a) Waived the right;

“(b) So conducted itself as to be debarred from denying that it had elected in the case of articles 5-8 to consider itself bound by the treaty, or in the case of articles 20 and 22 to consider the treaty as unaffected by the material breach, or by the fundamental change in circumstances, which has occurred.”

58. In accordance with the Commission's wishes, the terms “estoppel” and “preclusion” had not been used, but the general proposition had been maintained that failure to pursue a claim to invoke nullity or to terminate a treaty after the party had become fully aware of the facts giving rise to a right to do so, would bring that right to an end.

59. The opening words of sub-paragraph (b) clearly showed that the State must have been in a position to take action on the claim; it hardly seemed necessary to deal more explicitly with the question, raised during the discussion (701st meeting), what the position would be if a State had not been free to act. Perhaps the matter could be mentioned in the commentary.

60. In the first sentence the word “claim” should be substituted for the word “right”.

61. Mr. TUNKIN, referring to the Special Rapporteur's amendment, said that the Commission should not be afraid of its own shadow and shrink from speaking of a right to invoke the nullity of a treaty.

62. Mr. YASSEEN thought it was correct to speak of a “right to invoke the nullity” of a treaty in article 4: the right existed, and it was not the right to declare the treaty void.

63. He doubted the advisability of retaining the word “fundamental” at the end of sub-paragraph (b).

64. Mr. GROS stressed that the word “right” had been criticized not as first used in the article, but in connexion with the subsequent words “to terminate or withdraw from a treaty”. The same terms must certainly be used in article 4 as in article 25. Similarly, the word “fundamental”, if it was used in article 22, should be retained in article 4.

65. Mr. YASSEEN thought that the expression “change of circumstances” would cover both fundamental changes and changes that were not fundamental.

66. Mr. de LUNA agreed with Mr. Gros. Mr. Yasseen had given the reason why the word “fundamental” should be retained, not deleted. The opening words of the article should be brought into line with the wording adopted for the beginning of article 25.

67. The CHAIRMAN, speaking as a member of the Commission, said that the question whether the word “fundamental” should be retained or not should be left until the Commission had reached a final decision in the wording of article 22, since the two texts must obviously be uniform.

68. He was not sure that article 4 as re-drafted was in its proper place. Perhaps it should be the last article in section IV.

69. Mr. LACHS said he agreed with the Chairman's first point and also thought that the position of article 4 should be reconsidered. As a matter of drafting, it was always undesirable to refer to articles which came later in the text.

70. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that the decision on the word “fundamental” should be deferred until the Commission had adopted article 22.

71. He had no firm opinion on the position of article 4 and recognized the force of Mr. Lachs' objection. However, the article dealt with a matter of substance and could hardly be included in section IV, which was concerned with procedure. Perhaps it could be placed in a separate section to follow section III, in which the Commission might also include the article he had prepared on severance, setting out the conditions under which severance was permissible. He was also going to propose separate provisions on severance for inclusion in certain articles. The question of the position of article 4 might be referred to the Drafting Committee.

72. Mr. de Luna's proposal, which would mean inserting the words “a claim” before the words “to terminate” at the beginning of the article, was acceptable.

73. The CHAIRMAN put article 4, thus amended, to the vote.

Article 4, thus amended, was adopted by 19 votes to none, with 1 abstention.

ARTICLE 27 (LEGAL CONSEQUENCES OF THE NULLITY OF A TREATY)

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title of his original article 27 (A/CN.4/156/Add.3) should be changed to “Legal consequences of the nullity of a treaty” and that the text should read:

“1. Subject to paragraph 2, a treaty established to have been void *ab initio* has no legal force or effect; and the situation which would have existed if the treaty had not been concluded shall be restored as quickly as possible.

“2. If the nullity of a treaty results from fraud or coercion imputable to one party, that party may not invoke the nullity of the treaty for the purpose of contesting the legality of acts done by the other party or parties in reliance upon the void instrument.

“3. Paragraphs 1 and 2 also apply where a particular State's consent to a multilateral treaty is established to have been void.”

75. Paragraph 2 contained a new provision to protect the innocent party from the legality of its acts being contested by the party guilty of fraud or coercion.

76. Mr. TUNKIN questioned whether the drafting of the second clause in paragraph 1 was appropriate;

it might not be possible to restore the situation which would have existed if the treaty had not been concluded.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that his original wording "as far as possible" had been criticized as being too weak.

78. Mr. BRIGGS pointed out that the word "restored" was quite unsuitable, since it was impossible to restore what had never existed.

79. Mr. ROSENNE said that the original text, with the words "as quickly as possible" instead of the words "as far as possible", would be preferable, because it would give the right emphasis, even though all questions of state responsibility would be left open and it would not escape the criticism made by Mr. Briggs.

80. The CHAIRMAN, speaking as a member of the Commission, asked whether paragraph 2 would apply if the legality of acts done by one of the parties were contested on the ground that the treaty was void because of error.

81. Sir Humphrey WALDOCK, Special Rapporteur, said that he was still not entirely satisfied with the article because, if the grounds of nullity were comparatively innocent, it was difficult to accept the treaty being invalidated *ab initio*, particularly as certain acts might have been performed in good faith in execution of its provisions.

82. Mr. CADIEUX observed that in two respects the English and French texts did not entirely agree. There was a semi-colon in the middle of paragraph 1 in the English text, but not in the French text; and in paragraph 3 of the English text, the word "particular" was not needed, as the French text read "*consentement d'un Etat*".

83. The Chairman said that the two texts would be brought into line; on that understanding, he put article 27 to the vote.

Article 27 was adopted by 16 votes to none.

ARTICLE 28 (LEGAL CONSEQUENCES
OF THE TERMINATION OF A TREATY)

84. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the word "consequences" should be substituted for the word "effect" in the title of article 28 and that the text should read:

"1. Subject to paragraph 2 and unless the treaty otherwise provides, the lawful termination of a treaty:

"(a) Shall release the parties from any further application of the treaty;

"(b) Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

"2. If a treaty terminates on account of its having become void under article 22 *bis*: a situation resulting from the application of the treaty shall retain

its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

"3. Unless the treaty otherwise provides, when a particular State lawfully denounces or withdraws from a multilateral treaty:

"(a) That State shall be released from any further application of the treaty;

"(b) The remaining parties shall be released from any further application of the treaty in their relations with the State which has denounced or withdrawn from it;

"(c) The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

"4. The fact that a State has been released from the further application of a treaty under paragraph 1 or 3 of this article shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subjected under any other rule of international law."

85. The Drafting Committee had included the provision in paragraph 2 to satisfy those members who had asked what would be the consequence of a treaty becoming void owing to the subsequent establishment of a *ius cogens* rule with which it came in conflict.

86. The CHAIRMAN put article 28 to the vote.

Article 28 was adopted by 17 votes to none.

ARTICLE 29 (LEGAL CONSEQUENCES
OF THE SUSPENSION OF THE APPLICATION OF A TREATY)

87. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new article entitled "Legal consequences of the suspension of the application of a treaty", which read:

"1. Subject to the provisions of the treaty, the suspension of a treaty:

"(a) Shall relieve the parties from any application of the treaty during the period of the suspension;

"(b) Shall not otherwise affect the legal relation between the parties established by the treaty.

"2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the application of the treaty impossible."

88. That text had been put forward in response to the suggestion made by Mr. Rosenne (709th meeting, para. 54) and supported by other members. The Drafting Committee had come to the conclusion that as questions of substance were involved the matter should be dealt with in a separate article rather than among the definitions.

89. Mr. YASSEEN said he was afraid the Commission was laying down rather too strict a rule in paragraph 2 by enjoining the parties to "refrain from acts calcu-

lated to render the resumption of the application of the treaty impossible." The prohibition might be understood also to apply to acts performed in order to claim the nullity of a treaty or to denounce it, in other words to exercise rights deriving from the articles under which States could resort to those procedures.

90. Mr. ROSENNE, thanking the Drafting Committee for complying with his request, said that the new article constituted a useful addition to the law of treaties.

91. He noted that the title referred to suspension of the "application" of a treaty, whereas in other articles the word used was "operation"; the same word should be used throughout the draft.

92. Mr. LACHS said that the article was a useful one, but paragraph 1 ought also to stipulate that suspension would not affect the legality of any act done in conformity with the provisions of the treaty prior to its suspension; the article would then be consistent with article 28, paragraph 3 (c).

93. Mr. AGO agreed with Mr. Lachs and thought it would be advisable to add a clause similar to that in article 28, paragraph 3 (c), so as to ensure that the legality of acts done before the suspension of the treaty was not impaired.

94. With regard to the fears expressed by Mr. Yasseen concerning paragraph 2, it was clear that that provision applied only to suspension. The termination of a treaty lay outside the scope of article 29, and an act legitimately intended to terminate a treaty could not be regarded as an act prohibited under the terms of article 29, paragraph 2.

95. Mr. ROSENNE said that Mr. Lachs' point was a pertinent one, but he thought it was already covered by paragraph 1 (b).

96. Mr. YASSEEN said he wished to be sure that paragraph 2 could not prevent a State which suspended the application of a treaty from undertaking any act required for invoking or establishing its nullity; the word "acts" might be interpreted as acts in law or material acts. It might perhaps be better to be more specific and say "unlawful acts".

97. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Yasseen's point could be covered in the commentary. It would be quite arbitrary to interpret the provision as meaning that the parties were precluded from exercising lawful rights in connexion with the treaty.

98. Mr. BARTOŠ said that the Drafting Committee had intended the provision to prevent parties from behaving as if they had been released from their legal obligations, and to make it clear that, even though they were exempted from applying the treaty during the period of suspension, they were not thereby released from their legal obligations.

99. Mr. LACHS, replying to Mr. Rosenne, said that paragraph 1 (b) only covered the legal relation between the parties, not acts performed in conformity with the provisions of the treaty.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne had correctly interpreted the meaning of paragraph 1 (b), but in order to prevent any misunderstanding the paragraph could be amplified so as to cover the point made by Mr. Lachs more explicitly. That could be left to the Drafting Committee.

101. The Chairman put article 29 to the vote, subject to the drafting changes indicated by the Special Rapporteur.

Article 29 was adopted by 19 votes to none.

The meeting rose at 12.25 p.m.

715th MEETING

Friday, 5 July 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Co-operation with other bodies

[Item 7 of the agenda]

1. The CHAIRMAN invited the Commission to discuss item 7 of the agenda: Co-operation with other bodies.

2. Mr. LIANG, Secretary to the Commission, said that no meeting of the Asian-African Legal Consultative Committee or of the Inter-American Council of Jurists had taken place since the Commission's last session, so that there had been no occasion for the Chairman to appoint an observer.

3. The Asian-African Legal Consultative Committee had informed the Secretariat that its next session, which was to be of two weeks' duration, would be held at Cairo starting on 15 February 1964, and that it hoped an observer from the Commission would be able to attend.

4. Members were aware that Mr. Caicedo Castilla had attended some of the Commission's meetings as an observer for the Inter-American Juridical Committee.

5. The Inter-American Council of Jurists had not yet communicated the date of its next session, which was to be held at El Salvador.

6. The CHAIRMAN invited the observer for the Asian-African Legal Consultative Committee to make a statement.

7. Mr. TAMBIAH, observer for the Asian-African Legal Consultative Committee, said he regretted that he had been unable to be present at the beginning of the session; the Committee hoped that in future years its observer would be able to attend for a longer period.

8. Mr. PAL had said at the opening of the session (673rd meeting, para. 2) that international law must be largely the creation, not of professors, but of statesmen capable of judging where focal points of tension lay and where adjustments must be made to take account

of far-reaching political, economic and social developments. Although Grotius, Vattel and others had founded modern international law on the *jus naturale* and had enunciated principles to be upheld by all nations, later lawyers, such as Westlake, had claimed that it was the exclusive preserve of peoples of European descent. With the emergence of many new States throughout the world and with international law rapidly developing under United Nations auspices as a just and equitable system of universal application, that view was no longer tenable. The Commission, as a body of experts, was making a vital contribution to the maintenance of peace.

9. The Asian-African Legal Consultative Committee, whose Member States accounted for almost three-fifths of the world's population, had been set up not only to discuss problems of public law, but also to examine the kind of topics considered by the Commission, with which it was anxious to co-operate fully. It hoped that the Commission would continue to be represented at its sessions by an observer.

10. He intended to suggest that some of the important subjects being dealt with by the Commission should be taken up by the Committee, which would then be able to communicate its views and thus help the Commission to frame rules that would be acceptable to Asian and African countries.

11. The Committee had been considering a number of topics of interest to the Commission, including restrictions on the immunity of States in respect of commercial transactions entered into by, or on behalf of, States or state trading corporations; the principles of extradition; the status and treatment of aliens; free legal aid; the legality of nuclear tests; state responsibility for the maltreatment of aliens; and dual nationality. Although the agenda for the Committee's forthcoming session had not been finally agreed, it was likely to include such items as the United Nations Charter from the point of view of Asian and African States; the rights of refugees; the law of the territorial sea; the law of treaties; and state succession.

12. Mr. PAL proposed that the Commission should be represented by its Chairman at the Committee's next session.

13. Mr. TSURUOKA said he gladly seconded Mr. Pal's proposal. It was particularly appropriate that the Commission should appoint its Chairman, Mr. Jiménez de Aréchaga, to represent it at the Cairo session of the Asian-African Legal Consultative Committee. The Committee would certainly be glad to meet Mr. Jiménez de Aréchaga, not only because he was an eminent professor and jurist of international repute, but also because he came from a region remote from Asia and Africa and would therefore be able to offer fresh suggestions.

14. The CHAIRMAN suggested that the Commission should allow some flexibility in the matter and, as before, authorize the member selected to represent it as an observer to appoint another member or the Secretary to take his place if he were unable to perform that duty.

15. Mr. BRIGGS said he supported Mr. Pal's proposal and agreed with the Chairman that a substitute should be appointed if necessary. It was certainly desirable that the Commission should be represented at sessions of other bodies working in co-operation with it.

16. Mr. LACHS said that experience had shown the advantages of keeping in touch with the work being carried out by other bodies, particularly those of a regional character, when they were studying the same topics as the Commission. The importance of developments in Asia and Africa and their contribution to international law could not be over-estimated, and every effort should be made to strengthen existing links with the Asian-African Legal Consultative Committee.

17. He supported Mr. Pal's proposal, it being, of course, understood that if the Chairman were unable to go to Cairo, he would be free to appoint a substitute.

18. Mr. BARTOŠ supported Mr. Pal's proposal and associated himself with the remarks of previous speakers.

19. He stressed the importance of the codification and study of international law for the Asian and African countries, where certain problems of international law had a different aspect from that which they presented in countries whose history had taken a different course.

20. In the circumstances, it was certainly necessary to establish co-operation between the countries which claimed to be better qualified to codify international law and those which were struggling to free it from a certain routine and formalism and aspiring to a freedom and equality based on justice.

21. He had the highest esteem for those great civilizations of the East which had contributed so much to the development of other civilizations. The Commission's duty was to make contact with the jurists of Asia and Africa and with the trends that were shaping international law in those regions. No one seemed better qualified to make that contact on the Commission's behalf than Mr. Jiménez de Aréchaga. If he accepted the mission which the Commission was asking him to undertake, he might perhaps have to sacrifice other duties and some of his work projects, but the mission would be a real contribution to the achievement of the Commission's ideal and to the accomplishment of its task.

22. Needless to say, the Commission would authorize its Chairman to appoint another member to replace him if necessary, but he (Mr. Bartoš) hoped that that necessity would not arise, and that the Commission would be represented by its Chairman at the important Cairo meeting.

23. Mr. TUNKIN said that he too supported Mr. Pal's proposal and hoped that the Chairman would be able to attend the Committee's session at Cairo; if not, he should of course be authorized to appoint someone to replace him.

24. The importance of keeping in close touch with the Asian-African Legal Consultative Committee was

generally accepted, because of the need to keep abreast of the opinions of new States on problems of international law. The Committee should be informed of the work already done by the Commission and of its plans for the future.

25. He wished to take the opportunity of renewing an appeal he had made some years previously, for a full exchange of documentary material between the Commission, the Asian-African Committee and the Inter-American Juridical Committee. An effort had been made in that direction, but the arrangements had been allowed to lapse.

26. Mr. YASSEEN said he fully supported Mr. Pal's proposal that the Commission should appoint its Chairman to represent it at the Cairo session of the Asian-African Legal Consultative Committee, not only because of the eminent position occupied by Mr. Jiménez de Aréchaga as Chairman of the Commission, but also because of his personal merits and qualifications.

27. It was becoming increasingly necessary for the Commission to co-operate with bodies concerned with international law in all parts of the world, especially intergovernmental bodies. With the large-scale emancipation of peoples, many new States had entered the international community. They formed an integral part of that community, but their differences in background, needs and interests were such that, just as their internal law differed, several differences were also to be observed in their conceptions of international law. Some jurists had spoken of an American international law, while about ten years previously the Chilean judge Alejandro Alvarez had maintained that an Asian-African international law was in process of formation.

28. The countries of Asia and Africa had their own history and their own difficulties. Many Asian-African jurists considered that there were few rules of classical international law, which some called European international law, that could be applied to their problems. It might be thought that classical international law had been conceived to regulate relations between States with approximately the same economic and cultural level and the same political status. Without sharing the extremist opinion that classical international law was essentially an instrument of colonialism, it could be recognized that many of its rules did not suit the new States. If they were to be made into general international rules, they must accordingly be adapted to existing conditions.

29. Under its statute, one of the functions of the Asian-African Legal Consultative Committee was to study the topics on the agenda of the International Law Commission; that showed that there were points of contact between the Commission and that Committee. If the Commission was to achieve really universal results in the codification and progressive development of international law, it must take account of the views of such organs, which were not only learned bodies, but represented States. If it was to be of practical value too, the Commission's work must develop a common basis from all the differing and sometimes conflicting opinions. In

keeping in touch with such intergovernmental bodies the Commission would be following a commendable practice.

30. Mr. PAREDES said that co-operation with other bodies concerned with international law was important because no progressive development was possible without examining the main trends in all parts of the world. Although international law had been created in Europe, other regions had their special contributions to offer. For example, certain new principles which had originated in the Latin-American continent had now gained wide acceptance. The Commission could not properly perform its functions and secure universal support for its drafts unless it kept in touch with events in the different continents of the world. It must also take account of the great impetus given to international law by the emergence of new States.

31. He welcomed Mr. Pal's proposal because the Chairman, with his European training and special knowledge of Latin-American law, was particularly well qualified to study the trends of opinion in the Asian-African Legal Consultative Committee and to inform it of the Commission's own work.

32. Mr. VERDROSS said that he too supported Mr. Pal's proposal. In its earlier work, the Commission had taken account of the Harvard draft and of the results of the Havana Conference of 1928;¹ clearly, it should also take account of the legal opinions of the new States. If it intended to codify a universal international law, it must keep itself informed of all the opinions advanced in different parts of the world.

33. Mr. EL-ERIAN, supporting Mr. Pal's proposal, said he hoped the Chairman would be able to attend the Committee's session. He subscribed to everything that had been said about the importance of the Commission maintaining close relations with the governmental bodies working to strengthen the role of international law in the maintenance of peace.

34. He fully agreed with Mr. Tunkin that proper arrangements ought to be made for the exchange of documents; that was a matter that could be considered by the Sixth Committee under the item placed on the agenda for the eighteenth session of the General Assembly by resolution 1816 (XVII): "Technical assistance to promote the teaching, study, dissemination and wider appreciation of international law".

35. Mr. ROSENNE said he supported Mr. Pal's proposal and looked forward with interest to the report on the Committee's deliberations.

36. He entirely agreed with Mr. Tunkin that the exchange of documentary material between the Commission and intergovernmental bodies concerned with international law should be placed on a more regular and satisfactory basis. Perhaps it would be appropriate for the Commission to express the hope in its report that any administrative difficulties encountered within the United Nations would be overcome.

37. The Commission's representative to the General Assembly, or to any other body, should take every

¹ Hudson, *International Legislation*, Vol. 4, pp. 2378 ff.

opportunity of impressing on government representatives the importance which the Commission attached to obtaining the comments of governments on its first drafts. The position in that regard was not entirely satisfactory and the number of governments which replied was not very large.

38. Mr. TABIBI said that the Chairman was particularly well qualified to represent the Commission at the forthcoming session of the Asian-African Legal Consultative Committee. The Committee's programme had many points in common with that of the Commission, and close relations between the two bodies were highly desirable. The time when international law had been regarded as the property of the so-called civilized nations was past and the views of new States must be taken into account. It was satisfactory to see that the Asian-African Legal Consultative Committee was being joined by many African countries.

39. In its report, the Commission should stress the need for a regular exchange of documents; so far, at least, as the United Nations was concerned there were no financial difficulties.

40. Mr. AGO said that at that stage in the discussion custom required him to congratulate the Chairman on the unanimity of his appointment to represent the Commission; besides congratulating him, however, he would most earnestly beg him to accept the assignment and carry it out in person.

41. The task with which the Commission wished to entrust the Chairman was a particularly delicate and important one. He would have to make contacts with a new world in full ferment, which was filled with the desire to contribute its own genius to the building of that great edifice, the law of the world community. Mr. Jiménez de Aréchaga came from a country in the continent which was traditionally known as the New World, but which nowadays, after the recent revolution in international society, might well be regarded as part of the Old World. In any case his country did represent the Latin civilization which had been established on both sides of the Atlantic. His penetrating intelligence and understanding specially qualified him to participate in a meeting such as that to be held at Cairo and to grasp any new elements emerging from it which might help the Commission in its work of developing international law and making it better fitted to meet the requirements of a really world-wide international community.

42. At the same time, his origin and personal qualities also fully qualified Mr. Jiménez de Aréchaga for another task which he should perform at the Cairo meeting. Exchanges could not be in one direction only, and he thought that it was sometimes useful to make the enthusiastic representatives of the newly independent countries understand that it would be a pity to confuse international law with certain political practices, largely abandoned in modern times, which had had far less influence on the formation of international law than certain people and certain countries tended to believe. After all, it must not be forgotten that the fundamental

rules of international law had been developed at a time when colonialism, in its most important aspects, did not yet exist, and that the application of those rules had by no means been confined to relations between States belonging to similar civilizations. It was not only Christian States that had contributed to the formation of international law, but also, in large measure, the Moslem and other States. It would therefore be wrong to confuse international law with the certain policies followed by a few Powers in the nineteenth century, and it would be a pity for that error to be too deeply rooted in the minds of the representatives of the new nations.

43. Admittedly, it was sometimes necessary to modify certain rules when they were to be given a wider field of application. But it must not be thought that everything had to be changed. Just as the older States should make an effort to understand the tendencies, demands and aspirations of all the new nations, so the new nations should make an effort to understand the *raison d'être* of certain rules which had evolved in the western world, but were not bound up with particular political conditions. On the contrary, those rules were made to be perfectly adaptable to relations between political entities of every kind irrespective of their origin, civilization, geographical situation or the period when they were established.

44. The Commission's representative at the Cairo meeting of the Asian-African Legal Consultative Committee should therefore try to grasp everything that might be useful to the Commission in its work and at the same time make it understood that international law and its classical rules were a precious heritage which belonged, not to Europe or the Old World alone, but to the whole of mankind, and the loss of which would be a grave danger not only to the old States, but also to the new.

45. Mr. de LUNA said he warmly supported the proposal to appoint the Chairman as the Commission's representative at the forthcoming session of the Asian-African Legal Consultative Committee. His satisfaction was all the greater because the Chairman belonged to the same legal family as himself. That did not mean that he believed there was such a thing as a Latin-American legal system; there was not. Nor did he accept the idea that the Latin-American countries were daughter nations of Spain; the truth was that the Mexicans, Uruguayans, Ecuadorians and Spaniards of today were all the heirs of sixteenth-century Spain. The characteristic features of the Spanish tradition were the rejection of absolute rule, respect for the principle of equality before the law and a system of internal law which had its roots in Roman law.

46. Where international law was concerned, he did not claim, as some did, that such Spanish writers as Vitoria were its real founders. International law had existed ever since independent States had had mutual relations. But it was the merit of that great sixteenth-century Spanish jurist that he had asserted the principles of law in defiance of the King and the Pope.

47. The overseas possessions of the King of Spain had never been regarded as colonies; their inhabitants, whatever their race, had been deemed to be Spanish

citizens, and universities had been founded for them within twenty years of the conquests of ancient Mexico and Peru. That had been the origin of the Spanish legal tradition represented by the Chairman and the other members from Spanish-speaking countries in the Commission, which was called upon to harmonize the ideas deriving from the different legal systems of the world.

48. Mr. CADIEUX associated himself with the previous speakers and said that the whole Commission would be grateful to its Chairman if he accepted the mission offered him. He was, indeed, particularly well fitted by his personal qualities to speak for the Commission, and coming from the Americas he represented a region which it was important to bring into contact with the members of the Asian-African Committee.

49. He also wished to endorse Mr. Ago's comments. Canada was a country that was neither European nor old, and certainly not imperialist, but it had been able to accept the rules of international law which had existed before it appeared on the world scene; and Canada had never felt that it had lost by doing so. On the contrary, it had welcomed with deference the rules evolved through the centuries, which everyone was in duty bound to treat with the greatest respect. He believed that Canada's point of view was shared by a number of American countries and that to present the existing rules as capable of bringing together the different elements of the international community would serve the interests of the new countries no less than those of the old. Far from making for division, those rules were a force for unity and coherence which might be of the greatest value.

50. As to Mr. Rosenne's suggestion regarding comments from governments, he agreed that they should be invited to send whatever comments they could. But in the past fifteen years international activities had increased considerably and perhaps the machinery of State had not evolved at the same rate. If States had enough officials to prepare comments at every stage, the idea was feasible; but under present conditions it would be unreasonable to ask them for comments too often. It was an internal administrative problem. The Commission could ask governments to do their best, but it should avoid any suggestion that they were guilty of negligence if they failed to supply all the documentation asked of them.

51. Mr. GROS said that he personally would be very glad if the Chairman would agree to represent the Commission at the Cairo meeting.

52. As to the substance of the discussion, he fully agreed with Mr. Ago's remarks; they reflected his own views exactly.

53. Sir Humphrey WALDOCK said he supported Mr. Pal's proposal and agreed with Mr. Ago's comments on certain general issues involved.

54. The CHAIRMAN, thanking the Commission for proposing that he should represent it as an observer at the forthcoming session of the Asian-African Legal Consultative Committee, said he looked forward to attending the Committee's deliberations, particularly in

view of the interesting agenda that was proposed. In the unlikely event of his being unable to go to Cairo in February, he would ask another member or the Secretary to replace him.

55. Mr. LIANG, Secretary to the Commission, said that the Secretariat had distributed to members all the documents and proceedings of earlier sessions of the Asian-African Legal Consultative Committee which had been received.

56. The United Nations had regulations concerning the distribution of documents and perhaps similar regulations were applied by other bodies. The Commission might therefore wish to mention in its report that it was desirable to modify the United Nations regulations with a view to ensuring an adequate exchange of documents and to authorize the Secretariat to negotiate with other bodies to that end.

The meeting rose at 11.30 a.m.

716th MEETING

Monday, 8 July 1963, at 5.20 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Programme of work for 1964

1. The CHAIRMAN announced that at its private meeting the Commission had approved the following programme of work for 1964:

1. Law of Treaties: Application, interpretation and effects of treaties;
Treaties of international organizations (as part of topic of Law of Treaties);
2. State Responsibility: Preliminary report;
3. Succession of States and governments: Aspect of treaties (preliminary report);
4. Relations between States and Intergovernmental Organizations: First report and general directives; second report, with draft articles;
5. Special Missions: First report, with draft articles.

2. Since it would not be possible to deal with all the items at the main summer session, which should be mainly devoted to the Law of Treaties and, if possible, to a discussion of the preliminary reports on State Responsibility and State Succession, it was suggested that a three-week winter session of the Commission should be held from 5 January to 24 January 1964.

3. At that session the Commission would consider the draft articles submitted by the Special Rapporteur on Special Missions, the first report on Relations between States and Intergovernmental Organizations and the general directives to be given to the Special Rapporteur on that subject. If time permitted, a first reading might also be given to the draft articles submitted by the Special

Rapporteur on Relations between States and Inter-governmental Organizations in his second report.

4. It was suggested that steps should be taken at once to arrange for another winter session in January 1965, at which the Commission could continue consideration of the same two topics and complete the codification of diplomatic law without encroaching on the time required for its work on the Law of Treaties.

5. Some members had expressed the hope that it would be possible to meet at a place other than Geneva, but no formal proposals had been made; it was realized that a decision on the matter would depend on a number of factors, many of them beyond the Commission's control.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda]

(resumed from the 714th meeting)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

6. The CHAIRMAN invited the Commission to resume consideration of the articles submitted by the Drafting Committee.

ARTICLE 3 [26] (SEPARABILITY OF TREATY PROVISIONS FOR THE PURPOSES OF THE APPLICATION OF THE PRESENT ARTICLES)

7. Sir Humphrey WALDOCK, Special Rapporteur, said it would be appropriate to examine the new article 3 (formerly article 26, A/CN.4/156/Add.2) on the separability of treaty provisions, that being the term now accepted by the Drafting Committee. The article read:

"1. Except as provided in the treaty itself or in articles 7, 8, 11, 20, 21, 22 and 22 *bis*, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

"2. The provisions of articles 7, 8, 11, 20, 21, 22 and 22 *bis* regarding the partial nullity, termination or suspension of the application of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

"(a) The clauses in question are clearly severable from the remainder of the treaty with regard to their operation; and

"(b) It does not appear either from the treaty or from statements made during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treaty as a whole."

8. The method adopted by the Drafting Committee to deal with the question of separability was a compromise between the various views expressed during the discussion. A general article laying down the conditions for severance had been formulated as article 3, but provisions on separability were to be included in each of the other articles it referred to. The Commission would thus be called upon to consider whether it would be

appropriate and useful to permit severance for the purposes of each of those articles.

9. The provisions of paragraph 2 were based on the consideration that, where separability was recognized, it must be subject to certain conditions in order to ensure that the severance of certain provisions did not lead to an absurd result or to an inequitable application of the treaty.

10. Since article 3 laid down the minimum conditions to which separability would be subject in all cases, the Commission should examine it before taking up articles 7, 8, 11, 20, 21, 22 and 22 *bis*.

11. The Drafting Committee had not yet decided on the position of the general article on separability, which might perhaps be placed with article 4 in a small section between sections III and IV: that explained the retention of the former number [26] as an alternative.

12. Mr. ROSENNE said that during the discussion of various articles, he had expressed reservations regarding the manner in which the question of severance had been dealt with. However, the cautious recognition of separability in article 3, and the guarded manner in which the conditions for severance were stated, went a long way towards removing his doubts. He would therefore support the proposed article.

13. Mr. TABIBI said that he too had had reservations regarding the provisions on severance. He was satisfied with the solution adopted in article 3, however, particularly sub-paragraphs (a) and (b) of paragraph 2, and would accept the article on the understanding that the commentary would be adjusted to the new terminology.

14. Sir Humphrey WALDOCK, Special Rapporteur, assured Mr. Tabibi that, as in the case of all the other articles of the draft, the commentary would be adjusted to the text adopted.

15. The CHAIRMAN put article 3 to the vote.

Article 3 was adopted unanimously.

ARTICLE 5 (PROVISIONS OF INTERNAL LAW REGARDING THE PROCEDURES FOR ENTERING INTO TREATIES)

16. The CHAIRMAN invited the Commission to consider the text proposed by the Drafting Committee for article 5, which read:

"When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 of Part I to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding the procedures for entering into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree."

17. Mr. VERDROSS said he thought that the idea underlying the article could be better expressed by

adding after the words "regarding competence to enter into treaties" after the words "violation of its internal law". There might be other violations of internal law regarding the procedure for entering into treaties which in no way affected their international validity. For example, there might be violations in respect of the parliamentary quorum or provisions requiring a two-thirds or three-fourths majority, which, although manifest, did not affect the international validity of treaties.

18. Mr. de LUNA, supporting Mr. Verdross, added that it was not only a matter of procedure; there might be a formal violation of the constitution, but there could also be a substantive violation. A parliament might, for example, approve a treaty in violation of substantive constitutional rules.

19. Mr. YASSEEN asked why the provision referred only to internal law regarding procedure. Was it intended to exclude the substantive rules on treaty-making?

20. Sir Humphrey WALDOCK, Special Rapporteur, replied that the point raised by Mr. Yasseen could be met by replacing the words "procedures for entering", both in the title and in the text of the article, by the words "competence to enter".

21. Mr. YASSEEN thought that retention of the word "procedures" definitely favoured his own position, as all the rules concerning the substance then remained reserved. He had confined himself to asking the question, for he personally favoured the constitutionalist doctrine.

22. Mr. de LUNA agreed with Mr. Yasseen. The usual phrase was "treaty-making power", which might be rendered in French by the word "*compétence*". The substitution of the word "competence" for "procedures", as suggested by the Special Rapporteur, would meet Mr. Verdross's point without the need for any addition.

23. Mr. VERDROSS agreed and withdrew his proposal.

24. The CHAIRMAN put article 5 to the vote with the amendment suggested by the Special Rapporteur.

Article 5, thus amended, was adopted unanimously.

ARTICLE 6 (LACK OF AUTHORITY TO BIND THE STATE)

25. The CHAIRMAN invited the Commission to consider the new text of article 6 proposed by the Drafting Committee, which read:

"1. If the representative of a State, who cannot be considered under the provisions of Article 4 of Part I as being furnished with the necessary authority to express the consent of his State to be bound by a treaty nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

"2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty had been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed

by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States."

26. The CHAIRMAN put article 6 to the vote.

Article 6 was adopted unanimously.

ARTICLE 7 (FRAUD)

27. Sir Humphrey WALDOCK, Special Rapporteur, said that article 7 was the first of the articles referred to in article 3 in which a provision on separability was included. Paragraph 2 provided that the power of a State to invoke fraud as invalidating its consent only with respect to the particular provisions of the treaty to which the fraud related was subject to the conditions specified in article 3. The article read:

"1. If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty.

"2. Under the conditions specified in article [3], the State in question may, if it thinks fit, invoke the fraud as invalidating its consent only with respect to the particular provisions of the treaty to which the fraud relates."

28. Mr. YASSEEN said that paragraph 2 was a first application of the principle stated in article 3. It gave the injured party only the right to invoke the partial nullity of a treaty, which was perfectly understandable.

29. Mr. LACHS asked the Special Rapporteur whether the words "if it thinks fit", in paragraph 2, added anything to the meaning.

30. Sir Humphrey WALDOCK, Special Rapporteur, explained that the expression was commonly used in English to stress the fact that a certain discretion was allowed to the party concerned.

31. Mr. LACHS said that while he had no objection in principle to the retention of the words, he must point out that they were not used in certain other articles where discretion was allowed.

32. Mr. CASTRÉN said he accepted the new paragraph 2 and had only one comment to make on the wording. The word "provisions" was used, whereas the word "clauses" appeared elsewhere; the same applied to article 11. The terminology should be made uniform.

33. Sir Humphrey WALDOCK, Special Rapporteur, agreed that the word "provisions" in paragraph 2 should be replaced by the word "clauses".

34. Mr. TABIBI said that he accepted article 7, but had doubts about the expression "may, if it thinks fit".

35. Mr. de LUNA said he had meant to make the same remark about the French text as Mr. Lachs had made about the English, but the explanations given by

the Special Rapporteur had made him hesitate. The expression in question referred to a faculty reserved to the State, which it would exercise after weighing the pros and cons.

36. Mr. AGO said that, if he had correctly understood the meaning of the words "if it thinks fit", as explained by the Special Rapporteur, in order to bring out the discretionary element the French text should be amended to read "*à sa discrétion*" instead of "*s'il le juge bon*".

37. Sir Humphrey WALDOCK, Special Rapporteur, explained that there was a shade of difference between the provisions of paragraph 2 of article 7, on fraud, and those of paragraph 3 of article 8, on error. In the case of fraud, there was always an injured party, but in the case of error, there was generally no injured party; injury would only be conceivable where the error had been induced by misrepresentation by one of the State concerned.

38. In view of the difference between the two situations, there was perhaps some advantage in emphasizing the discretionary element in the case of fraud. That explained why the words "if it thinks fit" were used in article 7, but not in article 8. But since those words had raised some difficulty, he would be quite prepared to omit them.

39. The CHAIRMAN put article 7 to the vote with the deletion of the words "if it thinks fit" and the substitution of the word "clauses" for "provisions".

Article 7, thus amended, was adopted by 19 votes to none, with 1 abstention.

The meeting rose at 5.50 p.m.

717th MEETING

Tuesday, 9 July 1963 at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*continued*)

Articles submitted by the Drafting Committee

1. The CHAIRMAN invited the Commission to continue consideration of the articles submitted by the Drafting Committee.

ARTICLE 8 (ERROR)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new text for article 8, which read:

"1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at

the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

"2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

"3. Under the conditions specified in article [3], an error which relates only to particular clauses of a treaty may also be invoked as a ground for invalidating the consent of the State in question with respect to those clauses alone.

"4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and Articles 26 and 27 of Part I then apply."

3. Paragraphs 1, 2 and 4 reproduced paragraphs 1, 2 and 3 of the text adopted by the Commission at its 705th meeting (paras. 1-18); paragraph 3 was new and dealt with the question of separability.

4. Mr. YASSEEN suggested that in paragraph 3 the word "also" should be dropped, as it was unnecessary.

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

6. Mr. PAREDES suggested that, in the Spanish text of paragraph 1, the word "*suponía*" should be replaced by the word "*aceptaba*". Since the State concerned felt certain that the fact or state of facts actually existed, in other words, acknowledged their existence, what was involved was not a supposition, but a certainty.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that the change was one of substance and would involve amending the English and French texts as well; the word "assumed" would have to be replaced by "acknowledged". He must oppose that change because it would not reflect the intended meaning.

8. The CHAIRMAN said that there was no support for Mr. Paredes' suggestion. If there were no objection, he would put article 8 to the vote as amended by the deletion of the word "also" in paragraph 3.

Article 8, thus amended, was adopted by 13 votes to none with 1 abstention.

ARTICLE 11 (PERSONAL COERCION OF REPRESENTATIVES OF STATES)

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a new text for article 11, which read:

"1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

"2. Under the conditions specified in article [3], the States whose representative has been coerced may, if it thinks fit, invoke the coercion as invalidating its

consent only with respect to the particular provisions of the treaty to which the coercion relates.”

10. Paragraph 1 reproduced the text adopted by the Commission at its 705th meeting (paras. 19-30); paragraph 2 was new and dealt with the question of separability.

11. The Drafting Committee had carefully considered whether separability was admissible where a treaty was vitiated because consent had been procured by personal coercion of the negotiating representatives. It had taken into account the Commission's view that personal coercion was a very grave matter, and came close to coercion of the State. However, there was a possibility, though a rather remote one, that coercion might take the form of blackmail or corruption and be connected with the acceptance of a particular part of the treaty. In such a case, the injured State might perhaps be penalized if it were not allowed to maintain the rest of the treaty, which was not affected by the coercion of its representative.

12. Mr. VERDROSS thought it might be desirable to insert the words “or against members of their families” after the words “in their personal capacities” in paragraph 1, since threats against a representative's family might have the same consequences as threats against the representative himself.

13. Mr. CASTRÉN pointed out that the word “provisions” was used in the English text of paragraph 2; it had been decided at the previous meeting to replace it by the word “clauses” (716th meeting, para. 39).

14. Mr. TSURUOKA noted that the word “*également*” used in the French text of paragraph 2, had no equivalent in the English text. The Commission had decided to delete the word from article 8, and it should also be deleted from article 11.

15. Mr. CADIEUX, referring to the point raised by Mr. Verdross, said that a threat against a member of a representative's family constituted, in a sense, pressure exerted on the representative in his personal capacity. Any attempt to specify exactly how far that kind of coercion extended would lengthen the article considerably; it might be sufficient to mention the point in the commentary.

16. Sir Humphrey WALDOCK, Special Rapporteur, said that the matter was already fully explained in the commentary. The Commission had always understood that the expression “acts or threats directed against them in their personal capacities” would include indirect coercion by means of threats against the family.

17. The CHAIRMAN suggested that the difficulty might arise from the fact that the French word “*personnellement*” could be understood as excluding the family; the English text seemed clearer.

18. Mr. GROS said he fully endorsed the Special Rapporteur's interpretation. The intention was to cover all forms of threat against a representative, no matter which members of his family were affected. He thought

the word “*personnellement*” did render that idea, for what was meant was a personal threat, which was not the same as a threat against the person. He did not think the present text was ambiguous but he saw no objection to amending it.

19. The CHAIRMAN said that, if there were no objection, he would put article 11 to the vote as amended by the deletion of the word “*également*” from the French text of paragraph 2.

Article 11, thus amended, was adopted by 13 votes to 1.

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

20. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the title of article 13 as adopted by the Commission at its 705th meeting (paras. 53-89), had been shortened by the Drafting Committee. The proposed text read:

“Article 13: Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

“A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

21. The Drafting Committee had reached the conclusion that severance should not be allowed in the cases covered by article 13. It was possible that the conflict with a rule of *jus cogens* might only affect certain clauses of the treaty, but the Committee had considered that, in view of the nature of *jus cogens*, it would be inappropriate to recognize separability. If the parties entered into a treaty which conflicted with an existing rule of *jus cogens*, they should take the consequences; the treaty would be invalidated and all that the parties could do would be to re-negotiate the treaty, and formulate it in accordance with international law.

22. The wording of the article had been slightly amended in order to meet a point raised by Mr. Yasseen (705th meeting, para. 63).

23. Mr. YASSEEN said that the phrase “from which no derogation is permitted” was rather vague, for to derogate unilaterally was not permitted, even from a rule which did not have the character of *jus cogens*. It might be more accurate to say: “A treaty is void if it conflicts with a general norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

24. Mr. TUNKIN said that the change proposed by Mr. Yasseen would weaken the text. He was fully aware of the problem involved, and had himself spoken on it during the earlier discussion of the article (705th meeting, paras. 75-77). The intended meaning was that States could not contract out, and the expression “from which no derogation is permitted” should be construed

in that sense; if it were taken to mean that no breach was permitted, there would be confusion between rules of *jus cogens* and other rules of international law, since no breach of any rule of international law was permitted.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that the present text meant precisely that States could not contract out of the rules in question. However, the meaning could, if necessary, be made still clearer by adding, after the word "permitted", some such words as "even by agreement between States".

26. Mr. BRIGGS supported the Special Rapporteur's view.

27. The CHAIRMAN, speaking as a member of the Commission, said that while he agreed that the additional words were not logically necessary, they would help to make the meaning clearer to anyone who was not familiar with the Commission's discussions.

28. Mr. ROSENNE said it was quite clear that the term "derogation" meant something entirely different from "breach". As now drafted, the article stated categorically that States were not permitted to contract out of the *jus cogens* rules in question.

29. Mr. TSURUOKA said he preferred the original wording because, in general, a new rule of that character could be created only by agreement between the majority of States. If the expression "even by agreement between States" were used, it might perhaps be held to exclude the possibility of creating a new rule, which was not the intention.

30. Mr. GROS said that, from the point of view of drafting and clarity, the text seemed preferable without the addition of the words "even by agreement between States". As Mr. Rosenne and Mr. Tunkin had observed, the present text was very firm and quite unequivocal. There could be no derogation except by agreement between States. The text proposed by the Drafting Committee had, moreover, been suggested precisely by the criticisms made by Mr. Yasseen. For his part, he hoped it would be retained.

31. Mr. YASSEEN said that, for the sake of greater clarity and precision, he would have preferred the addition of the words proposed by the Special Rapporteur and supported by the Chairman; for a unilateral derogation might conceivably occur, for example, if a constitutional rule were adopted which derogated from a rule of *jus cogens*. In that case there would not be a breach, but a derogation from a rule of general international law by a rule of internal law.

32. What might make the present wording acceptable was the final phrase: "which can be modified only by a subsequent norm of general international law having the same character".

33. Mr. CADIEUX said he favoured the existing text. The difficulty arose from the fact that two meanings could be attached to the word "derogation". It could be understood to mean either a breach — and that case was covered by the expression "peremptory norm" —

or an exception to the rule by virtue of unilateral or internal measures or of a treaty, which seemed to be covered by the last part of the text. For greater precision it would be necessary to state that the parties to a treaty likewise could not derogate from a peremptory norm by measures of internal law or by any act performed without notice, and that would greatly complicate the wording of the article. It would probably be sufficient to go into that point in the commentary.

34. Mr. VERDROSS said he could accept the text proposed by the Drafting Committee or that suggested by Mr. Yasseen, but certainly not the words: "even by agreement between States". If a clear distinction was made between a breach and a derogation, it was not possible to derogate from a rule of international law otherwise than by another rule of international law. The words "even by agreement between States" implied that a derogation was possible not only by agreement between States, but also otherwise, which in reality it was not.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that he had not formally proposed the addition of the wording criticised by Mr. Verdross. He himself considered that the text as it stood fully expressed the intended meaning. He had merely endeavoured to assist the Commission by suggesting a form of words which, although not strictly necessary, might make the meaning clearer; perhaps a better wording would be "whether by agreement or otherwise".

36. Mr. TUNKIN said that, although he considered the text satisfactory as it stood, he could accept the last form of words suggested by the Special Rapporteur. It should be remembered that the text had still to be submitted to governments; when their comments were known, the Commission would have to reconsider it.

37. The CHAIRMAN put to the vote the amendment suggested by the Special Rapporteur, adding the words "whether by agreement or otherwise", after the word "permitted".

The amendment was rejected by 5 votes to 5, with 5 abstentions.

38. Mr. ROSENNE said that he had abstained from voting on the amendment.

39. The CHAIRMAN put article 13 to the vote as submitted by the Drafting Committee.

Article 13 was adopted unanimously.

ARTICLE 15 (TERMINATION OF TREATIES THROUGH THE OPERATION OF THEIR OWN PROVISIONS)

40. Sir Humphrey WALDOCK, Special Rapporteur, said that, since the 708th meeting, the Drafting Committee had further amended the title of article 15 to read "Termination of treaties through the operation of their own provisions" and had redrafted the text to read:

"1. A treaty terminates through the operation of one of its provisions:

- “(a) on such date or on the expiry of such period as may be fixed in the treaty;
- “(b) on the taking effect of a resolutive condition laid down in the treaty;
- “(c) on the occurrence of any other event specified in the treaty as bringing it to an end.
- “2. When a party had denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.
- “3. (a) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation or withdrawal takes effect.
- “(b) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.”
41. Though some members of the Commission had considered paragraph 1 unnecessary, the majority had seemed to be of the opinion that it had its place in a codifying instrument. No substantial changes had been introduced in the revised text and the Drafting Committee had thought it unnecessary to insert a cross-reference to the articles providing for termination in other ways, as suggested by Mr. Castrén.
42. Mr. CASTRÉN said he was willing to vote for the Drafting Committee's text, but must point out that, in paragraph 3 (a) the French words “*a cessé d'y être partie*” did not exactly correspond to the English word “withdrawn”. It would be better to use the verb “*se retirer*”, as in other articles.
43. Mr. GROS said that that was just a matter of language, but it was nevertheless more correct to say “*a cessé d'être partie*”. The verb “*se retirer*” expressed the act whose consequence was that the State concerned ceased to be a party to the treaty. Of course one could say “*s'est retirée*”, but although the noun “*retrait*” was good French, the verb was not equally apt. It was just a question of style, for as far as substance was concerned, the two ways of expressing the idea were exactly equivalent.
44. Sir Humphrey WALDOCK, Special Rapporteur, said that “withdraw” was the proper term in English and was used in treaty clauses concerning termination.
45. The CHAIRMAN said he questioned whether the expression used in the French text was the exact equivalent.
46. Sir Humphrey WALDOCK, Special Rapporteur, said he wondered whether the expression used in the French text would be appropriate for the other articles in section III. Paragraph 3 (a) was concerned with the voluntary exercise of the right of withdrawal. He would

have no objection to amending the English text by substituting the words “or exercised its right to withdraw” for the words “or withdrawn”.

47. Mr. GROS said that in French it would then be necessary to say “*a exercé son droit de retrait*”, but that was not exactly equivalent to the English word “withdrawn”.

48. Mr. AGO thought that the expression “*a exercé son droit de retrait*” would be preferable, if an equivalent phrase could be found in English. What was really meant was two successive acts: first, the exercise of the right to withdraw and then the result, which was that the treaty no longer applied to the party in question.

49. Mr. TSURUOKA suggested the words “*ou s'en est retirée*”.

50. Mr. GROS said that that was correct, even if not perhaps the best legal drafting.

51. Mr. CADIEUX suggested that the form of words used in article 16 (para. 57 below) might be taken as a model. Whatever decision the Commission took would have to be uniformly applied to the other articles.

52. Mr. GROS said that the case contemplated in article 16 was rather different, for it was stated there that a party could denounce or withdraw from the treaty, whereas in article 15 it was stated that a legal act — denunciation or the exercise of the right of withdrawal — had been performed in conformity with the terms of the treaty. Technically, it would therefore be more correct to say “*a exercé son droit de retrait*” in article 15, and that would not involve any inconsistency between the two articles. The concurring of the texts of the articles would, as usual, be carried out by the Drafting Committee at its last meeting.

53. Mr. TUNKIN said that if the Special Rapporteur's suggestion were adopted, it would mean substituting the words “exercised its right to denounce” for the word “denounced”; personally, he preferred the text as it stood and did not think there was any discrepancy between the English and French versions.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that in fact no change was necessary in the English text; the words “in conformity with” made it sufficiently clear that the act of denunciation or withdrawal had been performed in the exercise of a right.

55. Mr. GROS said he accepted the wording proposed by Mr. Tsuruoka.

56. The CHAIRMAN put article 15 to the vote as amended by the substitution, in the French text of paragraph 3 (a), of the words “*s'en est retirée*” for the words “*a cessé d'y être partie*”.

Article 15 was adopted by 17 votes to none.

ARTICLE 16 (TREATIES CONTAINING NO PROVISIONS REGARDING THEIR TERMINATION)

57. Sir Humphrey WALDOCK, Special Rapporteur, said that in accordance with the Commission's decision

at its 709th meeting (paras. 7 and 40), the Drafting Committee had expressed the proviso in the first sentence of article 16 in positive instead of negative form. The text proposed read:

“A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case a party may denounce or withdraw from the treaty upon giving to the other parties or to the Depositary not less than twelve months' notice that effect.”

58. Mr. TABIBI said he could vote in favour of article 16 on the understanding that the right of denunciation in accordance with the principle of self-determination was provided for in other articles.

59. The CHAIRMAN put article 16 to the vote.

Article 16 was adopted by 14 votes to 2.

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

60. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had made small drafting changes in paragraphs 1 and 2 (b) of the text adopted by the Commission at the 709th meeting (paras. 92-128); the article now read:

“1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty, or suspending its operation in whole or in part.

“2. A material breach of a multilateral treaty by one of the parties entitles:

“(a) any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting States;

“(b) the other parties by common agreement either:

“(i) to apply to the defaulting State the suspension provided for in sub-paragraph (a); or

“(ii) to terminate the treaty or to suspend its operation in whole or in part.

“3. For the purposes of the present article a material breach of a treaty by one of the parties consists in:

“(a) the unfounded repudiation of the treaty; or

“(b) the violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

“4. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.”

61. After careful consideration, the Drafting Committee had come to the conclusion that the right of partial

termination or suspension on the ground of breach should be subject to the conditions laid down in the new article 3 concerning separability. He accordingly proposed that a new paragraph 4 should be added reading: “The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in paragraphs 1 and 2, is subject to the conditions specified in article [3].” The existing paragraph 4 would be re-numbered paragraph 5.

62. Mr. VERDROSS said that if he understood paragraph 2 correctly, it covered two cases: that of a State party to a multilateral treaty which violated that treaty with respect to only one of the other parties, and that of a State which violated a multilateral treaty with respect to all the other parties. That distinction had not been brought out plainly; sub-paragraph (a) should be amended to read “any other party injured by the breach to invoke the breach . . .” and sub-paragraph (b) to read “the other parties injured by the breach by common agreement . . .”.

63. Mr. ROSENNE said there seemed to be some inconsistency between paragraph 1 and paragraph 2 (b) (ii), in that paragraph 1 contained a comma after the words “terminating the treaty”; that suggested that termination would apply to the whole treaty, whereas suspension could be partial.

64. Sir Humphrey WALDOCK, Special Rapporteur, said the intention was to give the injured party the option of not terminating or suspending the whole treaty, provided the conditions laid down in new article 3 were fulfilled.

65. Mr. AGO said that a question of substance was involved. The Drafting Committee had in fact considered that provision should be made for the possibility of terminating part of a treaty; that was why there had been some question of adding a reference to article 3 *ad abundantiam*. Article 3 contained a reference to article 20, and that meant that it already provided for the possibility of terminating only part of a treaty in the circumstances contemplated in article 20, which was quite logical.

66. Mr. TUNKIN endorsed the Drafting Committee's conclusion that the right of severance in the case of a material breach must be made subject to the provisions of the new article 3. He was not fully satisfied with the new text of article 20, however, and felt some concern about the consequences it might have for general multilateral treaties.

67. Mr. VERDROSS asked whether the wording of paragraph 2 meant that if a State violated the rights of only one other State, the other parties to the treaty could avail themselves of the right conferred by paragraph 2 (b).

68. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had not intended to make the kind of distinction between sub-paragraphs (a)

and (b) of paragraph 2 contemplated by Mr. Verdross, because it took the view that a material breach would be of concern to all the parties to a multilateral treaty.

69. The CHAIRMAN, speaking as a member of the Commission, said he would have no objection to a provision allowing for the partial termination or suspension of a treaty on the ground of a material breach, if it were made subject to the conditions laid down in the new article 3.

70. Mr. de LUNA said that the re-draft of paragraph 2 was a great improvement on the original draft, under which a breach of a bilateral or multilateral treaty gave the other parties the right to denounce it. The solution proposed by the Special Rapporteur was acceptable; it would hardly be possible to go further towards safeguarding multilateral treaties.

71. The CHAIRMAN put article 20 to the vote with the addition of the new paragraph 4 proposed by the Special Rapporteur.

Article 20, thus amended, was adopted by 18 votes to none with 1 abstention.

72. Mr. ROSENNE said that although he shared Mr. Thunkin's concern about its possible effects on general multilateral treaties, he had voted in favour of article 20.

ARTICLE 21 *bis* (SUPERVENING IMPOSSIBILITY OF PERFORMANCE)

73. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed a revised text for article 21 *bis* which read:

"1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty.

"2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.

"3. Under the conditions specified in article [3], if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only."

74. The Drafting Committee had come to the conclusion that, provided the conditions specified in the new article 3 were complied with, the principle of severance could be applied in cases of impossibility of performance.

75. Mr. PAREDES said that the new draft failed to take into account the possibility of the subject-matter of a treaty no longer serving the purpose which the parties had intended — a point he had already brought up earlier (710th meeting, paras. 8-9). Unless it were amended to remedy that defect, he would have to vote against the draft article.

Article 21 bis was adopted by 17 votes to 1.

ARTICLE 22 (FUNDAMENTAL CHANGE OF CIRCUMSTANCES)

76. Sir Humphrey WALDOCK, Special Rapporteur, said that in the light of the discussion of its previous text at the 710th meeting, the Drafting Committee proposed that article 22 should read:

"1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in this article.

"2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

"(a) the existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

"(b) the effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

"3. Paragraph 2 does not apply:

"(a) to a treaty fixing a boundary, or

"(b) to changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

"4. Under the conditions specified in article [3], if the change of circumstances referred to in paragraph 2 relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only."

77. The Drafting Committee had decided that the retention of the word "fundamental" in paragraph 2 made it unnecessary to keep the word "wholly" in paragraph 2 (b) of its first text (710th meeting, para. 27).

78. A new paragraph 4 had been added allowing for severance under the conditions laid down in the new article 3.

79. Mr. YASSEEN said that paragraph 2 (b) was excellent and very precisely drafted; he would now vote for the article.

80. The CHAIRMAN put article 22 to the vote.

Article 22 was adopted by 15 votes to none with 1 abstention.

ARTICLE 22 *bis* (EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW)

81. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that a new paragraph 2 be added to article 22 *bis* allowing severance, under the conditions laid down in the new article 3, where a new peremptory norm of international

law came into being, with which only certain clauses of the treaty conflicted. The article would read:

"1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in article 13 is established and the treaty conflicts with that norm.

"2. Under the conditions specified in article [3], if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void."

82. The Drafting Committee had substituted the word "when" for the word "if" in paragraph 1 of its first text (711th meeting, para. 27) and had reworded the title to read: "Emergence of a new peremptory norm of general international law".

83. Mr. CASTRÉN said he approved of the substance of the article, but wished to propose a purely formal amendment. It was rather abrupt to say that a treaty — which might have been in force for a very long time — suddenly became "void". It would be better to say that a treaty terminated "*eo ipso*" if it conflicted with a new peremptory norm of general international law having the character of *ius cogens*.

84. The CHAIRMAN said that when that question had been brought up during Mr. Castrén's absence, the majority of the Commission had decided, after discussion, to maintain the wording "becomes void and terminates".

85. Mr. CASTRÉN said he would not press his amendment.

86. The CHAIRMAN put article 22 *bis* to the vote.

Article 22 bis was adopted by 16 votes to none.

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

87. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had made a drafting change in the text of article 23 as submitted at the 714th meeting (para. 2), in order to bring it into line with article 4 of Part I by making express reference to "evidence" of authority. The text proposed read:

"The rules contained in article 4 of Part I relating to evidence of authority to conclude a treaty also apply, *mutatis mutandis*, to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation."

88. The CHAIRMAN put article 23 to the vote.

Article 23 was adopted unanimously.

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

89. Sir Humphrey WALDOCK, Special Rapporteur, said that both the title and paragraph 1 of article 24 as submitted at the 714th meeting (para. 9) had been slightly modified; the article now read:

"ARTICLE 24 : PROCEDURE UNDER A RIGHT PROVIDED FOR IN THE TREATY

"1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty, must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

"2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect."

The CHAIRMAN put article 24 to the vote.

Article 24 was adopted unanimously.

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

90. Sir Humphrey WALDOCK, Special Rapporteur, said that some drafting changes had been made in the text of article 29 as submitted by the Drafting Committee at the 714th meeting (para. 88). A new sub-paragraph (c) had been added to paragraph 1 to meet the point made by Mr. Lachs that the provision contained in article 28, paragraph 3 (c), should also apply in the case of suspension. The new text of the article read:

"1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:

"(a) shall relieve the parties from the obligation to apply the treaty during the period of the suspension;

"(b) shall not otherwise affect the legal relations between the parties established by the treaty;

"(c) in particular, shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

"2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible."

91. The CHAIRMAN put article 29 to the vote.

Article 29 was adopted by 17 votes to none.

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

92. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed that the title of the article be changed to "Presumption as to the validity, continuance in force and operation of a treaty" and that the text should read:

"Every treaty concluded and brought into force in accordance with the provisions of Part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or the suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the provisions of the present articles."

93. His original article 2 (A/CN.4/156), which he had placed among the general provisions, had sought to establish a primary rule of validity, but had been regarded by some members as unnecessary.

94. If, as seemed probable, his original article 1, containing definitions, disappeared, article 2 in its new form would be useful in the context of what followed in sections II and III. Perhaps when all the articles in the draft were combined in a single report, article 2 would need to be moved elsewhere.

95. The article had now been worded in neutral terms because it had been decided that the procedures for establishing nullity and effecting termination should be governed by the general law on the settlement of disputes and the provisions of the United Nations Charter.

96. Mr. AGO said he had consulted Mr. Gros about the French text of article 2, and he proposed that the words "*ne résulte de l'application*" should be substituted for the words "*ne découle des dispositions*" at the end of the article. It could hardly be said that the suspension of the operation of a treaty or the withdrawal of a particular party "*découle*" (derives) from the provisions of an article.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that in the English text the expression "results from" seemed broad enough for the purpose.

98. The CHAIRMAN said that Mr. Ago's point could be met by substituting the word "application" for the word "provisions" in the English text and the word "*résulte*" for the word "*découle*" in the French. He put the article, thus amended, to the vote.

Article 2, thus amended, was adopted by 16 votes to none, with 1 abstention.

Relations between States and inter-governmental organizations (A/CN.4/161)

[Item 6 of the agenda]

99. The CHAIRMAN invited the Commission to consider item 6 of the agenda — Relations between States and inter-governmental organizations — on which Mr. El-Erian, the Special Rapporteur, had submitted a first report.

100. Mr. EL-ERIAN, Special Rapporteur, introducing his report (A/CN.4/161) explained that it was not a definitive study of the subject, the scope of which had not been defined either by the Sixth Committee or by the Commission itself. In resolution 1289 (XIII) the General Assembly had invited the Commission to give further consideration to the question after the study of diplomatic intercourse and immunities, consular intercourse and immunities, and *ad hoc* diplomacy had been completed, in the light of the results of that study and of the discussions in the General Assembly. That resolution had been based on a proposal by the French delegation in the Sixth Committee; at the suggestion of the Greek delegation it had also been decided to specify that the international organizations in question were inter-governmental.

101. In the introduction to his report he had touched on the discussions in the Sixth Committee. Chapter II was devoted to the evolution of the concept of an international organization and traced the historical development of the conference system and the international administrative unions established during the second half of the nineteenth century, and their final transformation into general international organizations of a universal character with political, economic, social and technical functions. In his classification of international organizations, he had excluded *ad hoc* conferences and non-governmental organizations.

102. Chapter III contained a review of the attempts to codify the international law relating to the legal status of international organizations and dealt with the external relations of their members, but not with constitutional problems within the organizations themselves. In addition to the Convention on the Privileges and Immunities of the United Nations,¹ which had served as a prototype for similar conventions concluded between specialized agencies or regional organizations and States, he had discussed earlier attempts to codify the legal status of international organizations, made by the League of Nations Committee of Experts for the Progressive Codification of International Law and by the 34th Conference of the International Law Association in 1926. He had also mentioned the work of the group of experts convened under General Assembly resolution 1105 (XI) to prepare recommendations concerning the method of work and procedure for the first Conference on the Law of the Sea. Their report² had served as a basis for the rules of procedures for both conferences on the Law of the Sea, as well as for the Conference on Diplomatic Intercourse and Immunities and the Conference on Consular Relations.

103. The subject of relations between States and inter-governmental organizations had not been included in the Commission's provisional list of fourteen topics to be given priority, but had come up in connexion with its work on the law of treaties. The first three special rapporteurs on the law of treaties had included certain provisions concerning inter-governmental organizations in their drafts and the present Special Rapporteur had intimated at the previous session that he intended to devote part of his report to that subject, but the Commission had decided to defer consideration of it. Again, although Mr. Ago, in the working paper he had submitted to the Sub-Committee on State Responsibility (A/CN.4/SC.1/WP.6) had referred to the responsibility of other subjects of international law, the Sub-Committee had decided that the matter should be left aside. The Sub-Committee on State Succession had decided only to deal with succession in respect of membership in international organizations and not with succession between international organizations, which was discussed in Mr. Lachs' working paper (A/CN.4/SC.2/WP.7).

¹ United Nations Treaty Series, Vol. I, pp. 16 ff.

² *United Nations Conference on the Law of the Sea, Official Records*, Vol. I (United Nations publication, Sales No.: 58.V.4, Vol. I), pp. 172-175.

104. Chapter IV of his report contained a preliminary survey of the scope of the subject of the legal status of international organizations, with a section on their international personality. An important landmark had been the advisory opinion of 1949 of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*; the Court had come to the unanimous conclusion that the United Nations was a subject of international law capable of possessing international rights and duties.³ Some consideration was given in the following sections to the legal and treaty-making capacity of international organizations and to their capacity to bring international claims. The Court had been divided on the question whether the United Nations had the capacity to bring international claims on behalf of its officials, because of the possibility of conflict with the diplomatic protection exercised by the States of which the officials were nationals.⁴ A section was also devoted to the privileges and immunities of international organizations and the institution of legation, and to the question whether they should be standardized, which was a matter of great practical importance to all national authorities because of the variations in the privileges and immunities of different organizations in the same country and in those of offices of the same organization in different countries.

105. In the last section of his report he had dealt with the responsibility of international organizations and with the problem of their recognition, which arose primarily in respect of regional organizations. In that connexion he drew attention to the passage from the Court's Advisory Opinion quoted in paragraph 174 of his report. Finally, he had touched upon the question of succession between international organizations.

106. The conclusion he had reached was that the subject could be divided into three groups of questions. The first comprised the general principles of international personality and would include legal capacity, treaty-making capacity and capacity to bring international claims. The second comprised international privileges and immunities and would include three subjects: first, the privileges and immunities of international organizations themselves; second, the application of the institution of legation to international organizations; and third, diplomatic conferences, regarding which very valuable experience had been gained at the two Geneva Conferences on the Law of the Sea, the 1961 Vienna Conference on Diplomatic Intercourse and Immunities and the 1963 Vienna Conference on Consular Relations. The third group comprised special questions, which included: first, the law of treaties with respect to international organizations; second, the responsibility of international organizations; and third, succession between international organizations.

107. Of the special questions, perhaps the responsibility of international organizations had the greatest practical importance. It would arise, for example, with regard to the activities of the International Atomic Energy Agency. There was also the very interesting case of a territory

administered by an international organization itself. That situation had arisen for the League of Nations in the case of the Saar Basin; but for the United Nations, the first case had been that of West Irian. Under the Agreement between the Netherlands and Indonesia, which had received the unanimous approval of the General Assembly, the United Nations itself had been placed for a limited period in charge of the actual administration of West Irian. Consequently, there was a possibility of international responsibility on a territorial basis. So far, the case of West Irian was the only practical example, because the provisions regarding the administrations of the territories of Trieste and Jerusalem had not come into effect.

108. Outside the three groups, there were some other questions which might perhaps constitute a fourth group, but they were not of major importance. One was the right of international organizations to fly their flag on vessels operated by them. On that question, a working paper had been submitted to the Commission by the late Professor François, the Rapporteur on the regime of the high seas and the regime of the territorial sea. His paper had raised a number of problems, however, and the Commission had not reached a decision. The first United Nations Conference on the Law of the Sea, held at Geneva in 1958, had adopted a Convention on the High Seas, which included an article 7 reading:

“The provisions of the preceding articles do not prejudice the question of ships employed on the official service of an intergovernmental organization flying the flag of the organization.”⁵

There had thus been no positive pronouncement on the question at the time, and a further attempt to deal with it at the 1961 Brussels Conference on nuclear-powered ships, had been similarly inconclusive.

109. With regard to the scope of the draft articles, the Commission should concentrate first on international organizations of a universal character, and then examine whether the draft articles could be applied to regional organizations without change or not. The study of regional organizations raised a number of problems, such as recognition by, and relationship with, non-member States, which would call for the formulation of special rules for those organizations.

110. In determining an order of priorities, he had followed a process of elimination. A distinction had to be made between the juridical personality and privileges and immunities of international organizations and the other aspects of relations between States and international organizations. Consideration of topics such as the law of treaties with respect to international organizations, the responsibility of international organizations, and succession between international organizations should be deferred until the Commission had completed its work on the same topics as applied to States. The Commission should also consider whether those topics could

³ *I.C.J. Reports*, 1949, p. 179.

⁴ *Ibid.*, pp. 185 ff and 188.

⁵ See *United Nations Conference on the Law of the Sea, Official Records*, Vol. II (United Nations publication, Sales No.: 58.V.4, Vol. II), p. 136.

be taken up more appropriately in connexion with its work on the law of treaties, State responsibility and succession of States.

111. Once the order of priorities was settled, he could concentrate on the juridical personality and the privileges and immunities of international organizations, which could be examined separately. The general principles of juridical personality would include legal capacity, treaty-making capacity, and capacity to bring international claims. With regard to the treaty-making capacity, he wished to make it clear that he did not propose to deal with all the ramifications of the question. He would not examine the whole of the law of treaties in relation to international organizations, but only the question of treaty-making capacity as such. For many writers, the capacity to make treaties was the criterion of international personality. The privileges and immunities of international organizations included those which the organizations themselves enjoyed as bodies corporate, as well as those of officials and representatives of international organizations; they also covered the related question of the institution of legation with respect to those organizations. The experience of the last fifteen years had shown a certain diversity in the modalities of application of those privileges and immunities.

112. With regard to the form of the draft articles, his aim was to prepare a set of articles that could provide the basis for a draft convention. At the same time, however, further consideration must be given to the question whether the draft articles on the juridical personality of international organizations could not be more appropriately framed as an expository code than as a draft convention.

113. With regard to terminology, he had already observed that the adjective "intergovernmental" had been introduced before the words "international organizations" in resolution 1289 (XIII) at the request of a delegation. He himself considered that it was sufficient to refer to "international organizations", the term used in the Charter; he would therefore adhere to the traditional terminology which the Commission itself had used in its work on the law of treaties and dispense with the unnecessary adjective "intergovernmental".

114. Finally, as to the designation of the topic, three titles had been used by writers. The first was "The law of international organizations", which was not suitable because it usually referred to the constitutional law of international organizations, their functions and structure; the second was "The law of relations between States and international organizations"; and the third was "The legal status of international organizations". He proposed to use either the second or the third of those titles.

115. Mr. CADIEUX said that the Special Rapporteur was to be congratulated on his excellent report. He had undertaken a great deal of research and the documentation he had compiled was presented methodically and clearly; it was evidence of his professional ability and constituted in itself a valuable source of reference material.

116. At that stage, the Commission should merely take a decision on the recommendation in paragraph 179 of the report. He believed that the first recommendation was a wise one and willingly accepted it. So long as the Commission had not made more progress with its other work, the Special Rapporteur would be right to refrain from going too far ahead. It would be better for him to work first on the general principles, as he himself proposed, and then to determine what rules already existed in the fields connected with his subject: privileges and immunities and the right of legation. He would thus be reducing the danger of duplication and the problems of co-ordination to a minimum.

117. The second recommendation — that the Commission should concentrate first on international organizations of universal character, and in particular on the United Nations system — was likewise acceptable; for it was right to begin with the essentials of the subject, even though the rules drawn up might have to be adjusted later to fit particular cases. That was the method which the Commission itself had followed in its work on diplomatic missions: it had begun with permanent missions and then gone on to consider special missions. He was fully prepared to agree to Mr. El-Erian's very logical approach.

118. Mr. TUNKIN, congratulating Mr. El-Erian on his comprehensive study, which fully met the Commission's expectations, said that the objective at that stage should be to give the Special Rapporteur instructions on the scope of the topic and the approach to its study.

119. With regard to the scope of the topic, the difficulties were probably greater than in the case of State responsibility and State succession, because the question of international organizations was one on which there had been many recent developments in international law; the rules were continually evolving. It was therefore difficult to determine which questions properly pertained to the topic and which should be left aside. Nevertheless, an attempt should be made to limit the scope of the study, with a view to deciding which questions should be taken up first.

120. He had listened carefully to the Special Rapporteur's views on the scope of the topic, and had some doubts as to whether the treaty-making capacity of international organizations, the law of treaties in respect of international organizations, the responsibility of international organizations and succession between international organizations properly belonged to it. He would not express any definite views on the question at that stage, but thought that it should be carefully considered.

121. A more important matter was the choice of subjects for immediate study, and it was unfortunate that the Commission had not enough time at its disposal to make a thorough study of priorities; that being so, he would confine himself to a few preliminary remarks on the matter.

122. He had his doubts about the group of questions relating to international personality. The legal personality

of an organization was determined by its constitution. There were rules of general international law on the subject of the international personality of States, but none on the international personality of international organizations. There was therefore a great difference between States and international organizations in that respect. The rules on the personality of an international organization, which resulted from its constitution, were only binding on member States of the organization and on any States which freely accepted that international personality.

123. There were considerable differences in status between the various international organizations. That was true even of international organizations of a general character, such as the specialized agencies of the United Nations. It would therefore be necessary to examine the relationship between the draft articles to be prepared and the constitutions of the specialized agencies. In fact, that problem would arise in regard to the United Nations Charter itself.

124. In regard to privileges and immunities and the institution of legation, the discussion was on much firmer ground. There was the Convention on the Privileges and Immunities of the United Nations approved by the General Assembly on 13 February 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly on 21 November 1947. The relationship between those Conventions and the draft articles to be prepared by the Special Rapporteur would also have to be examined.

125. As to diplomatic conferences, the law of international conferences was in process of development and the question arose whether that subject should be considered together with relations between States and inter-governmental organizations or treated separately.

The meeting rose at 1 p.m.

718th MEETING

Wednesday, 10 July 1963, at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Relations between States and intergovernmental organizations (A/CN.4/161)

[Item 6 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of the first report by the Special Rapporteur on relations between States and inter-governmental organizations (A/CN.4/161).

2. He reminded the Commission that it was not attempting at its present session to reach a decision on the general directives to be given to the Special Rapporteur concerning the scope of the topic or those parts of it to which priority should be given. It had already decided, when approving the programme of work for 1964, that general directives would be given to the

Special Rapporteur at the winter session in January 1964 (716th meeting, paras. 1-3). The sole purpose of the present discussion was to give members who already had a settled opinion on the matter an opportunity of stating their views. There would be a further opportunity of doing so at the winter session and the Special Rapporteur would then sum up the discussion. Any opinions expressed at the present session, however, would be useful to the Special Rapporteur for his work in the intervening months.

3. Mr. ROSENNE, after congratulating the Special Rapporteur on his report, said he would confine himself to a few general observations of a preliminary character.

4. The topic of relations between States and inter-governmental organizations had emerged from the discussion of the articles on diplomatic relations. In view of that fact, and of the title of the topic, he had been struck by the reference in paragraphs 11 and 82 of the report to "the external relations of international organizations". International organizations were essentially part of the machinery by which States conducted their relations. The emphasis should therefore be on the relations of States with international organizations, rather than on the external relations of the organizations. The point was not a purely academic one. The report mentioned, for example, such matters as the espousal of claims by international organizations and the institution of legation in respect of international organizations. Unless the proper emphasis were placed on relations between States and international organizations, a study of those subjects could be misleading. Admittedly there had been instances of the espousal of claims by international organizations, but a question of equal if not greater importance was that of international organizations appearing as respondents in international claims. Similarly, the institution of legation was a matter for States between themselves and it would be misleading to suggest that an international organization had a right of legation.

5. With regard to international legal personality and treaty-making capacity, those notions were convenient academic expressions for conveying certain ideas; they should be regarded as points of arrival after a great deal of experience rather than as points of departure for the analysis of legal principles. In its advisory opinion of 11 April 1949 on Reparation for Injuries suffered in the Service of the United Nations, the International Court of Justice had referred to international personality as "a doctrinal expression, which has sometimes given rise to controversy", and had arrived at the pragmatic conclusion that if the United Nations were recognized as having that personality, it was "an entity capable of availing itself of obligations incumbent upon its Members".¹ In the light of that guarded approach, any attempt to formulate the notion of international personality could lead to difficulties.

6. On the general question of the privileges and immunities of international organizations, he had been interested by the plea for uniform standards in paragraph 170

¹ *I.C.J. Reports*, 1949, p. 178.

of the report, as well as by the warning, in paragraph 94, against any drive for absolute identity. Personally, he thought there was something to be said for a re-examination of the privileges and immunities of the major international organizations in the light of the experience gained since 1947. It would be useful, in particular, to examine how the development of the law in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations needed to be reflected in the privileges and immunities and in the status of international organizations.

7. He wished, however, to draw attention to a difficulty concerning the competence of the International Law Commission. The Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies had been adopted by the General Assembly, in 1946 and 1947 respectively, in pursuance of Articles 104 and 105 of the Charter, as mentioned in the preambles to those Conventions. He was not at all certain that the Commission was empowered to take any action regarding the two Conventions unless it had some specific indication that the General Assembly would welcome such action. If his doubts were shared by other members, he would suggest that the Commission should draw the attention of the General Assembly to the matter in its report.

8. Mr. CASTRÉN associated himself with the congratulations conveyed by previous speakers to the Special Rapporteur on his first report. The subject was a new one and only a few of its aspects had been studied before; but the Special Rapporteur had nevertheless succeeded in basing his report on very full documentation taken from the official sources and the researches of other scholars. The report gave a clear account of the evolution of the concept of an international organization, of the attempts to codify the legal status of international organizations and of the present position; the definitions and classifications of international organizations seemed to be acceptable. He approved, in general, of the Special Rapporteur's proposals and accepted the two recommendations made at the end of the report.

9. It was difficult at that stage to specify all the problems which should be examined and define the scope of the study, particularly in the case of certain special questions such as the law of treaties in respect to international organizations, the responsibility of those organizations and diplomatic conferences. But the Commission had already stressed the need for close co-operation between the various Special Rapporteurs to avoid overlapping.

10. As Mr. Tunkin had said, the Special Rapporteur's task was difficult, because he had to deal with an extensive subject that was evolving fast. Mr. Tunkin had also expressed doubts concerning the study of the first group of questions — the legal capacity of the international organizations, their treaty-making capacity and their capacity to espouse international claims. Yet those were precisely the problems which ought to be studied, and, if possible, solved, and it was desirable that the Commission should contribute to that work.

11. It was also true that the existing rules relating to international organizations varied greatly according to the nature and functions of the body concerned, and he recognized that there were some international organizations, such as the United Nations, which had a place apart. There were also international organizations which, though similar in status, were governed by different rules. The Special Rapporteur's task was, first, to determine which those organizations were, and then to see how far it was possible to propose uniform or analogous rules.

12. With regard to the order of priorities, he shared the Special Rapporteur's view. As to the form of the draft, he thought it too early to take a decision at the moment. Perhaps the two methods, code and convention, could be combined, but a decision on that point could not be taken until later.

13. Mr. de LUNA congratulated the Special Rapporteur on the manner in which he had performed his by no means easy task. His report scarcely called for any particular comment for, as was stated in paragraph 10, it was "intended primarily as a preliminary study of the scope of the subject of relations between States and intergovernmental organizations, and the approach to it".

14. The General Assembly, in resolution 1289 (XIII), had invited the Commission "to give further consideration to the question of relations between States and intergovernmental international organizations". The use of the adjective "intergovernmental" created an initial difficulty, which the Special Rapporteur had very neatly overcome in his oral statement. The French delegation had first spoken of "permanent international organizations", but had subsequently accepted a suggestion by the Greek representative that it should be made clear that the draft resolution referred to "intergovernmental" organizations, a designation that was both ambiguous and mistaken. The Government was only an organ of the State; hence the proper term was "international", "inter-State" or even "supra-State" organizations.

15. As to the method, although international organizations were what the sociologists called "secondary societies" created by States, they had a functional aspect, a specific purpose, which was organized and institutionalized, and the treaty was their constitution. The example of the International Red Cross, whose constituent elements were the various national societies, was very much to the point.

16. With regard to the legal capacity of international organizations, as Mr. Gros had rightly observed, they must forget the distinction between public law and private law, which, it must be added, was not recognized in all legal systems.

17. He intended to state his views in writing in greater detail on the various problems raised by the topic.

18. Mr. YASSEEN said that the topic was difficult and complex and that he greatly appreciated the work done by the Special Rapporteur in preparing his report. In compliance with the Chairman's directions, he would not go into details, because the present discussion was merely a preliminary exchange of views.

19. He approved of the Special Rapporteur's two recommendations, of his list of subjects to be dealt with and of his views on the form which the Commission's draft should take. He wished, however, to make one general comment.

20. The problem to be studied was that of the relations between States and international organizations. Relations always involved two sides; in the particular case in point there was the international organization on one side and the State on the other. It was understandable that emphasis should be placed on the study of the topic with reference to the international organization, because that aspect was new; but it was also important, even essential, not to overlook the difficulties which might also arise in regard to States themselves. In other words, the relations in question should be studied from both points of view.

21. He fully shared the Special Rapporteur's opinion on the form to be given to the Commission's work on the juridical personality of organizations. It was well known that there was no uniformity among international organizations, and that they differed greatly in their rights, their obligations and their functions; it might be said that they differed greatly in their international juridical personality. It would therefore be wise not to decide forthwith that the work should take the form of a general convention. What could be said at that stage was that the capacity of each international organization was governed by its particular Statute; that was a rule which could be adopted, but before deciding whether it was possible to go further and lay down general rules, it would be better to await the completion of the Special Rapporteur's researches.

22. Mr. AGO said he would confine himself to a few general remarks, as the subject was too broad for thorough discussion in the short time available; the January session would afford an opportunity for more careful study.

23. The main value of the Special Rapporteur's report was that it clearly showed the scope and the various aspects of the problems of international law raised by the growth of international organizations. The Commission would have to choose between two alternatives: to continue on the course it had adopted, or to abandon it. Thanks to the Special Rapporteur's work the Commission was in a position to make its choice advisedly.

24. One possibility would be to codify every part of international law which concerned international organizations; that would mean drafting a convention covering all the problems of international law which arose where the subject was not a State, but an international organization. The other method, which the Commission had followed so far, was to identify, in each branch of international law it was attempting to codify, the special features encountered when the subject was an international organization. That would raise the question whether it might not be advisable to supplement the main codification in each case by a chapter or protocol dealing with the same problem as it affected international organizations.

25. The Commission had been moving towards the second alternative, and while the Special Rapporteur's report offered a choice between the two methods, he thought it tended to encourage the Commission to continue on the course it had chosen. It would be unwise to attempt a general codification of the international law relating to international organizations until several branches of classical international law had been codified. Only then should the Commission examine, in each branch, whether there were special rules relating to international organizations.

26. The title chosen — relations between States and inter-governmental organizations — was explicit, for in fact the Commission wished to complete the codification of diplomatic law; it had been cautious enough not even to mention relations between different organizations.

27. With regard to the main subject, which would supplement the codification of diplomatic law, although the Commission should give the Special Rapporteur some directions, they should not be too strict, for once he had gone into the problem thoroughly, the Special Rapporteur would himself be able to say what should be included or left aside. Nevertheless, it would be unwise to try to codify rules on the international personality of international organizations.

28. At the previous meeting, Mr. Tunkin had very rightly said that there were no rules concerning the personality of international organizations. It was the concrete exercise of certain rights and the fulfilment of certain obligations which made it possible to say that a particular international organization was an autonomous subject of international law distinct from the States which composed it. It was even possible to go further and say that there was no rule of law giving States international personality or making them subjects of international law, and that personality was more in the nature of a concept arrived at by scientific observation. Hence it was also unnecessary, *a fortiori*, to determine rules that would make it possible to say which international organizations possessed legal personality. Nor was there any need to examine the treaty-making capacity of international organizations or their competence to bring claims before an international court. The form in which those questions arose would differ from one organization to another.

29. In reality, there was only one form of capacity to be considered, and that was capacity under internal law — the capacity to make contracts, to hire premises and to institute legal proceedings — which international organizations must possess in the countries in which they operated, in order to perform their functions. As the Special Rapporteur had said, that capacity really came under diplomatic law, in the sphere of privileges and immunities, and, in general, was connected with the status which the organization should have within the legal system of the State with which it had relations. He thought the Commission should ask the Special Rapporteur to pay particular attention to that matter, which certainly came within the scope envisaged for the first attempt to be made at codification.

30. Caution also required that the problem of conferences should not be considered at that preliminary stage, but held over for a later phase of the work.

31. The Special Rapporteur had asked whether the Commission wished to confine itself to organizations of a universal character. Although the instructions should not be too precise, he (Mr. Ago) thought that, from the practical point of view, relations between States and organizations of a universal character might not differ appreciably from relations between States and smaller, regional organizations. He did not wish to express any definite opinion on that point, however.

32. With regard to the form that the work should take, if the Commission wished to supplement the codification of diplomatic law by examining the problem of relations between States and international organizations, it should work towards a convention, adding a new chapter or an additional protocol to what had already been done on diplomatic law.

33. Mr. LACHS said that the Special Rapporteur had been unduly modest in describing his first report as "a reconnaissance rather than a definitive study". He warmly congratulated him on a scholarly, bold and interesting study, which traced the history of international organizations, attempted to define them and classified them in types and categories. The Special Rapporteur rightly expected some guidance from the Commission for his future work; in particular, having listed the problems involved, he wished to know which of them should be given priority.

34. Resolution 1289 (XIII) of 5 December 1948, by which the General Assembly had invited the International Law Commission to consider the question of relations between States and intergovernmental organizations, had had its origin in a French draft resolution. The French representative in the Sixth Committee had referred not only to the codification of what he had termed "special conventions", but also to working out "general principles which would serve as a basis for the progressive development of international law on the subject".² But by the resolution itself, the Commission was called upon to consider the topic "at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussions in the General Assembly". That wording clearly showed what was expected of the Commission.

35. With regard to the Special Rapporteur's introductory remarks, he shared the doubts of other members as to the wisdom of starting with a study of the juridical personality of international organizations. That was a wide and complex subject and involved considerations of a very general nature. He would prefer those general considerations to be set aside in favour of more concrete points. The Commission was not engaged in working out a model treaty for an international organization. In view of the variety of purposes which such organiza-

tions served, it would be extremely difficult to make them all conform to a single pattern.

36. The study of the treaty-making capacity of international organizations should also be deferred. Some organizations had that capacity clearly established in their constitutions; some derived it from decisions of their organs and others from the interpretation of their constituent instruments.

37. It would be wiser, in his opinion, if the work began with the Special Rapporteur's second group of questions, namely, the international privileges and immunities of the organizations themselves and the related question of the institution of legation with respect to international organizations. The study of diplomatic conferences should be left aside for the time being.

38. It would be consistent with General Assembly resolution 1289 (XIII) for the Commission to confine its attention at that stage to the privileges and immunities of international organizations themselves, their officials and representatives and to the related question of the institution of legation. That approach would not preclude consideration of other subjects at a later stage.

39. Mr. LIANG, Secretary to the Commission, said that Mr. Rosenne had drawn his attention to certain aspects of the problem of the privileges and immunities of international organizations, in particular the very practical question whether a study of relations between States and intergovernmental organizations could, or should, lead to a general codification of the special conventions which at present governed the matter. In that connexion, the French representative on the Sixth Committee of the General Assembly had said on 28 October 1958, that

"The development of permanent international organizations presented a number of legal questions, which were only partially solved by the special, bilateral conventions by which most of them were governed. It was necessary, therefore, not only to codify those special conventions, but also to work out general principles which would serve as a basis for the progressive development of international law on the subject".³

40. A few days later he himself had addressed the Sixth Committee, pointing out "that the various conventions governing the relations of international organizations constituted an extremely complex and intricate body of rules which it might be dangerous to disturb".⁴ After giving an account of the various conventions adopted pursuant to Articles 104 and 105 of the Charter, he had cautiously concluded that:

"Any attempt to codify those manifold rules in a single text might thus prove dangerous, as any new draft would have to take into account all divergencies in the existing instruments, and even a preliminary text prepared by the Commission might cause some misinterpretation of the existing positive law".⁵

³ *Ibid.*

⁴ *Ibid.*, 571st meeting, para. 13.

⁵ *Ibid.*

² *Official Records of the General Assembly*, thirteenth session, Sixth Committee, 569th meeting, para. 22.

41. In reply to the misgivings he had thus expressed, the representative of France had stressed that

“his delegation had never envisaged the reconsideration of existing conventions on the immunities enjoyed by organizations. Those instruments should of course be maintained, although it might be of interest to see whether they did not contain certain common principles.

“The matter contemplated in the French draft resolution was in fact entirely different. The study proposed therein was not of the immunities enjoyed by the organizations themselves, but of questions arising in the relations between those organizations and States.”⁶

The substance of that statement had been included in the report of the Sixth Committee.⁷

42. Thus the Commission could see that the Secretariat was concerned at the possible consequences of any effort to universalize the modalities of relations between organizations and States in the matter of privileges and immunities. The different circumstances of each case had made it necessary for the United Nations, for example, to conclude bilateral agreements with many Member States and with a non-Member State — Switzerland. There were many practical reasons for that situation which were bound to subsist for a long time to come. From the theoretical standpoint, there could be no doubt about the truth of the view expressed by a writer, and quoted in the Special Rapporteur's report (para. 170):

“From the standpoint of an international organization conducting operations all over the world there is a similar advantage in being entitled to uniform standards of treatment in different countries”.

But it was clear that it would not be possible to achieve that ideal state of affairs in the near future and that the present situation, which was one of diversity in universality, must endure for a considerable time.

43. While he subscribed to the ideal of universality, he was bound to counsel prudence. The codification of the various bilateral conventions governing the matter presented very serious problems, which would have to be settled on the basis not of the views of writers, but of those of governments. It was therefore important, if the Commission wished to undertake a study of the principles common to the various conventions, that the General Assembly should be consulted, as suggested by Mr. Rosenne.

44. The Commission could not consult the General Assembly at the present session and it should not act hastily. At that stage, he wished only to stress the need for consultation and to express the hope that, as the Commission advanced in its work, more time could be devoted to the matter of great practical importance to which he had referred.

⁶ *Ibid.*, paras. 15 and 16.

⁷ *Official Records of the General Assembly*, thirteenth session, Annexes, item 56, Document A/4007, para. 36.

45. Mr. VERDROSS said that the Special Rapporteur had submitted a noteworthy report and brilliantly developed his ideas in his oral statement.

46. He was able to associate himself with most of the comments made by previous speakers, but he wished to stress that States were at the origin of international law, whereas international organizations were creations of States; their existence rested on agreements concluded between States, and their legal status depended on the content of those agreements. There were accordingly no general rules, but only rules peculiar to each organization. The Special Rapporteur should therefore undertake a study of comparative law, from which it might be possible to derive certain general rules.

47. He shared Mr. Rosenne's opinion on the question of the privileges and immunities of international organizations. The rules adopted on that matter were the subject of conventions between States, and it was beyond the Commission's competence.

48. Mr. TABIBI said that the Special Rapporteur's treatment of a very difficult subject reflected both his academic distinction and his great practical experience of international organizations.

49. Some members had expressed doubts as to whether the topic was suitable for codification. In his view, the study should be conducted from the standpoint of the relations between international organizations and States; it would then involve an examination of the conventions on which those relations were based.

50. There had been some discussion about the legal capacity and treaty-making power of international organizations, which were clearly different and distinct from those of their member States. Resolution 1289 (XIII) showed that the General Assembly had had in mind mainly the practical aspects of daily relations between States and international organizations, which needed thorough study. The same was true of relations between international organizations themselves, which had given rise to complex problems of co-ordination. The differences between the statutes of different organizations were a constant source of difficulties for member States regarding the treatment to be accorded to representatives, international officials and the organizations themselves. There was therefore a strong feeling that an attempt should be made to arrive at uniform standards where possible.

51. There was no doubt that the different needs to be met and the different circumstances prevailing at the time the statutes of the various international organizations had been adopted had led to marked differences in their legal status. The result had been that similar operations were now conducted under totally different conditions in different countries and sometimes in a manner that was at variance with the basic needs of the institutions concerned.

52. One example was the OPEX programme, which provided for the supply of much-needed experts to serve as officials in developing countries. In flat contradiction with the terms of Article 100 of the United Nations Charter, the experts supplied were placed on the same footing as national officials, giving orders to some

national officials and receiving orders from others. In addition, there were marked differences between the status of OPEX experts in different countries; in some cases the responsible minister could dismiss an OPEX expert, while in others only the Secretary-General of the United Nations could do so.

53. Another example was provided by the Technical Assistance Resident Representatives which the United Nations maintained in no fewer than fifty-two countries. The agreements relating to privileges and immunities, local costs and housing differed from country to country; in at least one country the Resident Representative had a higher status than a diplomatic agent. There was clearly a need to study that situation with a view to securing a greater measure of uniformity.

54. Among the sources which would be useful to the Special Rapporteur were the international instruments establishing the various organizations. Another important source was the practical experience of the Secretariat in the application of those instruments — a matter on which the Secretariat could provide information. With regard to relations between the organizations themselves, the Special Rapporteur should consider the reports of the Administrative Committee on Co-ordination.

55. It was important that the study of the topic should not overlap with other work. The Special Rapporteur would no doubt keep in touch with his colleagues in order to guard against that eventuality.

56. As to the form of the draft articles, he strongly favoured a draft convention, as opposed to a code.

57. Mr. TSURUOKA, associating himself with the thanks and congratulations addressed to the Special Rapporteur by previous speakers, said that like Mr. Tabibi, he thought that, in the matter of relations between States and international organizations, the true needs of those organizations should be the main consideration.

58. The meaning of the term "international organization" was really still rather vague. A legal system for international organizations comparable with the commercial law which applied to companies in private law might be envisaged. The constitutions of the various international organizations would then be assimilated to the articles of association of commercial companies. But in view of the present development of international law he did not think that such assimilation was possible.

59. The practical importance of the question of the privileges and immunities to be granted, both by international organizations and by States, fully justified the request which the General Assembly had made to the Commission in resolution 1289 (XIII). By responding to that request, the Commission could certainly contribute to the development of international organizations and of their work for the benefit of mankind.

60. Mr. GROS associated himself with the Commission's unanimous tribute to the Special Rapporteur for his report, which he had too modestly described as a "reconnaissance".

61. He was, however, rather surprised that the introduction gave such prominence to the successive stages of

the draft resolution submitted to the General Assembly; what mattered was the text finally adopted. By its resolution, the General Assembly invited the Commission, after completion of the study of diplomatic and consular intercourse and immunities and of *ad hoc* diplomacy, to give further consideration, in the light of the results of that study, to the question of relations between States and intergovernmental organizations. That was certainly an important task, but it did not seem to correspond entirely to what Mr. Tabibi had described, which was more like a study of the law of international organizations in general; such a study would certainly be valuable, but it was not, perhaps, exactly what the General Assembly had asked for.

62. He did not see why the Commission should hesitate to examine the existing bilateral conventions which governed most of the problems relating to the international organizations it had to study and to make recommendations to the General Assembly if necessary.

63. On the basis of the Special Rapporteur's plan of work, he thought the questions to be considered first were those in the second group. As Mr. Yasseen had pointed out, relations between States and international organizations operated both ways, and it was the aggregate of diplomatic relations covered by group II in the Special Rapporteur's "broad outline" that the Commission should study.

64. With regard to the questions in the first group, he supported the view expressed at the previous meeting that there was no general rule governing international organizations, but that each international organization had rights and obligations deriving from its constituent instrument. He did not share Mr. Tabibi's view that international organizations were not subject to international law; they were, with certain qualifications. It therefore seemed difficult to deal with the questions in the first group otherwise than as a kind of general and fairly brief explanation of the actual substance of the topic.

65. As to the question of legal capacity, for which it hardly seemed possible to find an original and decisive solution, for the time being, its examination had better be deferred.

66. The same applied to the "special questions" in the third group.

67. The Special Rapporteur's report on relations between States and intergovernmental organizations would be valuable not only to the members of the Commission but also as documentation on international organizations.

68. Mr. BARTOŠ said that the Special Rapporteur had produced an outstanding piece of work.

69. He agreed with him about the formation of a general international law relating to international organizations. Most members of the Commission were perhaps inclined to take a traditionalist view which stressed the contractual character of international organizations because they were created by conventions between States. He himself was more concerned with practice than with the prevailing theory in international law. And practice

showed that international organizations were living entities with an influence of their own. For instance, the International Civil Aviation Organization had become so influential that even States which had opposed its establishment or had not been admitted to membership had had to adopt the rules of air navigation it had drawn up.

70. He did not share the view of some writers, in particular French writers such as Madame Bastid and Chaumont, that the United Nations was no more than a syndicate of States. In his opinion it was the personification of the international community and should assert itself. Looking at the matter from another point of view, if the United Nations caused an injury to a non-member State, he did not think it could be denied that it had international personality and international responsibility. Nor could it be said that States were divided into two groups, Member States and non-member States. It might happen, as it had in the case of the International Refugee Organization, that an international agency had more relations with States that were not members, but enlisted its services, than with States that were members, but in many cases had no need of its services.

71. The essential point was to determine the legal nature of international organizations and their general status and to establish a legal basis on which to build.

72. The Special Rapporteur's assignment was thus a difficult one, since he had to deal with vague notions on which opinions differed and, sometimes, even conflicted. He was all the more to be congratulated on having tackled the definition of those notions.

73. He (Mr. Bartoš) would revert to the question of the existence of an international law on inter-governmental organizations at the next session.

74. The CHAIRMAN, speaking as a member of the Commission, expressed his appreciation of the excellent and comprehensive report, in which the Special Rapporteur had explored the subject in a preliminary fashion and made certain suggestions as to how it should be handled. In accordance with what was becoming an established practice, the Commission should now provide him with general directives on the scope of the study to be made and the priorities to be given to certain items, especially as no sub-committee had been set up to consider the subject, as had been done in the case of State responsibility and of State succession.

75. The Special Rapporteur had adopted a very broad approach to the scope of his subject. However, since it was doubtful whether the Commission would be able to complete its work on that subject and on State responsibility and State succession within the term of office of its present members, it should not concern itself too much with the scope of the various topics on its agenda and the exact dividing lines between them. The Commission should lay down, within each topic, some order of priorities of a kind that would maintain the continuity and homogeneity of its programme as a whole, rather than attempt to define the scope of each study.

76. It was understandable and logical for the Special Rapporteur to propose that he first examine the general

principles of the juridical personality of international organizations, since that was the initial question in the study of the topic. But it might also be understandable for the Commission to take a different view, because it should be more concerned with the overall continuity and homogeneity of its programme of work than with the logical sequence within each topic. Accordingly, if the Commission was to complete its work on the whole subject of diplomatic intercourse, perhaps at the outset the Special Rapporteur ought to concentrate on certain matters of direct relevance to that subject, though not at first sight of prime importance.

77. Thus he should first direct his attention to the privileges and immunities of representatives to international organizations, and other related questions. The first two subjects which he proposed might be dealt with in the second part of his study, namely, the privileges and immunities of international organizations as bodies corporate and those of their officials, could perhaps be left aside, since rules governing both of them had been codified in the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the the Specialized Agencies. It might perhaps be claimed that those Conventions also regulated the privileges and immunities of representatives to international organizations, but authoritative information had been published to the effect that, despite Article 105 of the Charter and the Convention on the Privileges and Immunities of the United Nations, in practice such representatives were usually accorded diplomatic and not functional privileges in the majority of countries where international organizations had their headquarters or where conferences took place.⁸

78. It was therefore necessary to examine how far rules governing diplomatic relations — for example, those concerning the *agrément*, the declaration of persons as *non grata* and the position of representatives of States which had not received recognition — were applicable by a State to representatives to international organizations established in its territory. Such an investigation was badly needed because the rules of diplomatic intercourse had been developed before international organizations had become established, and they might not prove adequate in all respects.

79. Mr. EL-ERIAN thanked the Commission for finding time to give some preliminary consideration to his report and for all its valuable comments and criticism. It would only be possible for him to make some general observations on the discussion.

80. In reflecting on the scope of his subject, he had been very conscious of the fact that certain aspects of it came within the province of other Special Rapporteurs. He appreciated the need to dovetail the work with other subjects on the Commission's agenda and not to view it solely in the context of the codification of rules on diplomatic intercourse.

⁸ *Repertory of Practice of United Nations Organs*, Vol. V (United Nations publication, Sales No.: 1955.V.2, Vol. V), p. 350, para. 95.

81. He had sought to place the different issues in perspective in his report, so as to enable the Commission to select those that should be given priority. It was clear from the Sixth Committee's report to the General Assembly at its thirteenth session that the intention had been to give the Commission wide discretion in the handling of the subject.⁹ In its report to the seventeenth session of the General Assembly, the Sixth Committee had stated that a number of representatives stressed the importance which relations between States and inter-governmental organizations had acquired and that some representatives thought a very valuable study could be made on such questions as the international personality of international organizations, their capacity to enter into treaties, their international responsibility and the privileges and immunities of their staffs.¹⁰

82. With regard to the point raised by Mr. Tunkin concerning the relationship between the proposed draft articles and the Charter, under Article 104 the United Nations enjoyed in the territory of each of its Members "such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes," so that it did seem necessary to examine the nature of that legal capacity in the light of practice.

83. In reply to the Secretary he pointed out that the Convention on the Privileges and Immunities of the Specialized Agencies had been ratified by only thirty-nine States, so that there was a real need to consider whether that Convention was fully adequate or whether supplementary protocols were necessary.

84. It would hardly be appropriate to seek the views of the General Assembly on the scope of the study at that stage, but perhaps some comments would be made, at its next session, on the section of the Commission's report devoted to the present discussion.

85. He welcomed Mr. Gros' helpful suggestion that some brief preliminary consideration of an introductory character might be given to the questions of the juridical personality and legal capacity of international organizations, because of the organic link between those questions and privileges and immunities.

86. He hoped it would be possible to reach agreement on the scope of the study at the Commission's winter session in January 1964, so that the homogeneous character of the programme could be preserved. The purpose of his first report had been to elicit the Commission's views, not to suggest any definitive lines of approach.

87. Mr. TABIBI said he had been misunderstood by Mr. Gros. He had never suggested that international organizations were not bound by rules of international law; he had merely pointed out that they were the creation of States and were governed by the rules of their own constituent instruments. He had not suggested that the Committee should study rules applicable to international organizations, but that it should concentrate on certain practical problems.

⁹ *Official Records of the General Assembly*, thirteenth session, annexes, item 56, document A/4007, para. 36.

¹⁰ *Official Records of the General Assembly*, seventeenth session, annexes, item 76, document A/5287, para. 51.

Law of Treaties (A/CN.4/156 and Addenda)

[Item 1 of the agenda] (*resumed from the previous meeting*)

88. The CHAIRMAN invited the Commission to resume consideration of the articles submitted by the Drafting Committee.

ARTICLE 2 *bis*: TREATIES TO WHICH THE PROVISIONS OF THIS PART DO NOT APPLY

89. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had prepared an article concerning the constituent instruments of international organizations which read:

"ARTICLE 2 *bis*: TREATIES TO WHICH THE PROVISIONS OF THIS PART DO NOT APPLY

"Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provisions of Section III of this Part shall be subject to the established rules of the organization concerned."

90. The Drafting Committee had come to the conclusion that it would be inappropriate to stipulate that none of the articles in the draft would apply to treaties of that kind. It proposed that the application of the provisions of section III should be subject to the established rules of the organization concerned. It had been agreed that treaties concluded at conferences held under the auspices of, but not within, international organizations would come under the application of the general rules being framed, but that those drawn up within international organizations, such as International Labour Conventions, or those adopted by a resolution of an international organization, such as the Genocide Convention, would come within the scope of the proposed article 2 *bis*. The Drafting Committee had decided that it was not necessary to add the qualification suggested when the matter had been discussed earlier, that the treaties in question were those whose execution was supervised by an international organization.

91. Mr. YASSEEN said he accepted the principle of article 2 *bis*, but the French expression, "*dans le cadre d'une organisation internationale*" seemed too broad. It might be thought that the Drafting Committee had wished to include all treaties adopted by international organizations or by a conference convened under the auspices of an international organization. He proposed the expression "*au sein d'une organisation internationale*". The title of the article also seemed unsatisfactory.

92. Mr. GROS thought that the expression proposed by Mr. Yasseen would not be more restrictive; the point he wished to make should be dealt with in the commentary.

93. Mr. YASSEEN accepted that suggestion.

94. The CHAIRMAN proposed the title: "Treaties which are constituent instruments of an international

organization or were drawn up within an international organization”.

Article 2 bis, with the title proposed by the Chairman, was adopted by 15 votes to none with 1 abstention.

ARTICLE 27 (LEGAL CONSEQUENCES OF THE NULLITY OF A TREATY)

95. Sir Humphrey WALDOCK, Special Rapporteur, said that in the light of the discussion at the 714th meeting (paras. 75 - 84) and in order to safeguard the position of parties which had relied on a treaty in good faith to perform certain acts, the Drafting Committee had prepared a new text for article 27, which read:

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

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

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

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

96. Mr. CASTRÉN asked whether the question of responsibility would be dealt with in the commentary on article 27.

97. Sir Humphrey WALDOCK, Special Rapporteur, said he had drafted a passage for inclusion in the commentary explaining that the question of responsibility had not been covered in articles 27 and 28, because the Commission considered that it belonged to another branch of international law.

98. Mr. TUNKIN proposed the insertion of the words “as such” after the word “treaty” in paragraph 1 (a).

99. Sir Humphrey WALDOCK, Special Rapporteur, said that amendment was acceptable.

Article 27, thus amended, was adopted by 15 votes to none with 1 abstention.

Other business

[Item 9 of the agenda]

100. Mr. de LUNA said he wished to make a few remarks on the treatment accorded to the Spanish language. The improvement on the previous year in regard to the interval between the distribution of English texts and the Spanish translation must be acknowledged. It was, unfortunately, necessary, when there were three working languages, to choose a “key” language, which ought to be that used by the Special Rapporteur. But was there any reason why the summary records should not

be issued in the language used by each speaker, and then translated into the language of the Special Rapporteur, which, in the case of the law of treaties, was English?

101. Mr. ROSENNE proposed that the Commission include in Chapter V of its draft report a passage reading:

“*Delay in publication of the Yearbook*

“The Commission has noted with concern that publication of the volumes of the *Yearbook* is being subjected to an increasing delay. In making this observation the Commission expresses the hope that steps will be taken to ensure that in future the *Yearbook* will be published as soon as possible after the termination of each annual session.”

102. His proposal was not made in any spirit of criticism, but it was obviously essential that both volumes of the *Yearbook*, in the three languages, should be available to governments when they were asked to prepare their comments on the Commission's drafts, and, if possible, to delegations on the Sixth Committee when they had to consider the Commission's reports.

103. Mr. BRIGGS supported Mr. Rosenne's proposal.

The proposal was adopted.

The meeting rose at 1 p.m.

719th MEETING

Thursday, 11 July 1963, at 9.30 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

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

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.102)

Chapter I was adopted, with various drafting changes

CHAPTER IV: PROGRESS OF WORK ON OTHER QUESTIONS UNDER STUDY BY THE COMMISSION (A/CN.4/L.102/ADD.2)

Paragraph 3 (53 in final report)

1. Mr. TUNKIN proposed the deletion of the last two sentences, which read: “Some members stressed the codification of existing rules, others the progressive development of those rules. However, it was considered that the question whether, in this subject, more prominence should be given to codification or to progressive development could not be finally settled until the substance of the specific problems involved was studied”. The first of those sentences could give the misleading

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

impression that some members favoured codification rather than progressive development and that other members held the opposite view; the second sentence was quite unnecessary.

2. Mr. CADIEUX suggested that only the penultimate sentence and the word "However" in the last sentence should be deleted.

3. Sir Humphrey WALDOCK, General Rapporteur, said that the point could perhaps be met by replacing the two sentences by some such wording as: "How far the work done would represent codification and how far progressive development could not be ascertained until the substance of the specific subjects was studied."

4. Mr. BRIGGS said it would be better to omit the two sentences altogether. It had been the unvarying experience of the Commission that almost every subject involved both codification and progressive development.

Mr. Tunkin's proposal was adopted unanimously.

5. Mr. ROSENNE proposed that a paragraph be added to record that the Commission had held a short discussion on the topic of relations between States and inter-governmental organizations.

It was so agreed.

Chapter IV was adopted as amended, with various drafting changes.

CHAPTER V (OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION) (A/CN.4/L.102/ADD.3)

Paragraph 4 (70 in final report)

6. Mr. BARTOŠ, referring to the first sentence of paragraph 4, said that several members had suggested, at earlier sessions, that the Commission should widen its co-operation with the other bodies concerned with international law. But the Commission's report had never mentioned the matter. A sentence on that point should be added, for it should not be neglected any longer. Large bodies like the International Law Association, of which he was Vice-Chairman, and the Institute of International Law might well be surprised that the Commission made no attempt to get in touch with them and did not keep them informed of the topics it was studying. Even associations not having consultative status with the United Nations could be enabled to follow the Commission's work; for example, the Commission could inform them of its plans for future studies. The prestige of the Commission was at stake too; it was not in its interests to isolate itself from the other bodies concerned with international law.

7. Mr. ROSENNE said that the Austrian representative had raised that matter during the discussion of the Commission's report in the Sixth Committee of the General Assembly.² He suggested that the question of expanded co-operation with other bodies, official and otherwise, should be placed on the Commission's agenda for its sixteenth session.

² *Official Records of the General Assembly, seventeenth session, Sixth Committee, p. 43.*

8. Mr. LIANG, Secretary to the Commission, said he welcomed Mr. Rosenne's proposal.

9. Paragraph 4 dealt with the co-operation of the Commission with those inter-governmental organizations with which it had so far had relations. The exchange of observers with those bodies involved considerable expense and, of course, required certain budgetary appropriations.

10. The position regarding co-operation with non-governmental organizations was different. The present practice was to forward sets of the Commission's documents to the secretariats of those bodies. If the Commission considered it important that a sufficient number of sets should be sent to them for all their members it would be a different matter, and new regulations on the distribution of documents would be required. The best course would be for the Commission to discuss the whole subject, as suggested by Mr. Rosenne, and take some concrete measures.

11. The CHAIRMAN, speaking as a member of the Commission, said that the point raised by Mr. Bartoš should be met by a full discussion at the sixteenth session.

12. Mr. CADIEUX supported Mr. Rosenne's suggestion. The text under consideration reflected the conclusions which the Commission had reached after discussing the question of co-operation. It had considered widening its co-operation with certain intergovernmental bodies, but as to making contact with non-governmental bodies — a question which deserved consideration, but which had political implications — it would be better merely to indicate the agreement reached by the Commission and reserve its position on the wider issue raised by Mr. Bartoš.

13. Mr. PAL observed that the Commission was discussing its report on what it had already done, not what it would do in the future.

14. Mr. de LUNA said that a reference to the widening of co-operation by the Commission with other bodies would not in any way prejudice a decision concerning which bodies it was to co-operate with. It was customary in all countries to publicize work on codification to some extent, in order to ascertain the views of as many jurists as possible. That had been done when the Italian codes had been revised. It would be for the Sixth Committee and the General Assembly to consider the question of wider co-operation between the Commission and other bodies, and to take a decision on the subject.

15. The CHAIRMAN said that the Commission could not, at that late stage, consider the whole question of expanded co-operation with other bodies.

16. Mr. BARTOŠ asked that, since Mr. Rosenne and he had brought up the point during the discussion, paragraph 4 should merely state "Some members of the Commission proposed . . .", instead of "The Commission further recommended . . .".

17. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed

to the inclusion in paragraph 4 of a passage to the effect that the question of expanded co-operation had been raised by some members and that the Commission had decided to place the subject on its agenda for the sixteenth session.

It was so agreed.

Paragraph 5 (71 in final report)

18. Mr. LACHS said that since the time-limit for government comments on the subject of State succession had been extended to 1 January 1964, it was unlikely that he would be able to have a report ready in time for the Commission's sixteenth session. He therefore suggested that the words "if possible" should be inserted after the words "(preliminary report on the aspect of treaties)". The text, as drafted, did not cover the possibility of the Special Rapporteur not being able to submit a report.

19. Mr. AGO said that Mr. Lachs' point also applied to the topic of State responsibility. It would be advisable to change the order of the items and to place "relations between States and intergovernmental organizations", which was certain to be considered in 1964, before "State responsibility" and "State succession", neither of which was likely to be dealt with before 1965.

20. The CHAIRMAN suggested that the order of the items should be: (1) Law of treaties; (2) Special missions; (3) Relations between States and intergovernmental organizations; (4) State responsibility; (5) Succession of States and governments. In the case of items (4) and (5), the words "if ready" could be added after the words "preliminary report".

It was so agreed.

Paragraph 10 (80 in final report)

21. Mr. BRIGGS pointed out that it was stated that the Commission had decided that it would be represented at the next (eighteenth) session of the General Assembly by its Chairman. To the best of his recollection the Commission had not taken such a decision. He therefore formally proposed that the Commission now decide that it be represented at the eighteenth session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Eduardo Jiménez de Aréchaga.

Mr. Briggs's proposal was adopted unanimously.

Paragraph 11 (79 in final report) (A/CN.4/L.102/Add.6)

22. Mr. BARTOŠ said he was not able to find any mention among the Commission's conclusions of Mr. Paredes' complaint, which had been supported by the Commission, regarding the delay in the distribution of documents in Spanish.

23. Mr. ROSENNE said that, in view of the Commission's criticisms in paragraphs 84 and 85 of the report on its fourteenth session,³ of the facilities provided for the production of documents, summary records and

³ *Official Records of the General Assembly, seventeenth session, Supplement No. 9.*

translations, it was only fair to preface any remarks on the subject of delay in the distribution of documents in Spanish by a statement that there had been a marked improvement in the services provided to the Commission.

24. Mr. de LUNA supported Mr. Rosenne's proposal. The Commission certainly should acknowledge the praiseworthy efforts made by the Secretariat at the present session; there had been an improvement in the translations into Spanish. It was unfortunately inevitable that there should be a time-lag between the distribution of original documents, especially documents from the Drafting Committee, and the distribution of the translations.

Mr. Rosenne's proposal was adopted.

25. Mr. PAREDES, after thanking Mr. Bartoš for his support in the matter, suggested that the production of documents in Spanish could be speeded up if the Drafting Committee would prepare the text of its articles in Spanish as well as in English and French. It could quite easily do that if it would consult the Spanish-speaking members of the Commission.

26. Mr. AGO said that great progress had been made in both the promptness of distribution and the quality of translation of documents in French.

27. The CHAIRMAN said that the Drafting Committee always included at least one Spanish-speaking member. He had himself served on the Drafting Committee and it was his experience that, if a text was discussed and formulated in English, neither the French-speaking nor the Spanish-speaking members of the Drafting Committee could be expected, in addition to participating in the discussion on substance, to accept responsibility for the translation into French and Spanish. The responsibility for translation must necessarily be accepted by the Secretariat.

Chapter V was adopted as amended, subject to drafting changes.

CHAPTER II: LAW OF TREATIES

28. The CHAIRMAN invited the Commission to consider the commentaries on articles 5-8 and 11-12 (A/CN.4/L.102/Add.1).

29. Sir Humphrey WALDOCK, Special Rapporteur, said he had not had much time to prepare the commentaries because decisions on some of the articles had been taken late in the session. Some of the footnotes might need revision or amplification.

30. It would be explained in the introduction to chapter II of the report that article 1 of his original draft, containing definitions, had been omitted and that the definitions in Part I would apply to the present articles.

Commentary on article 5 (31 in final report)

Paragraph 12

31. Mr. BRIGGS proposed that, in the last sentence, the words "prevailed in the Commission and" should

be deleted because, in fact, the reference was to a minority view that had been reflected in article 5 as the result of a compromise.

The commentary on article 5 was adopted with that amendment and various drafting changes.

Commentary on article 6 (32 in final report)

Paragraph 3

32. Mr. CASTRÉN proposed that the words "though the circumstance that Denmark was then under enemy occupation renders the case a somewhat special one" at the end of the sixth sentence should be deleted, because that circumstance was no excuse for a minister concluding an agreement without full powers to do so. Otherwise, the whole sentence should be deleted.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that he had mentioned that case, which owing to its special features was no safe guide, only because it had been brought up during the discussion.

34. Mr. de LUNA said that although he had been responsible for mentioning the case during the discussion the reference could well be dropped from the commentary.

It was so agreed.

The commentary on article 6 was adopted as amended.

Commentary on article 7 (33 in final report)

35. Mr. CASTRÉN pointed out that the commentary did not say anything about paragraph 2 of the article; perhaps it was not necessary if the commentary on the article concerning severance was full enough.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that he would expand the commentary to cover that point.

Paragraph 5

37. Mr. BRIGGS said that the formulation of the first sentence was hardly satisfactory. It ought to be stated in terms of fraud giving the injured party the right to invoke the voidability of the treaty.

38. Sir Humphrey WALDOCK, Special Rapporteur, said he would amend the sentence accordingly.

The commentary on article 7 was adopted with the amendments proposed.

Commentary on article 8 (34 in final report)

Paragraph 7

39. Mr. CASTRÉN said he questioned whether the second sentence faithfully reflected the decision reached by the Commission. Perhaps only the first sentence should be retained.

40. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that in his original draft (A/CN.4/156) he had emphatically stipulated that the error must have

related to a fact or state of facts, but the Commission had not wished to be so absolute in the matter and some members had pointed out that the possibility of error relating to regional rules of customary law, for example, must be taken into account. He had sought to reflect that general view in the text of the article and the commentary.

41. Mr. VERDROSS thought that the second sentence of paragraph (7) was useful, because it would show governments that the matter had been raised and that the Commission had taken a decision on it.

42. Mr. BARTOŠ said that the question had been discussed at length in the Drafting Committee, and that the Commission had considered the Committee's report when Mr. Castrén had been absent. The Commission had voted on the article after explanations given by the Special Rapporteur (705th meeting, paras. 1-18).

The commentary on article 8 was adopted with various drafting changes.

Commentary on article 11 (35 in final report)

Paragraph 1

43. Mr. ROSENNE proposed the deletion of the third, fourth and fifth sentences, as he thought it unnecessary to include such historical illustrations. He particularly disliked the reference to Hitler by name.

44. Mr. TUNKIN said that the illustrations were important and should be retained.

45. Mr. LACHS agreed with Mr. Tunkin.

46. Sir Humphrey WALDOCK, Special Rapporteur, said he would redraft the fifth sentence, omitting the reference to Hitler.

Paragraph 3

47. Mr. BRIGGS considered that the first sentence should be re-drafted to read: "The article permits the State to invoke the nullity of consent given, etc."; that would remove the suggestion that coercion automatically nullified a treaty. He pointed to an apparent contradiction between paragraphs 1 and 2 of article 11; while paragraph 1 seemed to suggest automatic nullification, paragraph 2 permitted a State to "invoke" nullity.

48. The CHAIRMAN, speaking as a member of the Commission, questioned whether the first sentence of paragraph 3 was necessary at all.

49. Mr. BARTOŠ drew Mr. Briggs' attention to a difference in drafting between article 12 (36 in final report) and article 11. In the commentary on article 11, the word "nullifies" was used, whereas under article 12 a treaty was void *ipso jure*.

50. Mr. AGO referring to the second sentence in paragraph 3 said that a distinction should be made between automatic nullity and nullity established on the initiative of the injured party.

51. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had left open the question of the relationship between the article and the procedural provisions. It had come near to equating the personal coercion of a representative with coercion of a State — a point of view which he did not share.

52. The CHAIRMAN, speaking as a member of the Commission, pointed out that when discussing article 25 (714th meeting, paras. 17-56) the Commission had clearly endorsed Mr. Pal's view that coercion could provide a ground for the assertion of nullity, but that nullity did not follow automatically. The Commission was by no means contemplating a unilateral right of repudiation in such cases.

53. Mr. BARTOŠ said that at all stages in its work the Commission should take account of contradictions which might be noted and try to remedy them. There was a serious contradiction in article 11. With regard to general effects, the concept of automatic application was adopted, but with regard to severance (paragraph 2), it was said that a State might "invoke" the coercion. He asked the Special Rapporteur to give his opinion.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that if there were any contradiction between paragraphs 1 and 2 of article 11, it could be removed by substituting the word "treat" for the word "invoke" in paragraph 2.

That amendment was adopted.

55. The CHAIRMAN speaking as a member of the Commission, proposed that the first sentence of paragraph 3 should be deleted and that the word "absolute" should be substituted for the word "complete" at the end of the second sentence.

It was so agreed.

56. Mr. ROSENNE proposed that the last part of the second sentence, following the semi-colon, should read: "it concluded that the use of coercion against the representative of a State for the purpose of procuring the conclusion of a treaty would be a matter of such gravity that the article should provide for the absolute nullity of consent to a treaty so obtained or for the severance of the tainted provisions at the option of the injured State".

57. Mr. AGO said that a distinction should be made. Article 25 dealt with procedure but the Commission had wished to establish a very clear distinction where grounds for nullity were concerned. In the cases of fraud and error, the Commission had said that consent was vitiated, but that the vitiation would produce effects only if invoked by the party concerned. In the case of coercion, on the other hand, whether it was directed against a person or against the State, or whether it involved conflict with a *jus cogens* rule, the Commission had not wished the nullity to depend on the will of one party; it took effect *ex lege and erga omnes*. Of course some form or procedure for recognition of the fact would also have to be followed in the latter case; but the distinction was fundamental and it should not be

lost sight of merely because there was a procedure to be followed.

The commentary on article 11 was adopted as amended with various other drafting changes.

Commentary on article 12 (36 in final report)

Paragraph 1

58. Mr. TSURUOKA, noting that the Tokyo Charter was mentioned in the fourth sentence, asked whether there was any such charter.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that in order to satisfy Mr. Tsuruoka, he would refer to the Charters of the Nuremburg and Tokyo tribunals.

Paragraph 3

60. Mr. YASSEEN said he had raised the question of the scope of article 12 (705th meeting, paras. 31-52) and he thought that the commentary took too little account of the comments he had made. In the second sentence it was stated that "Some members of the Commission expressed the view that certain extreme forms of economic pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion". But economic pressure was not the only form of pressure that need be taken into account: for example, there could also be political pressure. He therefore asked the Special Rapporteur to mention that some members had suggested that the article should cover all forms of coercion.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that perhaps Mr. Yasseen's point could be met by substituting the words "certain other forms of pressure" for the words "certain extreme forms of economic pressure".

62. Mr. BARTOŠ said that, at the same time as Mr. Paredes and Mr. Yasseen, he, too, had advocated mentioning all forms of pressure.

63. Mr. EL-ERIAN said he fully supported Mr. Bartoš on the principle, but he thought the Special Rapporteur's suggested amendment would cover the point.

64. Mr. de LUNA suggested the words "any other forms of pressure". Modern technical facilities, such as broadcasting, made it possible to exert pressure of many kinds.

65. Mr. PAREDES thought that the words "certain extreme" should be replaced by the words "the other".

66. Mr. CASTRÉN said he was surprised that some members of the Commission wished to go so far as to include all forms of pressure. The word "certain" could, of course, be deleted if they wished, but he did not share their opinion.

67. Mr. de LUNA proposed that, if the word "extreme" was deleted, it should be replaced by the word "serious". It was necessary to use a qualifying adjective, because in international politics there were always pressures.

68. Mr. YASSEEN said it was merely a question of making the commentary reflect what had been said. He remembered having spoken of the condemnation of all forms of coercion.

69. The CHAIRMAN, speaking as a member of the Commission, proposed that the words "certain extreme forms of economic pressure" be replaced by the words "any other form of pressure".

It was so agreed.

70. Mr. de LUNA, noting that the word "serious" had not been adopted, asked that it be mentioned in the record that he was not among the members of the Commission referred to in the second sentence of paragraph 3.

Paragraph 5

71. Mr. TUNKIN drew attention to the third sentence, reading: "The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, the expression of general rules of international law which are of universal application and which find their authoritative formulation in the Charter". In order to avoid theoretical controversies, he proposed that the words "the expression of general" and the words "and which find their authoritative formulation in the Charter" should be deleted, and that the word "general" should be inserted before the words "international law".

It was so agreed.

72. Mr. AGO proposed that the word "today" should be inserted before the words "of universal application" so as to avoid giving the impression that the rules referred to were of long standing.

It was so agreed.

Paragraph 6

73. Mr. TUNKIN said that, again in order to forestall doctrinal argument, he proposed that the words "international law" be substituted for the words "international public order" in the second sentence, and that the words "of the United Nations Charter" be substituted for the words "of international public order" at the end of the paragraph.

74. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Tunkin's first amendment. He thought that the last sentence, which might prove to be controversial, could be omitted, as it had no direct bearing on the Commission's discussions.

75. Sir Humphrey WALDOCK, Special Rapporteur, maintained that the last sentence dealt with a point that had been discussed at considerable length and had been given particular prominence by Mr. Ago (682nd meeting, paras. 38-42).

76. Mr. de LUNA supported the Chairman's proposal that the last sentence be deleted.

77. Mr. ROSENNE said he would regret the deletion of the reference to international public order, the existence of which was an important point brought out during the discussion.

78. Mr. YASSEEN said that the text under discussion was a commentary, not an article, and the last sentence referred to a consequence, which was perfectly appropriate in a commentary.

79. Sir Humphrey WALDOCK, Special Rapporteur, said that the last sentence could be retained with the substitution of the words "in effect by the conclusion of a new treaty" for the words "by a process of 'novation'".

80. Mr. TUNKIN said that although it was generally recognized that there were certain rules of *jus cogens* from which States could not derogate, the concept of an international public order was a controversial one.

81. Mr. YASSEEN agreed with Mr. Tunkin; he would not press for the retention of the expression "international public order", but he attached great importance to the substance of that idea. It covered rules from which States could not derogate by agreement.

The amendments proposed by Mr. Tunkin and the Special Rapporteur were adopted.

The commentary on article 12 was adopted as amended.

82. Mr. PAREDES said he would be obliged to abstain from voting on the commentary as a whole, as he had not had enough time to study it.

83. Mr. TUNKIN said he wished to make a general observation on commentaries on drafts prepared by the Commission; it was not intended as a criticism of the Special Rapporteur on the law of treaties.

84. The time had come for the Commission to abandon its traditional practice of relying exclusively on the works of western writers. No reference was made in the report on the law of treaties to works by socialist lawyers, even though some had been translated into English or French, or to Asian or African writers. The Commission was engaged in framing general rules of international law and must take account of the views of authorities throughout the world.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that he would have liked to engage in further research, but had been prevented from doing so by the need to submit his report in time for it to be translated into other languages. He would be glad to receive the names of authors of further publications concerning the law of treaties, so that he could enlarge the bibliography that might be attached to his report.

86. The CHAIRMAN said that any member of the Commission was at liberty to communicate the titles of further works of reference to the Special Rapporteur.

The meeting rose at 1 p.m.

720th MEETING

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

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

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

Chapter II: Law of treaties (*continued*)

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

Commentary on article 13 (37 in final report)

Paragraph 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Paragraph 3

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

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

21. Mr. de LUNA supported Mr. Gros.

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

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

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

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

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

It was so agreed.

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

It was so agreed.

The commentary on article 13 was adopted, as amended.

Commentary on article 15 (38 in final report)

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

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

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

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

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

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

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

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

The proposal was adopted.

The commentary on article 15 was adopted as amended.

Commentary on article 16 (39 in final report)

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

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

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

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

It was so agreed.

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

Commentary on article 18 (40 in final report)

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

Commentary on article 19 (41 in final report)

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

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

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

Paragraphs 1 to 32 were adopted with various drafting changes.

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

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

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

It was so agreed.

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

Paragraph 16 (66 in final report)

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

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

The proposal was adopted.

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

Chapter II: Law of treaties (resumed)

Section B: Draft articles on the Law of Treaties

Part II: Invalidity and Termination of Treaties²

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

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

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

² See final Report, pp. 3 ff.

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

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

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

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

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

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

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

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

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

It was so agreed.

Section I: General provision

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

Article 30 was adopted.

Section II: Invalidity of treaties

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

Article 31 was adopted with various corrections.

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

Article 32 was adopted without discussion.

ARTICLE 33 (FORMERLY ARTICLE 7): FRAUD

Article 33 was adopted without discussion.

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

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

Article 34 was adopted with that amendment.

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

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

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

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

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

Article 35 was adopted.

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

Article 36 was adopted without discussion.

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

Article 37 was adopted without discussion.

Section III: Termination of treaties

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

Article 38 was adopted without discussion.

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

Article 39 was adopted without discussion.

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

Article 40 was adopted without discussion.

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

Article 41 was adopted without discussion.

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

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

Article 42 was adopted with that amendment.

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

Article 43 was adopted without discussion.

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

Article 44 was adopted without discussion.

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

Article 45 was adopted without discussion.

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

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

Article 46 was adopted without discussion.

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

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

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

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

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

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

Article 48 was adopted without discussion.

Section V: Procedure

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

Article 49 was adopted without discussion.

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

Article 50 was adopted without discussion.

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

Article 51 was adopted without discussion.

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

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

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

Article 52 was adopted with that amendment.

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

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

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

Article 53 was adopted.

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

Article 54 was adopted without discussion.

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

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

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

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

The motion was carried by acclamation.

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

The meeting rose at 5.30 p.m.

721st MEETING

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

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

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

Chapter II: Law of Treaties (continued)

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

Commentary on article 20 (42 in final report)

Paragraph 1

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

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

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

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

Paragraph 4

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

It was so agreed.

Paragraph 5

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

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

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

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

Paragraph 6

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

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

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

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

Commentary on article 21 (43 in final report)

The commentary on article 21 was adopted without discussion.

Commentary on article 22 (44 in final report)

Paragraph 5

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

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

sic stantibus principle, but on a new *jus cogens* rule. He and Mr. El-Erian had given that example as an illustration of a change in peremptory law. As he had been present at the discussion, he asked that the facts should be checked.

13. Mr. BRIGGS said that, although he agreed with Mr. Bartoš, he considered that the second sentence of paragraph 5 was correct.

14. The CHAIRMAN, speaking as a member of the Commission, suggested that Mr. Bartoš' objection might be overcome by substituting the words "in some quarters the Egyptian case was interpreted" for the words "some delegates interpreted the Egyptian case".

15. Mr. EL-ERIAN agreed with Mr. Bartoš; it was important to ensure that the sentence was accurate.

16. Sir Humphrey WALDOCK, Special Rapporteur, said that an amendment of the kind suggested by the Chairman should suffice: a number of writers had interpreted the case in the manner described and he had, after all, made no deduction from the interpretation mentioned in the second sentence. However, he would certainly look into the matter further.

Paragraph 6

17. Mr. AGO, referring to the fifth sentence, questioned whether it was appropriate to speak of a gap in the law.

18. Sir Humphrey WALDOCK, Special Rapporteur, said that he had had in mind not so much a gap in the law as the absence of rules regulating peaceful change. He was not very well satisfied with the drafting of the sentence, particularly the expression "imperfect legal institution", and intended to revise it.

Paragraph 7

19. Mr. AGO, referring to the fourth sentence, said it would be going too far to say that making the application of the doctrine of change of circumstances depend on the intentions of the parties was only a fiction.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that the point could be met by deleting the words "by making the doctrine dependent upon the intentions of the parties it invited", and substituting the words "it increased the risk of".

21. Mr. TUNKIN proposed the deletion of the words "the Commission recognized that" at the beginning of the paragraph, because the point referred to in the first sentence had not in fact been discussed.

22. He also proposed the insertion of the words "and to divorce it from some doctrinal connotations" after the word "rule" in the penultimate sentence, and the deletion of the last sentence.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin's amendments were acceptable, but he would prefer to retain some reference to the *clausula rebus sic stantibus*, because of the particular objections to which it gave rise. He therefore suggested

that Mr. Tunkin's amendment to the sixth sentence be amplified by the addition of the words "connected with the *clausula rebus sic stantibus*".

The commentary on article 22 was adopted as amended, subject to further drafting changes.

The commentaries on articles 22 bis, 23 and 24 (45, 49 and 50 in final report) were adopted without discussion.

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

24. Mr. YASSEEN said that on the whole the Commission was in favour of the solution proposed in the final paragraph of the Special Rapporteur's report (A/CN.4/162), but that view did not seem to be fully reflected in the draft of Chapter III. The Commission had plainly expressed a preference with regard to the problem of the succession of the United Nations to the functions and powers of the League of Nations. It had been said that the United Nations could find a method of designating an organ to replace the League of Nations Council and assume its powers.

25. Sir Humphrey WALDOCK, Special Rapporteur, said that he had sought to reflect the Commission's view in the last two sentences of paragraph 33 (c) (50 (c) in final report).

26. The CHAIRMAN, speaking as a member of the Commission, said he thought the last two sentences of paragraph 33 (c) were quite categorical enough. It was, after all, possible that the General Assembly might not follow the course advocated by the Commission.

27. Mr. YASSEEN said that the method proposed by the Special Rapporteur was the best, so far as the substance was concerned, because it did not entail what might be termed a bilateral system. His own interpretation of the Commission's view evidently differed from the Chairman's. He (Mr. Yasseen) had maintained that if the Commission could find a better method, it should say so.

28. Mr. CASTRÉN said he had not been present when the matter had been discussed, but he had read the summary records and the draft before the Commission. He agreed with Mr. Yasseen that the third method was the best and that the drafting might be improved.

29. Sir Humphrey WALDOCK, Special Rapporteur, suggested, in deference to Mr. Yasseen, that the last sentence of paragraph 33 (c) be amended to read: "It would avoid some of the difficulties attendant upon the use of other methods and would be administrative action...".

30. Mr. TUNKIN proposed that the word "However" should be added at the beginning of paragraph 33 (c) in order to give special emphasis to its content.

The amendments proposed by the Special Rapporteur and Mr. Tunkin were adopted.

31. Mr. LACHS said that paragraph 33 (e) (50 (e) in final report) should be expressed in stronger terms,

since the examination of general multilateral treaties to determine whether they needed to be brought up-to-date was no less important than the question of extended participation in them, and the General Assembly's attention should be drawn to that fact.

32. The CHAIRMAN, speaking as a member of the Commission, suggested that it might suffice to delete the word "any" before the words "further action."

33. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that sub-paragraphs (d) and (e) of paragraph 33 should be read together; he thought that sufficient prominence had been given to the point made by Mr. Lachs.

34. Mr. TUNKIN agreed with Mr. Lachs; before extending participation it would have to be decided whether the treaties in question needed to be adapted to contemporary conditions. Mr. Lachs' point could be met by deleting the opening words of paragraph 33 (e) "Independently of the question of extending participation in the treaties" and substituting the words "what action" for the words "whether any further action".

The amendments proposed by Mr. Tunkin were adopted.

Chapter III, as amended, was adopted.

Chapter II: Law of Treaties (resumed)

The CHAIRMAN invited the Commission to consider the remaining commentaries (A/CN.4/L.102/Add.9).

Commentary on article 2 (30 in final report)

The commentary on article 2 was adopted with a drafting change in the French text.

Commentary on article 2 bis (48 in final report)

35. Mr. TUNKIN said that the title of the article should be amended to refer to treaties which were the constituent instruments of international organizations or had been drawn up within such organizations.

It was so agreed.

36. Mr. ROSENNE proposed that in paragraph 2 a passage should be added to explain that the expression "established rules of the organization" was intended to have the same meaning as it had in article 18, paragraph 1 (a), of Part I.

It was so agreed.

The commentary on article 2 bis was adopted as amended, subject to drafting changes.

Commentary on article 4 (47 in final report)

Paragraph 1

37. Mr. BRIGGS proposed that in the first sentence the words "that a party is not permitted to take up a legal position" should be replaced by the words "that a party is not permitted to benefit from a legal position...". He also proposed the deletion of the final words of the first sentence: "when another party has

been led to assume obligations towards, or attribute rights to, the former party in reliance upon such representations or conduct".

38. Mr. TUNKIN proposed the deletion of the first sentence and of the first part of the second sentence: "If in some legal systems, such as the common law systems, the application of the principle may to some extent be dependent upon technical rules...". Comparisons with systems of internal law would introduce controversial ideas into the commentary.

39. Sir Humphrey WALDOCK, Special Rapporteur, accepted Mr. Briggs' proposals. In reply to Mr. Tunkin, he said he would be prepared to drop the reference to the common law systems, but thought that the commentary would have to retain some description of the general principle referred to in paragraph 1.

40. Mr. ROSENNE proposed that the first two sentences should be replaced by a single sentence reading:

"The foundation of the principle that a party is not permitted to benefit from a legal position that is in contradiction with its own previous representations or conduct is essentially good faith and fair dealing, which demand that a party shall not be able to take advantage of its own inconsistencies." (*Allegans contraria non audiendus est*).

Mr. Rosenne's proposal was adopted subject to drafting changes.

Paragraph 5

41. Mr. TUNKIN said that the Commission could in no case formulate "a full statement of the conditions" for the operation of an article; he therefore proposed that the first sentence should be deleted.

It was so agreed.

The commentary on article 4 was adopted as amended subject to drafting changes.

Commentary on article 25 (51 in final report)

Paragraph 3

42. The CHAIRMAN suggested that, in the first sentence, the word "invoked" should be replaced by the word "alleged".

Paragraph 4

43. Mr. TUNKIN suggested the deletion of the last two sentences, which could give rise to controversy regarding the interpretation of Article 33 of the Charter and of article 25 of the Commission's draft.

44. Mr. CASTRÉN thought that those two sentences should be retained, as they gave a useful explanation.

45. Sir Humphrey WALDOCK, Special Rapporteur, said he believed that the last two sentences were correct and stated the logical consequence of the Commission's proposals.

46. Mr. TUNKIN said that if the other members wished to retain those two sentences, he would propose that in the last sentence the word "still" should be replaced by "also".

47. Mr. ROSENNE proposed that the word "will" should be replaced by the word "would" in both sentences.

48. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to the amendments just proposed by Mr. Tunkin and Mr. Rosenne.

It was so agreed.

The commentary on article 25 was adopted as amended, with various other drafting changes.

Commentary on article 26 (46 in final report)

49. Mr. BARTOŠ suggested that a note should be added stating which were the pronouncements of the Permanent Court of International Justice referred to in the last sentence of paragraph 2.

It was so agreed.

The commentary on article 26 was adopted as amended, subject to drafting changes.

Commentary on article 27 (52 in final report)

The commentary on article 27 was adopted without discussion.

Commentary on article 28 (53 in final report)

50. Sir Humphrey WALDOCK, Special Rapporteur, said that in view of a previous comment by Mr. Tunkin (719th meeting, para. 73), the words "international public order" in the penultimate sentence of paragraph 3 would be replaced by the words "international law".

The commentary on article 28 was adopted with that amendment, subject to drafting changes.

Commentary on article 29 (54 in final report)

The commentary on article 29 was adopted without discussion.

Introduction

51. The CHAIRMAN invited the Special Rapporteur to present the introduction to Chapter II (A/CN.4/L.102/Add.10).

52. Sir Humphrey WALDOCK, Special Rapporteur, said that the introduction to the chapter of the Commission's report dealing with the law of treaties was similar to the corresponding passage in the report on the previous session.

53. Paragraph 3 (11 in final report) explained that the Commission had come to the conclusion that it was more appropriate to formulate the articles on what had previously been called the "essential validity" of treaties in terms of the various grounds upon which

treaties might be affected with invalidity, and the articles on "duration and termination" in terms of the various grounds upon which the termination of a treaty might be brought about.

54. Paragraph 4 referred to the Commission's plan (mentioned in paragraph 18 of its report on the previous session) to prepare three sets of articles on the law of treaties. It was explained that, in accordance with its decision at the previous session, the Commission had prepared a second self-contained group of articles.

55. With regard to the scope of the draft articles, it was explained in paragraph 6 (14 in final report) that they did not deal with the effect of the extinction of the international personality of a State upon the termination of treaties and that the Commission had decided to review that question at a later session when its work on the succession of States was further advanced.

56. Paragraph 7 set out the different trends of opinion which had emerged, during the Commission's discussion on the invalidity of treaties, regarding the case of a treaty whose provisions conflicted with those of an earlier treaty.

57. The change of the title of Part II to "Invalidity and termination of treaties" was explained in paragraph 3.

The introduction to Chapter II was adopted without discussion.

Production and distribution of documents²

58. Mr. PAREDES said he had abstained from voting on some parts of the draft report because he had not yet received the Spanish text.

59. The CHAIRMAN explained that some parts of the draft had been distributed only that morning in the original English.

60. Mr. BRIGGS expressed the desire that the final report should reach members as early as possible, to enable them to prepare for the forthcoming session.

61. Mr. ROSENNE proposed that it be recommended in the report that documents should be sent to members by air mail.

62. Mr. BARTOŠ supported Mr. Rosenne's proposal. The documents sent to him for the Vienna Conference on Consular Relations and for the current session of the Commission had been received at Belgrade on 2 July.

Mr. Rosenne's proposal was adopted.

63. Mr. TUNKIN expressed concern regarding the arrangements for the distribution of documents for the winter session to be held in January 1964. It was essential that members should receive the draft articles before they came to Geneva; otherwise the first few days of a short three-week session would be wasted.

64. The CHAIRMAN suggested that the Secretariat should take that point into consideration when preparing the documents for the winter session.

² See Chapter V, section C of the Commission's report.

65. Mr. BARTOŠ said it would be hard to ensure that members of the Commission received documents by early December. He had proposed a solution, but the Secretary to the Commission had doubted whether it was feasible. In the case of some commissions (for example those of the Economic and Social Council), if the Rapporteur was a Yugoslav, the documents were published at the United Nations office at Belgrade and sent direct to the persons concerned. If that was feasible for other departments of the Secretariat, it ought also to be so for the Legal Office.

66. Mr. LIANG, Secretary to the Commission, said that when he had discussed the matter with the officers of the Commission, he had promised to refer the whole subject to the Department of Conference Services. One of the problems involved was that of translation, in particular the availability of legal translators in New York and Geneva.

67. Mr. AGO recalled that in 1962, in order to save time, he had sent the introduction to the study on State responsibility to the Secretariat for circulation and had simultaneously sent copies to members of the Commission. As there was little time remaining before the winter session, Mr. Bartoš might perhaps follow the same procedure with his report on special missions.

68. Mr. BARTOŠ pointed out that the Sub-Committee on State responsibility had consisted of only five members, and his own report would be longer than Mr. Ago's. He could, however, assure members that they would receive the text of the draft articles by 15 December.

69. The CHAIRMAN noted that the Special Rapporteur on special missions would try to send his colleagues direct, by air mail, at least the text of his draft articles.

70. If there were no further remarks or proposed additions to the report, he would put the draft report as a whole to the vote.

The report of the Commission on the work of its fifteenth session, as amended, was adopted unanimously, subject to drafting changes.

Closure of the session

71. The CHAIRMAN thanked the members and officers of the Commission for their co-operation and understanding during the session, and the Drafting Committee for performing its task so effectively.

72. He paid a tribute to the Special Rapporteur on the law of treaties for the work he had done before and during the session. His pragmatic, bold and imaginative approach, his flexibility on drafting points and his firmness on matters of substance would place him among the most eminent of the Commission's special rapporteurs.

73. After the customary exchange of courtesies the Chairman declared the fifteenth session of the Commission closed.

The meeting rose at 1.15 p.m.

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