

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1965

Volume I

*Summary records
of the first part
of the seventeenth session*

3 May–9 July 1965

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 figures in square brackets appearing against the draft articles on special missions show the final numbering of these articles in the Commission's report on this session.

The reports by the Special Rapporteurs on the law of treaties and on special missions, and certain other documents, including the Commission's report, are printed in volume II of this Yearbook.

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MEMBERS OF THE COMMISSION

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Rapporteur : Mr. Taslim O. ELIAS

Mr. Constantin A. Baguinian, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

*[A/CN.4/174/Rev.1]
[5 April 1965]*

The Commission adopted the following agenda at its 775th meeting, held on 3 May 1965:

1. Filling of a casual vacancy in the Commission (article 11 of the Statute)
2. Law of treaties
3. Special missions
4. Relations between States and inter-governmental organizations
5. Organization of future sessions
6. Dates and places of meetings in winter and summer 1966
7. Co-operation with other bodies
8. Other business

YEARBOOKS OF THE INTERNATIONAL LAW COMMISSION

List of volumes published to date

<i>Yearbook</i>	<i>United Nations publication Sales No. :</i>
1949 Summary records and documents of the first session	57.V.1
1950, vol. I Summary records of the second session	57.V.3, vol. I
1950, vol. II Documents of the second session	57.V.3, vol. II
1951, vol. I Summary records of the third session	57.V.6, vol. I
1951, vol. II Documents of the third session	57.V.6, vol. II
1952, vol. I Summary records of the fourth session	58.V.5, vol. I
1952, vol. II Documents of the fourth session	58.V.5, vol. II
1953, vol. I Summary records of the fifth session	59.V.4, vol. I
1953, vol. II Documents of the fifth session	59.V.4, vol. II
1954, vol. I Summary records of the sixth session	59.V.7, vol. I
1954, vol. II Documents of the sixth session	59.V.7, vol. II
1955, vol. I Summary records of the seventh session	60.V.3, vol. I
1955, vol. II Documents of the seventh session	60.V.3, vol. II
1956, vol. I Summary records of the eighth session	56.V.3, vol. I
1956, vol. II Documents of the eighth session	56.V.3, vol. II
1957, vol. I Summary records of the ninth session	57.V.5, vol. I
1957, vol. II Documents of the ninth session	57.V.5, vol. II
1958, vol. I Summary records of the tenth session	58.V.1, vol. I
1958, vol. II Documents of the tenth session	58.V.1, vol. II
1959, vol. I Summary records of the eleventh session	59.V.1, vol. I
1959, vol. II Documents of the eleventh session	59.V.1, vol. II
1960, vol. I Summary records of the twelfth session	60.V.1, vol. I
1960, vol. II Documents of the twelfth session	60.V.1, vol. II
1961, vol. I Summary records of the thirteenth session	61.V.1, vol. I
1961, vol. II Documents of the thirteenth session	61.V.1, vol. II
1962, vol. I Summary records of the fourteenth session	62.V.4
1962, vol. II Documents of the fourteenth session	62.V.5
1963, vol. I Summary records of the fifteenth session	63.V.1
1963, vol. II Documents of the fifteenth session	63.V.2
1964, vol. I Summary records of the sixteenth session	65.V.1
1964, vol. II Documents of the sixteenth session	65.V.2

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SEVENTEENTH SESSION

*Held at Geneva from 3 May to 9 July 1965**

775th MEETING

Monday, 3 May 1965, at 3.15 p.m.

Chairman : Mr. Roberto AGO

Later : Mr. Milan BARTOŠ

Present : Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Opening of the Session

1. The CHAIRMAN, after declaring the seventeenth session of the Commission open, explained that he had not been able to submit the Commission's last report to the General Assembly because the Assembly's nineteenth session had not proceeded normally. The General Assembly should be able to consider the Commission's report at its next session, in September 1965.

2. In April he had attended the Baghdad meeting of the Asian-African Legal Consultative Committee. He had been greatly impressed by the Committee's serious approach to its work and had been glad to note that it desired to co-operate closely with the Commission. As one of the items on the Committee's agenda was the law of treaties, he had recommended it to transmit its comments on that topic to the Commission in due course, so that the Commission could take them into consideration. The Commission had a special interest in knowing the views of the many new countries represented on the Committee. He would submit a written report on the Committee's session under item 7 of the agenda, "Co-operation with other bodies".

3. Mr. PALTHEY (Deputy Director, European Office of the United Nations), welcoming the Commission for its annual session at the European Office, said that although at times of political anxiety like the present the legal aspects of questions tended to be overlooked, the importance of the Commission's work was fully recognized. Since the end of the War, the Commission had endeavoured to foster the spirit of law and to adapt international law to the new situations. In order to give the

Commission's work the publicity it merited and to arouse the interest of young people studying law, the European Office was organizing, in 1965, as an experiment, a seminar on international law which would take place from 10 to 21 May and would enable some twenty young teachers and advanced students to learn something from the Commission and to absorb the spirit in which it worked. He relied on the Commission itself to ensure that the experiment would be successful and would be a first step towards the establishment of a centre for legal studies at the European Office.

4. The CHAIRMAN said that was an excellent idea. It would help to make the Commission and its work better known and understood, and to spread knowledge of international law. He thanked the Deputy Director and wished the Seminar every success.

5. He welcomed Mr. Baguinian, the new Director of the Codification Division, who was to be Secretary to the Commission.

6. Mr. BAGUINIAN, Secretary to the Commission, said he felt greatly honoured by the responsibility placed on him. He could assure the Commission that the Secretariat would, as in the past, do everything in its power to ensure the successful outcome of the session. The bulk of the comments by governments on the Commission's draft articles on the Law of Treaties (A/CN.4/175 and Add.1, 2 and 3) as well as the first and second parts of the Special Rapporteur's fourth report on the law of treaties (A/CN.4/177 and Add.1) had been circulated. The second report on special missions was expected to be circulated by 24 May in all the working languages.

Election of Officers

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

8. Mr. ROSENNE proposed Mr. Bartoš, whose outstanding qualifications as a jurist and great diplomatic experience eminently fitted him for the post.

9. Mr. AMADO seconded the proposal.

10. Mr. BRIGGS, Mr. YASSEEN, Mr. de LUNA, Mr. PAREDES, Mr. TSURUOKA, Mr. EL-ERIAN and Mr. PESSOU supported the proposal.

Mr. Bartoš was unanimously elected Chairman and took the Chair.

* The Second Part of the Seventeenth Session was held in Monaco from 3 to 28 January 1966.

11. The CHAIRMAN paid a tribute to the outgoing Chairman, and thanked the Commission for the honour it had done both to himself and to his country in electing him. He would endeavour to merit the Commission's trust, but in performing his duties he would have to rely on the support of all the members of the Commission and the assistance of the Secretariat and all who served the Commission, whether inside or outside the meeting room.

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

13. Sir Humphrey WALDOCK proposed Mr. Jiménez de Aréchaga.

14. Mr. de LUNA seconded the proposal.

15. Mr. AMADO, Mr. CASTRÉN and Mr. ELIAS supported the proposal.

Mr. Jiménez de Aréchaga was unanimously elected First Vice-Chairman.

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

17. Mr. AGO proposed Mr. Reuter.

18. Mr. de LUNA seconded the proposal.

19. Mr. PESSOU, Mr. TSURUOKA and Mr. AMADO supported the proposal.

Mr. Reuter was unanimously elected Second Vice-Chairman.

20. Mr. REUTER congratulated the Chairman on his election and thanked the members for the honour they had done him in electing him Second Vice-Chairman.

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

22. Mr. AGO proposed Mr. Elias.

23. Mr. PESSOU seconded the proposal.

24. Mr. EL-ERIAN, Mr. TUNKIN, Mr. YASSEEN, Sir Humphrey WALDOCK, Mr. BRIGGS, Mr. de LUNA, Mr. ROSENNE and Mr. AMADO supported the proposal.

Mr. Elias was unanimously elected Rapporteur.

25. Mr. ELIAS congratulated the Chairman and Vice-Chairmen on their election and thanked the members for the honour they had done him in electing him Rapporteur.

Documentation and Records of the Commission

26. Mr. PAREDES said he wished to raise two questions connected with the documentation and records of the Commission. The first related to the drafting of the summary records. The United Nations existed for the purpose of preventing war and maintaining peace, a purpose which could only be achieved by extending the rule of law in every sphere, and the International Law Commission was one of its most important organs. Even if the United Nations were to disappear, the work of the

Commission would endure, just as the work of the ILO had continued after the demise of the League of Nations. Because of the great importance of the Commission's work, the records of its discussions were also of great importance to all peoples. He did not approve of the method by which those records were prepared. In the first place, they were too brief; it was essential that the ideas expressed by speakers should be reproduced at greater length. Another grave defect was that statements made in Spanish were summarized in English and the summary was then translated back into Spanish; after that double translation process the speaker's ideas were no longer accurately reproduced—they were sometimes even misrepresented. He urged that all statements made in an official language should not only be taken down in notes in that language, but should also be summarized in it and not go through a double process of translation.

27. The second question was the difficulty created for readers of Volume I of the Commission's Yearbook, which contained the summary records of the session, by the fact that the text being discussed was not always clearly identifiable, usually because of changes in the numbering of articles as the Commission's work progressed. When the Commission began its discussion of any article, the text of that article should be reproduced in the summary record, regardless of whether it was already available in some other document. He had urged on previous occasions that the Commission should always begin its discussion of a text with the reading of that text. If that suggestion were adopted, it would be much easier for the reader of Volume I to follow the changes undergone by a text as the discussion progressed.

28. Mr. BRIGGS said he supported Mr. Paredes' suggestion that the text of each article should be reproduced in the summary record of the meeting at which the article was first discussed. Of course, Volume I of the Yearbook had to be read in conjunction with Volume II, which reproduced the reports containing the articles as proposed, but the need to refer to Volume II did create difficulties, which were increased by changes in numbering. It should not add much to the cost of the Yearbook to reproduce the text of each article when it was introduced.

29. Mr. de LUNA said he supported Mr. Paredes on both the points he had raised. Even though notes might be taken in Spanish when a member spoke in that language, the fact that the summary record was drafted in English and subsequently translated into Spanish involved a process of double translation which could not but detract from the accuracy with which the thoughts expressed by the speaker were rendered.

30. Whenever there was a change in the numbering of an article, that at least should be made clear.

31. Mr. ROSENNE said that the validity of the second point raised by Mr. Paredes was demonstrated by a comment of the Government of Portugal on article 49,¹ from which it was clear that that Government had had difficulty in understanding the article because some of the documents relating to it had not been received. It might

¹ A/CN.4/175, p. 132.

therefore be appropriate to make some adjustment in the presentation of the Yearbook and the Commission's annual report to cover that point. The Commission should not take a hasty decision, however, and he suggested that the question be examined by the Chairman and officers in consultation with the Secretariat, so that specific proposals could be made later in the session.

32. Mr. YASSEEN said that he had himself been hindered in his research by the second of the difficulties mentioned by Mr. Paredes. The Commission's Yearbook was an important part of the *travaux préparatoires* for international conventions; it should therefore give a clear account of all the stages in the drafting of an article, and the summary records should accordingly embody the texts discussed, including those subsequently dropped or amended.

33. The CHAIRMAN said that Mr. Paredes had raised two important points. First, the summary records should faithfully record the thinking of members, which might be distorted by subsequent translation. Secondly, it was certainly difficult to use the Yearbook; he himself had often had to refer to his personal files in order to get to the bottom of a discussion. The difficulty must be much greater for anyone who had not taken part in the discussion.

34. He suggested that the Commission ask the Secretariat to consider those two questions and report to the Commission's officers.

It was so decided.

Adoption of the Agenda

35. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/174/Rev.1), explaining that adoption of the agenda as it stood would not mean that the Commission must take the items in the order in which they were set out.

36. Mr. AGO proposed that consideration of item 1 of the agenda, " Filling of a casual vacancy in the Commission ", should be deferred for a time, because the vacancy had only just occurred.

37. Mr. BRIGGS seconded that proposal.

Mr. Ago's proposal was adopted.

38. Mr. ROSENNE, referring to item 7, " Co-operation with other bodies ", said that at its previous session the Commission had examined the question of the exchange of documentation with other bodies.² After some discussion it had considered the possibility of setting up, at the present session, a small committee to study the problems involved. He hoped that the Commission would be able to discuss those problems early in the present session.

39. The CHAIRMAN said that the point raised by Mr. Rosenne would be borne in mind.

The provisional agenda (A/CN.4/174/Rev.1) was adopted.

The meeting rose at 5.5 p.m.

776th MEETING

Tuesday, 4 May 1965, at 10.5 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Organization of Work

1. The CHAIRMAN informed the Commission of messages received from several absent members. Mr. Liu was detained at New York, but hoped to arrive soon. Mr. Cadieux was detained by his official duties and Mr. Verdross by the celebration of the sixth centenary of the University of Vienna; both hoped to arrive on 17 May. Mr. Pal had written to say that he was prevented from attending by illness. If members of the Commission agreed he (the Chairman) would send a telegram to Mr. Pal wishing him a speedy recovery.

2. As Mr. Rosenne had reminded them at the previous meeting, the Commission had decided at its last session to set up a committee to discuss the question of the distribution of documents of the Commission; he suggested that Mr. Rosenne should prepare draft terms of reference for that committee.

3. Mr. ROSENNE said that he had nothing to add to paragraph 49 of the Commission's last report¹; it seemed hardly necessary to be more specific.

4. The CHAIRMAN said that in that case the Commission would appoint the committee the next day.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

[Item 2 of the agenda]

5. The CHAIRMAN invited the Commission to take up item 2 of the agenda.

6. Sir Humphrey WALDOCK, Special Rapporteur, introducing his fourth report on the law of treaties (A/CN.4/177 and Add.1), drew attention to the accompanying documents, namely, the two volumes of comments by governments on Parts I and II of the draft articles drawn up by the Commission at its fourteenth and fifteenth sessions (A/CN.4/175 and Add.1-3) and a document prepared by the Secretariat (A/CN.4/L.107), containing the text of all the draft articles adopted by the Commission. If it proved necessary, he would later submit a further series of draft articles, on which he was at present engaged. At its last session the Commission had expressed the hope that a document setting out the comments of governments in full under each article would be made available. For technical reasons it had proved

² Yearbook of the International Law Commission 1964, Vol. I, pp. 300-302.

¹ Yearbook of the International Law Commission, 1964, Vol. II, p. 227.

impossible to comply with that request; he had therefore given a summary of those comments under each article.

7. If the Commission was to conclude consideration of the law of treaties at the 1966 session, it had a heavy programme of work before it; as the draft would soon be approaching its final form, it might be advisable to set up the Drafting Committee at an earlier stage than usual.

8. The CHAIRMAN said he agreed that the Drafting Committee should begin its work without delay; he therefore suggested that the Committee should be set up at the next meeting.

9. He gathered that the Special Rapporteur thought the Commission had reserved the right to make amendments to the draft on its own initiative in the light of the comments by governments. If there were no objections he would take it that the Commission agreed to the method of work proposed by the Special Rapporteur.

10. He asked the Special Rapporteur whether, in his view, the Commission should first come to a decision on the general questions mentioned in the introduction to his report or whether it should first discuss the next of the articles.

11. Sir Humphrey WALDOCK, Special Rapporteur, said he thought it advisable to take up the substance of the articles as soon as possible. Nevertheless, he wished first to mention two problems referred to in the introduction to his report and the following pages.

12. The first was the order of the draft articles in their final form. At the sixteenth session there had been a suggestion that some rearrangement was necessary; and indeed, since the articles on termination, for example, could affect the actual drafting of the other articles, it would be desirable to have a clear idea of the order. He did not propose that the point should be taken up at that stage; he would submit a paper on the general order of the articles later in the session.

13. The second problem was that of the form of the draft articles. Some governments doubted whether the Commission's work on the law of treaties should take the form of a convention. His own view was that the Commission ought not to reconsider its decision to prepare its draft in the form of a convention or series of conventions. Even if it were thought that the General Assembly might ultimately decide on some form of code, the draft should nevertheless be prepared by the Commission in such a way that it would be capable of forming the basis of a convention if governments so decided; in other words, the Commission should draft a set of articles suitable for practical application.

14. The CHAIRMAN invited the Commission to discuss the form which the Commission's draft should take. The Commission had committed itself to the preparation of a clear text which would be applicable as a rule of international law.

15. Mr. AMADO expressed his agreement with that view. At previous sessions the Commission had decided to prepare a convention on the law of treaties so that States could be presented with precise and clear formulae to assist them in developing relations with each other. Those who had drawn up the Statute of the Commission²

had taken the view that States could hardly be asked to endorse theoretical opinions such as might appear in a code. States were guided by positive and precise interests, and that was why the Commission, under article 16, paragraph (h) of its Statute, was consulting States on the practical methods of reaching agreement between them. He had always supported that view and he wished to reaffirm it. The Commission might regard itself as the agent of States acting through the General Assembly. The States, meeting in conference, were subsequently free to adopt the legal rules proposed to them for the purpose of fixing the limitations they were prepared to accept.

16. He fully approved of the position taken by the Special Rapporteur in his fourth report. The Commission should abide by its previous decision. Some governments had commented on the difficulty of formulating a text intended to be a convention binding States. The subject was a difficult one, but the Commission was there to overcome the difficulties, to prune the text and to remove anything relating to the philosophy of law and anything expressing abstract wishes or a concern for perfectionism.

17. Mr. TSURUOKA said he agreed with the Special Rapporteur that the Commission should continue to follow the method adopted hitherto for codifying the law of treaties, and should, at least for the time being, drop any idea of preparing a code; that was a matter which could always be taken up again by the representatives of States meeting in conference. It was true that some governments had expressed the opinion that the Commission should prepare a code, but that was probably because the draft seemed to them too cumbersome and too burdened with details and controversial points. The Commission should take that view into account. It should endeavour to prepare a draft convention acceptable to the large majority of States, and to that end it should, as far as possible, eliminate details and controversial points.

18. Mr. de LUNA said that the question had already been examined by the Commission on previous occasions and the comments by governments had not introduced any new element. It was a question that arose in regard to any codification considered in comparison with customary law. Codification had the advantage of certainty and security, while customary law, precisely because it was vague and uncertain, was more flexible and dynamic.

19. Personally, he would prefer the Commission to work on the basis that it was preparing a draft convention rather than a mere code or restatement. They all knew the fate of recommendations for model treaties. If the Commission wished to perform its function of codifying international law and contributing to its progressive development, it must prepare the best possible text, and that text could only be a draft convention; States would subsequently decide what form they would give to the final instrument. Experience had shown that, however perfect the text prepared by the Commission, States would always wish to introduce changes, even though such changes might not always be improvements.

20. He agreed with the Special Rapporteur that a text which could serve as a convention could also serve as a code.

² A/CN.4/4/Rev.1.

21. He accordingly urged the Commission to prune the text of all non-essential details and all elements that were not of permanent value. At the present stage, when the Commission was engaged in the second reading of the draft, it was essential to concentrate on what was universal and permanent and drop all provisions dealing with matters that could be left to the discretion of States.

22. The CHAIRMAN said that, under article 23, paragraph 1, of its Statute, the Commission was competent to recommend what action the General Assembly should take on its draft. It should therefore decide whether its draft was intended to become a convention.

23. Mr. REUTER said that he, too, shared the view of the Special Rapporteur. The Commission should submit a draft convention for two reasons. First, it should abide by its earlier decision. Secondly, it should aim at maximum results and prepare as perfect a text as possible: since conventional law was the highest form of legal commitment, the text could only be a draft convention. The question whether a conference should be convened to conclude the convention was a political matter for governments to consider.

24. Moreover, the Commission's draft should be a single draft convention. The question whether the law of treaties should form the subject of several separate conventions was likewise a political one with which the Commission need not concern itself.

25. Some members seemed to think that a code would mean a less firm undertaking than a convention; viewed in that light, the idea of a code should be dropped. Others, in particular Mr. Tsuruoka and Mr. de Luna, seemed to consider that a code would be a fuller text in which the Commission could deal with controversial questions. His own opinion was that the existing text was balanced and that all doctrinal or over-theoretical points had already been virtually eliminated.

26. Mr. AGO said that, when it had decided to undertake the study of certain topics, such as the law of treaties, the succession of States and State responsibility, the Commission had intended really to codify the law, in other words to transform unwritten into written law, in the belief that the time was ripe for such a change. He did not think that the Commission should alter its approach simply because it had received comments from some governments holding other views. The Commission should draw up a single general convention with the firm intention of recommending to the General Assembly that a conference be convened to conclude that convention. Even if States did not proceed on the lines laid down for them, the work would not have been in vain. But the Commission's aim should be to produce a convention.

27. He was disturbed to find that some members apparently thought the Commission should deal only with general questions and should delete from its text what they considered to be details and controversial points. Having taken the law of treaties as the subject of his lectures that year, and having, in those lectures, followed point by point the text so far prepared by the Commission, he had the very definite impression that, although it could be improved, the text was sound and not too detailed. He would therefore advise the Commission against excessive excisions.

28. He agreed with the Special Rapporteur that the Commission should draw up provisions that were as balanced and precise as possible. Experience had shown that, when the Commission had done its work well, States meeting in conference had followed its lead, whereas when it had been unsure of itself and the text submitted had been defective, difficulties had arisen. The Commission should face up to its responsibilities, and its work would then have the best chance of success.

29. Mr. EL-ERIAN said that the question had both a theoretical and a practical aspect. So far as theory was concerned, the Commission had decided that, despite the special character of the law of treaties and the central position it occupied in the system of international law, the draft articles should take the form of a convention. The practical problem was that objection might be made to a convention on the ground that some States might not participate in it, which might have a weakening effect on customary international law; but the Commission had taken the view that that risk was inherent in all its work.

30. He agreed with the Special Rapporteur's remark, in connexion with the comment by the Swedish Government, that a number of articles still contained some element of "code" and were not yet cast in the form required for a convention (A/CN.4/177, section C). Nevertheless, such articles should not be omitted; after all, there were provisions of an expository nature in both the Diplomatic and the Consular Conventions. He was of the opinion that the Commission should proceed on the same basis as before, but should bear in mind that some articles needed revision.

31. Mr. ELIAS said he agreed with the Special Rapporteur's summary of the position. The Commission was not bound to accept the views of governments, although in order to enlist the support of the majority of States it might have to redraft some of the articles. Unless the proposals by governments raised fundamental issues that had not yet been considered, the Commission should not go over the whole ground again. The form of presentation to the General Assembly and the question whether the draft should contain expository elements should be left to the Commission.

32. Mr. BRIGGS said he fully agreed with the Special Rapporteur that the Commission should proceed on the assumption that its draft should be of a kind that would be capable of incorporation in a convention. Article 20 of the Commission's Statute stated that "The Commission shall prepare its drafts in the form of articles". That did not preclude the possibility that, when the Commission reached article 23, it might recommend a scientific restatement instead of the conclusion of a multilateral treaty. Nevertheless, the approach to the articles should be that suggested by the Special Rapporteur.

33. In 1962 the Commission had not sufficiently emancipated itself from the idea of drafting a code; it would now have an opportunity to review the articles very carefully. He was impressed by the comments of certain governments to the effect that some material, especially in the first twenty-nine articles, could be eliminated.

34. Mr. ROSENNE said he saw no reason why the Commission should reverse its 1961 decision, especially as the report of the Sixth Committee of the General

Assembly, as its seventeenth session, had stated that the great majority of representatives approved the decision to give the codification of the law of treaties the form of a convention.³ Moreover, General Assembly resolution 1765 (XVII) had recommended that the Commission should continue the work of codification of the law of treaties, taking into account the views expressed at the seventeenth session of the General Assembly.⁴ Hence the Commission had a proper basis for its work.

35. The Special Rapporteur had rightly introduced a nuance in stating that the articles should be "capable of" forming the basis of a convention. There were in fact two separate questions: the form and structure of the draft articles and the recommendations to be made by the Commission regarding the manner in which the articles should be dealt with at the political level. As the Special Rapporteur had pointed out, it was only when the Commission had completed its work that it could consider its final recommendations to the General Assembly.

36. The Commission should come to an understanding that it was contemplating a single convention; he did not think it desirable to split up the subject and prepare several separate instruments. A decision to do that would affect the drafting throughout.

37. He noticed that, whereas thirty-one governments were listed in the introduction to document A/CN.4/177, document A/CN.4/175 and its addenda contained the comments of only twenty-three.

38. Mr. TUNKIN said that at its last three sessions, the Commission had worked on the assumption that the draft was intended to form the basis of a convention rather than a code. No member had formally challenged the 1961 decision; it therefore remained in force and no new decision was required. That being so, he would not repeat the arguments in favour of a convention put forward in 1961, beyond saying that the Commission should do the maximum, and that meant produce a convention.

39. It seemed to him that the draft still contained some elements from earlier drafts which had been intended as a basis for a code. The Commission should take into account the comments made by governments on that point and make the text as concise as possible.

40. Mr. CASTRÉN said he shared the views of previous speakers; unless he was mistaken, the Commission had unanimously decided to adopt the form of a convention for the rules it was preparing, and he did not see why that decision should be changed merely because two or three governments had criticized the Commission's method. Nevertheless, he agreed that, as the Swedish Government had suggested, and as the Special Rapporteur and Mr. El-Erian had said, certain paragraphs or clauses in the draft ought to be deleted or amended.

41. Mr. YASSEEN said that in 1961 the Commission had decided to prepare a draft convention, not a code. That decision had led to the plan which the Special Rapporteur had followed, and had determined the Commission's method of work.

42. The Commission had gone too far in that direction to be able to reconsider its decision. Besides, very few States had opposed the idea of a convention, and most of their arguments had been against the idea of codification in general, not against the codification of treaty law in particular. Nevertheless, it was always possible to improve a text, and the Commission could draft the provisions in more precise terms, more suitable for a convention.

43. Mr. TSURUOKA said he was not opposed to the decision taken earlier. He had listened to the discussion with satisfaction, for it had shown that the Commission would keep to the method adopted. But now that the Commission was aware of the results of its work, it might be said that a certain modesty was called for. Part I of the draft had been commented on by governments, which doubted whether they could really sign and ratify as a convention a text in that form and including so much detail.

44. The CHAIRMAN, speaking as a member of the Commission, said he associated himself with the comments of earlier speakers, especially Mr. Ago. He had already expressed his views on the recommendations addressed to the Commission, which had not exactly filled him with enthusiasm, any more than the General Assembly's decision concerning the Commission's draft on the rights and duties of States, to the effect that the draft articles were to serve as a "guide" — in other words, as a text not forming part of positive law.

45. Mr. LACHS said he fully shared the view of previous speakers that there was no reason why the Commission should depart from its former decision. Nevertheless, it could not ignore the comments by governments and should define its attitude.

46. It should be remembered that, although very few governments had opposed the draft, only a quarter of the Members of the United Nations had yet replied. Hence the Commission should not underestimate the difficulties the draft might encounter when it reached the General Assembly. The draft should be prepared in the form of a convention, but in formulating the articles the Commission should be careful not to invite criticism in the final stage by including a mixture of principles and descriptive elements. When the time came for the Commission to submit its final draft, it should draw attention to the problem of form in its introduction; it should then recommend a convention, but should not rule out the possibility of some other form of document that might be more acceptable to States.

47. The CHAIRMAN said he thought he could interpret the Commission's position, especially after Mr. Tsuruoka's second statement, as being that it upheld the decision it had taken in 1961, and that its intention was to prepare a single set of draft articles on the law of treaties, designed to serve as the basis for a convention.

48. He would ask the Special Rapporteur and the General Rapporteur to take account, when preparing their report, of Mr. Ago's proposal that the General Assembly should be asked to recommend the draft to Members with a view to the conclusion of a convention and to convene a conference to conclude a convention, in

³ *Official Records of the General Assembly, Seventeenth Session, Annexes*, Vol. III, agenda item 76, p. 13, para. 19.

⁴ *Op. cit.*, *Seventeenth Session, Supplement No. 17*, p. 65.

accordance with article 23, paragraph 1 (c) and (d) of the Commission's Statute.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that a number of general questions arose out of the comments by governments. The first was that of terminology, which he suggested should not be dealt with at the present stage; many questions of terminology were bound to attract the attention of the Commission and its Drafting Committee as their work advanced, and it would be easier to deal with them definitively when some progress had been made with the re-examination of the articles.

50. There was, however, another general question which should be dealt with at that initial stage, and which affected the title of the draft articles as a whole and the definitions, in particular the definition of a "treaty" in paragraph 1 (a) of article 1. That was the question of stating explicitly that the draft articles were confined to treaties between States. At present, there was some inconsistency between the definition of a "treaty" in article 1 and the provisions of article 2, paragraph 1, on the one hand, and the rest of the draft on the other hand. The definition stated that "treaty" meant an international agreement in written form concluded between two or more States "or other subjects of international law". Article 2, paragraph 1, stated that: "Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (a)". One would therefore expect the remainder of the draft to deal not only with treaties between States, but also with treaties concluded between "other subjects of international law". In fact, there were few, if any, provisions on the latter kind of treaty. The special rules contained in the draft articles on the constitutional instruments of international organizations did not come under that heading, because those instruments were treaties between States. With the exception of some provisions in article 3, on the capacity to conclude treaties, the draft articles did not contain any rules on treaties concluded by international organizations.

51. In the circumstances, and bearing in mind that the draft articles would have to stand the test of a conference of plenipotentiaries, it was necessary to limit their scope to what they actually covered. The general principle that subjects of international law other than States had the capacity to conclude treaties was not in question, although there were some differences of opinion regarding the conditions applied to those treaties. That point, however, could be covered in the commentary; the draft articles, in order to be coherent, must show that their scope included only treaties between States. That fact could be made clear in the title and in the definition of "treaty", or in the provisions of article 2 on the scope of the articles.

52. The CHAIRMAN said he would like to make sure he had been right in understanding that the procedure proposed by the Special Rapporteur was that the Commission might comment on questions of terminology and on definitions, but that the final text would be settled by the Drafting Committee.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would have to give

particular attention to the question of definitions. In general, it would be convenient for the Commission to follow the same practice as hitherto and examine each definition with the article to which it related, after which the Drafting Committee would deal with the drafting of the definition.

54. Mr. BRIGGS said that, although he agreed with the suggestion that the Commission should not attempt to deal with all terminology questions at that stage, he believed that such questions would arise from the outset. That was certainly true with regard to the language used in the definition of a "treaty" in article 1, paragraph 1 (a).

55. Mr. CASTRÉN said that, like Sir Humphrey Waldock, he thought the draft should not mention "other subjects of international law". He had noted that, in addition to Finland, the Netherlands and Colombia had submitted comments to that effect. The references to "other subjects of international law" and "international organizations" should be deleted.

56. Mr. ROSENNE said that the discussion had raised two separate questions. The first was that of definitions; that was a question of substance and he agreed with the Special Rapporteur's proposal regarding the discussion of the definitions. The second was that of terminology which, except where it occasionally affected matters of substance, was above all a question of clarity and consistency in the use of expressions throughout the articles; it also involved the problem of ensuring to the fullest degree the concordance between the English, French and Spanish versions.

57. Mr. AGO said that the general impression given by the Commission's work was greatly affected by the article introducing the draft. The Commission should give close attention to the definitions in order not to expose itself to criticism; hence, before referring the definitions to the Drafting Committee it should discuss them itself.

58. With regard to the question raised by the Special Rapporteur, he would be very sorry if the reference to "other subjects of international law" were just deleted. Two passages in the draft articles were affected: article 1, paragraph 1 (a), and article 2, where the treaties to which the draft articles applied were identified. If any limitation was to be indicated, it should be done in article 2, which specified the scope of the articles, rather than in article 1 (a), which contained definitions, for a treaty was still a treaty, even if concluded between a State and an international organization, and it would therefore be absurd to exclude such a treaty from the definitions in the draft. On the other hand, the Commission could say in article 2 that the draft articles did not apply to treaties concluded between international organizations or between States and international organizations. It should not be stated too categorically that the draft articles applied exclusively to treaties between States. The Commission's commentary on article 1 in its report on the work of its fourteenth session,⁵ included a relevant paragraph which read:

"(8) The term 'treaty', as used in the draft article, covers only international agreements made between two or more States or other subjects of international

⁵ *Yearbook of the International Law Commission, 1962, Vol. II, p. 162.*

law'. The phrase 'other subjects of international law' is designed to provide for treaties concluded by: (a) international organizations, (b) the Holy See, which enters into treaties on the same basis as States, and (c) other international entities, such as insurgents, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties or to enter into agreements governed by public international law."

Clearly, although the Commission now wished to exclude from the application of the draft articles treaties concluded by international organizations, it would certainly not wish to exclude treaties concluded by the Holy See or by insurgents. The expression "other subjects of international law" was still necessary.

59. To cover the point over which the Special Rapporteur had expressed concern, paragraph 2 might provide that treaties concluded by international organizations would be considered separately; that would exclude such treaties, and only such treaties, from the application of the draft articles.

60. Sir Humphrey WALDOCK, Special Rapporteur, replied that there would be a gross inelegance in defining a "treaty" in article 1, for purposes of the draft, as though it covered instruments concluded by subjects of international law other than States, when all the language of the subsequent draft articles related exclusively to treaties between States. In a draft convention, there would be serious implications if it were suggested in a definition that the contents covered more than they actually did. What governments expected of the Commission was that it should draft a set of rules governing treaties between States, and although it could be assumed that treaties concluded by other subjects of international law would follow similar rules, it was highly desirable to limit the scope of the draft explicitly so as to show that those treaties were not covered by it.

61. The problem had a very real connexion with the manner in which the Commission would deal with article 3, on the capacity to conclude treaties. The provisions of that article dealt with difficult and controversial problems and had been adopted with little enthusiasm. The text as it now stood seemed to him a somewhat inadequate statement on the capacity to conclude treaties, but any attempt to enlarge its provisions was bound to create difficulties, as the comments by governments clearly showed. He was therefore proposing the deletion of article 3, although with some regret because, as a lawyer, he would have liked an article on capacity to be included. If the Commission adopted his proposal, the only article which contained a reference to subjects of international law other than States would be dropped.

62. The CHAIRMAN pointed out that in his report the Special Rapporteur had formally proposed a new text to replace article 1, paragraph 1 (a), as adopted in 1962.

63. Mr. YASSEEN said that it would not be logical to speak of treaties concluded between subjects of international law other than States; on that point he fully agreed with Sir Humphrey Waldock's comments.

64. On the other hand, he did not agree with the Special Rapporteur's suggestion that article 3 should be omitted altogether. The draft articles should mention the capacity of States to conclude treaties, and the article should therefore be amended. For example, it would be possible to retain paragraph 1 as far as the words "... is possessed by States"; to retain paragraph 2, which served a useful purpose; and to delete paragraph 3.

65. Mr. AGO said that in order to allay the Special Rapporteur's fully justified concern, while at the same time providing for the possible application of the draft articles to other subjects of international law, he would propose that article 1, paragraph 1 (a) read simply: "For the purposes of the present articles, the expression 'treaty' means a treaty concluded between States". But in that case it would be necessary to delete paragraph 1 of article 2, which would become unnecessary, and add a provision on the following lines: "The fact that the articles apply to treaties concluded between States shall in no way preclude their application, in so far as it is possible, to treaties concluded by other subjects of international law".

66. Mr. REUTER said he supported Mr. Ago's remarks. He himself had tried to draft a text, which he submitted to the Commission for comment, but not as a model, reading: "Nothing in the present treaty shall prejudice the application of all or of some of the rules stated therein to international agreements concluded by entities treated by international law on the same footing as States or by other subjects of international law". That proviso would make it possible to treat entities such as the Holy See and international organizations in the same way as States, under other rules of international law which need not be discussed at the moment.

67. Mr. ROSENNE said he was inclined to agree with Mr. Ago. To his great regret, he could not agree with the Special Rapporteur's categorical statement that all the articles had been drafted with only States in mind. Some of the articles in Parts II and III referred to "States", others to "parties"; and there was even a proposal to include a definition of the term "party" in article 1.

68. As paragraph (8) of the commentary on article 1 indicated, treaties concluded by international organizations could be of two kinds: those concluded between two international organizations and those concluded between a State and an international organization. The latter type of treaty involved a State and it would be a retrograde step to exclude it from the definition. In that connexion it was interesting to compare the definition of "treaty" contained in the Harvard draft of 1935⁶ with that of an "international agreement" contained in article 118 of the American Law Institute's 1962 restatement of the foreign relations law of the United States.⁷ An increasing number of modern constitutions—for example, article 27 of the French Constitution of 1946 and article 53 of that of 1958—also referred to treaties with international organizations in their provisions concerning the national treaty-making power.

⁶ *Research in International Law*, "III, Law of Treaties"; Supplement to the American Journal of International Law, vol. 29, 1935, p. 686.

⁷ The American Law Institute, Restatement of the Law, *The Foreign Relations Law of the United States*, p. 422.

69. The general reservation which the Special Rapporteur proposed should be included in article 2, paragraph 2 (b) would go a long way towards meeting the practical exigencies in the matter; he therefore saw no reason at all to change the title of the draft articles and replace it by the cumbersome phrase proposed in the report.

70. He suggested that both the title of the draft articles and the definition of a "treaty" in article 1 be retained, and that in the course of its work the Commission should always bear in mind the question whether a given article should refer to a State or to a party.

71. Mr. LACHS said he understood the concern of Mr. Ago and Mr. Reuter but did not think the point raised by Mr. Ago would be adequately met by a negative formulation to the effect that parties to a treaty which were not States were not precluded from adopting the rules in the draft articles. It would be more appropriate to state, in a positive formulation, that the rules applied *mutatis mutandis* to the types of treaty which Mr. Ago had in mind.

72. Mr. TUNKIN said he agreed with the Special Rapporteur that there was a logical discrepancy between the definition contained in article 1 and the remainder of the draft. If it was stated in the definitions clause that the term "treaty" covered treaties concluded both by States and by other subjects of international law, the logical implication would be that the remaining provisions of the draft would deal with all those treaties. But in fact, and that point was relevant to the remarks of Mr. Rosenne, the Commission had taken a formal decision to deal only with treaties between States.

73. The problem that had arisen could be settled by dropping from the definition in article 1, paragraph 1, the opening words "For the purposes of the present articles". Elsewhere in the draft it would be made clear that the articles which followed dealt only with treaties between States.

74. Lastly, he drew attention to the difference between the English and French texts of the opening sentence of article 1.

75. Mr. CASTRÉN said he was quite willing to accept the new formula proposed by Mr. Ago and Mr. Reuter, which met his own difficulties, and he hoped that the Special Rapporteur would also be able to accept it. He preferred a negative formula, such as the text read out by Mr. Reuter, because a positive formula might go too far and suggest that there were too many analogies between treaties concluded by States and those concluded by other subjects of international law.

76. The CHAIRMAN said that at its next meeting the Commission would elect the members of the Committee to consider documentation, and he hoped that at that meeting he would receive proposals concerning the membership of the Drafting Committee, which should then begin its work without delay.

The meeting rose at 1.5 p.m.

777th MEETING

Wednesday, 5 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Appointment of a Committee on the Distribution of Documents

1. The CHAIRMAN said that, as agreed at the previous meeting, a small committee would be appointed to study the problems raised by the distribution of the documents of the Commission. He suggested that the committee should consist of Mr. Ago, Mr. Lachs, Mr. Pessou, Mr. Rosenne and Mr. Ruda.

It was so agreed.

2. Mr. TSURUOKA asked what would be the committee's terms of reference.

3. The CHAIRMAN said they would be as stated in paragraph 49 of the Commission's report on the work of its sixteenth session.¹

Appointment of a Drafting Committee

4. The CHAIRMAN said that, having consulted the officers of the Commission, he suggested that a Drafting Committee be appointed consisting of the two Vice-Chairmen, the Rapporteur of the Commission, the Special Rapporteur on the law of treaties, Mr. Ago, Mr. Briggs, Mr. Lachs, Mr. Tunkin and Mr. Yasseen. Mr. Wattles, the Assistant Secretary to the Commission, would act as Secretary to the Drafting Committee.

It was so agreed.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

ARTICLE I (Definitions)

Article 1

Definitions

1. For the purposes of the present articles the following expressions shall have the meanings hereunder assigned to them:

(a) "Treaty" means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agree-

¹ *Yearbook of the International Law Commission, 1964, Vol. II, p. 227.*

ment, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.

(b) "Treaty in simplified form" means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.

(c) "General multilateral treaty" means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole.

(d) "Signature", "Ratification", "Accession", "Acceptance" and "Approval" mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by a treaty. Signature however also means according to the context an act whereby a State authenticates the text of a treaty without establishing its consent to be bound.

(e) "Full powers" means a formal instrument issued by the competent authority of a State authorizing a given person to represent the State either for the purpose of carrying out all the acts necessary for concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

(f) "Reservation" means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that State.

(g) "Depositary" means the State or international organization entrusted with the functions of custodian of the text of the treaty and of all instruments relating to the treaty.

2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State.

5. The CHAIRMAN invited the Commission to consider article 1, paragraph 1 (a), and related problems. He drew attention to the new text proposed by the Special Rapporteur in his fourth report (A/CN.4/177) which read:

" 'Treaty' means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation, concluded between two or more States and governed by international law."

6. Mr. BRIGGS said he would address himself to four points raised by the Special Rapporteur in his fourth report.

7. The first was the title of the Commission's draft, "Draft articles on the law of treaties", which the Special Rapporteur proposed should be amended to read "Draft articles on the law of treaties concluded between States". That could be discussed in connexion with the question whether the words "or other subjects of international law" in article 1, paragraph 1 (a) should be deleted. There would be some logic in the change of title if the intention was to exclude treaties concluded between international organizations to which States were not parties; there were about 200 such treaties. But there were over a thousand treaties to which both States and international organizations were parties and, as Mr. Rosenne had pointed out at the previous meeting, it

would be a retrograde step to go back to the Harvard draft of 1935, which excluded not only agreements in simplified form but also treaties to which a person other than a State was a party. The Commission's draft had already been criticized by one writer on the ground that it gave too little attention to treaties to which international organizations were parties. Practical considerations had led the Commission to decide not to make a special study of such treaties until it had concluded its study of the law of treaties between States, but many of the provisions of the draft could be applicable to such treaties. The Special Rapporteur's statement that all the articles except articles 1 and 3 had been drafted for application in the context of treaties concluded between States (A/CN.4/177, *ad* title of draft) seemed to go too far. References to treaties drawn up in an international organization were to be found in paragraphs 2 (b) and 6 (c) of article 4, in article 5, in article 6 (b), in paragraph 1 (c) of article 7 and perhaps also in paragraph 1 of article 8 and paragraph 1 (b) of article 9. Those provisions did not exclude the applicability of the rules in the draft articles to instruments to which international organizations were or might be parties. It would be most unfortunate if they were all deleted because they contained references to international organizations. He therefore urged that both the title "Draft articles on the law of treaties" and the words "or other subjects of international law" in article 1, paragraph 1 (a), be retained. A provision could perhaps be added along the lines suggested by Mr. Ago at the previous meeting.

8. His second point concerned the opening words of article 1, in regard to which Mr. Tunkin had called attention to the difference between the French and the English versions. The passage could be replaced by some such wording as "As the terms are used in this convention", or "in this draft". It was important not to omit that qualification, because to do so would open the floodgates to doctrinal disputes by implying that the Commission was attempting a logical scientific definition. He would prefer to say that the Commission was describing the way terms were used for the purposes of the draft articles, rather than defining them; at the 655th meeting he had suggested that the title of article 1 should be changed to "Use of terms" instead of "Definitions".²

9. His third point was the proposal to delete the list of appellations in paragraph 1 (a); that proposal had been accepted by the Special Rapporteur and he supported it.

10. His fourth point concerned the request made by a number of governments that the element of intention to create a relationship in international law should be introduced into the definition. Proposals along those lines had, for very good reasons, been strongly opposed by many members of the Commission during the discussions at the fourteenth session. Perhaps the difficulty arose from the use of the word "any" before the words "international agreement" in the Commission's definition; States were anxious to except agreed statements of policy and agreements made subject to municipal law. That point could perhaps be met by replacing the word "any" by the word "an".

² *Yearbook of the International Law Commission, 1962, Vol. I, p. 172, para. 69.*

11. Mr. TSURUOKA agreed with the Special Rapporteur that the list of appellations of treaties should be deleted.

12. The Commission had had good reasons for not making a detailed study of treaties concluded between "other subjects of international law", in particular, treaties concluded between States and international organizations and treaties concluded between international organizations; but it had certainly not meant to deny the existence of such treaties or their binding force in international law. He therefore proposed that the new formula suggested by the Special Rapporteur for article 1, paragraph 1 (a) be adopted with a few changes, and that a new paragraph be added to article 2³ reading: "The fact that the present articles do not, except to the extent that the particular context may otherwise require, apply to international agreements other than treaties as defined in article 1, paragraph 1 (a), shall not be understood as affecting the legal force that such agreements possess under international law". That suggestion should be adopted if the Commission adopted the formula proposed by the Special Rapporteur and retained article 2, paragraph 2.

13. He also suggested that in the new text for article 1, paragraph 1 (a) proposed by the Special Rapporteur the word "international" before the word "agreement" should be deleted.

14. Mr. TUNKIN said that a careful examination of article 1, paragraph 1 (a) showed that, unlike the other sub-paragraphs, it did not state the definition of a term; it stated the scope, or sphere of application, of the whole draft. He therefore suggested that the idea be taken out of the definitions article to form a new article 1, which would state that the rules set out in the draft articles applied to treaties concluded between States.

15. A provision could be added along the lines suggested by Mr. Ago, to the effect that nothing in the article should be construed as precluding the application of those rules to treaties between States and other subjects of international law, or between such subjects.

16. The definitions article would then become article 2 and would begin:

- " 1. As the terms are used in these draft articles;
(a) 'Treaty' means any international agreement in written form, whether embodied in a single instrument

³ Text of article 2:

" Scope of the present articles

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (a).

2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law."

Text of the Special Rapporteur's proposed redraft of article 2:

" 1. The present articles apply to treaties as defined in article 1, paragraph 1 (a).

2. The fact that the present articles do not apply

(a) to international agreements not in written form,

(b) to international agreements concluded by subjects of international law other than States,

shall not be understood as affecting the legal force that such agreements possess under international law nor the rules of international law applicable to them."

or in two or more related instruments and whatever its particular designation, concluded between States and governed by international law."

The concluding words "and governed by international law", however inadequate, should be retained for want of more suitable language to express an essential idea.

17. The change he suggested would express the fact that although many of the draft articles might be applicable to treaties concluded by international organizations, that was not true of all of them. The examples given by Mr. Briggs did not, in his opinion, show that any of the articles were intended to apply to treaties concluded by international organizations. The constitution of an international organization was a treaty between States; a treaty concluded within an international organization was equally a treaty between States. He therefore saw no reason for going back on the Commission's earlier decision to confine its draft articles to the rules governing treaties between States.

18. Mr. de LUNA said he could not support Mr. Briggs's suggestion that the word "any" should be replaced by the word "an" before the words "international agreement" in paragraph 1 (a). Several governments had expressed dissatisfaction with the definition of treaties in simplified form. That type of treaty had been devised in order to overcome various practical difficulties encountered by governments wishing to conclude urgently required international instruments without being delayed by the need to go through the process of obtaining parliamentary approval, and it was essential to retain the wording which made it clear that the term "treaty", as used in the draft articles, covered all international agreements in written form concluded by States.

19. With regard to the problems of treaties to which an international organization was a party, he would go even further than Mr. Tunkin. The draft articles were being prepared for submission to a conference of plenipotentiaries and the States participating in that conference would clearly not be committing themselves in any way with regard to treaties to which an international organization might be a party. Whether international organizations would follow the rules set out in the draft articles depended on international practice.

20. As noted by a number of governments, it was desirable to introduce into the definition of a "treaty" some element of the intention to create obligations under international law. He therefore suggested that the concluding words of the definition, "governed by international law", be replaced by the words "with the intention of being bound under international law".

21. He also suggested the deletion of articles 2 and 3, which could easily be dispensed with; they constituted an *excusatio non petita*. If the purpose of the draft articles was to serve as the draft of a convention, they should contain only provisions which created rights or obligations. Expository material such as that contained in articles 2 and 3 should be relegated to the commentary. That applied particularly to article 3, paragraph 1, which stated that the capacity to conclude treaties was possessed by States and by other subjects of international law. In fact, the generally accepted doctrine, which was that of Anzilotti, was that the capacity to conclude

treaties, or treaty-making power, was precisely the test of whether an entity constituted a subject of international law. Moreover, since article 1, paragraph 1 (a) already stated clearly that a treaty was an international agreement concluded between two or more States " or other subjects of international law ", it was clear that a treaty could be concluded by subjects of international law other than States.

22. However, if the Commission decided to retain the contents of articles 2 and 3, paragraph 2 of article 1 should be transferred to article 3, or else the present article 3 should be transferred to article 1 as a third paragraph.

23. Mr. REUTER said he would confine his remarks to article 1, paragraph 1 (a). He thought the members of the Commission were, on the whole, in agreement with the Special Rapporteur. The precise reason for excluding from the scope of the draft articles treaties other than those defined in the new text proposed for paragraph 1 (a) was that not all those agreements had been studied in detail and that they constituted a series of special cases. Hence precautions should be taken in the drafting.

24. He would deal with two specific points. First, as other speakers had already pointed out, there were agreements between two or more States to which an entity other than a State became a party. Many examples could be given, such as the Charter of the International Telecommunication Union (ITU), agreements to which the Holy See had acceded, and the agreements of association concluded by the European Economic Community with Greece and Turkey. Two solutions were possible: the Commission could either explain in the commentary that its draft articles applied to such instruments, or, if it wished to be even more precise, it could insert a provision in the body of the article on the following lines: " The fact that a subject of international law other than a State is a party to a treaty binding two or more States shall not render the rules laid down by the present Convention inapplicable to that treaty ".

25. Secondly, with regard to the main point, which had been dealt with in the proposal submitted by Mr. Ago at the previous meeting,⁴ he had himself proposed a text; on reflection, he thought the Commission could go further, since all its members held that the rules in the draft applied to all agreements governed by international law. He would therefore suggest a more positive provision than those previously proposed, reading: " The rules which follow shall apply to agreements governed by public international law which are not treaties within the meaning of paragraph 1 (a), subject to due regard for the special nature of those agreements ".

26. Mr. AGO said that the substance was not in dispute; for the time being the draft should apply to treaties between States, but at the same time the definition of a " treaty " must not permit of any misunderstanding. Mr. Tunkin had no doubt been right in saying that article 1 should be amended more radically. It was awkward, especially in the English text, to have the words " ' Treaty ' means ", which obviously introduced a definition proper, followed by the assertion that only

treaties concluded between States could be regarded as treaties. It would therefore be better to say, as Mr. Tunkin had suggested, " The present articles shall apply only to treaties between States ", and to move the definitions a little further on.

27. Mr. Reuter had rightly observed that the difficulties regarding subjects of international law other than States arose from the diversity of the cases to be considered. An explanation might be given in the commentary; but the commentary would ultimately disappear and only the treaty would remain. The Commission might well adopt the formula proposed by Mr. Reuter.

28. The formula he (Mr. Ago) had proposed at the previous meeting was negative only in form; it was not yet perfect, and it would be for the Drafting Committee to prepare a text. In short, the intention was to separate article 1, paragraph 1, from the rest of the existing text; to add article 2 to it; and to make the definitions follow.

29. He would not say anything about article 3 for the moment, because it raised other problems; but that should not be taken to mean that he agreed to its deletion.

30. Mr. BRIGGS said he was largely in agreement with Mr. Tunkin. The articles he had mentioned in his earlier statement were primarily intended to deal with the conclusion of treaties between States, but their provisions could also be applicable to treaties to which international organizations were parties. It was therefore necessary to take care not to exclude the possibility that the draft could apply to the conclusion of treaties by international organizations.

31. With regard to Mr. Tunkin's suggestion that there should be a separate article on the scope of the draft articles, there was already a provision on that subject in the present paragraph 1 of article 2. The presence of that provision, however, did not obviate the need to describe the use of the term " treaty " for the purposes of the draft articles.

32. Mr. ELIAS said there was much merit in Mr. Tunkin's suggestion of a new article 1 embodying the substance of the present article 2 in a slightly different form.

33. He also fully agreed that there should be a provision on the lines suggested by Mr. Ago. It could take the form of a statement to the effect that nothing in the draft articles was to be taken as precluding their application to treaties concluded between States and other subjects of international law. Article 2 as it stood would then become unnecessary and could be dropped.

34. With regard to the definitions article, he was not in favour of replacing the opening phrase of the English text by wording similar to that used in the French version; the text which had been put forward on those lines⁵ did not bear close scrutiny. The definition of a " treaty " in paragraph 1 (a), should be retained, but without the enumeration. He did not believe it was a sound idea to introduce a reference to the intention of the parties into that definition, for the reasons given when the Commission had first discussed articles 1, 2 and 3 at its fourteenth session.⁶

⁵ Para. 16 above.

⁶ *Yearbook of the International Law Commission, 1962, Vol. I, p. 52, para. 26.*

⁴ Para. 65.

35. Paragraph 2 of article 1, on the classification of international agreements under internal law, was closely related to the question of the capacity to conclude treaties, dealt with in article 3. An example of the difficulties involved was provided by the present dispute between the Federal Government of Canada and the Provincial Government of Quebec, which had put forward the argument that treaties were instruments entered into by the Federal Government of Canada with foreign States, whereas international agreements could be concluded with a foreign State by a province, which was a constituent State of the Federal Union, and that applied to the agreements on the exchange of students and teachers between Quebec and France. The Federal Government maintained that, although the Canadian Constitution was not specific on the point, no province of Canada was empowered to enter into such agreements.
36. He could not go quite as far as the Special Rapporteur in doubting the value of article 3, but thought that if it was to be retained, it must be in an altogether different form.
37. Mr. ROSENNE said he remained firmly of the opinion he had expressed at the previous meeting, that it would be a retrograde step to eliminate from the definition of a "treaty" the reference to other subjects of international law. The general feeling since expressed in the Commission had been that the retention of those words would lead to considerable difficulties; the Special Rapporteur himself had proposed their deletion.
38. In the circumstances, he was attracted by Mr. Tunkin's proposal. Since the purpose of the new articles would no longer be to define the term "treaty", either for the purposes of the draft articles or for any other purpose, it would be sufficient to introduce at the outset a provision stating, with the necessary precautions, to what the draft articles applied. From his own point of view, the approach suggested by Mr. Tunkin was acceptable because it removed many difficulties, some of which, it seemed, might have arisen precisely from the fact that the definitions article had been placed before article 2.
39. The proposed opening article would have to contain a positive element, namely, a statement of the area of application of the draft articles, on which there appeared to be general agreement. The provision should also contain two negative elements, taken mainly from the new text of article 2 proposed by the Special Rapporteur: first, the reservation regarding agreements not in written form and secondly, the reservation regarding agreements of a different character. The latter included not only agreements between two subjects of international law other than States, a type of agreement which, as far as agreements concluded between two international organizations were concerned, did not constitute a major problem, but also agreements between States and other subjects of international law. That type of agreement was giving rise to real difficulties, and care must be taken not to disturb existing practices. It was difficult to see how such agreements could be excluded from draft articles dealing with treaties made by States. In drafting that negative portion of the article, care should be taken to avoid using the expression "*mutatis mutandis*", which, as the previous experience of the Commission on another topic had shown, could become a source of confusion.
40. Lastly, he thought that paragraph 2 of article 1 should form a separate article; the provisions of that paragraph had no place in a definitions article, since they dealt with a completely different subject.
41. Mr. YASSEEN said he would confine himself to discussing the sphere of application of the draft. There should be a separate article defining the sphere of application, which should clearly state that the draft articles were applicable only to treaties concluded between States, but emphasize that that did not in any way affect the legal force which other treaties or agreements possessed under international law. In that article the Commission should also state its position on the applicability of the draft to what might be called "mixed" treaties—those concluded between States and other subjects of international law. He had not yet made up his mind on that subject, and thought that the Commission should study it a little further.
42. He pointed out that, at the beginning of article 1, the French text contained the word "projet", whereas the English and Spanish texts spoke of "articles"; he suggested that the word "articles" should also be used in the French text.
43. The CHAIRMAN suggested that the Commission pass on to consider article 1, paragraph 1 (b).
44. Sir Humphrey WALDOCK, Special Rapporteur, said he thought it would be better to postpone the discussion of individual definitions until the need arose in discussing the substance of the draft articles. Article 1, paragraph 2, however, was a different matter and he thought it could be discussed independently.
45. As to paragraph 1 (b), all the governments which had commented on it had strongly opposed the definition of a "treaty in simplified form". It was impossible to form a useful opinion on the matter until it was decided whether such a definition was needed at all; it might not be necessary, but it was difficult to know until an attempt was made to formulate the articles which raised the problem. The same applied to the term "general multilateral treaty"; it might be possible to drop the definition of that term also.
46. The CHAIRMAN agreed that it would be better to consider sub-paragraphs (b) and (c) of paragraph 1 when the Committee came to deal with the substance of the articles.
47. Mr. LACHS said he agreed with the Special Rapporteur. It might turn out that if the enumeration in sub-paragraph (a) were omitted, the further enumeration in sub-paragraph (b) would become redundant, since treaties in traditional form and treaties in simplified form would then belong to a single family of treaties. The Commission should be careful to avoid any suggestion that treaties in simplified form were not treaties.
48. Mr. AGO asked whether it was proposed to postpone consideration of sub-paragraphs (a) to (g), but nevertheless to include a list of definitions in article 1, or not to include any definitions in that article. In proposing that article 1 should specify what a treaty was for the purposes of the present articles, Mr. Yasseen seemed to favour the second course.

49. The position would be greatly affected by the Commission's choice between those two courses. Personally, he did not think it advisable to define, at that point, terms which did not appear until much later in the draft or, especially, to group together under the title "Definitions" some explanations which really were definitions and others which were not. For example, sub-paragraph (d) did not define the terms "signature", "ratification", and so on; it rather described the legal effect of those acts. It would be much better to do that later in the draft. Incidentally, it was not correct to include signature, without qualification, in the list of acts expressing the consent of a State to be bound by a treaty. He would therefore prefer the Commission not to include any definitions in article 1, but to try to define each term, if necessary, where it was used in the draft.

50. Mr. ELIAS said that the Special Rapporteur's suggestion was the most satisfactory way of dealing with the matter. It might even be possible to dispense with an article on definitions and to attach a definition to each particular article concerned. Perhaps the articles could be reformulated in such a way that any definition would be redundant.

51. Mr. AMADO said he was surprised to note that, as the discussion progressed, members seemed to be losing sight of a most important idea, namely, that in the text being prepared it was States which were supposed to express their will and give undertakings; it would be strange if States undertook *inter se* to treat a particular term as having a particular meaning. Words were merely the means used by States to define their interests and explain their views. Hence, the Commission should be careful not to propose to States texts which might hamper them when they met in conference to conclude the convention it had drafted for them.

52. Sir Humphrey WALDOCK, Special Rapporteur, said he did not think it possible to dispense with article 1 altogether since, as the Commission had found in 1962, such a step would complicate the drafting later on. For instance, it was useful to define such terms as "depository" and "ratification" at the beginning. It had to be made clear that, in using the term "ratification", the Commission meant the international act of ratification.

53. The CHAIRMAN, speaking as a member of the Commission, said he shared the Special Rapporteur's opinion: it would be wrong to abandon all idea of including definitions in the draft. After discussing the substantive articles, the Commission should consider whether the proposed definitions were necessary and correct in the light of the text adopted for those articles. A further argument in favour of including a list of definitions was that if an institution was mentioned in several articles it was more convenient to explain the general concept in an article appearing early in the draft. In deferring the discussion on definitions, the Commission would not be deciding for or against the inclusion of definitions in general or of any of them in particular.

54. Mr. ROSENNE said the Drafting Committee should be asked to prepare the draft, as far as possible, in such a way that a separate article on definitions would be unnecessary, especially as some of the definitions were, on the whole, obvious or repetitive. He did not consider it

necessary to define the term "depository" in article 1, since there was a whole section on depositaries later in the draft. It had to be assumed that the articles would be read as a whole.

55. He agreed with the Special Rapporteur, however, that the question should be postponed. The Special Rapporteur's reference to the need for a definition of the word "party" in section C of his report might have some bearing on the discussion.

56. Sir Humphrey WALDOCK, Special Rapporteur, said it would be a mistake to place any reliance on the assumption that a long series of draft articles would be read as a whole; it was essential to assist correct interpretation. The word "party" was a case in point; it would probably be necessary to define that term.

57. Mr. AGO said he wished to amend his earlier proposal, for on reflection he had arrived at the conclusion that the article on definitions should include a definition of a "treaty", which would specify that it was an agreement "in written form"; otherwise it would not be clear why the following article referred to agreements not in written form.

58. He therefore proposed that the Commission should adopt as paragraph 1 (a) of article 1 the new text suggested by the Special Rapporteur, up to and including the words "particular designation".

59. For article 2 he tentatively proposed the following wording:

"1. The present articles refer only to treaties concluded between States.

"2. The fact that the present articles do not refer to treaties to which subjects of international law other than States are parties does not mean that the rules contained in the present articles do not also apply, so far as possible, to such treaties.

"3. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law."

60. Mr. TUNKIN said he would like to make it clear that the purpose of his proposal had been that the provision limiting the scope of the draft articles should be placed at the beginning; it was no part of his proposal to drop the definition of a "treaty" from the definitions article. The definition contained in paragraph 1 (b) should be retained in a modified form.

61. Mr. TSURUOKA, referring to the possible application of the Commission's draft articles to treaties to which subjects of international law other than States were parties, said there was no reason to suppose that international organizations, for instance, would become parties to the convention which the Commission was preparing. Consequently, in so far as the rules laid down in the convention applied to such parties, they would do so by virtue of customary law or of a practice specified in the convention. A proviso on that point should perhaps be made in the draft articles. For example, as Mr. Tunkin had proposed, article 1 might specify that nothing in the draft should be construed as precluding the application of the rules laid down in the articles to treaties to which subjects of international law other than States were parties.

62. Mr. PAREDES said that Mr. Briggs had been right in saying that the definitions given in the article were descriptions rather than true definitions. The purpose of a definition was to establish the fundamental characteristics of the thing defined ; but the definitions in the draft were purely formal. It was essential that the subject covered by the draft should be clearly delimited ; it was surely a mistake for a body with the standing of the Commission to use a term inaccurately. The Commission should hold to the principle that it was essential to define certain terms, as was done in almost all codes, and to give the theoretical meaning of words which would have a practical application. The definitions should deal with the intrinsic rather than the extrinsic characteristics of the terms or acts referred to in the articles.

63. In his view it was necessary to take into account the internal characteristics of a treaty ; he would define a treaty as an act by which, of their own free will, two or more subjects of international law, acting within their competence, settled their mutual relations. The essential feature of a treaty was that it was an act of will. One solution would be for the Commission to replace the title " definitions " by some other expression and to recast the entire article in a different form.

64. The Spanish text of article 1, paragraph 2, at any rate, was liable to lead to misunderstanding, since it implied that States were prohibited from using the terminology employed in the articles, whereas in fact, as he understood it, it meant that the use was optional. It should at least be added that a State could use that terminology if it so desired.

65. The Commission was preparing a code on the law of treaties to be submitted to States for their acceptance through a convention, and it should therefore present a *corpus* of doctrine on the subject. It was essential to bear in mind the thinking of the nations which would eventually have to apply the provisions of the articles ; but there was no need for the Commission to pay too much attention to the comments of a single government, except to the extent that it found them satisfactory.

66. The CHAIRMAN, summing up the debate, said that two most important questions had been raised : the order of the various provisions, and the applicability of the articles to treaties to which subjects of international law other than States were parties. A number of secondary questions also had to be settled, such as the deletion of the enumeration appearing in parentheses in article 1, paragraph 1 (a) ; the distinction between a treaty and an agreement ; the inclusion of the phrase " governed by international law " ; the replacement of the word " any " by the word " an " before the words " international agreement " ; the advisability of adding a reference to the intention of parties to bind themselves ; and the deletion of the word " international " before the word " agreement " .

67. He invited the Special Rapporteur to give his views on those questions.

68. Sir Humphrey WALDOCK, Special Rapporteur, said he had made his own position clear in his report. It seemed to him that members had now come to a clear conclusion and that the Commission must accept the logic of its decision and confine the articles to treaties

between States. The Commission might be considered somewhat irresponsible if it suggested that the articles applied to treaties concluded by international organizations, without having studied that question at all as a Commission. In 1962 he had been ready to submit a special section dealing with the treaties of international organizations. The Commission, however, for reasons which he now considered entirely sound, had been opposed to that idea and the articles had in consequence never been submitted. It might well be that many of the articles now included in the draft did apply to international organizations, but it would be wrong to state that they did ; clearly some variations would be necessary to make the draft suitable for international organizations.

69. Like other members, he attached importance to a reservation of the legal force of treaties concluded by other subjects of international law or by States with other subjects of international law, and indeed of treaties not in written form. He favoured a negative form of reservation on the lines suggested by Mr. Ago, to the effect that the application of the articles to such treaties and agreements and to agreements not in written form was not excluded.

70. He was inclined to agree that the expression " *mutatis mutandis* " should be avoided ; perhaps " so far as may be appropriate " would be better.

71. The Commission's directives to the Drafting Committee on the order of the articles should not be too rigid. Although existing codifying treaties such as the Conventions on Diplomatic Relations and Consular Relations began with an article containing definitions, he favoured Mr. Tunkin's proposal that the draft should begin with the article on scope rather than the definitions article. The article on scope should be exceedingly short, however, and should not say much more than " The present articles apply to treaties concluded between States " .

72. Then, in article 2, there would be the abbreviated definition now proposed, though perhaps not abbreviated to the extent Mr. Ago had suggested. It might be couched in some such terms as " A treaty means any international agreement concluded in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation " .

73. Article 3 would then contain the substance of the existing article 2, but differently formulated, on some such lines as " The fact that the present articles do not relate to treaties concluded between subjects of international law other than States, or between States and such other subjects of international law, shall not be understood as affecting in any way the legal force of such treaties or as excluding the application to them, so far as may be appropriate, of the rules laid down in the present articles " . A similar reservation to that now in article 1, paragraph 2 might still be advisable, but its language would be somewhat different from the existing formulation.

74. With regard to the title of article 1, the purpose of the word " definitions " was merely to indicate that it was a statement of the meaning to be attached to particular phrases in the draft articles. There was a tendency to

regard definitions as something absolute ; in the case of the word "treaty" he did not accept that view ; the object was to define terms as used in the draft articles. It was manifest that in certain major instruments the term "treaty" was used in different senses ; there was no absolute truth about the meaning of the word "treaty", which depended on the context and on the instrument in which it was used. For instance, Article 102 of the Charter was not at all clear on the question of oral agreements, and the same could be said of Article 38 of the Statute of the International Court of Justice.

75. He had dealt with the question of the words "governed by international law" in his report, and did not feel that any change ought to be made in the light of the comments by governments.

76. Mr. YASSEEN said that as to substance he fully agreed with the Special Rapporteur. As to form, he thought the Commission could perhaps avoid unnecessary repetition by making what might be called the definition of a treaty the basis of the article defining the scope of the draft. Article 1 would then consist of a first paragraph specifying that "the present articles shall apply to any international agreement in written form, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation, concluded between two or more States and governed by international law", followed by a second paragraph containing the saving clause suggested by the Special Rapporteur to preserve the validity of agreements not in written form and of agreements concluded with other subjects of international law.

77. Mr. CASTRÉN said that he, too, approved of the substance of the Special Rapporteur's proposals. In order to simplify the text he suggested that, instead of drafting an article on the scope of the convention, the Commission should give its draft the title "Draft articles on the law of treaties between States". It would then be possible to give the definitions in article 1.

78. The CHAIRMAN, noting that there were no objections to the Special Rapporteur's conclusions, proposed that the Commission refer paragraph 1 (a) of article 1 and related problems to the Drafting Committee.

*It was so decided.*⁷

The meeting rose at 1.5 p.m.

⁷ For resumption of discussion, see 810th meeting, paras. 10-27.

778th MEETING

Thursday, 6 May 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the Agenda]

ARTICLE 1 (Definitions) (continued)

1. The CHAIRMAN said that, after consultation with the Special Rapporteur, he would suggest that the Commission should postpone consideration of sub-paragraphs (b) and (c) of paragraph 1.

*It was so decided.*¹

2. Mr. PESSOU said he wished to make some general comments on the discussion. While some discussions might enhance the value of the text prepared by the Commission, others were less justified. By reconsidering the text which it had laboriously prepared at the cost of many concessions and compromises, the Commission might undo its own work.

3. Among the communications received from governments, one of the most interesting was that from the Netherlands (A/CN.4/175/Add.1). But some of the comments it contained were hardly justified. For example, the Netherlands Government said it would be preferable not to state that the provisions applied to treaties concluded by international organizations ; but if international organizations had been mentioned, it was only incidentally.

4. Nor was it easy to understand the reserve expressed by the Netherlands Government in its comment on article 3, paragraph 2, where it referred to the special form of the Netherlands State ; for that paragraph, after mentioning the capacity of member States of a federation to conclude treaties, referred to the constitutional law of such States.

5. He was concerned to note that there seemed to be a desire to reconsider the meaning of the expression "other subjects of international law" which the Commission had settled at its fourteenth session. In its commentary on article 3,² the Commission had stated that paragraph 1 laid down the general principle that treaty-making capacity was possessed by States and by other subjects of international law. Further on it had added that the expression "other subjects of international law" covered international organizations, the Holy See, and special cases such as an insurgent community. He categorically refused to deny the reality of an institution such as the Holy See, which was recognized in international law and whose influence was world-wide.

6. The CHAIRMAN said that the questions raised by Mr. Pessou had already been referred to the Drafting Committee, which would take his comments into account when considering article 1, paragraph 1 (a), in conjunction with article 2.

7. He proposed that the Commission should take up paragraph 1 (d) of article 1.

¹ For resumption of discussion, see 820th meeting, paras. 15 and 16.

² *Yearbook of the International Law Commission, 1962, Vol. II, p. 164.*

8. Sir Humphrey WALDOCK said he thought that consideration of paragraph 1 (d), like that of the remaining definitions, should be postponed until the Commission came to the articles dealing with the substance. In his view the Commission should take up paragraph 2.

9. Mr. de LUNA said he supported the Special Rapporteur's view that consideration of sub-paragraphs (d) to (g) of paragraph 1 should be postponed. The comments by governments had shown that it would be better to deal with those sub-paragraphs after the Commission had completed its examination of the whole draft, when the exact extent of the definitions required would be known. That course was the more advisable because the definitions raised many difficult questions.

10. For instance, "signature", a term defined in paragraph 1 (d), was always required for purposes of authentication; but sometimes it served a second purpose, namely, that of conferring a binding character on a treaty. That could occur when recourse was had to the device of executive agreements, used by governments to avoid the delays involved in securing parliamentary approval. A different effect of signature was illustrated by the case of two treaties concluded by Spain, the stipulations of which entered into force at once, but were subject to the reservation that, if ultimately there was no ratification, their application would cease. Another example was a treaty between Spain and Uruguay, which provided for signature and ratification, but in the end had not been ratified; one of the parties had in good faith applied some of the provisions of the treaty, however, so that partial effect had been given to it.

11. The CHAIRMAN suggested that before considering paragraph 1, sub-paragraphs (d) to (g), the Commission should take up paragraph 2.

It was so decided.

12. He drew attention to the new text of paragraph 2 proposed by the Special Rapporteur in his report (A/CN.4/177) which read:

Nothing contained in the present articles shall affect in any way

(a) The characterization or classification in internal law of international agreements or of the procedures for their conclusion;

(b) The requirements of internal law regarding the negotiation, conclusion or entry into force of such agreements.

13. Mr. BRIGGS said he had some difficulty in understanding what the opening phrase of the Special Rapporteur's new proposal for article 1, paragraph 2 meant. What bothered him was its effect. In paragraph (15) of the commentary on article 1 in its report on the work of its fourteenth session, the Commission had stated that "it is quite essential that the definition given to the term 'treaty' in the present articles should do nothing to disturb or affect in any way the existing domestic rules or usages which govern the classification of international agreements under national law".³ That was much more limited than the present article.

14. The United States Government, in its comments, had said that the disclaimer in paragraph 2 was satisfactory as far as it went, but that the classifications in paragraph 1 might be misleading in that they might be understood by some as a part of international law that had the effect of modifying internal law (A/CN.4/175, Section I.21). The United States Government had therefore suggested a new text which had been taken up by the Special Rapporteur and embodied in his new proposal. That proposal went too far, however: the draft was bound to affect the policies, and perhaps the classifications, of internal law. What the draft could not do was to modify internal law *ipso jure*. If the treaty which the Commission was preparing were adopted by a country like the United States, where treaties became the law of the land, it would become internal law, not because of the provisions of the draft, but because of the constitutional provisions of the United States.

15. The general rule was that the instrument that was later in date would prevail and it had presumably been for that reason that the saving clause had been introduced; he doubted, however, whether the future convention was the appropriate place for it. It was for the country concerned to make the appropriate saving clause when acceding to the convention.

16. He was unable to understand the exact relationship between article 1, paragraph 2, and article 31. Article 31 seemed to suggest that, even though a constitutional provision requiring submission to the legislative body had not been complied with, the treaty would in some cases become binding. His suggestion would be that paragraph 2 should be worded: "Nothing contained in this article shall modify the characterization or classification of international agreements under the internal law of any State for the purposes of its domestic constitutional processes."

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the original text of article 1, paragraph 2, had been drafted primarily with sub-paragraphs (a), (b) and (c) of paragraph 1 in mind; nevertheless, the Commission had always regarded it as having a somewhat broader context, because there were a number of constitutional procedures in which internal law might differ in its understanding of institutions, also known to international law, such as approval and ratification.

18. On reading the comments of governments he had gained the impression that the Commission had underestimated the extent of the problem of making a reservation in favour of the procedures of domestic constitutional law. Mr. Briggs had made it clear that there was a larger problem to be discussed, even if the Commission retained the rather narrower formulation of the existing paragraph 2 instead of expanding it in the manner suggested in his report.

19. But was it adequate merely to reserve the characterization and classification of agreements? If, under its constitution, a State made the draft articles part of its internal law, there might be a possibility of conflict with other articles of the draft dealing with actual processes such as ratification, accession and acceptance. It was inadmissible that whatever was included in the draft about the international processes should automatically

³ *Ibid.*, p. 163.

affect internal constitutional processes. That would be wholly unacceptable to States ; it might, indeed, be regarded as placing an undue burden on States to require them to readjust their constitutional processes to fit the language of the new convention on the law of treaties. He had therefore thought it might be necessary in any event to cover more than characterization and classification, and had accordingly formulated a wider form of reservation for submission to the Commission.

20. Article 31 embodied a compromise : it stated that the provisions of internal law had no effect on the international validity of a treaty except in cases where failure to comply with internal law was manifest. There were many other cases covered by the draft articles which might come before a municipal court, for example when, as had happened more than once, a breach of a treaty was invoked by a government as a reason for terminating the treaty. The tendency was for the domestic court to accept the decision of its government that there had been a breach of the treaty and to hold that that was sufficient cause for terminating it. The Commission had felt that those were delicate grounds of invalidity or termination, and had therefore provided a special procedure for invoking grounds of termination and invalidity and tried to formulate the actual grounds, such as *rebus sic stantibus*, in very careful terms.

21. It was surely in the highest degree desirable that, if agreement was reached by States on the formulation of the articles regarding invalidity and termination, those general rules of international law should be observed also by domestic courts. That was a good reason for not endeavouring to remove from domestic law those general provisions of the law of treaties. With regard to article 31, there might be cases where under the draft articles, a treaty would be held to be internationally valid between two States, but where a different view might be taken by a municipal court of one of the States as a result of views expressed by its government.

22. Members of the Commission should state whether they considered the existing text of article 1, paragraph 2 to be sufficient or to require expansion to cover certain of the procedures of treaty-making such as ratification and approval.

23. Mr. de LUNA said that paragraph 2 had originally confined the reservation to the characterization or classification of international agreements. Since the Commission had now adopted an amended version of paragraph 1 (a) omitting the details on classification and characterization, paragraph 2 no longer appeared to be necessary and could be dispensed with.

24. It was true that, in his report, the Special Rapporteur had proposed a new text containing not only the reservation on characterization and classification, but a second reservation concerning the requirements of internal law regarding the negotiation, conclusion or entry into force of agreements. Nevertheless, the Special Rapporteur had shown in his statement that it was not advisable to include the second reservation. He had referred to the provisions on the consequences of the breach of an agreement.

25. Another relevant provision was that on the requirements for the expression of the external will of the

State, in article 31. The discussion of article 31 (formerly article 5) had led to a thorough exchange of views at the fifteenth session and the present text represented a compromise between the views then expressed.⁴ His own feeling was that it did not go far enough in the direction of the supremacy of international law ; other members, however, feared that it might not be consistent with the constitutional provisions of certain countries. If an attempt were made to go back on the compromise reached, an element of insecurity would be introduced into international transactions. A party to a treaty could not be required to know the intricacies of the constitutional law of another party.

26. For those reasons, it was clear that the reservation in paragraph 2 (a) proposed by the Special Rapporteur was no longer necessary, because of the changes which had been made in paragraph 1 (a). Paragraph 2 (b) would have to provide for reservations to a great many articles, especially article 31, thereby weakening that provision, which would be extremely dangerous. He therefore urged that paragraph 2 be deleted.

27. Mr. TUNKIN said he shared Mr. Briggs's misgivings, especially with regard to the Special Rapporteur's new draft. It was surely going too far to say that " the requirements of internal law regarding the negotiation, conclusion or entry into force of such agreements " was not affected by the articles. For instance, the provisions of the internal laws of various countries differed regarding full powers. In some countries, full powers were obligatory even for the Minister for Foreign Affairs ; in others they were not. For negotiation, one country might require full powers, whereas the law of another country laid down no such requirement. There might also be different provisions on entry into force.

28. The question therefore arose what would be the effect of the convention if such a saving clause was incorporated ? His own view was that an international treaty was concluded with a view to binding the States concerned ; if the internal law of a particular State contained some obstacles to the fulfilment of the obligations undertaken under the treaty, the internal law should be amended.

29. He accordingly preferred Mr. de Luna's proposal to dispense with paragraph 2 altogether. If any difficulty arose in a State that became a party to the convention, it should be dealt with by that State in the way it considered preferable. If a saving clause were regarded as necessary, he would not oppose it, but it should be confined to article 1 and specifically to the classification of international agreements.

30. Mr. ROSENNE said that two points arose out of the Special Rapporteur's proposal ; the idea itself, and the question whether that idea should be expressed in the form of an article or otherwise. So far as the idea itself was concerned, the Special Rapporteur was correct, although when paragraph 2 had been drafted in 1962, the words " present articles " had referred to articles 1 to 29, whereas they now referred to articles 1 to 73. That in itself gave rise to a number of major problems. Never-

⁴ Yearbook of the International Law Commission, 1963, Vol. I, 674th-676th meetings.

theless, he agreed that the reservation should find a place in the Commission's final text.

31. Was it really possible, however, for the Commission to include a stipulation stating in so many words what did and what did not affect domestic legal systems? The point had to be considered in relation to the whole topic. The Commission had repeatedly emphasized that it was dealing exclusively with the international and not the domestic law of treaties. That being so, there was good reason for considering the article redundant in its existing form, though it might be too drastic to omit the idea altogether.

32. The idea could not be considered in isolation from the problem of definitions and, while it was quite true that some previous drafts on other topics had begun with a fairly elaborate article on definitions, that was not the Commission's invariable practice, or that of the codification conferences. For example, it was worth noting that the 1956 draft on the law of the sea (which had also contained 73 articles)⁵ had contained no such general article: definitions of such terms as "bay" were included in the text where substantively needed, and not necessarily where the term was first used. At the same time the Commission's report for 1956 included in the introduction to chapter II⁶ a number of observations applying to the whole draft on the law of the sea, and they established the context in which the articles as a whole had to be read. It might be possible to adopt a similar approach in the present case and include the Special Rapporteur's new version of paragraph 2 in the introduction to the Commission's final report as part of the description of the context in which all the articles had to be read. In any case, he did not think the paragraph could properly be included in article 1. If a majority of the members of the Commission considered it desirable to retain the paragraph, it should form a separate article.

33. Mr. REUTER said that paragraph 2 of article 1 was open to two very different interpretations. On first reading it, he had taken it as a supererogatory statement having no other purpose than to develop what was already said in the article's opening sentence, namely, that the terminology used in the articles did not affect the meaning attached to the same terms in the internal law of States. If that was indeed the effect of the paragraph it could be deleted, for it added nothing. If the Commission preferred to retain it, the drafting should be amended to make it clear that it related only to terminology; furthermore, the reference to the internal law of States should be supplemented by a reference to other international instruments, for it was possible that in the Charter, for example, the words "international agreement" or the word "treaty" might be used in a different sense.

34. However, several speakers, in particular Mr. Briggs and Mr. Tunkin, had shown that paragraph 2 raised another question: that of the effects of the convention on internal law. That question had nothing to do with the definitions; it was one which the Commission might, indeed, discuss, but which might take it very far because it involved the fundamental character of the whole draft.

The effects of the convention on internal law would vary according to national conceptions of the relationship between international law and municipal law—even though international law ought ultimately to prevail over municipal law.

35. But the scope of the draft varied according to the article considered. There was, for example, at least one article in the draft as it stood which postulated the existence of *jus cogens*. Other articles embodied general principles of law—and there the Commission was carrying out codification, since some State constitutions already provided that the general principles of international law were embodied in and prevailed over national law. In addition, the draft contained provisions that were entirely new. States would be free either to accept those provisions and take steps to implement them, or to reject them, or possibly to make reservations concerning them.

36. It was therefore necessary to decide whether paragraph 2 dealt solely with matters of terminology. The question of substance should be left in abeyance for the time being.

37. Mr. AGO said he wondered whether too much importance was not being attached to a provision whose scope had originally been very narrow. The commentary adopted by the Commission at its fourteenth session showed that the Commission had thought it advisable to insert the saving clause after the definitions.⁷ The clause had been justified because paragraph 1 (a) had contained an enumeration of the different kinds of instrument which the Commission regarded as treaties.

38. Some countries had rather strict constitutional rules on the ratification of treaties, however, and one way of mitigating their severity was not to qualify as treaties, for the purposes of internal law, certain international acts which were treaties for the purposes of the draft articles; an exchange of notes, for example, might not be regarded as a treaty and consequently not require the approval of certain organs. That was why the Commission had thought fit to explain that the articles did not in any way affect the characterizations or classifications adopted by States for internal purposes.

39. In fact, even if the definitions were left as they stood, paragraph 2 would not really be necessary, for each State could adopt whatever criteria it wished in its internal law, for its internal purposes. But since the Commission had moved towards a more succinct definition, the paragraph had become practically useless and he agreed with Mr. de Luna that it should be deleted. If a State was particularly concerned about its position under constitutional law, it would be for that State to take due precautions and formulate reservations.

40. The discussion had raised another far-reaching problem: that of the effects of the convention on the internal law of States. Like several other speakers, in particular Mr. Tunkin, he thought it would be dangerous to try to establish, for example, by adopting the second part of the text proposed by the Special Rapporteur, that the draft articles did not in any way affect the validity of internal provisions on the conclusion of treaties. In fact,

⁵ *Yearbook of the International Law Commission, 1956*, Vol. II, pp. 256-264.

⁶ *Ibid.*, pp. 254-256.

⁷ See *Yearbook of the International Law Commission, 1962*, Vol. II, p. 163, para. 15.

it was possible that some provisions of internal law might become inadmissible as a result of the conclusion of the convention, in which case they would have to be amended. A State which ratified the convention would have to bring its internal law into line with that instrument. In any case there was no need to deal with that matter. Paragraph 2 could therefore be deleted ; it should certainly not be expanded.

41. Mr. YASSEEN said it was clear from the position of the provision in the draft that it related solely to questions of terminology. Nevertheless, the comments of some governments, the proposal by the United States of America and the proposal in the Special Rapporteur's fourth report tended to give it an entirely different scope.

42. It was being suggested that the paragraph should deal with the very delicate question of the relationship between international law and internal law. A treaty was, of course, the outcome of co-operation between international law and internal law. There was no denying that some phases of the treaty-making process were governed by internal law. It was therefore necessary to draw a line of demarcation between the spheres of internal law and international law ; that line might be disputed, and it differed according to State and the writer concerned. But when the Commission considered the law of treaties, it did so solely from the international standpoint ; it was not called upon to regulate the law of treaties in so far as it was governed by internal law. Consequently, if the proposed saving clause related to that part of the treaty-making process which came under internal law, it was unnecessary because it was self-evident ; and if it related to that part of the treaty-making process which came under international law, it was not justified. On that point he shared Mr. Ago's opinion. The Commission should avoid giving paragraph 2 the scope which some recent proposals sought to give it.

43. Mr. ELIAS said he fully agreed with those members who considered that paragraph 2 should be deleted, especially as the main reason for it had disappeared as a result of the Commission's decision on paragraph 1 (a). If some sort of reservation were found to be necessary owing to the peculiarities of the internal law of certain States, the Commission should postpone its formulation until it took up the substance of the relevant article.

44. An alternative solution might be to include some kind of reservation in article 3, but he doubted whether that would be satisfactory.

45. Mr. LACHS said that Mr. Ago had done well to remind the Commission of the dangers it was facing. The issues which had arisen were bound to open the door to a discussion of the relationship between international law and domestic law. It was true that, from the point of view of international law, paragraph 2 was unnecessary, but it would be well to bear in mind the problems confronting the representatives of governments who would ultimately be called upon to discuss the draft at a conference of plenipotentiaries. A representative wishing to protect the interests of his State would be concerned not to affect its sovereign rights in domestic law. The Special Rapporteur had made an attempt to extend the scope of paragraph 2, but had not gone the whole way. Even going half way, however, he was already treading dangerous ground.

46. He (Mr. Lachs) was accordingly inclined to agree with Mr. de Luna's suggestion that paragraph 2 should be deleted. In order to reassure future participants in a conference of plenipotentiaries, however, the idea expressed in the paragraph should be included in the commentary.

47. Mr. CASTRÉN said he agreed that paragraph 2 should be either deleted or reduced in scope, as suggested by Mr. Briggs and Mr. Tunkin. The Special Rapporteur's revised version went too far and was open to dangerous misinterpretation because it weakened the force of the draft articles and over-emphasized the freedom of States. If a satisfactory formula could not be found it would be better to delete the provision.

48. He supported the proposal made by the Government of Israel (A/CN.4/175, section I.9 para. 6) and by Mr. Lachs that the matter should be dealt with in the commentary.

49. The CHAIRMAN, speaking as a member of the Commission, said that the Commission had to choose between giving precedence to international law and providing that certain questions governed by international law should be settled by internal law.

50. He could not approve of the use of an expanded formula referring those questions to internal law and associated himself with those members of the Commission who thought that, since the list of different types of treaties had been deleted, paragraph 2 was unnecessary. Hence, he could not accept the text proposed by the Special Rapporteur.

51. Sir Humphrey WALDOCK, Special Rapporteur, said it would be very undesirable to suggest that the main body of the draft articles was not fully applicable in internal law as well as in international law.

52. His purpose in proposing a new version of paragraph 2 had been to cover, in addition to the questions of characterization and classification, certain elements of procedure which could give rise to difficulties in internal law. Even if the expression "the present articles" were taken to cover only the articles in Part I, it should be remembered that those articles covered such matters as full powers and ratification, in respect of which it would perhaps be appropriate to reserve certain rules of internal law which might otherwise appear to be affected by those articles.

53. He fully agreed that, since the draft articles were intended to form the basis of a convention, the Commission was only dealing with the law of treaties at the international level. However, the Commission could not afford to disregard the whole question of the effects on internal law, because it could not ignore the susceptibilities of governments. In the interests of the Commission's future work, governments should not be given the impression that they might be required to contemplate the need for constitutional amendments in order to conform with the provisions of the draft articles. Governments were usually disinclined to accept any treaty that might require changes in domestic law for its implementation, particularly if constitutional provisions were affected. If fears of that kind were aroused, the reaction might well be a move to adopt the draft articles merely as a General Assembly recommendation. It was significant that a number of governments had stated in their comments that they were

in favour of transferring from the commentary to the body of the articles a number of indications by the Commission that certain matters of procedure were left for municipal law to regulate.

54. It was therefore clear that the mere deletion of paragraph 2 would not remove all the Commission's difficulties. He fully agreed that the provision should not be enlarged to cover matters of substance, but a reservation must be made regarding the right to deal in internal law with questions of internal terminology and procedure. One example was article 4, on the authority to negotiate and conclude a treaty; another was the question of provisions on entry into force which were silent on the subject of publication, on which most constitutions contained provisions. He urged the Commission not to take any decision on paragraph 2 at that stage, since its final attitude could well depend on the fate of the various articles in Part I.

55. He was particularly anxious that the final text adopted by the Commission should not be such as to discourage governments from taking part in a diplomatic conference.

56. Mr. BRIGGS said he was surprised at the suggestion that a wholesale amendment of constitutions might result from the provisions of the draft articles. However, he agreed that it would be wise to postpone a decision on paragraph 2.

57. Mr. de LUNA suggested that the Special Rapporteur should prepare, in the light of government comments, a list of the provisions which might give rise to difficulties. The only provisions which seemed to him likely to create any serious problem were those of article 31, on which he himself had made all the concessions he thought possible, bearing in mind the importance of the security of international transactions.

58. Mr. LACHS said that, although he was in favour of deleting paragraph 2, he agreed with the Special Rapporteur that it would be wise to postpone a decision for the time being.

59. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to defer its decision on paragraph 2.

It was so agreed.⁸

60. Mr. TUNKIN proposed that consideration of sub-paragraphs (d), (e), (f) and (g) of paragraph 1 should also be deferred. Since the Commission had already disposed of article 2, it could then proceed to discuss article 3.

Mr. Tunkin's proposal was adopted.⁹

Other Business

[Item 8 of the agenda]

EUROPEAN OFFICE SEMINAR ON INTERNATIONAL LAW

61. The CHAIRMAN invited Mr. Raton, Legal Adviser to the European Office of the United Nations, to

address the Commission on the seminar arranged by the Office.

62. Mr. RATON, Legal Adviser to the European Office of the United Nations, said that the seminar on international law would open on Monday, 10 May. It had been organized by the European Office under the rather broad terms of General Assembly resolution 1968 (XVIII) on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law¹⁰ and should enable advanced students and young civil servants or teachers to learn something about the problems of codification on which the International Law Commission was engaged. It would last for two weeks, during which time the participants, of whom there were sixteen, would attend the meetings of the Commission and lectures followed by discussions.

63. The organizers had encountered two difficulties: first, no funds had been appropriated to meet expenses—which explained why only two of the sixteen participants were from countries outside Europe—and secondly, they had had very little time, as the decision to hold the first seminar had been taken as recently as January. It had therefore been necessary to proceed empirically and that accounted for certain defects that would be remedied later. Members of the Commission, who had been consulted individually about the plan, had responded favourably, and that had encouraged the European Office to proceed. During the two weeks of the 1965 seminar, the participants would hear a number of lectures, seven of which would be given by members of the Commission — Mr. Ago, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Reuter, Mr. Tunkin and Sir Humphrey Waldock. It was to be hoped that the seminar would lead to useful contacts and that another could be arranged in 1966.

64. The CHAIRMAN, thanking Mr. Raton, suggested that after the Seminar the members of the Commission should hold a private meeting with the organizers to exchange comments, which would be useful for the future.

65. Mr. de LUNA congratulated the organizers of the seminar, which should serve to disseminate among scholars a greater knowledge and understanding of the Commission's work. It would lead to contacts between members of the Commission and young scholars, which were bound to be of mutual benefit.

66. There were, however, one or two points he would like to mention. First, efforts should be made to secure as universal a participation as possible. Secondly, the topic of the seminar should be fairly narrow; the law of treaties, for example, was too wide a subject. Thirdly, a bibliography should be circulated at least six months before each seminar, as had been done for those organized by the Academy of International Law at the Hague.

67. Mr. AGO said that the organizers had expressed the hope that members of the Commission would attend the lectures, but he feared that might affect their tone and content. The same applied to the discussions following the lectures, where the presence of members of the

⁸ For resumption of discussion, see 820th meeting, paras. 15 and 16.

⁹ For resumption of discussion, see 820th meeting, paras. 15-26.

¹⁰ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 15, p. 71.*

Commission might intimidate the trainees. He thought it would be preferable to restrict attendance to the trainees themselves.

68. Mr. TSURUOKA said he would inform his Government and university circles in Japan of that welcome venture, so that Japanese students could take part in future seminars. He would accordingly like to know what qualifications were required of participants, what languages would be used at the seminar, and whether there would be an interpretation service.

69. Mr. ELIAS, referring to the fact that only two of the sixteen participants in the seminar came from outside Europe, said that one of those two had been sent by the Government of Nigeria. The Commission should make some recommendations for grants to pay the return fare of participants from distant countries, leaving it to the government of the participant's country, or some other sponsor, to defray his expenses while at Geneva. Alternatively, the grants could be for living expenses and the fares could be paid by governments or other sponsors.

70. There was a great need to encourage the study and practice of international law in newly independent countries, particularly in Africa and Asia. He was aware of the present financial difficulties of the United Nations, but it was of the greatest importance to those continents that the influence of the Commission's work should be widely disseminated.

71. Mr. RATON, Legal Adviser to the European Office of the United Nations, said he had noted the comments of members of the Commission. Replying to Mr. de Luna, he explained that the organizers appreciated the need for preparatory work, but that in 1965 they had not had sufficient time for it. In reply to Mr. Tsuruoka he said that the minimum qualification required was the equivalent of a doctorate of law from a French university. For 1966, the organizing committee intended to send full particulars to governments. The working languages would be English and French and there would be interpretation into those languages. In reply to Mr. Elias he said that the organizers were aware of the inadequate results achieved in 1965 in regard to the geographical distribution of the participants, but that it had been impossible to do better owing to the total lack of funds. It was to be hoped that, if the Commission's report contained a paragraph on the seminar, it would be less difficult to obtain some positive action from the financial authorities.

72. The CHAIRMAN asked the Rapporteur to mention the seminar in his report.

73. Mr. EL-ERIAN said he welcomed the initiative of the organizers of the seminar ; it was a most appropriate form of the "Technical assistance to promote the teaching, study, dissemination and wider appreciation of international law" which was the subject of General Assembly resolution 1968 (XVIII).

74. As to the question of financial assistance to participants, he suggested that the organizers might contact

the various societies interested in international law. The Egyptian Society of International Law, for example, had helped young students to finance their passages to the Hague to attend a seminar there.

75. Mr. ROSENNE also congratulated the organizers of the seminar and welcomed the Chairman's announcement that, after it was concluded, the Commission would have an opportunity of discussing the results at a private meeting.

76. He had been struck by Mr. Ago's remark that if members of the Commission were to attend the lectures, that might inhibit discussion by the participants. Perhaps informal meetings, as distinct from the formal classes and discussions, could be arranged, at which the participants in the seminar and the members of the Commission would have an opportunity of exchanging views.

77. Mr. RATON, Legal Adviser to the European Office of the United Nations, said he thought it would be rather difficult to hold a meeting of the kind contemplated by Mr. Rosenne ; perhaps a reception given by the European Office might take its place. Mr. El-Erian's suggestions were valuable, but on the present occasion it had been necessary to organize the seminar quickly. It would be possible to approach the General Assembly later and perhaps obtain funds.

78. Mr. de LUNA thought that the organization of the Geneva seminar might perhaps be co-ordinated with that of the Hague seminar. The travelling expenses of students from distant countries were certainly very heavy, but it would be possible for a Japanese trainee, for instance, to come to Geneva and then go on to the Hague. The organizers should get into touch with the Curatorium of the Academy of International Law at the Hague, which would certainly be interested in the possibility of such co-ordination.

79. Mr. AGO pointed out that the Hague Academy gave its own courses in July. If the results were encouraging he was quite prepared to approach the Curatorium himself.

80. The CHAIRMAN said that the courses given at Geneva by the Carnegie Foundation should also be taken into account. The organizers should, in fact, make contact with quite a number of institutions, in particular in the interests of candidates from distant countries, in order to help them benefit from their stay in Europe. With regard to Mr. Rosenne's suggestion, he thought that during the recesses members of the Commission could make personal contact with the participants, who could then ask questions about problems they had heard discussed at the meetings.

81. He wished to assure the Administration of the European Office that the members of the Commission would do everything in their power to contribute to the success of the first seminar.

The meeting rose at 12.55 p.m.

779th MEETING

Friday, 7 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

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Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

ARTICLE 3 (Capacity to conclude treaties)

Article 3

Capacity to conclude treaties

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.
 2. In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.
 3. In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.
1. The CHAIRMAN invited the Commission to consider article 3 (Capacity to conclude treaties).
 2. Sir Humphrey WALDOCK, Special Rapporteur, said that in their comments (A/CN.4/175 and Add.1-3), a number of governments had criticized the provisions of article 3 as inadequate and some had made suggestions for their improvement.
 3. Article 3 had given rise to considerable difficulty in the Commission, which had been almost equally divided on the issues it raised; in the truncated form in which it had finally emerged, it was not very useful and the best course would probably be to drop it altogether. The Commission would then be following the precedent of the 1961 Vienna Convention on Diplomatic Relations which omitted all reference to the question of capacity.
 4. In his report, he had formulated elaborate provisions on capacity,¹ because he considered it to be a question more prominent in the law of treaties than in that of diplomatic relations, but article 3 as finally agreed upon did not have sufficient content to justify its inclusion in the draft.
 5. The Commission had decided, provisionally at least, to limit the draft articles to treaties between States. In the light of that decision, it was not easy to see how paragraph 1 of article 3 ought now to be drafted. The question that arose was what constituted a State for the purposes of that paragraph. The Commission had purposely avoided qualifying its statement by a reference to "inde-

pendent" States. The second sentence of paragraph (2) of the commentary² contained an explanation of the use of the term "State", but it had been pointed out by governments that the matter required elucidation in the provisions of the article itself, which must stand on its own.

6. Paragraph 2 of the article dealt with the problem of the treaty-making capacity of member states of a federal union. Paragraph (3) of the commentary dealt with the interesting question whether in some cases the component state concluded the treaty as an organ of the federal State or in its own right. The answer to that question must be sought in the provisions of the federal constitution.

7. Paragraph 3, of the article, which dealt with the capacity of international organizations to conclude treaties, was out of place in a set of draft articles explicitly limited to treaties between States.

8. Mr. YASSEEN said that at a previous meeting he had urged the need to include an article on the capacity to conclude treaties; but the present text should not be retained as it stood.

9. Paragraph 1 referred to "other subjects of international law"; since the Commission had decided that the draft related to States, that reference should be deleted. The comments of the United Kingdom and the United States urged the need to refer to the limited capacity of certain dependent territories; but the system of dependent territories was on the point of disappearing, so it should not be mentioned. Furthermore, the colonial régimes that subsisted were only *de facto* régimes, especially since the General Assembly resolution of 1960.³ If they had been based on any customary rules, those rules had certainly now lost their psychological element.

10. According to the comments of the Government of Sweden, paragraph 1 added nothing new and was therefore unnecessary. That argument was irrelevant, for not every provision added something new; it was often necessary to state what existed. Perhaps paragraph 1 could be amended to read simply: "A State possesses the capacity to conclude treaties".

11. He had not yet made up his mind about paragraph 2, but in view of the importance of federalism in the world, he thought it might be useful to include a provision on the subject.

12. He saw no objection to deleting paragraph 3.

13. Mr. CASTRÉN said that the article had caused the Commission a great deal of difficulty ever since 1962. After long discussions, the Commission had adopted a text which had been rather severely criticized by several governments. To the countries mentioned by the Special Rapporteur in his last report should be added the Netherlands, Ecuador, Colombia and Venezuela, the last three of which had made comments in the Sixth Committee of the General Assembly.

14. Articles 3 said both too much and too little. Paragraph 1, for example, spoke of States and other subjects of international law, though treaty-making capacity belonged, as a general rule, only to independent

² *Ibid.*, p. 164.

¹ *Yearbook of the International Law Commission, 1962, Vol. II, pp. 35-36.*

³ *Official Records of the General Assembly, Fifteenth Session, Supplement No. 16, p. 66, resolution 1514 (XV).*

States and to a few of the other subjects of international law. Paragraph 2 referred only to federal States, and made no mention of other unions of States which might have treaty-making capacity. Paragraph 3 was superfluous, because the Commission had decided that the draft articles would deal with States only.

15. The Special Rapporteur's proposal that the article be deleted would satisfy several governments and save the Commission a great deal of trouble. He thought the Commission should consider that proposal first ; if the majority thought that the whole or part of article 3 should stand, he would propose amendments to paragraphs 1 and 2.

16. Mr. AGO said that some of the Special Rapporteur's comments were fully justified. It was obvious that the article should at least be amended if the Commission wished to abide by its decision to confine the draft to treaties between States. International organizations would have to be excluded, but not, for example, the Holy See and insurgents.

17. The criticisms of governments related mainly to the drafting of the present text, and he hoped that the Special Rapporteur would revert to a more positive proposal, for the article seemed really essential.

18. If the question of capacity were purely theoretical, he would vote for the outright deletion of article 3. But a question of substance was involved : a subject of international law did not automatically have capacity to act and to conclude treaties, and even though certain situations involving incapacity were disappearing, it was essential to take them into account. If it was intended to affirm the capacity of all States to conclude treaties and to preclude situations involving the loss of that capacity, the Commission should say so expressly.

19. Such an affirmation would also have considerable political value. The Commission should affirm that it did not recognize the existence of certain relations between States which involved loss of the capacity to act. Relations of that kind had existed not only under colonial protectorates, but also, and even recently, in Europe.

20. On the other hand, the exclusion of those cases of incapacity did not mean that there could not be certain relations between States whereby one State undertook to entrust its international representation to another, without losing the capacity to conclude treaties itself.

21. The only situation in which it was now recognized that capacity to act and to conclude treaties could be affected—and to cover which he thought a second paragraph was necessary—was that resulting from participation in certain international unions, in particular, in federal States. In such cases there were various possibilities, but certainly the treaty-making capacity of the member States was never unlimited ; it depended on the structure of the union.

22. In short, he was in favour of retaining the first two paragraphs and proposed that they be referred to the Drafting Committee.

23. Mr. LACHS said that paragraph 3 was an inadequate expression of the law. In fact, the *jus tractatum* or treaty-making power of an international organization could be derived from any of three sources. The first,

which was the only one mentioned in paragraph 3, was the constitution of the organization. The second was interpretation and practice, which gave rise to a customary rule ; capacity was in that case acquired by virtue of the development of the law of an international organization, even if there was no constitutional provision on the subject. The third possibility was that the organization could acquire treaty-making power by virtue of a decision of one of its organs. Since paragraph 3 did not reflect the real position, it would in any case have had to be redrafted, but since the Commission had decided to confine the draft articles to treaties between States it had become redundant and should be dropped.

24. He was also in favour of dropping paragraph 2, which had given rise to serious doubts on the part of several members of the Commission. Its provisions dealt with only one of several similar problems and were not indispensable.

25. Paragraph 1 was a most important provision because it touched on a fundamental issue. Its provisions were declaratory ; they reflected the law as it was and did not purport to create new law. He fully shared Mr. Ago's view on the legal and political importance of stating the principle that every State possessed the *jus tractatum*. A declaration to that effect was essential.

26. He certainly could not accept the comment of the Government of Finland (A/CN.4/175, Section I.8) which suggested that there might be States which were not subjects of international law. Every State possessed *ex definitione* the right to conclude treaties ; no State could suffer such a *capitis diminutio*. The right to conclude treaties could be an inherent right or a delegated right. States had an inherent right ; an international organization could have the right to conclude treaties conferred upon it by States.

27. Paragraph 1 should be retained, but redrafted, particularly the concluding words " and by other subjects of international law ". It might be desirable to include the idea in the article on definitions. The definition of a " treaty " in that article was of an objective character and dealt with the notion of a treaty. The provisions of article 3 were subjective ; they dealt with the subject which made the treaty. It might be possible to combine those two elements in a single provision.

28. Mr. de LUNA said that the Commission had to choose between making an exhaustive study of the question of capacity and deleting article 3 altogether.

29. The comments of governments showed that a partial formulation was not advisable and that it would be better to deal with each problem of capacity as it arose, according to the practice of sovereign States in the light of the circumstances. That solution was the more desirable because international law was in process of transition from a liberal, European-centred law to a social and universal law. His own position in the matter was agnostic and he thought that if the article was to be retained, in whole or in part, its drafting would be so difficult that the result would hardly justify the effort. If the Commission had been drafting a code, it would have been necessary to deal with the question of capacity ; but in a draft convention, the pragmatic should prevail over the systematic approach. If article 3 were dropped, the draft would be no

less effective and would prove more acceptable to a conference of plenipotentiaries.

30. Mr. ROSENNE said that the proposal to delete article 3 had been put forward in 1962, but had not then attracted much support.⁴ Now, however, after listening to the discussion, he agreed with Mr. de Luna that deletion was desirable. It would not affect the validity of the codification, which the Commission had decided to confine to the rules governing treaties concluded by States.

31. He had always had great difficulty in understanding the concept of *capacité d'agir* (capacity to act), which seemed to him a highly abstract generalization. It really needed to be given concrete expression according to the different circumstances in which it arose. In the codification of the law on diplomatic relations,⁵ for example, its concrete expression had assumed a different form from that to be found in the Statute of the International Court of Justice. So far as the law of treaties was concerned, any attempt to give it concrete expression would lead the Commission into a subsidiary codification of the whole question of international personality other than that of international organizations. The Commission was hardly in a position to attempt such a task at that stage and whatever form article 3 might now take, it was bound to be incomplete and misleading.

32. At the same time, he had been impressed by Mr. Lachs' remarks and agreed that it would be useful to incorporate the idea of paragraph 1 in an objective definition of a "treaty", if that were possible.

33. Mr. REUTER said he thought that after the discussions at the previous meeting and that morning, the Commission must decide whether its purpose was to lay down rules of general international law or, going even further, rules of *jus cogens* in certain cases, or to state rules of special international law or even rules of internal law. That was the fundamental question which was causing concern to governments.

34. Article 3 as it stood was quite unacceptable. He fully agreed with what the Special Rapporteur had said, particularly with regard to paragraphs 2 and 3, because paragraph 2 stated a rule of internal law and paragraph 3 a rule of special international law.

35. But Mr. Yasseen and Mr. Ago had upheld another idea which, if it were adopted, would have to be expressed in a different form: the idea of a rule of *jus cogens*. He himself had on several occasions made reservations concerning *jus cogens*; but as he wished to co-operate with the majority, if they wished to draft a rule of *jus cogens*, he would submit, merely as a suggestion, the following text: "The capacity to conclude treaties is an essential attribute of State sovereignty which a State cannot surrender except on the basis of the equality of States and of reciprocity". A provision of that kind would condemn colonialism and unequal treaties, but would not reflect on federalism or on the system of an international organization.

⁴ *Yearbook of the International Law Commission, 1962, Vol. I, 639th and 640th meetings.*

⁵ *United Nations Conference on Diplomatic Intercourse and Immunities, 1961, Official Records, Vol. II, p. 82 et seq.*

36. Mr. TUNKIN said that in 1962, he had been rather against including an article on capacity. On further reflection, however, he had now reached the conclusion that article 3 contained some useful elements which should be retained. With regard to paragraph 1, he had been impressed by Mr. Ago's arguments, particularly his argument that the statement that all States possessed the capacity to conclude treaties was of great legal and political importance at the present day.

37. He wished to add that such a statement would reflect one of the aspects of the new international law, in contradistinction to the old international law, which had recognized the existence of States that were not fully independent; that situation had been the expression of colonial dependence. Contemporary international law condemned and prohibited any form of subjugation of one State by another. That prohibition followed from the United Nations Charter, as developed in 1960 by General Assembly resolution 1514 (XV) embodying the "Declaration on the granting of independence to colonial countries and peoples".

38. There was now a new rule of international law to the effect that all States possessed the capacity to conclude treaties—a rule which did not exclude the possibility of a relationship based on equality and compatible with the requirements of contemporary international law. He therefore urged that paragraph 1 of article 3 should be retained, but reworded so as to state clearly that all States possessed the capacity under international law to conclude treaties. That statement, in the light of the Commission's decision to confine the draft to treaties between States, would not imply in any way that other subjects of international law did not have the capacity to conclude treaties.

39. The provisions of paragraph 2 could usefully be retained, for they were a logical consequence of those of paragraph 1. Since paragraph 1 meant that general international law placed no limitations on the capacity of States to conclude treaties, such limitations could only result from the provisions of municipal law. If member states so constituted their federation as to retain the whole or part of the treaty-making power for themselves, there was nothing in general international law to prevent it. Paragraph 2 should therefore be retained and he favoured its present formulation, to which the Drafting Committee had devoted much time and effort.

40. With regard to paragraph 3, he agreed with the majority that it had no place in a draft dealing with treaties concluded by States and not with those concluded by international organizations.

41. Mr. ELIAS said he fully agreed with those members who favoured dropping paragraph 3.

42. He realized the need to proclaim the capacity of States to enter into treaties, but had some doubts about the placing of such a provision. He had been interested by the suggestion of Mr. Lachs that the idea might be incorporated in the definition of a "treaty"; it could also be introduced into the new opening article, which was to limit the draft to treaties between States. In stating the rule, however, the Commission should be careful not to give the impression that it had confined its draft to

treaties between States because only States had the capacity to conclude treaties.

43. Some of the ideas in paragraph 2 should be retained, because they followed logically on the provisions of paragraph 1. At a previous meeting, he had mentioned Quebec's claim that a province of Canada had the right to enter into international agreements with foreign States, whereas only the Federal Government could conclude actual treaties ;⁶ that strengthened the argument for providing, as in paragraph 2, that such matters should be settled on the basis of constitutional provisions.

44. Perhaps the simplest course was to delete article 3 altogether, since its provisions seemed to create more problems than they solved. The idea contained in paragraph 1 and some of the elements of paragraph 2 could be incorporated in a new article 1.

45. Mr. PAREDES urged that article 3 should be retained ; its provisions were among the most important in the whole draft. In a draft that dealt with contractual rights, it was essential to make it clear what subjects of law had the capacity to contract.

46. He saw no reason systematically to leave aside theoretical questions ; all practical achievements proceeded from some established theory. In any case, the issue in the present article was not just a theoretical one ; it was one of immediate practical application and could in no circumstances be ignored. To omit such an article would be comparable to omitting from the provisions on the law of contract, in a code of private law, all reference to the capacity to enter into contracts.

47. It was true, and that was a source of anxiety for the Special Rapporteur, that the text of article 3, especially paragraph 1, was not sufficiently broad. Paragraph 1 declared that States had the capacity to conclude treaties, but it was necessary to draw a distinction, as indicated by Mr. Ago, between legal capacity and capacity to act, as was done in civil law. The colonial mandates of the League of Nations clearly showed the difference, in that some subject States could conclude certain kinds of treaty, whereas others could not do so except through the Mandatory Powers. It was clear that there were States which had full capacity and States which had only a limited capacity.

48. In those circumstances, the formulation of the rule that all States had the capacity to conclude treaties, which related to general legal capacity, ought to be supplemented by provisions on the manner in which the treaty-making power was exercised. It was necessary to deal with the question which State organ had the capacity to conclude treaties, a matter that depended on the constitution of the State. If a treaty was concluded by a State organ which was not constitutionally competent to do so, the treaty would be void by reason of that organ's lack of capacity.

49. The third question of capacity which should be dealt with was that of the capacity of the negotiator under the laws of his country. Like the capacity of a State organ to conclude treaties, that question should be referred to municipal law.

50. It was disappointing to see the Commission discard, one after another, texts whose formulation had required a great deal of work. Article 3 should be retained because of the importance of its provisions with regard to the expression of the free will of the parties to a treaty. He agreed, however, with those members who favoured the deletion of paragraph 3. Apart from the reasons already given, there were some jurists—he was not among them—who considered that an individual could be a subject of international law.

51. Paragraph 2 referred to the treaty-making capacity of a component state of a federal union under the constitutional provisions of the union and he saw no harm in retaining it.

52. Mr. TSURUOKA observed that while no one wished to deny independent and sovereign States the right to conclude treaties and no one denied the desirability, at least in theory, of retaining an article of that kind, no one was satisfied with the formulation of article 3 as it stood. If the Commission could possibly work out a formula that would satisfy the majority of its members and of the international community, as Mr. Ago had believed, it should try to do so ; but if it could not, that would not be of much practical importance. After all, if an international conference met to negotiate, sign and ratify a treaty such as a treaty on the law of treaties that proved, by the mere fact that the conference met, that it was known who would negotiate, sign and ratify. Consequently, in the case of the convention which the Commission was preparing, the text would still be applicable even if there were no article such as article 3 on the capacity to conclude treaties. As he had not made up his mind which of the two possible solutions he preferred, he would ask the Drafting Committee to do its best to work out an acceptable formula on which the Commission could come to a decision.

53. Mr. EL-ERIAN said he would confine his comments to the general principle of the article, leaving aside the special questions that arose in connexion with federal States and international organizations.

54. He agreed with the Special Rapporteur that the question of capacity had a prominent place in the law of treaties. Capacity to establish diplomatic relations had not been regulated in the draft articles on diplomatic relations because of the different context in which it had been raised ; there had been a controversy as to whether the establishment of diplomatic relations was a right or an attribute of international personality. The majority of the Commission had decided that it would not be appropriate to refer to the establishment of diplomatic relations in terms of a right, and agreement had been reached on an article which stated that the establishment of diplomatic relations took place by mutual accord.

55. Then there was the question of the basic purpose of the article. It would have to be drafted in a manner consistent with the realities and requirements of contemporary international relations. It was desirable and indeed necessary that there should be a general statement on the capacity of all States to conclude treaties as an attribute of sovereignty. Mr. Reuter's proposal was useful and should be considered by the Drafting Committee. As Mr. Tunkin had rightly said, special arrangements of a limited

⁶ 777th meeting, para. 35.

character, which were compatible with the sovereign equality of States and were designed to serve a practical need or take account of a special relationship between two States, would not be affected in any way.

56. It had been suggested that if article 3 were retained, it would be necessary to define the term "State". He did not agree: the term was used without any attempt at a definition in Article 4 of the Charter and in Article 34 of the Statute of the International Court of Justice. The Commission itself, when drafting the Declaration on Rights and Duties of States,⁷ had not deemed it opportune to provide a definition.

57. If it were agreed that it was desirable to have an article on capacity to conclude treaties as a basic attribute of national sovereignty, the question of the best way of formulating it would arise. It had been objected that if the article did not go into detail it would be useless. He must point out, however, that the Commission had decided that it would be useful to include an article on *pacta sunt servanda*—the present draft article 55—because it was considered important to enunciate that principle; but that article did not go into detail.

58. Another problem was whether there should be a reference to restrictions on capacity. There could be no general restriction on the capacity to conclude a treaty; to recognize such a restriction would be incompatible with the facts and with the requirements of contemporary international relations. The comments of some governments had dwelt on the capacity of certain other subjects of international law; but since the Commission had decided that the draft should be mainly applicable to States, the question could be viewed in a different perspective.

59. The United States Government had commented that paragraph 1 might affect certain treaties entered into by entities that were not fully independent (A/CN.4/175, Section I.21). He did not think that the article prejudiced the question of the status of those entities, since that was covered by the development of international law, the Charter and the General Assembly resolution on the granting of independence to colonial countries and peoples.

60. His view was that there should be an article 3 incorporating a statement in general terms, not going into details on questions of restriction or of the capacity of subjects of international law other than States; it should be an article reflecting the principle of the equality of States in law.

61. Mr. AMADO said he had come to the meeting with the firm intention of supporting the Special Rapporteur who, after studying the comments of governments, had proposed the deletion of article 3. In supporting the Special Rapporteur's proposal, he had the satisfaction of knowing that he was being entirely consistent with the views he had expressed during the fourteenth session of the Commission at the 639th meeting, when he had said that "it was a pleonasm to say that any independent State had the capacity to conclude a treaty, for without that attribute it would not be a State in the accepted

sense of the word".⁸ He had at that time linked capacity with validity, since the validity of the treaty depended on the capacity of the contracting party. The concern to define capacity, to verify the personality and legal status of the contracting party, seemed to him to be reminiscent of internal law. Besides, he had qualified the word "State" by the adjective "independent".

62. Some members of the Commission were now taking the view that such a rule should appear in the draft and, as Mr. Reuter had said, it would be a rule of *jus cogens*. It was true that there were contemporary examples of States at an intermediate stage of evolution whose contractual capacity was relative; the question was whether their voices could be heard and whether they were capable of expressing a will approximating to a sovereign will? He was perplexed, for he recognized that the existence of such States should influence the drafting adopted by the Commission. He had been struck by Mr. El-Erian's remarks on the drafting; very often what appeared easy and simple proved most difficult and required the greatest effort. The Commission should find a formula which was not pleonastic but which took the new aspects of international life into account.

63. In speaking of capacity to act Mr. Ago was entering the realm of psychology. It was understandable, however, that he should be concerned over the case of States which were now concluding treaties without really having the capacity to do so in the sense understood by the Commission.

64. Mr. PESSOU said that, after hearing the brilliant expositions by Mr. Ago, Mr. Reuter and Mr. Tunkin, he was convinced of the need to retain article 3 as it stood, except of course, for paragraph 3, which would be deleted. If the whole article were deleted, all the work accomplished at the cost of so much effort would be rendered unintelligible. Other members of the Commission had said that the rule stated was pleonastic; but if all the articles were examined from the grammatical standpoint, how many more pleonasms might not be discovered? Mr. Paredes had made many of the points he had intended to make himself, and he would not repeat the same arguments.

65. At first sight Mr. Reuter's position might seem opposed to that of Mr. Ago, but in reality the two were complementary. Mr. Reuter's text reproduced elements of the draft article, with the addition of the idea contained in the phrase "on the basis of reciprocity", which corresponded to current practice. In spite of some hesitation, Mr. Tunkin had also finally opted for retaining the article. In his (Mr. Pessou's) opinion, it was perfectly right and natural to try to define the personality of those who concluded treaties at the international level and according to international law.

66. He suggested that Mr. Ago and Mr. Reuter should work out an agreed minimum text reconciling all demands, which could be approved by the Commission.

67. Mr. BRIGGS said the question was what would constitute an adequate content for article 3. At the fourteenth session he had suggested that the international

⁷ *Yearbook of the International Law Commission, 1949*, pp. 287-288.

⁸ *Yearbook of the International Law Commission, 1962*, Vol. I, p. 61, para. 48.

juridical capacity to become a party to a treaty was determined by international law, that every independent State possessed the capacity to become a party to treaties, and that, in the case of entities that were not fully independent, the treaty-making capacity depended on the recognition of that international capacity by the State or union of States of which the entity formed a part or which conducted its foreign relations, and on the acceptance by the other contracting parties of the possession of that capacity by the entity concerned.⁹ Those views had not been accepted in their entirety, and the article now before the Commission was the result of a compromise. As it stood, it was quite unacceptable, and he was sceptical as to the Commission's ability to adopt a text that would be acceptable.

68. The position was that, for political reasons, the Commission could not discuss the treaty-making capacity of entities that were not fully independent, and that for reasons of a rather rigid logic it was expected not to discuss the capacity of subjects of international law other than States or the capacity of international organizations. It followed that all that could be said was the first part of paragraph 1, namely, "Capacity to conclude treaties under international law is possessed by States". That seemed hardly sufficient.

69. As he understood it, the United States Government's comment on the article was intended to be a criticism not so much of the drafting of paragraph 1, as of the examples given in the commentary. The assumption of the United States Government was that the entities to which it referred would necessarily be subjects of international law for the purposes of the article. That might suggest that, if the Commission decided on a vague formula, it could adopt some such language as "Capacity to conclude treaties under international law is possessed by States and by other subjects of international law". It might be possible to deal with the problem when the Commission came to consider article 1, but there had been considerable objection in the Commission to retaining the phrase "other subjects of international law" in the definitions.

70. Personally, he thought that article 3 as at present worded should be deleted, though he would be prepared to co-operate in preparing a fresh draft. It might perhaps be better to adopt Mr. Lachs' suggestion that any attempt to draft article 3 be abandoned and that the Commission consider whether the topic could not be dealt with in connexion with the definition of a treaty.

71. Mr. AGO said he wished to clear up some misunderstandings to which his first statement seemed to have given rise. In speaking of "capacity to act" he had employed an expression that was in very general use in Latin language countries, and merely meant "contractual capacity" or, in international law, "treaty-making capacity". In future he would try to use the latter term.

72. Moreover, what he had wished to recommend to the Commission in his first statement was not the idea that only States had the capacity to conclude treaties, but that all States should possess that capacity and that there could be no States which were deprived of it, except the

members of a federal union—a special case to which he would revert later.

73. Some speakers had objected that the rule proposed was pleonastic. Yet even Mr. Amado had been prudent enough to say "all independent States". That was the essential point. The Commission should say whether or not it recognized that there could be States which were not independent—that there could be relationships of dependence between States involving loss of the capacity to conclude treaties. That was by no means a purely theoretical issue. On the contrary, it was a matter of substance, since capacity was the prime condition for the validity of treaties. For example, two States A and B might enter into a relationship whereby State B agreed that State A should manage its international relations, which meant that State B gave State A an undertaking not to conclude treaties directly on its own behalf. What would happen if, in spite of that undertaking, State B concluded a treaty with a State C? If, as a result of the relationship between A and B, State B had lost its treaty-making capacity, it followed that the treaty between B and C would be void. On the other hand, if State B had retained its treaty-making capacity, it was probably acting in breach of its undertaking to A, but the treaty between B and C would be valid. By stating a rule that every State possessed the capacity to conclude treaties, the Commission would make it possible to settle the problem in favour of validity of the treaty between B and C. The rule was therefore of practical importance, and the Commission could not avoid taking a stand on the matter.

74. With regard to Mr. Pessou's suggestion, he thought it would be better for the whole Drafting Committee to try to work out a satisfactory formula.

75. It was not advisable to insert such a provision in the definitions. It was not a definition at all. Mr. Lachs had perhaps been misunderstood, for he had not been speaking of the definitions, but of article 1 as the Commission intended to draft it.

76. He did not think that paragraph 2 could be dropped so easily. Without expressing any preference for one formula rather than another, he believed that if paragraph 1 stated the rule that every State had the capacity to conclude international treaties, it would be necessary to add a saving clause concerning federal States; in the absence of such a clause, the first rule would imply that in a federal union each member automatically had the capacity to conclude treaties. The difficulty arose from the double meaning of the word "State", which designated both a State which was a subject of international law and a State which had personality for internal purposes only.

77. Mr. de LUNA said he remained unconvinced. Since the Commission was not defining the term "State" except indirectly, he did not think that much was to be gained by a more or less detailed reference to the capacity possessed by any State to conclude a treaty. After all, if the international community had recognized a given political and territorial entity with the power of self-determination as a State, that State possessed treaty-making capacity.

78. Mr. Tunkin had maintained that every State had the capacity to conclude treaties. That was true; but he had

⁹ *Ibid.*, p. 59, para. 20.

felt uneasy when Mr. Tunkin had gone on to propose that paragraph 2 of the article should be retained, for that paragraph provided that such capacity could be limited by internal law. Triepel had maintained that federal law was a hybrid, part international law and part internal law;¹⁰ but could a State which had wholly lost its capacity to conclude treaties be considered a State in international law, whatever its status might be in internal law? He thought not. Sovereignty was made up of two elements: *summa potestas* and *plenitudo potestatis*. A State could surrender part of its *plenitudo potestatis* and still remain a State with the power to conclude treaties dealing with some matters, but not with all. But if it surrendered all of its *plenitudo potestatis*, it could not conclude any sort of treaty and had ceased to be a State.

79. Mr. AMADO said that he, too, was not convinced by the example cited by Mr. Ago, which irresistibly called to mind intervention "in matters which are essentially within the domestic jurisdiction of any State", in other words, an act contrary to Article 2, paragraph 7, of the Charter. That example, suggested that there were some States which were of inferior status. He believed in the sovereign equality of independent States. The term "State" implied the qualification "independent", and "independent" implied "treaty-making capacity". To try to state a rule on the subject would result in a pleonasm and would mean transferring to international law the principles of Roman law on which internal law was based.

80. Mr. CASTRÉN said that to avoid any misunderstanding, he must emphasize that he was not in favour of imposing restrictions on the ability or right of States to conclude treaties. It could not be denied, however, that States which did not possess that faculty or right had existed and still existed: for example, the self-governing provinces sometimes called "states". There was also the problem of unions of States, the position of their member States, etc. As Mr. Elias had said, if the Commission wished to introduce into its draft a rule on the treaty-making capacity of States, it would probably first have to define the concept of a "State", which was no easy task. It was also necessary to take account of the possibility of a State's waiving its right to conclude treaties. He would be the first to vote in favour of a new formula for article 3 if all those problems could be solved.

81. The CHAIRMAN, speaking as a member of the Commission, said he had not intended to take part in the discussion, but it had become so important that he felt obliged to state his position.

82. With regard to paragraph 1, all the members of the Commission agreed that there was a positive rule of public international law on the capacity of States to conclude treaties. Since that rule existed, it must be codified. But the rule had also been contested in certain cases, to which Mr. Tsuruoka had alluded. Consequently, for the purposes of progressive development of international law, the Commission should state the present position regarding the rule. The position was that all States now had the capacity to conclude treaties. It was

therefore important to retain the idea of paragraph 1, and the Drafting Committee would be able to find suitable wording to express it.

83. With regard to paragraph 2, contrary to the opinion expressed by some members of the Commission, he considered that it also related to general international law. It did not seek to define the position of the members of a federal union, but stated the rule concerning competence, by specifying that capacity depended on the federal constitution. The question was too controversial and the practice differed too widely for the Commission to be able to lay down a general rule; but it should show how the problem ought to be solved. By so doing it would forestall disputes and provide a criterion that was needed in international life.

84. The problems raised by the expression "and by other subjects of international law" and by the reference to international organizations had already been settled in principle by the Commission's decision on article 1, paragraph 1 (a), and by its acceptance in principle of the rule in article 2. He was therefore in favour of retaining article 3, perhaps in a modified form which the Drafting Committee would propose.

85. The article was neither unnecessary nor tautological. The State had not always been what it was today, and everyone did not have the same conception of it. As evidence of that, it was sufficient to refer to the comment by the United Kingdom, quoted by the Special Rapporteur in his fourth report (A/CN.4/177), that certain States did not possess capacity to conclude treaties. That comment clearly referred to protectorates and was politically exemplified by the position of the Middle-East sultanates. The Commission should take a position on the development of international law, bearing in mind that the state of public international law was indissolubly bound up with the stage reached in the world's historical and political development.

86. Mr. ROSENNE said that in view of the trend of the discussion, he still took the view that the Special Rapporteur's proposal was the more prudent; it would be very difficult to draft an article that would be sufficiently complete.

87. If the Special Rapporteur agreed, however, he would have no objection to the Drafting Committee's making an attempt. The last sentence of paragraph (3) of the Commission's 1962 commentary on the article had gone to the heart of the matter.¹¹ Who were the parties to a treaty concluded by one of the member states of a federal union? That was the real problem, at the international level, of the case referred to by Mr. Elias. If the Commission could not find a solution, it might be better not to include paragraph 2.

88. The matter was also connected with the question whether the term "party" should be defined in the draft articles.

The meeting rose at 1 p.m.

¹⁰ H. Triepel, *Droit international et droit interne* (trans. R. Brunet), Paris, 1920.

¹¹ *Yearbook of the International Law Commission, 1962, Vol. II, p. 164.*

780th MEETING

Monday, 10 May 1965, at 3 p.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the Agenda]

ARTICLE 3 (Capacity to conclude treaties) (continued)

1. The CHAIRMAN said he understood that Mr. Lachs wished to speak again before the Special Rapporteur summed up.

2. Mr. LACHS said he wished to renew his plea for the inclusion of a provision on the capacity of States to conclude treaties. The essential point was that the principle itself, and in particular the inherent right of every State to conclude treaties, should be clearly and unequivocally stated. If the Commission did not state the principle, the question might arise whether that right could be conferred on a State ; but then, who would confer it. Such questions might lead the Commission along a dangerous road towards the notion of inequality of States.

3. In practice, of course, there were many limitations on the right to conclude treaties ; but those limitations existed as a result of their acceptance by the States concerned and before they could be accepted it was necessary to recognise the basic premise that the right existed. Freedom was not equal in all cases ; Article 2 of the Charter itself spoke of "sovereign equality", not "equal sovereignty". That equality implied *inter alia* the right to conclude treaties. At all events, it was most important to clarify the situation, both for politicians and for jurists.

4. It had to be realized that the treaty-making powers of States were constantly changing. The range of problems covered by treaties was continually increasing and the paradoxical consequence was that the freedom of action of States was becoming limited, because the more treaties they were bound by the less freedom they had to conclude further treaties.

5. There could be no danger in reaffirming the right of every State to conclude treaties and to enter into treaty obligations.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that opinion in the Commission was divided, although there seemed to be a small majority in favour of retaining an article on treaty-making capacity.

7. He thought it undesirable that the Commission should adopt or reject the text of such an article by a very narrow margin. Rather than proceed to a hasty vote, the Commission should ask the Drafting Committee to find a formulation that would take into account the views and doubts expressed in the debate.

8. If article 3 were retained, it would need to be substantially modified in view of the decision to confine the draft articles to treaties between States. Only the first two paragraphs of the article would be left, and he felt serious doubts about the utility of retaining them, although he appreciated the motives of those who considered it advisable to affirm inherent treaty-making capacity. But a simple affirmation that every State had the capacity to conclude treaties under international law was either pleonastic, as Mr. Amado had said, or raised a question, namely, what was a "State" for the purposes of the article? In the report on its fourteenth session, in paragraph (2) of the commentary on article 3, the Commission had somewhat disguised its difficulties by saying "Paragraph 1 lays down the general principle that treaty-making capacity is possessed by States. . . The term 'State' is used here with the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations".¹

9. Presumably the majority wished to include a broad affirmation in some such words as "Every State has capacity under international law to conclude treaties". That was indeed implied in the definition of a treaty. Some members wished to go further and emphasize the inherent right or say something about the extent to which that right could be limited.

10. The main problem was that there were so many varieties of relationship between States: there were unions of States, partial unions of States, and arrangements for small international organizations of States, in which the legal status of the parties was far from clear. Such arrangements were by no means always made on a basis of strict equality; the voting power might not be equal. Consequently, in speaking of equality and reciprocity, care had to be taken not to damage or nullify arrangements entered into on an entirely voluntary basis by the parties concerned. If too hasty a general affirmation were made, there would also be a danger of affecting relationships such as those between Liechtenstein and Switzerland, and between Benelux and the Economic Union of Belgium and Luxembourg.

11. Then there was the question of federal States. Some members preferred to say nothing about them; others thought that if there were a broad affirmation, it would be logical to say something about federal States and their component units, which in many instances were also called states. In 1962 the Commission had reserved its position by saying, in paragraph (3) of the commentary, that a question might arise as to whether the component state concluded the treaty as an organ of the federal State or in its own right and that the solution must be sought in the provisions of the constitution.²

¹ Yearbook of the International Law Commission, 1962, Vol. II, p. 164.

² *Ibid.*

12. But the Commission should be clear in its mind whether, in considering the individual capacity of component units, it wished to say that the unit was, in international law, the party to the treaty. There were well-known instances in which treaties could be negotiated by component units; the Cantons of Switzerland were a notable instance and had the power to negotiate on local and, especially, on border questions. He was in some doubt whether in those cases Switzerland was in the last resort the party to the treaty: if there was a violation of the treaty, could Switzerland be brought before the International Court? Or was the Canton itself the sole party? Or again, did Switzerland delegate its treaty-making powers? Any opinion on that point was bound to be controversial. Although the language of paragraph 2 was to the effect that the matter would be decided by the constitution, the implication was that the Commission accepted the position that the component unit might be a party to a treaty.

13. If the component unit was accepted as a treaty-making unit, other questions arose: for instance, could it make different reservations from the federal State when both were parties to the same treaty? One suggestion was that there might be a difference between international responsibility and capacity to conclude a treaty; that was a very delicate point of doctrine on which he did not propose to enlarge. All he wished to do was to draw attention to the kind of difficulties that faced him as Special Rapporteur in proposing an article on capacity to conclude treaties.

14. His view was that the matter should not be put to the vote at once, but that the Drafting Committee should be asked to re-examine the article and produce a fresh text.

15. Mr. AGO said that the questions raised by the Special Rapporteur, interesting though they were, should not be considered in the context of article 3. The case in which a canton or member state of a federal State possessed only apparent capacity to conclude treaties, and that capacity vested in the federal State itself, which employed the local authorities as its representatives to negotiate a treaty, really came under the article concerning the authorities competent to negotiate a treaty, not the article on capacity. The question whether, in the event of breach of a treaty, it was the member state or the federal State which was responsible, was also outside the scope of the present discussion. The Special Rapporteur could rest assured that the delicate problems he had referred to would not be affected by the wording adopted by the Commission.

16. The CHAIRMAN suggested that, in accordance with the Special Rapporteur's proposal, the Commission should not vote on article 3 for the time being; that in view of its previous decisions, the words "and by other subjects of international law" in paragraph 1, and the whole of paragraph 3 should be deleted; and that the rest of the article should be referred to the Drafting Committee.

*It was so agreed.*³

³ For resumption of discussion, see 810th meeting, paras. 28-78, and 811th meeting, paras. 2-51.

ARTICLE 3 (*bis*) (Transfer of article 48 to the "General Provisions": proposed by the Special Rapporteur)

The application of the present articles, with the exception of articles 31-37 and article 45, to treaties which are constituent instruments of an international organization or have been drawn up within an organization shall be subject to the established rules of the organization concerned.

17. The CHAIRMAN invited the Special Rapporteur to introduce his proposed new article 3 (*bis*).

18. Sir Humphrey WALDOCK, Special Rapporteur, said that, at the time when he had prepared his report, he had not been in possession of the comments by governments on article 48. The purpose of his proposal was to widen the scope of article 48; he wished to know whether that idea was acceptable to the Commission. Although article 48 had been adopted in the context of the invalidity and termination of treaties, the Commission had appreciated that the same problem arose in other parts of the draft, notably in Part I. It would simplify the drafting of a number of later articles if article 48 were made a general article. It might be advisable only to consider the article in a general way at that stage and to postpone examination of the text until the Commission came to deal with article 48 itself.

19. Mr. ROSENNE said he supported the Special Rapporteur's proposal, both as to the generalization of the idea expressed in article 48 and as to postponing discussion of the text. On the other hand, it might be useful if the Commission could come to a decision on the principle immediately.

20. The CHAIRMAN said that if the Commission postponed a decision on principle until it came to article 48, it would in the meantime also have to defer consideration of all the articles which touched on the same question. He thought the Commission should settle the question of principle at once and postpone the final decision until it came to article 48.

21. Mr. AGO did not think it possible to decide on the principle of general application of the article without discussing its substance. But as the question would apparently arise in connexion with other articles before article 48, the Commission would be able to discuss it when considering those articles. From the point of view of principle, however, it would be inelegant to insert, before the articles on the negotiation and adoption of treaties, a provision to the effect that the application of the present articles to any treaty which was the constituent instrument of an international organization was subject to the rules of that organization: for the organization only existed from the date on which its constituent treaty was validly concluded.

22. Mr. BRIGGS said that in his view all discussion of the article should be postponed. The Commission would then be in a position to consider the consequences of the proposal when it came to article 48.

23. Mr. ELIAS said he was in favour of postponing consideration of the whole question: the Commission should discuss neither the principle nor the text, especially as the Special Rapporteur's formulation of article 3 (*bis*) had been drafted in the belief that article 3 would be adopted.

24. Mr. TUNKIN said that he too was in favour of postponement. There were special circumstances connected with treaties that were the constituent instruments of international organizations, and the Commission would have to bear them in mind when examining the articles concerned.

25. Sir Humphrey WALDOCK, Special Rapporteur, said he had merely asked for the Commission's provisional acceptance of the idea of broadening the scope of article 48. Obviously the substance would have to be discussed in detail. From a drafting point of view it would save repetition if the application of article 48 were extended.

26. The CHAIRMAN said that since the majority of the Commission appeared to be in favour of that course, he would suggest that discussion of article 3 (*bis*) be postponed.

*It was so agreed.*⁴

ARTICLE 4 (Authority to negotiate, draw up, authenticate, sign ratify, accede to, approve or accept a treaty)

Article 4

Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty

1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate or sign a treaty on behalf of their State.

2. (a) Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their State and the State to which they are accredited.

(b) The same rule applies in the case of the Heads of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question or between their State and the organization to which they are accredited.

3. Any other representative of a State shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his State.

4. (a) Subject to the provisions of paragraph 1 above, a representative of a State shall be required to furnish evidence of his authority to sign (whether in full or *ad referendum*) a treaty on behalf of his State by producing an instrument of full powers.

(b) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full powers, unless called for by the other negotiating State.

5. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of the State other than the Head of State, Head of Government or Foreign Minister, that representative shall be required to furnish evidence of his authority.

6. (a) The instrument of full powers, where required, may either be one restricted to the performance of the particular act in question or a grant of full powers which covers the performance of that act.

(b) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated shall be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.

(c) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2 (b) above.

27. The CHAIRMAN invited the Special Rapporteur to introduce his revised draft of article 4, which read:

Article 4

1. A representative may be considered as possessing authority to act on behalf of his State in the conclusion of a treaty under the conditions set out in the following paragraphs, unless in any particular case his lack of authority is manifest.

2. A Head of State, Head of Government and a Foreign Minister may be considered as possessing authority to negotiate, draw up, adopt, authenticate, or sign a treaty and to sign any instrument relating to a treaty.

3. (a) A Head of a diplomatic mission may be considered as possessing authority to negotiate, draw up or adopt a treaty between his State and the State to which he is accredited.

(b) The rule in paragraph (a) applies also to a Head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization to which he is accredited.

(c) Other representatives may not be considered in virtue of their office alone as possessing authority to negotiate, draw up or adopt a treaty on behalf of their State; and any other negotiating State may, if it thinks fit, call for the production of an instrument of full powers.

4. Except as provided in paragraph 2, a representative may be considered as possessing authority to sign a treaty or an instrument relating to a treaty only if —

(a) he produces an instrument of full powers or

(b) it appears from the nature of the treaty, its terms or the circumstances of its conclusion that the intention of the States concerned was to dispense with full powers.

5. (a) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.

(b) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 3 (b) above.

28. Sir Humphrey WALDOCK, Special Rapporteur, said there was a close connexion between article 4 and article 31, which was concerned with cases where a treaty might have been concluded without full compliance with the provisions of internal law. In article 31 the Commission had to a large extent excluded the provisions of internal law as irrelevant, unless their violation was manifest. As article 4 was also concerned with internal

⁴ For resumption of discussion, see 820th meeting, paras. 27 and 28.

law, the Commission might wish to wait until it reached article 31 and then take both articles together.

29. Mr. YASSEEN thought that the Commission should not discuss the two articles together, but that it would be difficult to discuss article 4 without some reference to article 31. It should therefore be quite in order for members of the Commission to refer to article 31 when discussing article 4.

30. Mr. ROSENNE said it would be difficult for the Commission to discuss article 4 without having heard the Special Rapporteur's views not only on article 31, but perhaps on articles 32 and 49 as well. He therefore supported the Special Rapporteur's proposal to postpone discussion of article 4.

31. Mr. AGO said he considered article 31 one of the least satisfactory articles in the draft and he would not like its provisions to be expressly linked with article 4. The two articles related to entirely different questions: article 4 dealt with the authority of the negotiator, whereas article 31 dealt with the validity of a treaty as affected by provisions of internal law regarding competence to enter into treaties. He hoped, therefore, that at that stage the Commission would confine itself to article 4.

32. Mr. AMADO said he was opposed to the idea of postponing the discussion of article 4 and taking it with article 31, which referred to internal law regarding competence to enter into treaties.

33. Mr. CASTRÉN agreed with Mr. Ago; he thought the Commission should discuss article 4 as a whole, at least to begin with, not paragraph by paragraph.

34. Mr. ELIAS said he thought that discussion should be concentrated on article 4, though the Special Rapporteur and members of the Commission should be free to refer to any other relevant article.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that article 4, like article 31, embodied a certain philosophy in its manner of dealing with the effects of internal law. Consequently discussion of article 4 might lead to alterations in article 31. He agreed, however, that article 4 could be discussed on its own merits. It would be difficult to deal with it paragraph by paragraph, because the paragraphs were closely connected.

36. The CHAIRMAN said he would call on the Special Rapporteur to give a general introduction to article 4, after which the Commission would discuss the article as a whole, and then paragraph by paragraph.

37. Sir Humphrey WALDOCK, Special Rapporteur, said that article 4 had attracted some criticism, in the light of which he had proposed a new text.

38. As noted by the Swedish Government in its comments (A/CN.4/175, Section I.17), the article dealt essentially with the question of evidence of authority; its provisions did not purport to lay down the actual authority of State organs, which derived from municipal law. The problem was that of determining to what extent the representative of a State could rely on the claim of another to act on behalf of another State. Article 4 was concerned with determining how far there existed a duty to produce evidence of authority.

39. The somewhat absolute terms in which the provisions of the article were couched had been criticized. It had been said that paragraph 3 did not correspond with existing practice, and that authority without written credentials was sometimes accepted outside the cases envisaged in paragraphs 1 and 2.

40. The Swedish Government had suggested that the article should be formulated bearing in mind the basic problem of where the risk of proceeding without evidence would lie, and he had endeavoured to take that suggestion into account. He had also shortened the text by combining, in the new paragraph 2, the provision on Heads of State, Heads of Government and Foreign Ministers, which had formerly appeared in paragraphs 1 and 5.

41. The new paragraph 1 was purely introductory, except for the final proviso, "unless in any particular case his lack of authority is manifest", which had been introduced with the provisions of article 31 in mind.

42. In the new paragraphs 2, 3 and 4, the expression "may be [or "may not be"] considered as possessing authority" was used, instead of the more categorical "shall be required" or "are not required" which appeared in the previous text. The intention was to soften the text, in line with the comments made by a number of governments; the new formulation would not be open to the misconception that the article was meant to be a statement of absolute power under international law to make treaties. The article would merely state, for example, that a Head of State, Head of Government or Foreign Minister could be considered as possessing authority in the matter without production of evidence.

43. The new text might perhaps need some adjustment to bring out more clearly that its provisions dealt only with the evidence of full powers. It might also prove possible to shorten it further.

44. Mr. CASTRÉN said the Special Rapporteur's new text seemed to be a distinct improvement on the old one, and on the whole he was prepared to accept it. There were, however, a few inaccuracies and a few passages that were unnecessary, and the French text was not always entirely consistent with the English original.

45. He approved of the deletion of paragraph 6 (a) of the previous text. He also approved of the redraft of paragraph 4 (b), which omitted the reference to treaties in simplified form, but applied to other possible cases and was therefore more complete.

46. Paragraph 5 of the previous text, which dealt with ratification, accession, approval and acceptance, could be omitted in consequence of the revision of the former paragraphs 1 and 4, but the title of the article should be similarly revised.

47. In paragraph 3 (a) of the new text, the Special Rapporteur had probably not intended to give the Head of a diplomatic mission a general right to adopt (in the French translation "*signer*") treaties between his State and the State to which he was accredited. Presumably, what was meant was merely adoption of the text of a treaty, that was to say the act referred to in article 6. If that was so, it should be made clear by saying "or adopt the text of a treaty"; and the same change should be made in paragraph 2, where, incidentally, the

English verb "adopt" was rendered in French by "adopter".

48. Finally, he suggested that the last part of paragraph 3 (c), reading: "and any other negotiating State may, if it thinks fit, call for the production of an instrument of full powers", should be deleted as being self-evident.

49. Mr. BRIGGS said he was glad the Special Rapporteur had emphasized that article 4 dealt with the evidence of authority to conclude treaties. It had been said that it dealt with a question of municipal law; in fact, it dealt with a question of international law and in 1962 he had suggested that the article should state expressly that it was for purposes of international law that a Head of State, Head of Government or Foreign Minister was not required to produce evidence of his authority to act.⁵ The question of the source of competence, on the other hand, was a matter of municipal law. He accordingly suggested that the title of the article should be amended to read "Evidence of authority to negotiate, draw up, etc".

50. As to the article itself, of which the previous text was not unsatisfactory, he could accept the Special Rapporteur's new approach, provided that paragraph 2 was amended so as to lay more stress on the fact that it dealt with a question of evidence.

51. He would, however, have difficulty in accepting paragraph 1, in particular the concluding proviso relating to "manifest" lack of authority. In article 31 the term "manifest" referred to a violation of law, and even there it was somewhat illusory to suggest that a violation of law could be easily described as manifest. In article 4, however, the question involved was one of lack of authority, and lack of authority was not always a question of law. According to Black's Law Dictionary, the term "manifest" meant "indisputable", "unmistakable", "self-evident" or "requiring no proof". It would certainly be very difficult to determine in what cases the lack of authority would require no proof at all. The new paragraph 1 was likely to create more problems than it solved and he suggested that it be deleted.

52. Paragraph 2 was equivocal; the words "may be", especially if read in conjunction with the final proviso of paragraph 1, could be taken to mean that full powers could be demanded from a Head of State, Head of Government or Foreign Minister if any doubt existed as to his authority. The paragraph should be reworded on the following lines: "For purposes of international law, a Head of State, a Head of Government and a Foreign Minister are regarded *ex officio* as possessing authority. . .".

53. Mr. YASSEEN said he had some difficulty in understanding the purpose of the article. As Mr. Briggs had said, the question was an international one: when was evidence required, and when was it not required, that a particular person represented his State for the purpose of performing the acts required for the conclusion of a treaty? It was generally recognized that a Head of State, a Head of Government or a Foreign Minister were not required to produce evidence of their authority. In his

view, any other person, even if not the Head of a diplomatic mission, should be considered as possessing the necessary authority if he produced an instrument of full powers.

54. Apart from the fact that the permissive formula was not satisfactory, the new text did not add much to positive international law; it contained too much detail for the expression of a simple idea; it should be simplified and abbreviated.

55. Mr. TUNKIN said that, on the whole, he agreed with the Special Rapporteur's approach and would limit himself to a few general remarks. The main difficulties in article 4 arose from the fact that it spoke of one thing, but meant another: it spoke of authority when it really meant instruments of full powers, in other words, the evidence that had to be produced, not the authority itself. That was particularly clear in the previous text, but even the Special Rapporteur's redraft still contained some reference to authority. The Drafting Committee would have to adjust the wording so as adequately to express the meaning which all the members of the Commission had in mind.

56. As to the words "may be considered", he shared Mr. Yasseen's views; it was the general practice not to require a Head of State, Head of Government or Foreign Minister to produce full powers. The text of the new paragraph 2 therefore appeared to be a retrograde step. If there were general agreement on that point, the Drafting Committee could be instructed to amend the paragraph accordingly.

57. Lastly, the article should be considerably shortened, to retain little more than the ideas contained in paragraphs 3 (c) and 4.

58. Mr. AGO said he was glad to note that the members of the Commission were largely in agreement with the Special Rapporteur on the idea that ought to be expressed in article 4; but at the same time they were not fully satisfied with the manner in which it had been expressed.

59. He agreed with what Mr. Tunkin had just said. The Special Rapporteur himself had realized that article 4 was too long and too elaborate for what was, in fact, a question of secondary importance. Furthermore, the drafting was equivocal, as the comments of governments showed. The Italian delegation to the Sixth Committee of the General Assembly, for example, had understood that the article referred to the question of substance and sought to define what bodies had the necessary powers. (A/CN.4/175, Section II)

60. He did not share Mr. Briggs's opinion that it should be made clear that the article dealt with a question of international law. In fact, it did not deal with a question of substance at all, either in international law or in internal law; it dealt only with the question of the evidence required to show that the representative of a State had the necessary full powers. He therefore supported Mr. Briggs's proposed amendment to the title of the article.

61. As to the drafting, the Special Rapporteur's proposal was an improvement on the former text in some respects, but not in all. For instance, the former paragraph 1, if properly understood, showed that it was simply a matter of evidence, but the corresponding

⁵ Yearbook of the International Law Commission, 1962, Vol. I, pp. 74-75, paras. 51-55.

paragraph of the new text, paragraph 2, increased the uncertainty by using the expression "may be considered".

62. Mr. Tunkin's proposals were excellent. Above all, it was necessary to condense the article and to state clearly who was required to produce an instrument of full powers and who was not so required, being presumed to possess the authority in question.

63. Mr. LACHS said he must congratulate the Special Rapporteur on his proposed improvements to article 4. Unlike article 31, which dealt with the substance of the law, article 4 dealt with a question of evidence. He therefore supported Mr. Briggs' proposed amendment to the title.

64. Article 4 stated the cases in which full powers must be produced and the cases in which such powers were presumed to exist. In both situations the provisions of the article were intended to establish a minimum of security in international intercourse; a negotiator must know to what extent he could rely on another negotiator's word.

65. He shared Mr. Briggs' doubts regarding the concluding proviso of paragraph 1. In any event, that proviso could only apply to paragraphs 2 and 3; in the cases covered by paragraphs 4 and 5 of the new draft, it was difficult to see how the lack of authority could be manifest, since full powers had to be produced. However, since paragraph 1 was introductory and did not add to the substance of the article, it should be dropped altogether.

66. With regard to paragraph 2, he supported Mr. Briggs' suggestion that the words "may be considered as possessing" be replaced by the words "are regarded as possessing". The words "may be" were equivocal and should be amended, not only in paragraph 2, but also in paragraphs 3 and 4. He agreed with Mr. Tunkin on the need to replace all references to authority by references to evidence of authority.

67. He did not understand why paragraph 2 referred only to the signing of an instrument relating to a treaty, whereas for the treaty itself the reference was to "authority to negotiate, draw up, adopt, authenticate or sign".

68. In paragraph 3 (c) the words "if it thinks fit" seemed quite unnecessary and should be deleted. Paragraph 4 could be shortened, although he had no objection of principle to its provisions.

69. The new text of article 4 nevertheless provided a good working basis for the Drafting Committee.

70. Mr. PAREDES said that article 4 and article 31 dealt with two totally different problems. Article 4 referred to the powers which must be produced by a negotiator and article 31 to the constitutional authority of a State organ to conclude a treaty. It would therefore be more appropriate for article 31 to precede article 4.

71. A Head of State or Head of Government should in no case be required to produce full powers, since it was, precisely, the Head of State or Head of Government who conferred full powers upon another person to negotiate a treaty; it would be inappropriate to suggest that a Head of State or Head of Government might have to confer full powers on himself.

72. As to the meaning of "manifest" lack of authority, lack of authority would be "manifest" where an agreement was not subscribed by the Head of State or Head of Government, but by another organ which did not possess under the constitution the power to conclude treaties.

73. Bearing in mind that article 4 was concerned with evidence, it was appropriate to draw a distinction between evidence of capacity to negotiate and evidence of capacity to conclude treaties. It was not obvious that a Foreign Minister must be presumed to have the power to conclude treaties, unless he was acting as agent of the Head of State or Head of Government.

74. He agreed with those members who had pointed out that the question of authority was a matter for municipal law; it was for the constitution to specify what functions and powers were vested in each of the State organs.

75. The Special Rapporteur's proposed new text would facilitate treaty negotiations and he was therefore prepared to accept it.

76. Mr. EL-ERIAN said he agreed with most of what Mr. Briggs had said. Since article 4 dealt with the evidence and not the substance of authority, the relationship with article 31 should be kept as originally envisaged.

77. He agreed with the suggestion that the proposed new paragraph 1 should be deleted. Elimination of that paragraph, with its final proviso, would help to maintain the special position of the Head of State, Head of Government and Foreign Minister—the previous text had recognized the general practice of not requiring them to furnish any evidence of authority. He also thought that the threefold distinction between, first, negotiating, drawing up and authenticating; second, signing; and third, ratification, accession, approval or acceptance, as reflected in the old formulation of article 4, should be retained.

78. Lastly, he asked whether the basis for discussion was the previous text of article 4 or the Special Rapporteur's proposed new text. For his part, he believed that the old text could be shortened to achieve some of the objectives pursued by the Special Rapporteur in his new formulation.

79. The CHAIRMAN said that the Commission had both texts before it, but that the Special Rapporteur's proposed new text had priority. However, the Commission was not bound by either; the views it expressed would be referred to the Drafting Committee with both texts.

80. Mr. TSURUOKA said the Special Rapporteur's new proposal considerably improved article 4. He associated himself with the comments made by previous speakers, in particular those by Mr. Lachs.

81. In drafting article 4, the Commission should remember that its purpose was to state the rule of international law, so as to ensure both the security and the flexibility of international transactions. The Drafting Committee would certainly be able to reconcile those two apparently contradictory requirements.

82. When the Commission spoke of full powers as evidence that a State authorized an individual to negotiate and to perform other acts connected with the conclusion of a treaty, it should also consider what form

those full powers must take. In its previous text the Commission had specified that the full powers must be attested by written credentials, but he thought the possibility of accepting as evidence an oral declaration by, for example, a Foreign Minister, should not be ruled out.

83. Like other speakers, he thought that article 4 should be simplified by being reduced to its essentials, which meant to paragraphs 2 and 3. The Commission would then be proposing a clear formula which most States would be able to accept.

84. Mr. AMADO said that the Commission's duty was to state the rule of international law on the subject. Was the principle that a Head of State, Head of Government or Foreign Minister was authorized to negotiate, draw up, authenticate and sign a treaty on behalf of his State? Or should the Commission accept the opinion of the Austrian Government (A/CN.4/175, section I.3, para. 4)—which the Special Rapporteur had supported—that that was a mere presumption? Were those three persons agents, or were they themselves the source of the authority in question? The Commission should answer those questions.

85. In the light of the comments made by various members, paragraphs 4 and 5 of the new text and paragraph 6 of the former text could not be sustained. He proposed that the article be reduced to a single provision reading: "Representatives other than (a) Heads of State, Heads of Government and Foreign Ministers, and (b) Heads of diplomatic missions, cannot be considered, by virtue of their office alone, as possessing authority to negotiate, draw up or adopt a treaty on behalf of their State". That, in his view, was the rule of international law.

The meeting rose at 6 p.m.

781st MEETING

Tuesday, 11 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(continued)

[Item 2 of the agenda]

ARTICLE 4 (Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty)
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the revised text of article 4 proposed by the Special Rapporteur.¹

¹ See 780th meeting, para. 27.

2. Mr. ROSENNE said that the discussion had revealed a general tendency to try to restrict the scope of article 4 to a purely formal question: when, and by whom, formal evidence of authority to act in connexion with the conclusion of a treaty was, or was not, required, and when it might be optional. He was prepared to accept that approach.

3. As Mr. Amado had pointed out, the emphasis should be placed on the question of full powers, treated exclusively as one of form. It was therefore essential to exclude such expressions as "authority to negotiate", which had been at the root of many of the Commission's problems; the term "authority" had a number of different meanings and could therefore lead to confusion. There would be some difficulty in finding an adequate substitute, however; at first sight, a reference to the instrument of full powers might seem appropriate, but the discussions at the fourteenth session had shown that greater flexibility was necessary than would be suggested by the use of that term. Of particular interest was the statement by the present Chairman at the 641st meeting concerning cases in which the evidence that a representative was empowered to negotiate took the form of a letter.²

4. He suggested that the Special Rapporteur and the Drafting Committee should use some such wording as "evidence that he is empowered to negotiate". That would make it unnecessary to deal, either in article 4 or in the commentary, with the question where the risk lay, to which the Swedish Government had referred (A/CN.4/175, section I.17). It was a question which arose directly in connexion with articles 31 and 32 and somewhat differently in connexion with article 47, and concerning which he reserved his position.

5. On that point, he could not agree with previous speakers that the material in article 4 was entirely distinct from that in articles 31 and 32; in fact, the two sets of provisions were the obverse and the reverse of the same coin. It was therefore necessary to co-ordinate the three articles not only as to their underlying philosophy, a result which the Commission was close to achieving, but also as to drafting.

6. Since Mr. Briggs had reintroduced his 1962 proposal to insert the proviso "For the purposes of international law", he would himself reintroduce his own counter-proposal that that phrase be replaced by the words "For the purposes of the present articles".³ It was essential to avoid using unduly broad language.

7. He did not favour the use of the expression "adopt a treaty", which was completely new in the draft articles and was totally inadequate, because it could have several different meanings.

8. He also had doubts about the expression "permanent mission to an international organization", used in paragraph 3 (b) of the Special Rapporteur's new text; the term usually employed, in the United Nations at least, was "permanent representative to the United Nations". Moreover, there were cases in

² *Yearbook of the International Law Commission, 1962, Vol. I, p. 72, para. 29.*

³ *Ibid.*, p. 76, para. 71.

which there was more than one permanent representative: a Member State could have a permanent representative at Headquarters in New York and another at Geneva, and perhaps yet another accredited to one of the other regional offices of the United Nations. In 1958, many delegations to the United Nations Conference on the Law of the Sea had included both the permanent representative in New York and the permanent representative at Geneva; with a provision such as that in the new paragraph 3 (b), it was difficult to tell whether one or both would be dispensed from producing their full powers.

9. He assumed that the reference to "an international organization" in paragraph 3 (b) meant a public international organization. A more important question arose, however, regarding the kinds of treaty covered by the paragraph. During the discussions at the fourteenth session, there had been a tendency to confine the provision to treaties concluded between a State and an international organization, but that tendency had not been reflected in the text of paragraph 2 (b) adopted by the Commission, which referred both to those treaties and to treaties "drawn up under the auspices of the organization": the Special Rapporteur's new text referred only to the latter type of treaty.

10. Paragraph 3 (b) should be the exact parallel of paragraph 3 (a) and should cover only treaties between a State and the organization to which the representative of that State was accredited. In the case of treaties concluded "under the auspices of the organization", an expression which could give rise to difficulties, the question of full powers was likely to be covered by the rules of procedure, or alternatively, or cumulatively, by the Special Rapporteur's proposal for a generalization of the rule in article 48 in his new article 3 (bis).

11. As to the general structure of the article, he had been attracted by the simplified structure put forward by the Japanese Government (A/CN.4/175, section I, 11, annex).

12. As to paragraph 5, a good deal depended on the expression to be used for the instrument of full powers. The paragraph did fulfil a useful purpose, but if it were dropped from the article, the point could be conveniently dealt with in the commentary.

13. The CHAIRMAN said he thought the reason why the Swedish Government had laid such stress on evidence of the authority of representatives was probably its recollection of the Eastern Greenland case.⁴

14. With regard to terminology, he had enquired among the inter-governmental organizations whether the right term was "representative", "representation", "delegation" or "mission" and had found that there was no standard usage, even in the resolution on permanent missions adopted by the General Assembly at its third session.⁵ The Carnegie Endowment was to study the position of permanent missions to international organizations; there, again, it would be necessary to decide what was meant by "permanent missions" and "permanent representatives" and whether the

two terms were interchangeable. Some States even had several permanent representatives to the United Nations, who might be the head of the delegation, the head of the delegation to the Trusteeship Council and the head of the delegation to the Security Council.

15. Mr. REUTER said he agreed with the speakers who had followed Mr. Tunkin and Mr. Amado. In considering each article the Commission should always bear in mind that it had to draft rules of international law, not advice, descriptions or rules of internal law.

16. In the case of article 4, the important point was to decide on whom rights were to be conferred. It seemed to him that the persons in question were not clearly specified in the new text, and there was no reference to the production of full powers until the end of paragraph 3 (c). The Commission intended to give rights, not directly to Heads of State, Heads of Government or Ministers, but to States negotiating through those persons.

17. There were in fact two rights involved. First, the right of any negotiating State to consider certain persons holding a particular position as being duly authorized: if the Commission intended to grant that right to all negotiating States, it should say so in the article, which was thus not unrelated to article 31. Secondly, there was the right to call for an instrument of full powers in certain cases.

18. Mr. ELIAS said that the Special Rapporteur had performed a useful service in producing a revised draft of article 4, but even that draft would benefit from pruning, as it still contained some elements of a code. The Special Rapporteur himself had expressed the view that "there is substance in the point that the articles still contain some element of 'code' and are not yet fully cast in the form required for a convention" (A/CN.4/177, section C, para. 2). There could be no doubt that at the fourteenth session the thoughts of members had still been dominated by the idea of a code, which the Commission had previously envisaged.

19. He therefore suggested that the proposed new text should be shortened by dropping paragraphs 1 and 5 and combining the contents of paragraphs 2, 3 and 4 in two short paragraphs.

20. The first would deal with the question when evidence of full powers was or was not required, the essential point mentioned by Mr. Amado, and could read, approximately:

"Evidence of full powers shall not be required from a Head of State, a Head of Government or a Foreign Minister, to negotiate, draw up, adopt, authenticate or sign a treaty, but may be required from a Head of mission, unless it appears from the circumstances of the conclusion that the intention of the States concerned was to dispense with full powers."

21. The second paragraph would simply state that: "In all other cases, evidence of full powers shall be required."

22. Mr. TABIBI said that the provisions of article 4 were necessary, because the Commission had adopted rules on the conclusion of treaties. Those provisions would help to bring uniformity into State practice on

⁴ P.C.I.J. Series A/B No. 53.

⁵ Resolution 257 (III), *Official Records of the Third Session of the General Assembly, Part I, Resolutions*, p. 171.

the conclusion of treaties and even into the relevant constitutional provisions. The rules adopted by the Commission would be very helpful to States engaged in drafting new constitutions, including some newly independent States.

23. With regard to the form of the article, he believed that, as suggested by Mr. Amado, it should specify that Heads of State, Heads of Government and Foreign Ministers had authority to conclude treaties. The article should also state the implied powers of a Head of mission and provide that evidence of authority was required for other representatives. A reference to the current practice of giving authority by means of a letter or telegram should be included. It must be remembered that a very large number of treaties were concluded and that authorization to conclude them more often than not took the form of a letter or telegram.

24. He disliked the use of the words "may be considered" in paragraphs 2 and 3. The persons referred to in those paragraphs definitely possessed the authority to negotiate treaties; the ambiguous expression "may be considered" should therefore be avoided.

25. Mr. CASTRÉN said that in order to facilitate the work of the Drafting Committee he had prepared a new text of article 4.

26. He agreed with those who had proposed that paragraph 1 of the Special Rapporteur's redraft should be deleted, and his own draft of paragraph 1 read:

"By reason of their general representative character, Heads of State, Heads of Government and Foreign Ministers are considered as possessing authority to act on behalf of their States in the conclusion of a treaty."

That provision, which was drafted in general terms, was based on Mr. Amado's comment that it was generally recognized in international law that such persons possessed a general right to perform the various acts relating to the conclusion of a treaty on behalf of their States.

27. Paragraph 2 of his proposal did not differ greatly from the Special Rapporteur's revised text, except that it was a little more concise and specific. It read:

"(a) A Head of a diplomatic mission is considered as possessing authority to negotiate or draw up (or to adopt the text of) a treaty between his State and the State to which he is accredited.

(b) The same rule applies also to a Head of a permanent mission to an international organization in regard to treaties drawn up under the auspices of that organization."

28. Paragraph 3 of his draft combined paragraph 3 (c) and paragraph 4 of the Special Rapporteur's revised text. It also took account of the fact that Heads of diplomatic missions and Heads of permanent missions to international organizations did not possess a general right to sign treaties. The text read:

"In all other cases, the representative of a State is considered as empowered to negotiate, draw up or sign (or to adopt the text of) a treaty on behalf of his State only if he produces an instrument of full powers or if it appears from the nature of the treaty,

its terms or the circumstances of its conclusion that the intention of the States concerned was to dispense with full powers."

29. Paragraph 4 reproduced paragraphs 6 (b) and (c), of the 1962 text which corresponded to paragraph 5 of the Special Rapporteur's revised draft.

30. Mr. PESSOU thought that the Commission was moving away from the lucid language suggested at the previous meeting by Mr. Amado and further improved by Mr. Reuter, and continuing to use terms which gave no clear idea of the scope of the article. It should define, first, which were the subjects of international law in question and, secondly, what rights were conferred on them.

31. Mr. TSURUOKA observed that Mr. Castrén's draft also did not exclude treaties between States and international organizations; it would be better to exclude them, because for the time being the Commission was concerned only with treaties between States.

32. The CHAIRMAN pointed out that treaties concluded between States through international organizations must also be considered. It would be for the Drafting Committee to clear up that question.

33. Sir Humphrey WALDOCK, Special Rapporteur, said he accepted the suggestion that the title be amended to show that the contents of article 4 related to evidence. He also accepted the arguments against the final proviso of his proposed paragraph 1, and since the beginning of the paragraph only served as a means of introducing that final proviso, he would drop paragraph 1 altogether.

34. It was undoubtedly the use of the expression "possessing authority" which made it difficult to disentangle the provisions of the article from the background of internal law. In the discussions at the fourteenth session,⁶ there had been a clear realization that the article dealt with the ostensible qualification to represent a State in the conclusion of a treaty. The intention had been to indicate the existence of what in English law would be regarded as certain presumptions. However, the term "presumption" was not suitable in international law because of the drafting difficulties it involved and its connotation for continental lawyers.

35. The idea the Commission was trying to express was that there were cases in which a representative could be considered as empowered, not so much to conclude a treaty, as to represent his State in the negotiation and conclusion of a treaty.

36. At the same time, as suggested by the Swedish Government, it would be appropriate to refer in the article to the risk that might be taken by a State if it proceeded without asking for evidence of qualification of a representative of another State. Because of the need to formulate the provisions of article 4 with that idea in mind, he did not favour Mr. Elias's suggestion that it should merely be stated that certain persons were not required to produce evidence of their powers; the question must be viewed from the standpoint of the other State.

⁶ Yearbook of the International Law Commission 1962, Vol. I, 641st and 659th meetings.

37. With regard to the various categories of persons mentioned in article 4, governments had criticized the text in their comments, pointing out that it was a common practice—often the normal practice—not to call for full powers in the case of representatives other than Heads of State, Heads of Government or Foreign Ministers. There again the question must be viewed from the point of view of the State which had to decide whether to call for evidence or not, and he suggested that the Drafting Committee bear that in mind when redrafting the article.

38. The Drafting Committee would also have to deal with the various other points that had arisen during the discussion, of which he would mention only one or two. One concerned the use of the expression “to adopt the text”. Another related to Heads of diplomatic missions, with regard to whom he understood the Commission not to wish to enlarge his present limited qualification, which covered only acts short of a binding signature.

39. The Drafting Committee, and ultimately the Commission itself, would also have to re-examine the question of permanent missions. Personally, he thought the 1962 text carried generalization too far with regard to the position of permanent representatives; much would depend on those representatives' credentials, which were sometimes limited to specific organs of the international organization concerned.

40. With regard to other representatives, he agreed with Mr. Amado and other members on the desirability of a shorter text in the form of a general residuary provision, which would make it clear that it was for the other States concerned to call for the production of full powers if they deemed it necessary. Article 32, which dealt with the lack of authority to conclude a treaty, and which had the effect of an estoppel or preclusion, would have to be considered in that connexion. If the State confronted with a representative in the circumstances envisaged were to omit to call for the production of full powers, the problem would arise whether its position might not be compromised with regard to raising the question of lack of authority.

41. He therefore proposed that article 4 be referred to the Drafting Committee with the comments made during the discussion and with instructions, first, to include in it a provision on the specific cases of the Head of State, Head of Government and Foreign Minister; secondly, to draft the general provision on other representatives on the lines suggested by Mr. Amado and others; and thirdly, to abridge and simplify the whole text.

The Special Rapporteur's proposal was adopted.⁷

CONCLUSION OF TREATIES BY ONE STATE ON BEHALF OF ANOTHER OR BY AN INTERNATIONAL ORGANIZATION ON BEHALF OF A MEMBER STATE

42. Mr. EL-ERIAN asked whether the Commission proposed to take a decision at that stage on the question raised after article 4 in the Special Rapporteur's report (A/CN.4/177) namely, the conclusion of treaties by

one State on behalf of another or by an international organization on behalf of a Member State.

43. Sir Humphrey WALDOCK, Special Rapporteur, said that in 1964 he had been instructed to bring the matter before the Commission at the present session. In his opinion, if an article on it was to be included at all, it ought to be placed immediately after the article on capacity. It was a question of deciding how far the notion of agency in the conclusion of treaties should be taken into account. He himself was now in favour of omitting any such article, but he wished to learn the Commission's views.

44. Mr. EL-ERIAN said he agreed with the Special Rapporteur that the question should be left aside. However desirable it might be in principle to study every possible aspect of the law of treaties, the Commission should, on practical grounds, confine itself to treaties between States.

45. Mr. REUTER thought the Commission might perhaps consider the problem when it took up the article on capacity, but it would be premature to discuss it at that stage.

46. Mr. AGO agreed. When the Commission had settled the question of capacity, it would see what it should do with regard to representation in the negotiation of treaties.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that that suggestion was acceptable to him; he shared Mr. Reuter's view that the link was with capacity. The Commission would be in a better position to decide whether the point should be dealt with when it had made up its mind on the question of capacity.

48. Mr. ROSENNE said that the connexion with capacity was not clear to him. He thought, however, that the Special Rapporteur had been right in proposing that the question should be left aside.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that there were two quite separate cases: the case in which a single diplomatic representative acted for two different States, which was a question of a representative's qualifications to represent a State; and the case in which one State acted on behalf of another, as Belgium did for Luxembourg. In the latter case, he thought the association with capacity was sufficiently close for the point to be considered in conjunction with capacity.

50. The CHAIRMAN thought that the issue was not the capacity of one State to be the trustee of another, but solely the not necessarily related question of representation. A State might have capacity to act on its own behalf and at the same time to perform services for another State on its request. Since on several occasions States had been known to take upon themselves the authority to act on behalf of others, the question was not solely one of law: it also concerned the organization of the international community and the application of the principle of equality of States.

51. Mr. AGO said that in one sense the Chairman and Mr. Rosenne were right, for all members of the Commission were now agreed that every State had the capacity to conclude international treaties, so that

⁷ For resumption of discussion, see 811th meeting, paras. 52-82.

when one State concluded a treaty on behalf of another, it could not be because of incapacity of the State represented.

52. But the question of capacity also arose in another connexion ; normally a State concluded treaties which created rights and obligations for itself, but it was also necessary to consider the possibility of a State concluding a treaty which created rights and obligations for another State. Such cases occurred, and the Commission should make provision for them ; the case of representation of one State by another could not be omitted from its draft.

53. He fully supported the view that the Commission should not settle the matter at once ; in fact, he even urged that the question where to deal with it in the draft should be held over. It would be irresponsible to decide forthwith not to devote an article to that matter.

54. Mr. AMADO said he fully agreed with Mr. Ago. The Belgo-Luxembourg Economic Union existed, and there were other similar cases ; they were facts of international life which could not be ignored. Moreover, such cases would become more and more frequent as the collective organization of States progressed. It was one of the great achievements of modern times that States were willing to curtail their sovereignty both in their own interests and in the general interest of mankind.

55. Admittedly, it might be difficult for the Commission to break off its general line in formulating the principles to be followed by States when making treaties in order to insert as it were a parenthetical provision dealing with an exceptional case. But his own attitude was not as exclusive as that of Mr. Rosenne ; it could be argued that the question has some connexion with the treaty-making capacity of States. In any event it had many links with the personality and responsibility of States.

56. Mr. ROSENNE said that the debate had shown the danger of abstractions such as capacity, which he had understood from the discussion on article 3 to refer to the capacity to conclude treaties and nothing else.

57. The main problem was that a State should know who its co-contracting parties in making a compact would be ; having settled that point, the next question was the most appropriate form in which to put the compact. It was difficult to legislate for a matter of that kind.

58. Mr. TUNKIN said that the principle was one of great importance ; the only problem was whether it should be discussed at that stage or later. His view was that the discussion should be postponed, because the problem of representation was closely linked with other articles, notably those on termination ; if a State could conclude a treaty, it could terminate it. He therefore proposed that the Commission proceed to consider article 5.

Mr. Tunkins's proposal was adopted.

ARTICLE 5 (Negotiation and drawing up of a treaty)

Article 5

Negotiation and drawing up of a treaty

A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some

other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself.

59. The CHAIRMAN invited the Special Rapporteur to introduce the new draft of article 5 suggested in his report, which read :

Article 5

The negotiation and drawing up of a treaty take place :

(a) Through the diplomatic or other agreed channel, at meetings of representatives or at an international conference ;

(b) In the case of a treaty concluded under the auspices of an international organization, at an international conference convened either by the organization or by the States concerned, or in an organ of the organization in question.

60. Sir Humphrey WALDOCK, Special Rapporteur, said it would be clear from his observations that he did not have any strong views on the article. Some governments had maintained that it was expository and might well be deleted. If it were included, it should be reformulated, since the 1962 text still bore many traces of code drafting. Negotiation was a distinct phase in the treaty-making process and there might therefore be a certain logic in including such an article.

61. The fact that the article was inclined to be expository was not really a bar to its inclusion, since other conventions, notably the Vienna Conventions on diplomatic and consular relations, included such articles.

62. Mr. CASTRÉN said that he had always been opposed to including such a purely procedural and descriptive article in the draft. With the exception of the Government of Israel, all the governments which had commented on the article had questioned its usefulness. To the three countries mentioned by the Special Rapporteur in his report—Japan, Luxembourg and Sweden—there should perhaps be added the United States and the Netherlands which, to judge from their comments (A/CN.4/175 and Add.1), seemed to be of the same opinion.

63. The Special Rapporteur himself was uncertain, and in case the Commission should decide to retain the article, he had proposed a redraft which, it must be added, differed only very slightly from the formula adopted in 1962.

64. In that connexion, he would draw the attention of the Drafting Committee to the comment by the Netherlands Government, suggesting that the word "government" should be inserted before the word "representatives" in the first sentence.

65. He proposed that article 5 be deleted.

66. Mr. YASSEEN said that he, too, was in favour of deleting article 5, not because it was a procedural article—a convention could include many rules of procedure—but because it was a descriptive article which would tend to make the draft look like a code ; it imposed no obligations and established no rights. The Special Rapporteur himself was neutral and said that the article could be retained or omitted without

any great harm. Brevity was a good quality in a convention, and it was better to lighten the draft by dispensing with an article if it was not essential or really useful.

67. Mr. AGO said that to his regret he could not agree with the two previous speakers. Only three governments had suggested the deletion of the article and their response had probably been due to the form of the proposed text, which had a defect inherited from earlier versions drafted more with a view to preparing a code. The Special Rapporteur had proposed a new text which was a distinct improvement on that of 1962 and which could be further improved to give it the required character.

68. It had been said that article 5 was descriptive: that was not in itself a sufficient reason for deleting it, for descriptive articles were necessary in a convention. But article 5 was not purely descriptive; its purpose was to specify the conditions under which a treaty was negotiated and drawn up, and in that sense it went well beyond a mere description. For instance, to quote an imaginary case, he and Mr. Bartoš, having discussed the possibility of concluding a treaty between Italy and Yugoslavia on some subject such as the demarcation of the continental shelf in the Adriatic, might prepare draft articles which each of them would then submit to his government. The two governments might become interested in the draft and decide to open official negotiations. The work Mr. Bartoš and he had done would thus have been useful, but it would certainly not have constituted the negotiation of the treaty. It was therefore important to specify that negotiation began when the representatives of States were provided with full powers.

69. The rules previously drafted by the Commission concerning defects of consent and certain problems and means of interpretation were rules applicable to the actual negotiations. It would therefore be strange if, having drafted those rules and regulated, in article 4, the question of evidence of the authority of representatives, the Commission did not specify what negotiation was and when it began.

70. He would accordingly urge the Commission to retain the article and improve its drafting, in particular by adding the words "possessing full powers" after the word "representatives" in sub-paragraph (a).

71. Mr. LACHS said he disagreed with Mr. Ago. In his report, the Special Rapporteur had suggested that one reason for retaining the article was that the word "negotiations" was used in other articles and should therefore be explained. His reply would be that negotiations would be mentioned in article 4; and since the term was linked with the very process of giving birth to a treaty, it could best be disposed of in that article.

72. His arguments against the article were, first, that it was not a rule and, secondly, that although it clearly described the process by which States arrived at an agreement, it did so in nebulous terms, since the description was not exhaustive. The process was so varied and complex that it could hardly be put into a rule.

73. The suggestion had been made that it was a technical rule and that technical rules were to be found elsewhere in the draft. In his view, it was not a technical legal rule:

it merely stated that certain persons met and was therefore redundant. If the Commission wished to meet the point made in the Special Rapporteur's report about the term "negotiations", it could do so by means of an explanatory note in the commentary.

74. Mr. AMADO said that the rules being drafted were intended to express the will of States. Consequently, the Commission could not invent anything; it could only state existing rules of law. Under the formula proposed, States would tell each other how to negotiate and draw up a treaty. There would be the diplomatic and other agreed channels, "meetings of representatives", and so on. The Yalta meeting, for example, had been a negotiation, but not "through the diplomatic channel" as understood by the Commission. In the example given by Mr. Ago, there was negotiation, but not within the meaning of article 5. Like the Special Rapporteur, he was undecided for the moment, and would not take a position until the Commission produced a sound outline.

75. Mr. REUTER said that the question whether article 5 should be deleted or retained depended on the significance attached to the article. If it was regarded as a purely procedural provision, it should probably, though not necessarily, be deleted. If it was not regarded as purely procedural, what category did it belong in? After hearing Mr. Ago's comments, he was inclined to think that the article was not solely procedural, but in fact concerned the scope of the future convention.

76. The Commission was at pains to exclude from its draft everything relating to international organizations; but while it could indeed exclude agreements concluded by such organizations, it should beware of excluding agreements which involved such organizations through not concluded by them. That point was particularly important in the proposed new text of article 5, the last sub-paragraph of which referred to "a treaty concluded ... in an organ of the organization in question". If that change had been made deliberately, it might have very important consequences. By saying "in an organ", and not "at a meeting of an organ", the Commission would bring within the scope of the future convention certain deliberations or decisions that were not unilateral acts attributable to the organization, but true international agreements in writing. States often deliberately allowed some doubt to subsist on that point; in order to avoid meeting requirements of constitutional law they presented as decisions of the organ of an organization, acts which later came to be regarded as treaties.

77. At that stage in the discussion, he was inclined to favour the retention of article 5.

78. Mr. TUNKIN said that, while no harm would be done by retaining the article, its omission would not create any difficulties. States would surely not be in doubt as to how they should act, even without the Special Rapporteur's sub-paragraphs (a) and (b).

79. The article was a remnant of a draft intended as a code and was, in his view, descriptive. It had been argued that it should be retained because negotiations were an important phase in the conclusion of a treaty; but that was self-evident and there was no need to say it.

80. The persons referred to in Mr. Ago's example had no full powers and the work they had done could not be described as negotiations for the conclusion of a treaty ; they had merely had private talks. The case seemed to be covered by article 4.

81. Even if it were admitted that article 5 contained some kind of legal rule, he still doubted whether it was necessary. It would be better to leave States free to act ; as Mr. Lachs had said, the channels of negotiation varied so much that it was inadvisable to restrict them. The substance of the matter should be included in the commentary.

82. Mr. ROSENNE said that, as in 1962, he considered that an article of that kind should be incorporated in the draft. The rule was not exclusively descriptive, but was one of quite profound legal significance for all the subsequent phases of the treaty. The fact that the term "negotiations" did not often appear in later articles did not mean that the concept of negotiation did not have some bearing on them. Negotiation was not merely a phase ; it was the process which distinguished a treaty from other kinds of international transaction, including unilateral assumptions of obligations which did not fall within the scope of the law of treaties.

83. He was not sure, however, that the Special Rapporteur's draft article met the requirements. The important element that had to be given expression was the fact that a treaty was the product of negotiations by the duly authorized representatives of States. It could be done either in an independent article—the method he favoured—or by asking the Drafting Committee to include the concept in the new article 1, which was to define the scope of all the articles. Negotiation was an essential attribute of a treaty and was therefore an important element of the material dealt with by the articles. The suggestion that the subject should be referred to in the commentary showed that it was not merely descriptive.

84. Mr. BRIGGS said that, after listening to the discussion, he was still opposed to the inclusion of such an article. The point made by Mr. Ago was covered by article 4. Any legal value the proposed article might have would be very slight, although he agreed that the subject could perhaps be referred to in the commentary.

85. Mr. EL-ERIAN said he was in favour of retaining the article. When the Commission had discussed the question whether the draft articles should take the form of a convention or of a code,⁸ it had come to the conclusion that, in order to meet the objections of governments which were opposed to a convention, purely expository articles should be revised, not deleted. The article served a useful purpose ; it described an integral phase of the treaty-making process and formed an essential link between articles 4 and 6.

86. Mr. TSURUOKA said that the arguments in favour of retaining article 5—though very interesting—had not fully convinced him. In particular, he found it difficult to accept Mr. El-Erian's argument that article 5 formed a link between articles 4 and 6, for he was in favour of deleting not only article 5, but article 6 as well.

87. The CHAIRMAN, speaking as a member of the Commission, said he subscribed to everything Mr. Ago had said. The article was necessary, especially because of its last clause. The Commission had decided that its draft would not relate to international organizations ; but modern international relations had reached a point where the drafting and conclusion of treaties were very often closely connected with international conferences, whether specially convened by intergovernmental organizations or held within their organs.

88. Thus the article was not purely technical. As drafted, it showed that the Commission took account of the evolution of international relations. It stated a substantive rule of law, under which the adoption of a particular procedure—the meeting of representatives of States authorized to negotiate and conclude a treaty—could have legal consequences in the form of an act giving effect to the negotiations.

89. Mr. TABIBI said he was opposed to the inclusion of the article. Negotiations were, of course, very important for the interpretation of a treaty ; but he feared that if a rule on the lines proposed by the Special Rapporteur were included, it might interfere with the preliminary process of sounding out through the diplomatic channel.

90. Sir Humphrey WALDOCK, Special Rapporteur, said he had not been convinced by the arguments on either side. Most of the objections to the article could be answered, while the arguments in favour of its retention could be met by saying that the notion was implied in any reasonable reading of the other articles.

91. The article might be regarded as important if it really contained a definition of the scope of negotiations ; it could then be said to be required for the interpretation of treaties. In discussing the subject, one naturally turned to the article referring to preparatory work (article 70), though the phraseology of that article had not been specifically linked to negotiations. He wondered whether Mr. Ago was taking a clear position on where preparatory work began and ended because, in his example, that work, though unofficial, might have inspired the attitude of governments and even been given official endorsement by them. Was such preparatory work to be totally excluded because it did not form part of the official negotiations ? The point could be argued.

92. If it were contended that the article was important because it was not merely technical but contained elements of substance, then it would be necessary to make sure that it would really have a useful effect on subsequent articles. But the great majority of the subsequent articles referred to negotiations only by implication. Hence he was still not convinced that the article would affect the substantive aspects of later articles. It was important that the newer processes of negotiation, such as negotiation in international organizations, should receive recognition. If those processes were so new that they needed stating, then there was a case for article 5 ; but they might by now be so well established that there was no need for them to be specifically recognized in a text.

93. In view of the difference of opinion, the Commission should decide either to delete the article or to find the

⁸ *Yearbook of the International Law Commission, 1961, Vol. I, 620th and 621st meetings.*

best possible formulation and then leave it to States to call for its deletion if they did not think it worth including.

94. Mr. AGO proposed that the Commission should refer article 5 to the Drafting Committee. In so doing it would not be committing itself either way, since it would still be free to delete or retain the Drafting Committee's revised text.

95. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Ago's proposal.

96. Replying to the Special Rapporteur, he said that although, in connexion with article 70, he had opposed the idea that the preparatory work must necessarily be taken into account in interpreting treaties, he had never denied that it might be of some value for their interpretation. Moreover, "talks" should not be confused with "negotiations".

Article 5 was referred to the Drafting Committee.⁹

The meeting rose at 1.5 p.m.

⁹ For resumption of discussion, see 811th meeting, paras. 83-90.

782nd MEETING

Wednesday, 12 May 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(continued)

[Item 2 of the agenda]

ARTICLE 6 (Adoption of the text of a treaty)

Article 6

Adoption of the text of a treaty

The adoption of the text of a treaty takes place :

(a) In the case of a treaty drawn up at an international conference convened by the States concerned or by an international organization, by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to adopt another voting rule;

(b) In the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question;

(c) In other cases, by the mutual agreement of the States participating in the negotiations.

1. The CHAIRMAN invited the Commission to consider article 6, for which the Special Rapporteur had prepared a revised text reading :

Article 6

1. The adoption of the text of a treaty takes place by the mutual agreement of the States participating in its drawing up, subject to paragraphs 2 and 3.

2. In the case of a treaty drawn up at an international conference, adoption of the text takes place by the vote of two-thirds of the States participating in the conference, unless

(a) By the same majority they shall decide to adopt a different voting rule;

(b) In the case of a conference convened by an international organization a different rule is prescribed by the established rules of the organization.

3. In the case of a treaty drawn up within an international organization, the adoption of the text takes place in accordance with the voting rule applicable in the competent organ.

2. Sir Humphrey WALDOCK, Special Rapporteur, said he had little to add to his report (A/CN.4/177). At its fourteenth session, the Commission had considered that the article served a useful purpose.

3. One of the main points of substance was the voting rule at international conferences where the negotiating States had not agreed to establish rules of their own. The Commission had considered that, in case any difficulties arose, it would be advisable to have a residuary rule on which a conference could proceed.

4. The Government of Luxembourg had raised the point that in small conferences it would be natural to follow the rule of unanimity (A/CN.4/175, section I.12). The article provided that States could adopt whatever rule they wished, so the possibility of recourse to that rule was not jeopardized. He had nevertheless endeavoured to place more emphasis on the unanimity rule by redrafting the article in such a way as to refer to it in the first paragraph instead of the last.

5. Mr. YASSEEN said that the rule proposed in article 6 was useful because it took account of the observable trend in positive international law and provided a starting point for regulating the procedure for the adoption of treaties.

6. The Special Rapporteur had been right to place first, in his revised text, the provision which appeared at the end of the draft article adopted by the Commission in 1962. It was logical to state the principle of unanimity first, since it was still the general rule in international law.

7. The revised text then stated a rule which was in conformity with practice, for at most conferences the majority required for adoption of the text of a treaty was two-thirds. However, the two-thirds majority rule applied only to general multilateral treaties ; he did not think it could be applied at a regional conference or a conference of a small group of States. He therefore suggested that in paragraph 2 the words " at an international conference " be amended to read " at a general international conference ".

8. Paragraph 2 (b) of the revised text introduced a change of substance. It dealt with the case of a conference convened by an international organization. The text adopted by the Commission in 1962 laid down the two-thirds majority rule for such conferences, and did not

mention the possibility that a different voting rule might be prescribed by the established rules of the organization. He would like the Special Rapporteur to clarify that point.

9. Sir Humphrey WALDOCK, Special Rapporteur, said he had wished to take into account the view expressed by the Government of Luxembourg regarding small organizations having a rule requiring unanimity. A specific provision reserving the established rules of international organizations was included in a number of articles, and the same question had arisen in connexion with his proposal to widen the scope of article 48 on treaties which were constituent instruments of international organizations. It was only logical that, if it was the established practice of an organization to draw up treaties within the organization and to employ settled voting rules, the Commission should include a reservation to cover that practice.

10. Mr. YASSEEN said he understood why the Special Rapporteur had taken that view, but thought it lessened the value of the article because most international conferences were now convened by international organizations.

11. Sir Humphrey WALDOCK, Special Rapporteur, said his present view was that reservations of that kind should be limited to treaties drawn up within organizations. The phrase "a conference convened by an international organization" was too wide.

12. Mr. CASTRÉN said he approved of the revised text proposed by the Special Rapporteur. The changes were only drafting amendments except for paragraph 2 (b), as Mr. Yasseen had just pointed out.

13. He was unable to support the suggestion made by some governments that the article, or some of its provisions, should be deleted. In his view, their criticisms were not pertinent, and the Special Rapporteur had convincingly refuted them in his report.

14. Article 6 contained a very useful residual rule which the Commission had thought it advisable to adopt in 1962.

15. Mr. LACHS said he was in favour of retaining the article; it served a useful purpose and indicated the current trend of development, while leaving States freedom of action whenever they wished to act otherwise. The new draft was in many ways superior to the previous one, especially as the Special Rapporteur had taken into account a number of comments by governments.

16. He had been right to disregard comments referring specifically to regional conferences. Such conferences came within the ambit of specific arrangements concluded by the States concerned, whereas the Commission was dealing with general conferences.

17. He considered the order of presentation correct, but, like Mr. Yasseen, he thought the relationship between paragraphs 2 (b) and 3 should be made clearer, since they overlapped. In using the words "convened by", paragraph 2 (b) covered both conferences convened within an organization and conferences convened under the auspices of an organization. Such conferences might take place within the existing machinery of the organization or outside that machinery. If they took place

within the existing machinery, then paragraph 3 applied, because within that machinery there must always be "a competent organ" and the rules applying to particular organs did not apply to the organization as a whole. In the case of conferences held outside the machinery of the organization, it was impossible to speak of the established rules of the organization, because the conference itself decided the rules.

18. Subject to drafting changes in paragraphs 2 (b) and 3, he supported the Special Rapporteur's new text.

19. Mr. EL-ERIAN said he supported the new formulation, which was an improvement in that it placed the general rule at the beginning of the article and made it subject to whatever might be agreed upon by the participating States or whatever might be the established rule in an international organization. The article should be general because, as the United States Government had commented, it served a useful purpose by stating general rules for application in the absence of agreement upon some other procedure (A/CN.4/175, section I.21). For that reason, the Commission should not lay down detailed rules as had been suggested by the Brazilian and Mexican Governments.

20. It was useful to codify the two-thirds majority rule, to the consolidation of which the United Nations Conference on the Law of the Sea had made a significant contribution. A committee of experts had met in New York to prepare a working paper on rules of procedure for that Conference, and the provisional rules it had drafted had been accepted by the Conference¹ and subsequently by the Second Conference on the Law of the Sea and the Vienna Conferences of 1961 and 1963.

21. Like Mr. Lachs, he had doubts about paragraph 2 (b). A conference convened by an international organization was a conference of sovereign States, and as such could adopt its own rules of procedure; it was not a conference within an organization. Practice supported that view; for instance, the Conference on the Law of the Sea, although convened by the United Nations, had adopted its own rules of procedure. It was true that in fact it had adopted the rules suggested by the Committee of Experts, but it could have adopted others.

22. Mr. REUTER said that he was opposed to the article, precisely for the reasons cited by most of the other members of the Commission in support of it.

23. First, the two-thirds majority rule was certainly in keeping with present practice and thus raised no difficulty for the international community at the moment, but no one knew that, in the future, the rights accorded to the minority would not have to be restricted or enlarged, or that the required majority would not have to be reduced to three-fifths or increased to three-quarters. Practice would have to decide. If a group of States representing a strong political force invariably found itself in the minority at universal international meetings, it was obvious that it would eventually refuse to participate. He would not labour the point, as he thought that very few members of the Commission would share his view.

¹ *United Nations Conference on the Law of the Sea, Official Records, Vol. II, pp. xxxi et seq. and 3-6.*

24. Secondly, with regard to conferences convened by international organizations, the question which conferences were governed by the rules of an organization was not a question of general international law, so the Commission was not required to state a rule on it. It was for each organization to determine which conferences were held within its own framework and which were convened by it, but held outside it. It was the law of each organization that fixed the scope of its rules. Consequently, some formula should be found to except from the rule laid down in paragraph 2 conferences which, according to the law of an organization, were governed by its own rules.
25. His third remark, which also applied to other articles, concerned what had been described as general international conferences. It was difficult to say what was general and what was particular in international law. For example, for Africans, what was African could be described as general. He would prefer the Commission to use the expression "universal international conference" or "world international conference", for he thought it would be possible to lay down rules for conferences that were intended to be universal or world-wide.
26. Mr. PESSOU said he completely agreed with Mr. Reuter. The Commission should be grateful to the Government of Luxembourg for the quality of its comments in general and for its suggestion regarding article 6 in particular.
27. The wording of the articles should be both rigorous and flexible. The dominant quality of the texts proposed by the Special Rapporteur was their flexibility; but in view of the particular subject dealt with in article 6, perhaps rigour should prevail there. He urged that if the Commission decided to retain article 6, it should follow the strict language suggested by Luxembourg.
28. Mr. ROSENNE said he was in favour of retaining the article.
29. He agreed, on the whole, with the comments made on paragraph 2 (b), but there was a further point to which he wished to draw attention. Although the article did not entirely consolidate the two-thirds rule, since the general principle of unanimity was now correctly placed at the beginning, it nevertheless gave increased status to that rule, which was already embodied in the Charter. He hoped that the two-thirds rule would not be applied in such a way as to obstruct the practice of attempting to reach international decisions by general agreement—sometimes called consensus—a procedure used at many recent international meetings and which he regarded as more desirable.
30. Mr. TABIBI said that he too was in favour of retaining the article, especially as the Special Rapporteur had revised it in the light of the comments by governments.
31. Nevertheless, as the Government of Luxembourg had observed, it was difficult to draw the line between regional conferences and general conferences; sometimes the scope and effect of a regional conference might be wider than those of a general conference. Hence it was useful to have an article couched in flexible terms.
32. Mr. El-Erian had referred to the Conference on the Law of the Sea; another example was provided by the 1964 Conference on Trade and Development, which might well be regarded as a universal conference. It had been proposed that all decisions at that conference should be taken by a two-thirds majority vote; but a group of industrialized countries had declined to support that rule and it had been clear that, without the co-operation of that minority group, it would be impossible to obtain a decision even on the basis of a two-thirds majority. A committee of experts had been convened in New York and had decided that prior consultation should take place between all parties before the two-thirds majority rule was applied to any decision affecting the industrialized countries. The rule had been accepted in that form and had been applied at the recent meeting of the Trade and Development Board. That example showed that the area was one in which development was still taking place and that a flexible rule was necessary.
33. Mr. TUNKIN said he thought the article should be retained, although he did not attach much importance to it. It stated a rule that was actually being followed in the practice of States and might be of some importance for conferences when difficulties arose, although that might happen only rarely.
34. He had some doubts about the wording of paragraph 1 when taken in conjunction with paragraphs 2 and 3, to which it referred. Paragraph 1 stated that the adoption of the text of a treaty took place by mutual agreement, while paragraph 2 said that it took place by a majority vote unless States otherwise agreed or unless the organization had a different rule. What, in that case, was intended in paragraph 1?
35. With regard to paragraph 2 (b), it was true that a conference of sovereign States was master of its own rules of procedure. Still, if there were regional organizations which prescribed certain specific rules for conferences they convened, it might be advisable to leave room for such arrangements, so paragraph 2 (b) could be retained as it stood.
36. Attention had already been drawn to the fact that there was no clear-cut distinction between paragraph 3 and paragraph 2 (b). It might be possible to re-word the relevant passage in paragraph 3 to read "In the case of a treaty drawn up by an organ of an international organization", thereby making it clear that the rule applied only to cases where a treaty was drawn up within the existing machinery of an international organization.
37. Mr. AGO considered that article 6 should be retained, for much the same reasons as he had put forward when speaking in favour of retaining article 5. It was useful to lay down the essential conditions under which the negotiation and adoption of treaties took place.
38. As to the wording, the revised text proposed by the Special Rapporteur was preferable to that adopted by the Commission in 1962, principally because the general rule stated in paragraph 1 was the one that should take precedence over the rules that followed, which applied to the special cases of treaties adopted

at international conferences or within an organ of an international organization. For paragraph 1, he was still inclined to prefer the formula suggested by the Government of Luxembourg, for it might perhaps be better to be quite unequivocal and not to shrink from using the word "unanimity". The Drafting Committee would certainly study that question and Mr. Tunkin's remarks. He himself would not take any definitive position on the matter.

39. With regard to paragraph 2, he understood some of Mr. Reuter's misgivings; the rule related rather to the functioning of international conferences. Nevertheless, he thought it would ultimately be useful. What mattered most was not that the text of the treaty should be adopted by a two-thirds majority, but that a two-thirds majority should be required for establishing the voting rule applicable to the adoption of the text; for that would prevent the conference from wasting valuable time discussing the point. Thus the value of the proposed rule was mainly practical.

40. Some members were opposed to paragraph 2 (b), but although it did not seem essential it would be better to retain it. Mr. Tunkin had implied that the Commission should inquire whether certain organizations had, in fact, established rules concerning the conferences they convened. At all events, it would be preferable to allow organizations to establish such rules in the future. That would render the Commission's text more flexible.

41. Paragraph 3 did not call for long discussion; the Drafting Committee would be able to put it into final form.

42. Mr. BRIGGS said he did not hold any strong views on the article, apart from a general objection to the tendency to clutter up the draft with too much detail. The article did perform a useful function.

43. Like Mr. Tunkin, he had been bothered by the drafting of paragraph 1, but took it to mean that the adoption of the text of a treaty took place under the unanimity rule. What would happen in the case of a conference of only three States? Would the two-thirds rule apply or would reliance be placed on a consensus of opinion? The most valuable part of the article was the rule that adoption of the text took place by the vote of two-thirds of the States participating unless two-thirds decided to adopt a different rule.

44. He too had doubts about paragraph 2 (b) and agreed with Mr. Lachs that there was a difference between the voting rule in an organ and the established rules of an organization, but he understood that the Special Rapporteur would take up that point.

45. He would support the article subject to adequate drafting changes.

46. Mr. TSURUOKA regretted that he was not convinced by the arguments of those who wished to retain article 6.

47. Paragraphs 1 and 3 of the revised text did not give rise to any difficulties, but they did not add anything either. Thus the only useful part of the article was paragraph 2. But practice in that matter was not altogether uniform. Conferences differed widely in nature, size and object; they could be regional or universal,

or in an intermediate category; they could be political, technical, economic, and so on. Hence it was essential for the Commission to keep its draft as flexible as possible. Conferences should be entirely free to settle their own voting rules; moreover, that was the present practice.

48. With regard to the general structure of the draft, some speakers had said that all the stages leading to the conclusion of a treaty should be described. He might be able to accept that argument, but he found it difficult to understand those who were against retaining article 5, yet in favour of article 6, thus acknowledging the value of article 6, while denying that of article 5. The practice showed that the value of such a provision was negligible. Article 6 did not state a rule but, at the most, a recommendation—as was clear from the revised wording proposed by the Special Rapporteur.

49. As to the functioning of conferences, it was probably pessimistic to fear that a conference would not be able to fix its own rule for adopting the text of a treaty.

50. He proposed that the substance of article 6 be put in the commentary on one of the articles dealing with the adoption of treaties.

51. Mr. AMADO said that, taking the point of view of States, as he always did, he was not enthusiastic about the article but would not oppose it.

52. Mr. El-Erian's comment on paragraph 2 (b) deserved the closest attention; for when a conference had been convened by an international organization, the States participating were not in any way obliged to follow the established voting rule of the organization. States were completely free to adopt whatever rule they wished. That was what had been done at the Conferences on the Law of the Sea. The Special Rapporteur and the Drafting Committee should study the question carefully.

53. The CHAIRMAN, speaking as a member of the Commission, said that his opinion concerning the need for the article had changed since 1962. He had thought it was a formal rule, but on reflection, and in the light of the experience of the United Nations Conference on Trade and Development, he had come to the conclusion that a rule of substance was involved. Even if the adoption of an authenticated text did not impose direct obligations on States, it imposed a choice on them: once the text had been authenticated, they had only the choice between acceding and not acceding.

54. He had formerly been convinced that the unanimity rule was a thing of the past, but he now believed that it had proved its value at the Conference on Trade and Development, where the main objective had been collaboration between the developing countries and the rest, and that it was still the fundamental rule. He was therefore in favour of retaining the article in the form proposed by the Special Rapporteur.

55. Mr. TSURUOKA said he had no objection to the question being studied by the Drafting Committee.

56. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Tunkin, said that paragraph 1 meant that the adoption of the text of a treaty took place by unanimous agreement except as provided in paragraphs 2 and 3. He had used the expression "mutual agreement"

in his draft because the Commission had preferred it in 1962, but it might be better to replace it by a reference to unanimity.

57. With regard to the distinction between paragraphs 2 (b) and 3, he had already referred to the need for careful reconsideration of that point, since it arose in other articles. In drafting those paragraphs, he had had in mind the well-founded concern of the Government of Luxembourg. He was not fully informed of the practice in certain organizations and was not sure whether there were cases in which treaties were drawn up not within the organization itself, but at a conference held under its auspices at which an established rule was automatically applied. He had introduced paragraph 2 (b) to cover the possibility that there might be established rules for conferences convened by organizations. Even if there were no such cases at present, it was impossible to be sure that the practice would not develop in the future.

58. In any event, it was essential that the Commission should be more precise in defining what was meant by a treaty concluded "within" an organization—an expression which some governments regarded as vague when used in article 48. It would be easier to deal with the point in a general way, rather than in connexion with article 6.

59. He agreed that the article should be referred to the Drafting Committee.

60. Mr. ROSENNE said he wished to draw attention to another practice. Recently, a convention for the establishment of a centre for the settlement of international investment disputes had been prepared by the International Bank for Reconstruction and Development. It had been drawn up within a small organ of the Bank, not even an organ that was fully representative of the general membership of the Bank. The draft had been considered by an advisory committee of jurists, but it had subsequently been adopted and submitted to governments by the Board of Directors of the Bank. That procedure for adopting a text was quite different from any of those contemplated by the Commission. He would not express a value judgement on it, but it was clear that the article should not prejudice the existence of that type of practice if it were found desirable in other cases.

61. Mr. AGO, referring to the Special Rapporteur's last statement, said he thought the Commission should adopt a clearer and more precise formula than that contemplated so far: the expression "within an international organization" was very vague. The Commission was thinking of cases in which a conference of States was itself an organ of an international organization, like the International Labour Conference. But where a conference was not an organ of an organization, even though all the participants were members of the organization, the case did not come under paragraph 3, but under paragraph 2 (b).

62. The CHAIRMAN said that, so far as the United Nations was concerned, there were three different practices: some conventions were drawn up by the General Assembly itself, like the Convention on the Prevention and Punishment of the Crime of Genocide; others

were prepared by the Economic and Social Council; and others were drawn up only at conferences convened by the organization.

63. The Drafting Committee should remember that the General Assembly had drawn up model rules of procedure for such conferences, but that there was a contradiction between the concept of model rules and the notice convening a conference. The conference was said to be convened in the name of the participating States and to have sovereign powers, but the convening notice stated that provisional rules of procedure would be placed at the disposal of the conference by the United Nations and could only be amended by a two-thirds majority. If the conference had sovereign powers, it could do whatever it wished; on the other hand, it was bound by the terms of the convening notice. The Drafting Committee should clarify the position.

Article 6 was referred to the Drafting Committee.²

64. The CHAIRMAN said that before passing on to article 7 he would ask members from the continents of Africa and America to assist the Secretariat in obtaining information on the practice of the Organization of African Unity and the Organization of American States in the matter of drawing up texts. The Drafting Committee would require that information for article 6.

65. Furthermore, Mr. Rosenne had asked the Secretariat to obtain certain information at once, before the Commission took up article 8; he asked Mr. Rosenne to explain exactly what it was he wanted.

66. Mr. ROSENNE said that, particularly in connexion with article 8, he wished to ask the representative of the Secretary-General to be good enough to supply, at his earliest convenience, certain information relating to questions of fact.

67. First, he would ask him to arrange for circulation of the full texts of the interventions of the Secretariat representative in the Sixth Committee, and of the Secretary-General himself at the 1258th plenary meeting of the General Assembly, referred to in paragraph 2 of the Special Rapporteur's Observations and Proposals on article 8 (A/CN.4/177), and the full text of the opinion of the Legal Adviser of the State Department, referred to in paragraph 5 of those same Observations.

68. Secondly, he wished to know what was the practice of the Secretary-General, as registering authority under Article 102 of the Charter, when he received for registration treaties concluded (a) between a Member of the United Nations and a State which was not a Member of the United Nations or of any of the specialized agencies and (b) between two or more States, none of which were Members of the United Nations or of any of the specialized agencies. If the Secretary-General had accepted such treaties for registration, or for filing and recording, was he in a position to furnish information concerning the views of governments on the registration of treaties by States in the latter category?

69. Thirdly, he wished to know whether any other depositary authorities—governments or secretariats—had adopted a position similar to that of the State

² For resumption of discussion, see 811th meeting, paras. 91-94.

Department referred to in paragraph 5 of the Special Rapporteur's Observations and Proposals.

70. The CHAIRMAN said that the Secretariat would try to meet Mr. Rosenne's request.

ARTICLE 7 (Authentication of the text)

Article 7

Authentication of the text

1. Unless another procedure has been prescribed in the text or otherwise agreed upon by States participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways :

(a) Initialling of the text by the representatives of the States concerned;

(b) Incorporation of the text in the final act of the Conference in which it was adopted;

(c) Incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

2. In addition, signature of the text, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 above.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.

71. The CHAIRMAN invited the Special Rapporteur to introduce his revised text of article 7, which read :

Article 7

1. Unless the text itself prescribes otherwise or the States participating in the adoption of the text otherwise agree, a text shall be considered to be authenticated as the definitive text by —

(a) Its incorporation in the final act of the conference in which it was adopted;

(b) Its incorporation in a resolution of an international organization in which it was adopted or any other procedure employed specifically for that purpose by such organization;

(c) In other cases, the initialling, signature or signature *ad referendum* of the text by the representatives of the States concerned.

72. Sir Humphrey WALDOCK, Special Rapporteur, said that the three governments which had commented on article 7 had questioned its utility. The article raised the question whether authentication of the text was to be recognized as a separate element in the treaty-making process, distinct from adoption of the text on the one hand and from signature and initialling on the other. In 1959, Sir Gerald Fitzmaurice had been very insistent that authentication should be acknowledged as an important element in treaty-making and that view had been accepted by the Commission. In 1962, the Commission had once more decided to mark the stages of authentication in treaty-making, but the text then adopted had been perhaps too cumbersome. In his revision he had tried to lighten it.

73. He had, of course, worked on the assumption that the Commission would wish to retain an article on authentication. It was for the Commission now to decide the preliminary question whether provision

should be made in the draft articles for the process of authentication, as distinct from signature.

74. Mr. AGO thought that with article 7 the Commission was taking up a rather controversial part of the 1962 draft in which important changes should be made. Article 7 was followed by a series of articles whose provisions were repeated and intermingled, and ranged from the description of acts to that of legal effects. Articles 8 and 9, for example, which dealt with participation, should be placed elsewhere in order to avoid a break in the logical train of thought. The Commission should not proceed article by article ; it would be better to discuss articles 7, 10, and 11 together and then redraft them ; he therefore made a formal proposal to that effect.

75. The CHAIRMAN noted that Mr. Ago was formally proposing that articles 7, 10 and 11, which he considered to be closely interrelated, be discussed together ; he invited the Commission to take a decision on that proposal.

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the question of the logical order of the articles was not an easy one. Treaties were no longer concluded in the same way as in the past, when they had been authenticated and signed by the representatives of the governments concerned. It was necessary, for example, to take into consideration cases in which the text of a treaty was adopted in an international organization and the Director-General or another official of the organization was called on to authenticate it. Clearly cases of that kind could not come under the heading of signature, which was the subject of article 10 ; for no State could claim to be a signatory of a treaty by reason of the signature of the official authenticating the text.

77. With regard to articles 8 and 9, he agreed that the provisions of those articles were interposed between the provisions relating to the three stages of the treaty-making process. That arrangement undoubtedly resulted in an inconvenient interruption of the train of thought, but there were logical and legal grounds for placing the two articles where they were. They established the right of participation, and some of the rights set out in the subsequent articles could only be exercised by virtue of what was provided in articles 8 and 9. However, he fully agreed that articles 8 and 9 should be dealt with separately from articles 7, 10 and 11, so as to avoid confusion, and that, for the purposes of the present discussion, articles 7, 10 and 11 could be taken in conjunction.

78. Mr. BRIGGS said he agreed with Mr. Ago that articles 8 and 9 related to a completely different matter from articles 7 and 10. He would prefer to see the contents of articles 7 and 10 brought together, but for the purposes of the present discussion, he thought the Commission should examine article 7, on the understanding that members could make any necessary references to articles 10 and 11.

79. Mr. LACHS said he supported Mr. Ago's proposal and agreed with his comments on articles 8 and 9. Article 9, at least, was logically linked with the article on accession and ought to precede it.

80. He agreed that articles 7, 10 and 11 should be discussed together, but suggested that it might be useful to take the provisions of article 10 as the starting point, because they related to the main functions. Any material left out of article 10 could then, if necessary, be introduced into article 7.

81. Mr. TSURUOKA said that he too agreed with Mr. Ago. Article 7 should not be omitted, but should, if necessary, be combined with articles 10 and 11.

82. As to discussion procedure, he supported Mr. Lachs's suggestion: members should be free to speak on all three articles.

83. Mr. AMADO said that after talks and negotiations, and after adoption of the text of a treaty, authentication was clearly superfluous before signature, which was an act of the greatest importance.

84. What was meant by the statement that a text could be authenticated by its incorporation in a resolution of an international organization in which it was adopted? Was it conceivable that an organization would adopt a draft and not incorporate it in a resolution?

85. The CHAIRMAN, speaking as a member of the Commission, said he accepted Mr. Ago's proposal that articles 7, 10 and 11 should be treated as a single whole. He also accepted Mr. Lachs's proposal that the discussion should begin with article 10.

86. He did not, however, subscribe to Mr. Amado's objections to article 7. The development of international law had brought into being an objective procedure for establishing texts, from which authentication had sprung. International organs drafted certain texts, which did not bind any State directly, but were at the disposal of States to adopt or not to adopt. Authentication took place in international organizations by means of a resolution. The legal phenomenon, which was different from the classic example referred to in article 10, was that there was authentication of a text as something separate from the process of signature or direct adoption.

87. Sir Humphrey WALDOCK, Special Rapporteur, said he was prepared to discuss article 10 jointly with article 7. He wished to draw attention, however, to the difficulty that arose where the text of the treaty was adopted by a resolution of an international organization and the resolution directed an official of the organization to sign the text for purposes of authentication. In such cases authentication would precede signature, since the treaty would be opened for signature after it had been authenticated by the official concerned.

88. Mr. AMADO thought that the Commission would have to reach agreement on the meaning of the word "adopt". If a treaty adopted by States still had to go through an authentication ceremony, adoption became an act entirely devoid of meaning and without effect.

89. The CHAIRMAN, speaking as a member of the Commission, said that a case in point was the Convention on the International Transmission of News and the Right of Correction, which had been authenticated by an absolute majority of the General Assembly, but to which only France and Yugoslavia had acceded from the first day. The text had been authenticated by its incorporation

in a resolution³ and was to become a convention as a result of the accession, signature and ratification of the States which followed the General Assembly's recommendation.

90. Leading writers on international law also thought that such authenticated instruments, even if not accepted, represented world legal opinion according to the number of States which had participated in their authentication, even though they imposed no direct obligation on States. International case-law often relied on such instruments which had been authenticated but had not entered into force.

91. Mr. AGO said he agreed with Mr. Lachs that the discussion should begin with article 10, but wide freedom should be allowed, for the text of that article itself was very involved; it could be pruned and supplemented with ideas taken from article 7.

92. It was necessary to choose a starting point: the Commission could begin with acts, such as initialling, signature and final act, but if it was to produce clear and fairly short articles, it would be more logical and useful to begin with legal effects. Several important questions arose. First, by what means did the text of a treaty become final? It could be by initialling, signature *ad referendum* or mere signature, or by incorporation in the final act of the conference or in a resolution of the conference. Secondly, were there any legal effects of signature which went beyond authentication in cases where signature did not establish the consent of the State to be bound by the treaty? Thirdly, by what acts did the State express that consent? Lastly, for that purpose, what were the respective positions of signature, ratification, approval, acceptance, etc.?

93. Mr. ROSENNE said he could give a recent example in which the different stages of treaty-making were clearly identifiable, but in which none of the rules had been very precisely observed. He was referring to resolution 1991 (XVIII)⁴ by which the General Assembly had adopted certain amendments to the Charter and submitted them for ratification by the States Members of the United Nations. First, he doubted whether many delegations to the General Assembly had been furnished with full powers to negotiate and conclude the treaty, except some permanent representatives who had those powers included in their general credentials. Secondly, the text had not been signed. Thirdly, in the practice of the General Assembly, the Secretariat had a general standing power to edit the text of every resolution after it had been adopted and the final authenticated text only came out in the printed volumes of the official records several months after the conclusion of the session. Nevertheless, the resolution provided for ratification, it had been submitted to States for ratification, and it had actually been ratified by a large number of them.

94. He supported the idea of taking article 10 first and hoped a liberal approach could be adopted to the residuary part of authentication. Personally, he was not certain what was the real difference between the

³ *Official Records of the Third Session of the General Assembly, Part II, Resolutions*, p. 22.

⁴ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 15*, p. 21.

adoption of the text of a treaty and authentication as a residuary step. Perhaps the concept of authentication could be incorporated in article 6.

95. The CHAIRMAN said that, if there were no objection, he would, consider that the Commission accepted Mr. Ago's proposal, together with Mr. Lachs's suggestion as to the order of discussion of articles 7-11.

It was so agreed.

The meeting rose at 12.50 p.m.

783rd MEETING

Thursday, 13 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldoock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(continued)

[Item 2 of the agenda]

ARTICLES 7 (Authentication of the text) (continued),¹ 10 (Signature and initialling of the treaty) and 11 (Legal effects of a signature)

Article 10

Signature and initialling of the treaty

1. Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the treaty itself or in a separate agreement:

(a) That signature shall take place on a subsequent occasion; or

(b) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the State concerned, in which case the signature is subject to confirmation.

(b) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

(c) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

3. (a) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the treaty.

(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the treaty.

Article 11

Legal effects of a signature

1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 7, paragraph 2, the signature of a treaty shall have the effects stated in the following paragraphs.

2. Where the treaty is subject to ratification, acceptance or approval, signature does not establish the consent of the signatory State to be bound by the treaty. However, the signature:

(a) Shall qualify the signatory State to proceed to the ratification, acceptance or approval of the treaty in conformity with its provisions; and

(b) Shall confirm or, as the case may be, bring into operation the obligation in article 17, paragraph 1.

3. Where the treaty is not subject to ratification, acceptance or approval, signature shall:

(a) Establish the consent of the signatory State to be bound by the treaty; and

(b) If the treaty is not yet in force, shall bring into operation the obligation in article 17, paragraph 2.

1. The CHAIRMAN invited the Commission to consider the group of articles 7, 10 and 11 together, as agreed at the previous meeting. The Special Rapporteur had already introduced article 7; he would now ask him to introduce his revised text of article 10, which read:

Article 10

Signature and initialling of the text

1. Signature of the text takes place in accordance with the procedure prescribed in the text or in a related instrument or otherwise decided by the States participating in the adoption of the text.

2. Subject to articles 12 and 14.

(a) Signature of the text shall be considered unconditional unless the contrary is indicated at the time of signature;

(b) Signature *ad referendum*, if and when confirmed, shall be considered as an unconditional signature of the text dating from the moment when signature *ad referendum* was affixed to the treaty, unless the State concerned specifies a later date when confirming its signature.

3. (a) If the text is initialled, instead of being signed, the initialling shall

(i) in the case of a Head of State, Head of Government or Foreign Minister, be considered as the equivalent of signature of the text;

(ii) in other cases operate only as an authentication of the text, unless it appears that the representatives concerned intended the initialling to be equivalent to signature of the text.

(b) When initialling is followed by the subsequent signature of the text, the date of the signature, not of the initialling, is the date on which the State concerned shall be considered as becoming a signatory of the treaty.

¹ See 782nd meeting, paras. 70-71.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that as suggested by Mr. Lachs, the Commission had decided to take article 10 as the starting point of its enquiry, bearing in mind the need to refer to other articles, especially articles 7 and 11, in the course of the discussion.

3. Mr. Ago had suggested that it would be more logical and useful to start with the question of legal effects. In fact, that question was dealt with primarily in article 11 ; article 10 only laid down certain rules—some of which had a certain substantive content—regarding the various forms of signature.

4. In the light of the discussion and of Mr. Ago's suggestion, it would be appropriate to consider what was the substantive content of articles 7, 10 and 11 on the question of signature. Those articles covered four forms of signature : first, signature pure and simple ; secondly, signature *ad referendum*, which was a conditional signature, subject to confirmation ; thirdly, initialling, the effects of which varied according to whether it was done by a Head of State, Head of Government or Foreign Minister on the one hand, or by a lesser representative on the other ; and fourthly, signature subject to ratification, acceptance or approval. Some treaties were expressly stated to be subject to ratification, acceptance or approval, but it was quite common for a reservation of that kind to be attached to a signature to a treaty which did not contain such a stipulation.

5. Distinct from those four forms of signature was what might be described as a representative signature by the President of the Assembly or the Executive Head of an international organization ; such a signature was attached to the text for the purpose of authentication on behalf of all the States Members of the organization, but it was not a signature in the accepted sense, because no State could base thereon any claim to have signed the treaty.

6. With regard to the legal effects of signature, all members were agreed that all four forms of signature constituted an authentication of the text of a treaty, if the text had not previously been authenticated in some other manner, such as by initialling, incorporation in a final act or through the special procedures of an international organization.

7. Where there had been prior authentication of the text and the treaty was subject to ratification, acceptance or approval, signature had only minimal effects. First, it qualified the State concerned to be considered as a signatory and to proceed to ratification, acceptance or approval in accordance with the terms of the treaty ; in the absence of such signature, it could only become a party to the treaty by accession, if at all. Secondly, signature gave rise to the obligation of good faith set forth in article 17. Thirdly, signature as a voluntary act of the State could be considered as having a certain significance as expressing general and provisional support of the text. Fourthly, it was arguable that signature conferred on the signatory State a certain status for such purposes as being informed by the depositary of all subsequent acts concerning the treaty.

8. In the case of a treaty which was not subject to ratification, signature had wider effects : it established

the consent of the State to be bound, unless the signature itself reserved ratification.

9. Signature *ad referendum* only had the effect of authenticating the text of the treaty. Moreover, when confirmed it became a full signature, dating from the moment when the signature *ad referendum* was affixed to the treaty.

10. With regard to initialling, it was proposed in paragraph 3 (a) (i) of his revised text that it should be considered as the equivalent of signature in the case of a Head of State, Head of Government or Foreign Minister. In the case of a lesser representative, in the absence of any contrary indication by him initialling would operate only as an authentication of the text, so that its effects would be similar to, but not identical with, those of signature *ad referendum*.

11. A signature which was expressed as being subject to ratification would produce the same effects as the signature of a treaty which was by its own terms subject to ratification, acceptance or approval. That particular case had not been specifically covered in the Commission's draft articles and the need to fill the gap should be borne in mind.

12. He had revised the text of article 10 in the light of government comments. Paragraph 2 of his revised text stated the rules which he had just described regarding signature pure and simple and signature *ad referendum*. Paragraph 3 stated the rules on initialling, which were not purely procedural in character : they involved some points of substance, although operating on a procedural plane.

13. With regard to the suggestion that articles 7, 10 and 11 should be combined, it should not prove difficult to eliminate article 7 and transfer its contents to articles 10 and 11 ; beyond that, any effort to combine the contents of articles 10 and 11 in a single provision would involve some very complex drafting problems.

14. Mr. BRIGGS said that certain provisions of article 7 should be retained, in particular those on the authentication of the text of a treaty by signature or by incorporation in the final act of the conference at which the text was adopted or in a resolution of an international organization ; so should some of the provisions of article 11.

15. On the other hand, he doubted the usefulness of article 10. Paragraph 1 of the Special Rapporteur's revised text was of an expository character ; it was more suited to a code than to a draft convention and should be dropped.

16. He was not entirely clear as to the significance of the opening words of paragraph 2, " Subject to articles 12 and 14 ". In paragraph 2 (a), the use of the word " unconditional " made the provision ambiguous : it could be taken as meaning that reservations were precluded or that ratification could not be reserved. With regard to paragraph 2 (b), he could see no special advantage in conferring retroactive effect on a signature *ad referendum* when it was subsequently confirmed. Moreover, he doubted whether signature *ad referendum* and initialling were sufficiently important to merit separate provisions, as in paragraphs 2 (b) and 3.

17. Care should be taken to avoid any suggestion that a signature could be subject to ratification; it was the instrument, the draft treaty, not the signature, that was subject to ratification.

18. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the last remark. However, it was quite common for a treaty not to be subject to ratification, but for a State, on signing the treaty, to make a reservation regarding ratification. Since the practice was quite common, the gap in the Commission's draft should be filled.

19. Mr. LACHS said his views were similar to those of Mr. Briggs.

20. He was in favour of combining articles 10 and 11 in a single article; elements omitted from the new article could then be transferred to article 7. With that rearrangement, there would be two sets of provisions, the first dealing with signature and its legal effects, the second with authentication and initialling.

21. Article 10 covered, in a single set of provisions, the three functions of signature, initialling and authentication. Its provisions consisted largely of descriptions and did not specify the legal effects; hence they served practically no useful purpose.

22. Article 10 drew a distinction between two classes of initialling; one was assimilated to signature, while the effects of the other did not go beyond authentication. He suggested that the provisions on the first class should be included in the article on signature and those on the second in the article on authentication.

23. The structure of the Special Rapporteur's revised text could give rise to a number of difficulties. The proposed title would tend to weaken the article because it referred to signature and initialling of the text, instead of signature and initialling of the treaty itself. Another defect was the opening phrase of paragraph 2, which made the provisions of that paragraph conditional on those of articles 12 and 14; that proviso was not justified because the paragraph did not refer to legal effects, but merely described certain functions and labelled them accordingly.

24. He would like to have a more substantive article on signature, which, while descriptive, would at the same time cover the legal effects; there should be a separate article on authentication, incorporating some of the elements of the present article 7.

25. Mr. CASTRÉN thought that the Commission should first discuss articles 7, 10 and 11 one by one, beginning with article 10. It would then be able to judge whether they could be combined, for each article contained some elements that should be retained; the Drafting Committee could be entrusted with that task. As redrafted by the Special Rapporteur the articles were clearer and more concise; governments had made few comments on them, so it could be concluded that they were satisfied.

26. On article 10, four governments had submitted comments. Their criticisms were certainly justified in several respects, and to meet them, the Special Rapporteur had almost completely recast the text. The new version had the advantage of being less descriptive and

more concise than the former one. He was not sure that the title of the article should be changed as the Special Rapporteur proposed. It was usual to speak of the signature of a treaty, not of the signature of its text, and according to the new draft, initialling could sometimes have the same legal effect as signature. If the title was to be changed, it should become "Signature and initialling of the text of the treaty". The words "of the treaty" would also have to be added after the word "text" in the first line of paragraph 1, and the words "a related instrument" in the same paragraph would have to be amended to read "an instrument related to the treaty".

27. He approved of the inclusion of the words "Subject to articles 12 and 14" at the beginning of paragraph 2. In paragraph 2 (b) the word "unconditional" seemed rather ambiguous. Moreover, instead of referring only to "signature *ad referendum*", if and when confirmed", the meaning of signature *ad referendum* should be explained, as had been done in the 1962 draft.

28. With regard to paragraph 3, he proposed that the words "instead of being signed" in sub-paragraph (a) should be deleted, since initialling or signature were not generally alternatives; in most cases initialling was followed by signature. Sub-paragraph (a) (i) was acceptable, but with the addition of the proviso "unless the contrary is stated", since practice was not uniform in all countries. If that addition were not made, sub-paragraph (b) should be linked to sub-paragraph (a) (ii).

29. Mr. AGO thought that, to find a way out of the difficulty, the Commission must choose between two systems: the descriptive system, which was that of article 10—a remnant of earlier drafts that had preceded the Special Rapporteur's—and the substantive system, which would concentrate on the force of the acts and their legal effects and would not retain much of the existing article 10.

30. The two essential legal effects which should be mentioned were, first, authentication, which consisted in establishing that the text adopted was considered to be definitive and *ne varietur*, and which could take place by signature pure and simple, by signature *ad referendum*, by initialling or by insertion in a final act or resolution; and secondly, establishment of the final consent of a State to be bound by a treaty; in some cases that function would be performed by signature, in others an act of ratification, acceptance or approval would be required.

31. In his opinion the Commission should take article 11 as a basis for drafting another article embodying the essential points of articles 7 and 10, to be placed earlier in the draft. Unlike Mr. Lachs, however, he thought the logical order would be to place authentication before the provision that signature could, in certain cases, express the consent of a State to be bound by a treaty.

32. Mr. PESSOU said there were certain discrepancies in the text which led him to oppose article 10.

33. With regard to the question whether the essential element was signature or ratification, he reminded the Commission that sometimes, when a Head of State

or Head of Government had signed a convention, the legislative organs of the government refused to ratify it. Consequently, he thought ratification was the more important, since it alone produced legal effects. It was true that paragraph 1 of draft article 10, as adopted by the Commission, provided that where the treaty had not been signed at the conclusion of the negotiations or of the conference, the States participating might provide that signature should take place on a subsequent occasion, or that the treaty should remain open for signature either indefinitely or until a certain date; and according to paragraph 3 (b), the State concerned became a signatory of the treaty on the date of signature. He was convinced, however, that the real date was the date of ratification.

34. The right to become a party to a treaty did not really correspond to a precise legal concept; it was not because one State invited another State to participate in a conference at which a treaty was drawn up that the latter had the right to become a party. Signature certainly had some effects, but they were provisional. It was possible that between the time when the text was drawn up and the time when the treaty was finally concluded, reservations or other circumstances might oblige the State to revoke the signature already appended. Thus effective participation resulted not from the signature, but from the final ratification which brought the treaty into force.

35. Mr. ROSENNE said the Special Rapporteur's introduction had been most illuminating. In his own practical experience, he had been struck by the fact that the distinction between signing and initialling a treaty, or even signing it *ad referendum*, very often had political rather than legal implications. It was often difficult to determine the exact legal significance of the political nuances.

36. On the general approach to article 10, his views were very close to those of Mr. Ago. As to the title, the difficulties that had arisen could perhaps be avoided by adopting the very short title "Signature and initialling".

37. Mr. TUNKIN said that articles 7, 10 and 11 were examples of provisions containing descriptive elements and unnecessary detail. Those provisions should be simplified, the descriptive material eliminated and the contents couched in terms suited to legal norms.

38. What had to be formulated was a residuary rule on the legal effects of the acts of authentication, signature and initialling. It should be a residuary rule because practice varied widely. Signature and initialling could perform many functions and, as indicated by Mr. Rosenne, certain nuances were sometimes more political than legal in character.

39. He supported Mr. Lachs's suggestion that articles 10 and 11 be combined. In the introductory paragraph to the new article, it might be appropriate to make a proviso to the effect that the rules therein set out applied unless otherwise agreed by the States concerned, or unless otherwise provided by the rules of the international organization concerned.

40. The structure of articles 7, 10 and 11 should reflect the various stages in the treaty-making process. The

first of those stages was the authentication of the text. The other stages were initialling and signature, which in many cases overlapped.

41. It was desirable to avoid laying down any very rigid rules on signature and initialling. The only legal rule in the matter, and one which was well worth stating in the draft articles, was that if a treaty did not provide for ratification, signature constituted the final act by which a State established its consent to be bound by the treaty. The statement of that rule should be followed by a provision on the legal effects of signature *ad referendum*, which was an exception to the rule.

42. For the sake of elegance in drafting, the provisions on initialling could be made the subject of a separate article. In international practice, initialling performed a number of different functions, but he had some misgivings over the statement in paragraph 3 (a) (i) of the revised text that initialling by a Head of Government or Foreign Minister was to be considered as the equivalent of signature. That was not always the effect, so that the provision did not accurately reflect existing practice.

43. The rule should be stated in very cautious terms and should express the idea that initialling could be equivalent to signature or constitute authentication, as the parties might agree; he did not think it was possible to go further.

48. Article 7 was not absolutely indispensable, but in order to trace out all the stages of the conclusion of a treaty, it would be useful to include in the draft articles some provisions on the authentication of the text; but they should not go into undue detail.

49. Mr. REUTER said that, after long hesitation, he had come to the conclusion that the Special Rapporteur's proposals should be taken as the basis for discussion.

50. If the Commission was to be logical, it must recognize that once the clauses constituting rules of international law had been removed from articles 7, 10 and 11 very little would be left; it would therefore be wise not to carry pruning too far.

51. Mr. Ago had mentioned two methods, one functional and the other formal. If the second method were adopted, the Commission must consider only the acts of initialling, voting and signing, and describe them.

52. If the functional method were adopted, it would be necessary to consider what were the main functions in international law. The first was that of establishing the substance of the treaty: it was "authentication", a convenient term, but one which, in French, applied only to a document and not to its substance. The second was that by which a State expressed its genuine, though provisional, will to be bound. The third was that by which the State in fact bound itself. Sometimes a long procedure comprising the three functions was used, but there was also a shorter procedure comprising only the first two, and a very short procedure in which the three functions were reduced to a single act.

53. The Special Rapporteur had adopted the functional method, by dealing first with authentication, and then the organic method. His solution was not extremely satisfactory from the intellectual point of view, but it

was the most practical, and he (Mr. Reuter) supported it, though still convinced that the drafting should be simplified as much as possible.

54. Mr. TSURUOKA said that Mr. Reuter had put his finger on the source of the Commission's difficulties. In the articles under discussion the Commission referred to authentication, signature and ratification, but at the same time to initialling. And whereas "authentication" designated the result to be achieved, the acts of initialling and signature were not accompanied *ipso facto* by their results. Thus there was an inconsistency of expression that was intellectually unsatisfactory. He hoped that the Drafting Committee would overcome that difficulty in the choice of words.

55. With regard to the method of work, since nearly all the members of the Commission were in agreement on the substance of the three articles, their examination would probably prove more fruitful after they had been recast by the Drafting Committee.

56. Mr. PAL said that all the matters under consideration had been discussed in 1962 when the text of articles 7, 10 and 11 had been adopted. One of the great difficulties was that several different acts were involved and their effects sometimes overlapped.

57. He could support Mr. Ago's suggestion on the understanding that the content of articles 7, 10 and 11 would not be materially affected. Nothing material should be added to or taken away from the substance of those articles; they should merely be rearranged, with a view to minimizing the extent of overlapping of the legal effects of the several acts involved.

58. Mr. YASSEEN observed that the opinions of members of the Commission were converging on a new draft. The articles raised no new question of substance; the rules they laid down were generally correct and faithfully reflected the practice; but there was a feeling that they should be drafted differently, omitting a number of details.

59. He had some doubts, however, about the rule laid down in the Special Rapporteur's revised text of article 10 concerning initialling by Heads of State, Heads of Government and Foreign Ministers. He did not believe there was any such rule in positive international law. From a logical point of view, he could not regard it as a reasonable interpretation of the act; if a President, a Prime Minister or a Foreign Minister really wished to sign, he would do so; if he merely initialled, it was because he wished to do something other than sign. Hence that rule should not be retained.

60. Mr. AGO thought it important for the Commission to choose between the two methods referred to by Mr. Reuter, for it would not be able to produce a clear text by trying to combine them. And if an unclear text was submitted to a diplomatic conference, it was to be expected that it would give rise to prolonged discussions and that its chances of acceptance would be jeopardized. As the Special Rapporteur and Mr. Reuter had pointed out, the problem was a difficult one, but that was an additional reason why the Commission should try to solve it itself.

61. If the Commission thought it more convenient to deal with the various acts one after the other by the descriptive method, stating the conditions under which they took place and their effects, it should start with initialling and acts having the same effect, then take signature and then ratification and similar acts. If it preferred the functional approach, which meant considering the legal effects of the acts, it should deal first with authentication and then with establishment of the final consent of the State.

62. With regard to substance, he found little to eliminate from articles 7 and 11, but he would be tempted to shorten article 10 considerably.

63. The Drafting Committee ought to be able to produce a satisfactory text, but the Commission should first give it instructions on the method to be followed.

64. Mr. REUTER said he did not wish to divert the Commission's attention from Mr. Ago's question, but he had a brief comment to make on the matter of initialling by a Head of State or Government. In fact, a Head of State did not initial a document, for only the solemn act of signature was consistent with the dignity of his office. If a series of documents were annexed to a treaty, however, a Head of State might sign the principal document and merely initial the others. Initialling was then obviously equivalent to signature. But in his opinion that was the only case in which it could be said that initialling by a Head of State was equivalent to signature.

65. The CHAIRMAN, speaking as a member of the Commission, said that the Commission had two tasks: to draw up a text and to set out international obligations. The Drafting Committee should take good care to distinguish between those two tasks.

66. As to the method to be adopted, the Commission should decide whether it wished to propose only norms having legal effects or whether it wished to add some interpretative norms to clarify certain legal ideas.

67. Interpretative norms also had direct legal effects, and it was dangerous to rely entirely on judges to draw inferences from the norms which established obligations and rights. There were general principles and ideas that ought to be defined. Experience showed that most of the difficulties which arose in the application of international law were due to the fact that certain institutions were not well defined. Too much latitude was left to case-law. The judgements of international courts showed great differences in the understanding and interpretation of certain ideas.

68. As to the distinction the Special Rapporteur proposed to make in paragraph 3 of article 10, according to the office of those who appended their initials, he agreed with Mr. Reuter that a Head of State rarely confined himself to initialling a treaty. Nevertheless, he had known cases of that kind in which it had even been provided that the treaty should take effect immediately, without subsequent confirmation. That applied to certain instruments concluded at conferences of Heads of State.

69. With regard to paragraph 3(b) of the revised text, he pointed out that a very important instrument, which had preserved peace by settling the relations between

Italy and Yugoslavia, namely, the London Memorandum of Understanding regarding the Free Territory of Trieste,² had been merely initialled by the ambassadors of the countries concerned, who had been duly authorized to make a settlement. The instrument had taken effect immediately, with an indication that the governments would confirm the agreement thus concluded. That example showed that it was dangerous to give definitions which were too categorical. Mr. Tunkin had been right in saying that the Commission should try to draft residual rules, because the practice was very varied.

70. Without making any formal proposal for the moment, he would urge the Commission to settle the question of method in regard both to the order of the provisions and to their substance, and in particular to decide whether the draft should only state rules of law or should also contain provisions of a descriptive character.

71. Mr. TUNKIN said that the difficulties should not be exaggerated. It was true that signature might have two different functions. When ratification was stipulated in a treaty, signature was a stage in its conclusion ; when there was no ratification, signature was the final act by which a State signified its consent to be bound. There was thus necessarily some overlapping, but for practical purposes the Special Rapporteur's method was quite acceptable.

72. Article 7 should come first ; articles 10 and 11 should be combined, giving priority to article 11, since it was concerned mainly with the legal effects of signature and initialling. The Drafting Committee could consider whether initialling and signature should be dealt with in the same article or in two separate articles.

73. Mr. CASTRÉN said that after hearing the comments of Mr. Reuter and the Chairman, he felt bound to express the view that it would be difficult to make a complete change of method at that stage. The Special Rapporteur had prepared texts based on practical considerations which had led him to combine two methods. The Commission had reached the second reading of its draft and had already made a choice. It had, for example, adopted the definition of a " treaty " in principle ; for as the Chairman had pointed out, it was impossible to omit all definitions from the draft. Furthermore, it had referred article 5, which was an entirely descriptive article, to the Drafting Committee ; it should be noted that those who were asking the Commission to choose a new method had supported article 5. He therefore urged the Commission to continue on the lines it had followed up to the present.

74. Mr. LACHS, referring to initialling, said that after meetings between Heads of State the document issued sometimes took the form of a declaration and sometimes that of a communiqué. Some such documents were initialled and not signed. The question of initialling was one of substance and should not be disregarded.

75. The Drafting Committee should be asked to prepare a new text, which might consist of three articles or of two, on authentication, initialling, and signature ; it should then submit a report on the subject.

76. Mr. AGO said he had no wish to provoke a long discussion on method. Personally, he could accept Mr. Tunkin's proposals. If the Commission referred the three articles to the Drafting Committee, with instructions to draft two articles on the basis of articles 7 and 11, adding to one or the other of them what ought to be retained of article 10, the Committee would probably be able to find a satisfactory solution. What would be incongruous would be to add an article on initialling, when authentication had been dealt with in article 7. The Commission would certainly find it useful to resume its discussion on the basis of the more elaborate text which the Drafting Committee would submit to it.

77. Sir Humphrey WALDOCK, Special Rapporteur, said he would not take up the specific points made on article 10, since it was clear that the article in its existing form would disappear.

78. With regard to the method to be followed, he did not think that in drafting a codifying convention there was any reason to exclude one method altogether in favour of the other ; nor did he think that there would be any great difficulty in arriving at the kind of result which members of the Commission appeared to desire.

79. Articles 7 and 11 should be retained ; anything that ought to be retained of article 10 could be incorporated in article 11 or perhaps partly in article 7. He agreed that, provisionally at all events, there was no case for a special article on initialling ; the point could be covered in article 7 or in article 11.

80. It was certainly somewhat unusual for a Head of State to initial a document with the idea that it would afterwards be referred to someone else for investigation. But on a point of that kind it was wise to be very cautious, and his new draft was rather too strongly worded. It might be better to treat both forms of initialling—by superior organs of the State, or by one of the lesser representatives—as essentially a matter of intention, in which case the only question was whether a residuary rule was required to cover cases in which the intention had not been made clear. The matter was not purely procedural ; it could be vitally important in establishing whether a State was bound by a treaty or not. The Commission would have noticed that governments had not opposed the idea of a residuary rule.

81. He suggested that articles 7, 10 and 11 should be referred together to the Drafting Committee for reformulation in the light of the discussion.

*It was so agreed.*³

ARTICLE 12 (Ratification)

Article 12 *Ratification*

1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in paragraph 2 below.

2. A treaty shall be presumed not to be subject to ratification by a signatory State where :

³ For resumption of discussion on article 7, see 811th meeting, paras. 95-103. For resumption of discussion on article 11 (incorporating article 10), see 812th meeting, paras. 1-34.

² United Nations *Treaty Series*, Vol. 235, p. 100.

(a) The treaty itself provides that it shall come into force upon signature;

(b) The credentials, full powers or other instrument issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty, without ratification;

(c) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(d) The treaty is one in simplified form.

3. However, even in cases falling under paragraphs 2 (a) and 2 (d) above, ratification is necessary where:

(a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

(b) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(c) The representative of the State in question has expressly signed "subject to ratification" or his credentials, full powers or other instrument duly exhibited by him to the representatives of the other negotiating States expressly limit the authority conferred upon him to signing "subject to ratification".

82. The CHAIRMAN invited the Special Rapporteur to introduce his proposals for the revision of article 12 (A/CN.4/177).

83. Sir Humphrey WALDOCK, Special Rapporteur, said that the question whether a treaty was to be considered in principle to be subject to ratification unless a contrary intention was disclosed, or whether the rule was the reverse, was a great subject of controversy in legal literature, in the Commission and among governments. The 1962 draft really satisfied no one, since even the majority in favour of stating the general principle did not approve of the way in which the paragraphs were arranged. However, if that majority view was accepted, the question of formulating the limits to the rule still remained.

84. Moreover, although in 1962 the Commission had undoubtedly been right to recognize the importance of treaties in simplified form and the significant role they played in reducing the importance of the article, it had perhaps been over-optimistic in thinking that such treaties could be defined—as they were in article 1 (b)—without producing either an unsatisfactory definition or one that begged the question of ratification.

85. Article 12 had been fairly strongly criticized by governments. Some disagreed with the basic rule, others wished the presumption to be reversed. The Government of Israel wanted the Commission to state the law pragmatically, without taking up a position; most governments wished the article to be simplified; some took exception to the concept of treaties in simplified form. It was therefore clear that the drafting would have to be modified considerably; at the next meeting he would submit a paper giving, in consolidated form, the various proposals on article 12 which he had made in his report.

86. The Commission had to make up its mind either to lay down a basic residuary rule or to dispense with it, if it could set out in intelligible form the circumstances

in which, in principle, ratification was or was not required. If the Commission preferred to state a rule, then it must decide whether to do so in the form used in the existing text—"Treaties in principle require ratification"—or in the opposite form.

87. Again, did the Commission still wish to use the concept of treaties in simplified form as an element in the drafting? His view was that it should no longer do so; in his new proposal he had used the formula "unless a contrary intention appears from the nature of the treaty . . .", which did not exclude treaties in simplified form, since it allowed recourse to the form of the treaty as an element, but on the other hand did not specifically state that there was a distinct concept in international law of treaties in simplified form.

88. The CHAIRMAN observed that it would be very dangerous for the Commission to take into consideration only the opinions expressly stated by Governments. Only about twenty Governments had commented, so it could not be concluded that the others did not approve of the articles or were at least indifferent. Thus the Commission could not compile statistics of the opinions received, but it should weigh them and give an opinion on the arguments put forward.

89. Two major questions of principle arose in connexion with article 12. The first was whether the requirement of ratification should be the general rule or the exception, in which case the wording would have to be reversed. The second question, which was equally important, related to the concept of a treaty in simplified form. In 1962, the Commission had taken the view that the non-requirement of ratification could be linked with that question of form.

90. Sir Humphrey WALDOCK, Special Rapporteur, said he endorsed what the Chairman had just said. It was hard to decide how much weight should be attached to the absence of comments by a government, or to the absence of comment on a particular article when a government had commented on others. As Special Rapporteur, he had considered that the only course was to take the expressions of opinion generally into account, but to treat every suggestion on its merits. It should be remembered that a point made by only one government might later be seen by others to be significant and might thus sway opinion at a conference.

91. Mr. TABIBI said that the Commission should not conclude that governments took no interest in the articles simply because relatively few of them had submitted comments.

92. Article 12 dealt with a most important stage in the conclusion of a treaty, since it marked the point at which the treaty came to life. It was particularly important for the new nations, which needed all the stages from negotiation to ratification to allow time for reflection. Most of the comments received had been from Europe, where States were better equipped to answer quickly.

93. In view of the increasing importance of treaties in simplified form, he thought that the Commission should define them. He would await the Special Rapporteur's text before giving his views at length.

94. Mr. REUTER said that after a superficial reading of the article he had come to the conclusion that the Commission could not propose a text of that kind. The article was so worded as to determine, not the cases in which a treaty was or was not subject to ratification in general, but the cases in which a treaty was or was not subject to ratification by one of the signatory States. Thus the Commission recognized in the article that a treaty could be subject to ratification by one State, but not by another—which was in conformity with practice. Consequently, it could not lay down a rule of general international law on the subject, since it recognized that it was governed by constitutional law.

95. The problem was to determine the conditions under which the representative of a State could consider that the treaty he had signed was or was not subject to ratification by another State. That was the problem the Commission had tried to solve by the parallel provisions of paragraphs 2 and 3 of article 12, which it had drafted in 1962. Personally he thought that, in the absence of any other indication, and more or less as a last resort, the form of the treaty could perhaps be taken as the criterion. If the Commission went further, it would greatly embarrass governments which, in practice, did not like to be explicit on that point and preferred to keep their constitutional law rather flexible in order to meet the needs of international life.

96. If the Commission laid down a rule, whatever it was it would embarrass governments. It would be better to lay down principles according to which each contracting State could interpret the position of the other contracting States. He would support the majority view, but he thought that if the Commission departed from that approach, it would rule out the mixed cases in which the same treaty was subject to ratification by one State and not by another.

97. The CHAIRMAN, speaking as a member of the Commission, said there had been an agreement concluded between France and Yugoslavia, which illustrated Mr. Reuter's point. Since in Yugoslavia every treaty was subject to ratification, that agreement had entered into force by an exchange of very dissimilar instruments: Yugoslavia had produced an instrument of ratification, and the Ministry of Foreign Affairs of the French Republic had produced a declaration to the effect that under the rules of the Constitution and in accordance with practice, ratification by France was not necessary for entry into force.

98. It was probable that many Governments had not reached a decision in the matter and that many others still thought that the need for ratification depended on the denomination of the instrument. In the United States, however, it was solely the content of the agreement which determined whether it was subject to ratification. Some treaties were considered to be "executive agreements", while a mere exchange of notes was sometimes subject to a formal act of ratification. In his view, it was not the form but the substance which should decide whether ratification was necessary or not.

The meeting rose at 1 p.m.

784th MEETING

Friday, 14 May 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pesou, Mr. Reuter, Mr. Rosenne, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the Agenda]

ARTICLE 12 (Ratification) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 12.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, as promised at the previous meeting, he had prepared a consolidated text showing the changes he proposed in article 12; it read:

" Paragraph 1

ALTERNATIVE A

1. A treaty in principle requires ratification by the States concerned unless

(a) The treaty itself provides that it shall come into force upon signature or specifically provides for a procedure other than ratification;

(b) A contrary intention appears from the nature of the treaty, the form of the instrument or instruments in which it is embodied, the terms of instruments of full powers, the preparatory work of the treaty or the circumstances of its conclusion.

ALTERNATIVE B

1. A treaty requires ratification where

(a) The treaty itself expressly contemplates that it shall be subject to ratification;

(b) The intention that it shall be subject to ratification appears from the nature of the treaty and the form of the instrument in which it is embodied, the terms of the representatives' instruments of full powers, the preparatory work of the treaty or the circumstances of its conclusion.

Paragraph 2

2. Among the circumstances which may be taken into account under paragraph 1 (b) is any established practice of the States concerned in concluding prior treaties of the same character between themselves.

Paragraph 3

3. Notwithstanding anything in the foregoing paragraphs

(a) Unless a treaty expressly provides that it shall be subject to ratification, a particular State may consider itself bound by its signature alone where it appears from

the terms of the instrument of full powers issued to its representative or from the preparatory work of the treaty that the other States concerned were informed that its signature was intended to be binding without ratification.

(b) Unless a treaty expressly provides that it shall come into force upon signature, a particular State may consider the treaty as subject to ratification by that State, where it appears from the terms of the instrument of full powers issued to its representative, or from the preparatory work of the treaty, that the other States concerned were informed that its signature of the treaty was intended to be conditional upon a subsequent ratification."

3. Alternative A for paragraph 1 followed the lines decided on by the Commission at its fourteenth session. It simplified the text then adopted¹ and made no reference to treaties in simplified form as a separate concept of international law.

4. Alternative B stated the reverse position, in case the Commission should feel that the rule was better phrased in that way. He had explained his reasons in paragraphs 4 and 5 of his observations on article 12 in his report (A/CN.4/177).

5. Paragraph 2 arose out of the comments by the Danish and United States Governments on constitutional practices and was explained in paragraph 7 of his observations.

6. Paragraph 3 dealt with a material point which was more difficult to formulate as a general rule, namely, the case in which a treaty was negotiated subject to ratification by one of the parties, whereas the other parties were bound by a simple signature. The paragraph was an attempt to formulate a provision covering that practice.

7. Mr. TSURUOKA said he would try to answer the two main questions put by the Special Rapporteur at the previous meeting concerning article 12.

8. The Special Rapporteur had first asked the Commission to decide what it wished the presumption to be where a treaty contained no express provisions on ratification: that the treaty entered into force without ratification, or that it entered into force only after ratification. His own impression was that the question was of little practical importance; disputes rarely arose on that point and they would probably become even rarer in the future. For while it could happen, when a bilateral treaty was concluded, that both parties forgot to include provisions on entry into force, in the case of multilateral treaties, which were now the commonest, the more parties there were, the more likely it was that at least one of them would think of raising that question.

9. From the theoretical point of view, the question was more one of interpretation. It was a case in which the will of the parties must be ascertained, since the fundamental rule was that it was the parties which must decide the conditions for entry into force of the treaty.

10. Where the parties had not expressed their will, the traditional solution was that the treaty would enter into force only after ratification. That solution certainly promoted the security of international transactions;

but according to another theory there was a presumption in such cases that signature sufficed to bring the treaty into force. That theory also had the considerable advantage of increasing the effectiveness of diplomatic activity.

11. In view of the uncertainty of practice and doctrine, if the Commission chose between those two opposite theories it would be developing rather than codifying international law. But the progressive development of international law called for much caution and reflection. The Commission must be sure that it was advisable to make a choice one way or the other.

12. It was also necessary to consider the effectiveness of the rule to be chosen. In speaking of the effectiveness of a rule of international law he was thinking mainly of the number of countries that would accept it; if the number was too small, the rule would not be applied widely enough and would therefore not be very effective.

13. Instead of trying to settle the question by laying down a rule of legal interpretation, it would be better to adopt a strictly practical viewpoint and deal only with what was essential. The Special Rapporteur had said at the previous meeting that if the Commission did not take a position on the matter it would be difficult to arrive at a reasonable form of words. But in fact, if the Commission refrained from taking a position and decided to treat the question as one of interpretation, its task would become much easier and the Drafting Committee would certainly find a suitable formula.

14. If it was recognised that it was only a question of interpretation, the simplest course might be to refer to the articles on the interpretation of treaties and to consider whether some particulars concerning ratification should be added to them.

15. The second question he wished to refer to was whether treaties in simplified form should be mentioned. There, too, the problem became easier if it was treated as one of interpretation. In the case of a treaty not in written form, the form itself suggested that the treaty would enter into force without ratification. At least there was a very strong presumption to that effect.

16. Mr. ROSENNE said he had stated his position on the principle and on some aspects of the drafting at the 646th, 660th and 668th meetings;² at the 668th meeting he had felt it necessary to express his complete dissent from the article (then article 10) as adopted. Despite careful consideration of the whole problem, his general position remained unchanged.

17. It was quite clear that, from the point of view of doctrine and of State practice, the same weight could be attached to either theoretical approach. It would therefore be necessary for the Drafting Committee to produce a text which attracted the maximum support and preserved a balance between the two doctrinal points of view. That was probably what the Government of Israel had had in mind when it had said that it was essentially for the negotiators to establish whether ratification was necessary or not, and that the question of ratification might itself be part of the negotiation, or be conclusively determined by the terms of the full

¹ See 783rd meeting, following para. 81.

² *Yearbook of the International Law Commission, 1962, Vol. I.*

powers of one or both of the negotiators (A/CN.4/175, section I.9, para. 13). It was always necessary to establish in a concrete case, whether ratification was necessary and by whom. That idea appeared in paragraphs 2 and 3 of article 12 and was left untouched in principle in the Special Rapporteur's new proposals. Mr. Tsuruoka had gone to the heart of the matter by referring to the question of interpretation.

18. A very important point had been raised by the Danish Government regarding the relevance of the constitutional practice of individual States (A/CN.4/175, section I.7). It was a point which might cause trouble and misunderstanding in practice and it would be useful if the Commission could establish the rule on the lines proposed by the Special Rapporteur in paragraph 2 of his new text. The very existence of the problem played havoc with the abstract doctrinal approach evident in the phrase "a treaty in principle requires ratification".

19. In view of the difficulty of defining treaties in simplified form, he had no objection to an attempt being made to draft the article without referring to them in so many words. It must be remembered, however, that the inclusion of the notion of treaties in simplified form in the 1962 draft had been a central part of the compromise solution.

20. If a definition of ratification were still thought necessary, it should in substance remain as it was in article 1, paragraph 1 (*d*) (A/CN.4/L.107), but he would prefer it to be incorporated in article 12.

21. Then there was the question of the "orientation" of the article, a term he preferred to "residual rule". He preferred alternative B, but hoped it would not be necessary to choose between the two alternatives by a formal vote.

22. Since the question was largely one of theoretical and doctrinal controversy, he hoped it would be possible, without a lengthy debate, to refer the article to the Drafting Committee, which should be given a very general directive to evolve the least controversial text it could, emphasizing practical requirements. The Drafting Committee should begin by listing the situations in which ratification was required and those in which it was not required. The real problem would be how to deal with what remained after the list had been made. If necessary, there could be a debate when the Drafting Committee reported back.

23. Mr. CASTRÉN said that the article on ratification which the Commission had adopted in 1962 was defective in several respects. In trying to work out a compromise, it had drafted a provision categorically requiring ratification in cases where the treaty was silent on the subject, and not even distinguishing between treaties of different kinds. But it had been obliged immediately to mention numerous exceptions, some of which were in turn subject to certain exceptions. It was not surprising, therefore, that nobody was really satisfied with the article, particularly where its drafting was concerned; that was clear from the comments submitted by governments and seemed to be the general opinion of the members of the Commission.

24. Of the two alternatives proposed by the Special Rapporteur for paragraph 1, he preferred alternative B,

which was more neutral inasmuch as it merely enumerated the cases in which a treaty required ratification, either because the treaty itself expressly provided for it or because there was a presumption that that was the intention of the parties. In accepting that alternative the Commission would not, he thought, be opting in favour of the principle that ratification was not necessary, for the formula proposed in the text was applicable to a large number of treaties, including the most important ones.

25. Another advantage of that formula was that it could hardly be construed as an attempt to settle the problem of ratification through internal law. As had been pointed out at the previous meeting, every State had the sovereign right to lay down the conditions for ratification in its constitution. But if the treaty itself provided, either expressly or by implication, that it needed to be ratified, or if it appeared from the circumstances in which it had been concluded that the parties had intended it to be ratified, then all the States concerned were bound at the international level by that fact or by that presumption of law and could not demand that the treaty should enter into force until all the formalities of ratification had been completed, both at the internal and at the international level. Thus it seemed that alternative B contained all that need be said about ratification; no purpose would be served by going further and giving detailed rules for a few special cases.

26. Consequently, he could not support the paragraph 2 which the Special Rapporteur had proposed in response to the suggestions made by the Governments of Denmark and the United States of America. If the Commission accepted the idea expressed in that paragraph, it should incorporate it in the preceding paragraph.

27. Nor did he approve of the paragraph 3 proposed by the Special Rapporteur to meet the other points made by the Danish Government. It only repeated the principal rules stated in paragraph 1 (*b*). The only new element was that the other States concerned had to be "informed" that it was the intention of a State to be bound, either as soon as it signed the treaty, or only subject to subsequent ratification. In particular, subparagraph 3 (*a*) was not much use, for if a State considered itself bound by its signature alone, that was its own business, and the other States concerned could only be gratified at not having to wait for ratification.

28. As to the question whether it was necessary to reconsider the definitions of a "treaty in simplified form" or of "ratification", he thought it would be hard to improve on the definitions adopted. Treaties in simplified form varied so much that there were no common criteria applicable to them; that was probably why, in 1962, the Commission had merely cited a few examples without giving any real definition. As the text proposed by the Special Rapporteur did not expressly mention such treaties, a definition was not necessary for the moment. The definition of ratification adopted in 1962 was not complete either, but in view of the purpose of the draft he thought it was sufficient to emphasize, as was already done, that the act by which a State expressed its consent to be bound by a treaty was performed on the international plane.

29. Mr. YASSEEN said that the main reason why the wording of article 12 was rather cumbersome was that it was based on a distinction between formal treaties and treaties in simplified form. If that distinction was abandoned it should be possible to arrive at a satisfactory formula.

30. He approved of the general arrangement of the revised version submitted by the Special Rapporteur. For paragraph 1 he preferred alternative A, because he was convinced that the general rule in international law was that ratification was necessary for a treaty's entry into force. There was no denying that many treaties entered into force upon signature alone, but if the importance rather than the number of treaties was considered, it would be found that all treaties which were important to States were subject to ratification. Hence the fundamental interests of States should be safeguarded by laying down the general principle applicable where a treaty did not expressly provide that ratification was necessary.

31. However, in view of the modern tendency to simplify the formalities of treaty-making, it was well to provide for exceptions to that principle. To be able to state that a treaty did not require ratification, it was necessary first to refer to the text of the treaty itself. If the text contained no express provision on the subject, the general method of interpretation formulated by the Commission in articles 69 and 70 could be applied, which meant that elements extrinsic to the text of the treaty would be taken into consideration.

32. Paragraph 1 (b) was open to question because of the reference to the preparatory work of the treaty. For the preparatory work could not be the basis of an obligation binding the parties if the intention suggested by that work did not find some expression in the text of the treaty itself. That had been the finding of the Permanent Court of International Justice, which in its advisory opinion on the question of "Access to, or anchorage in, the port of Danzig, of Polish war vessels" had stated that "The Court is not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself."³ In its articles on the interpretation of treaties, the Commission had given the preparatory work a very minor role, and its provisions on ratification should be in keeping with those articles.

33. Paragraph 2 of the Special Rapporteur's proposal was sound and very useful. He would have preferred it to include a specific reference to constitutional requirements, but since that seemed likely to meet with objection, he thought the Commission could legitimately refer to "any established practice of the States concerned in concluding prior treaties of the same character between themselves"; for such practice was generally based on constitutional requirements.

34. With regard to paragraph 3 of the Special Rapporteur's proposal, he agreed with Mr. Castrén that sub-paragraph (a) had hardly any practical value.

Sub-paragraph (b), on the other hand, seemed to be justified, for in the case contemplated it was important for the State concerned that the other States should take account of the circumstances which showed that it was not bound by its signature alone.

35. Subject to those comments, he could accept the revised version of article 12, with alternative A, subject to review of the text by the Drafting Committee.

36. Mr. PAREDES said that the Commission, in its anxiety to produce a universally acceptable set of rules, should not resort to compromises that substantially altered the meaning of the articles; it should take account of theory and of doctrine. Accordingly, it should not let itself be bound by the views expressed by certain governments; its responsibility was to the world community. The number of replies received from governments was small in relation to the total number of States. Moreover they were far from unanimous, especially in regard to article 12. Nevertheless, as the Special Rapporteur had shown, the majority accepted the requirement of ratification as a basic principle.

37. It was important to bear in mind the significance of ratification in the constitutional law of different countries. In Ecuador, for instance, the process of ratification required action by the legislature; in accordance with democratic principles, no treaty could be ratified without its consent.

38. Admittedly, the modern trend was towards greater simplicity in treaty-making. But it was necessary to distinguish between treaties of major national importance, which in his view called for the full process of ratification, and treaties in simplified form. In modern times, the range of simplified treaties—which might be commercial treaties on a particular question, or cover such subjects as hard currency loans or economic aid—was so wide and so varied that ratification might seem too cumbersome a process.

39. Countries should therefore be encouraged to amend their constitutions, as indeed it was their duty to do whenever they subscribed to an undertaking within the United Nations. To encourage them, the position regarding treaties of the more important kind should be safeguarded by means of a proviso to the effect that ratification was necessary except where the internal law of the country did not require it. He did not think it wise to leave the matter to interpretation, since interpretation was always difficult and sometimes biased: it should only be resorted to when no other course was open.

40. He was in favour of alternative A, which also covered cases in which the treaty was silent on the question of ratification. It was true that it was open to States to depart from the general rule and to say that in a particular case a signature was sufficient and no ratification was necessary; but the rule should be formulated perfectly clearly, since otherwise there was some danger that a State might claim that such and such was the position, when in fact its constitutional law did not so provide. In his opinion a treaty concluded in those circumstances would have no validity whatsoever.

³ P.C.I.J., 1931, Series A/B, No. 43, p. 144.

41. Mr. TABIBI said that, in the light of the discussion held in 1962,⁴ the Commission should accept the principle that ratification was required. However, both that discussion and the subsequent comments by governments showed that, if that principle were accepted, it would be necessary to provide for two exceptions, namely, treaties in simplified form and cases in which the parties agreed to dispense with ratification.
42. The rule and the exceptions must be stated clearly, for otherwise States might hesitate to accept the rule for fear that it might weaken the large number of treaties in force which had not been ratified.
43. A definition of treaties in simplified form was necessary. All that the Commission had done in 1962 had been to enumerate the types of treaty covered by that expression. Governments had also suggested that the article should be simplified.
44. He could support either alternative A or alternative B, provided that there was a clear reference in paragraph 1 (b) to treaties in simplified form.
45. There were many reasons why the general principle of the need for ratification should be accepted. Until the nineteenth century, the signature of the sovereign or of his representative had been regarded as sufficient to bring a treaty into force. In modern times, with the appearance of constitutional governments, it was necessary to respect the will of the people as expressed by the legislature, and that will was reflected in the requirement that a treaty should be ratified.
46. Mr. LACHS said that on the whole he agreed with the reasoning which had led the Special Rapporteur to redraft the article.
47. With regard to the question of treaties in simplified form, it should be noted that the number of such treaties was constantly increasing; indeed, they now represented an overwhelming majority of all the treaties and instruments signed by States. That created a new situation, and for purely practical reasons, the Commission should not let itself be tempted to establish any rule to the effect that ratification was required. Former principles were being abandoned and a new practice was developing.
48. In the case of bilateral treaties there were four possible situations. In the first, both parties ratified; in the second, one party ratified and a signature sufficed for the other; in the third, one party ratified and the other adopted a process of "approval" as a substitute for ratification; in the fourth, both parties considered a treaty to be binding on them by signature only.
49. He agreed with Mr. Reuter that governments did not wish to be committed one way or the other. The Commission should express itself in favour of a principle of interpretation rather than a rule.
50. Alternative A should be dropped; but alternative B provided a basis for an acceptable draft.
51. He could also accept paragraph 2, apart from the words "between themselves": prior treaties of the same character, not necessarily concluded between the same parties might still be relevant for the purposes of that paragraph.
52. He had serious doubts about paragraph 3, on which he shared Mr. Castrén's view. Cases in which the signature alone established a binding obligation for the parties should be dealt with in article 10 and in the context of the whole issue of signature and its legal effects; article 12 should be confined to ratification.
53. Mr. TUNKIN said that the main problem was that of determining whether there existed in international law a rule that treaties required ratification. In 1962, the Commission had adopted a provision stating that in principle ratification was required; he himself had opposed that provision and he still believed that no such rule existed in international law.
54. Of the theoretical problems involved, it might be appropriate to dwell briefly on that of the modes by which the will of a State was expressed and what relevance they had in international law. In practice, ratification was one of the modes of expressing a State's final consent to be bound by a treaty, but it was not the only one. It was for the constitution of each country to determine by whom the final consent of the State could be expressed and in what form. In current practice, many treaties were concluded merely by ministers and he did not believe that international law could prescribe to States the manner in which they might express their will to be bound by a treaty. It was for States themselves to decide through which organ, when and how they wished to express that will.
55. From the practical standpoint, it was a fact that the great majority of treaties being concluded at the present time did not require ratification and that not all those treaties were in simplified form; many were quite formal in character and had all the attributes of a treaty, both in form—under the definition adopted by the Commission—and in substance.
56. Hence, the Commission should not adopt a provision according to which States would be deviating from the requirements of international law if they concluded a treaty that was not subject to ratification. The Commission would come much closer to existing practice if it stated the rule that ratification was required only where the treaty itself stipulated that requirement. He therefore, favoured the Special Rapporteur's alternative B so far as paragraph 1 (a) was concerned. That text stated the main thesis that ratification was required where such was the will of the parties to the treaty.
57. In conformity with that same thesis, the text of paragraph 1 (b) should be simplified and reformulated so as to provide that manifestations of the will of the State or States concerned were to be considered relevant. The present text of alternative B was unduly complicated and attempted to discern a will of the State which had hardly been expressed at all; its vague formulation would be of no assistance in practice. He thought it would be advisable to confine paragraph 1 (b) to a statement that a treaty required ratification in two cases: first, where a representative's full powers limited his authority in that manner and, secondly, where all or some of the parties to the treaty stated that ratification was required where they were concerned. The provisions

⁴ *Yearbook of the International Law Commission, 1962, Vol. I, p. 100 et seq.*

of paragraph 1 would thus specify that ratification was required where the will of the States concerned was clearly expressed and not merely implied.

58. With regard to treaties in simplified form, they too might or might not require ratification, according to the will of the parties as clearly expressed by them. A statement of the rule along those lines would leave room for compliance with the requirements of internal law, in particular the requirement of parliamentary approval for ratification. It should be remembered that constitutional provisions on the subject varied from one country to another; a formulation such as he had suggested would enable representatives of States to act in accordance with national constitutions.

59. With regard to approval, he supported the view expressed by the Japanese Government (A/CN.4/175, section I.11) that it should be dealt with together with ratification and on the same principles. Many treaties signed by the USSR had been stipulated as entering into force on communication of approval by both parties. An examination of the various aspects of approval clearly showed that it could only be dealt with on the same basis as ratification; in fact, approval of a treaty might mean ratification by one country and approval by another, according to their respective constitutions.

60. Mr. de LUNA said he was largely in agreement with Mr. Lachs and Mr. Tunkin. One of the main difficulties arose out of the evolution of ratification, which had originated as a means of control by a monarch over the acts of his representative in an international transaction. Since the French Revolution, however, ratification had changed in character and had become a means of enabling parliaments to control the acts of the executive in treaty-making. It should be remembered that what a parliament did was to give its consent to ratification; it did not ratify a treaty signed by the executive, as was sometimes rather loosely stated.

61. Another point to be remembered was that it was not for international law to remedy imperfections in the internal organization of a State or the shortcomings of its government; nor was that possible, for if international law were to attempt to do so it would be interfering in the internal affairs of a State.

62. Some four-fifths of international obligations were at present contracted through instruments which were not subject to ratification. Consequently, the Commission could not state that ratification was required, as had been the case some thirty years ago. Nor could it state that ratification was not required. As Mr. Rosenne and Mr. Lachs had said, the Commission should avoid laying down any rule one way or the other, so as not to interfere with the development of international law on the subject, which was in process of evolution.

63. International practice provided many examples of delays in international relations due to the requirement of ratification and the need to obtain parliamentary approval. Faced with such problems, pragmatists in certain countries had found the empirical solution of calling a treaty an "executive agreement" and using the term "approval" instead of "ratification". By that simple change in terminology, they had succeeded

in avoiding the need for parliamentary approval. He could cite two well known examples of executive agreements concluded by the United States: the 1898 Peace Treaty with Spain⁵ and the 1940 agreement with Britain on the exchange of destroyers for bases.⁶ As executive agreements, those important instruments had not required to be submitted to the Senate, in accordance with the United States Constitution, for its consent to ratification by a two-thirds majority.

64. In the light of those developments, the Commission should adopt a purely practical approach. It could not go into the question of parliamentary control of governmental acts under the constitution of a State. During the French Third Republic, when the constitutional laws of 1875 had been in force, France had entered into between 4,000 and 5,000 treaties, the constitutionality of which under those laws had been disputed by French constitutional lawyers. Surely, a foreign State could not be expected to know more about the interpretation of the French constitution than French jurists themselves.

65. He accordingly supported the Special Rapporteur's alternative B. He also favoured the simplified language proposed by Mr. Tunkin, but had some doubts about the suggestion that the will of States should be expressly stated. The vast majority of international agreements were silent on the subject of ratification, but that was precisely because the States concerned did not wish to say anything: their object was to avoid having to comply with constitutional provisions requiring parliamentary approval for ratification. He therefore doubted whether it was advisable in practice to lay down the rule that States must declare their will in the matter expressly.

66. Mr. AGO said he gathered from the discussion that there was still some dissatisfaction with article 12. One of the reasons was that the question whether the consent of a State to be bound should be expressed by an act of ratification or by a signature depended on two kinds of law: international law and internal law. International law was involved in that the treaty itself might provide that it should be ratified; the need to ratify was then established, or at least confirmed, by an international agreement. Internal law might provide that a treaty should not bind the State until it had been ratified, or, on the contrary, that ratification was not required and that consent to be bound by the treaty was definitively expressed by signature.

67. Another reason was that alternative A contained the words "in principle". In his opinion those words were not appropriate: there were cases in which ratification was required and cases in which it was not, and they were determined either by international law or by internal law. Moreover, from the point of view of international law, it was not very wise to use the words "a treaty . . . requires ratification" since that requirement was normally established by internal law. It would be better to start with a phrase such as: "The consent of a State to be bound by a treaty is expressed by . . .".

⁵ *British and Foreign State Papers*, Vol. XC, p. 382.

⁶ *League of Nations Treaty Series*, Vol. CCIII, p. 202.

68. Lastly, the dissatisfaction felt by some members of the Commission also derived from their idea that it would be necessary to choose between two formulas: the treaty in simplified form or a more formal treaty. But the Commission was not called upon to express any preference or even to give the impression that, in its opinion, the future trend would be towards one form rather than another. Practice might well shift more and more towards the simplified form, but States might not wish to say so expressly, especially as the increased use of treaties in simplified form was sometimes due to a tendency on the part of the executive to try to increase the number of cases in which it could conclude treaties without ratification, which usually had to be authorized by the legislature.

69. How could the Commission get out of that difficulty? He approved of the substance of the Special Rapporteur's proposals, though he thought the Commission could express the same ideas in a slightly different way.

70. He would prefer an article in two paragraphs—or two articles—the first covering the case in which the treaty had to be ratified, the second the case in which signature was sufficient. The first paragraph would read:

“The consent of a State to be bound by a treaty is expressed by an instrument of ratification if

(a) the treaty itself expressly provides that it shall be ratified;

(b) the intention that it shall be subject to ratification appears from the nature of the treaty and from the form of the instrument in which the treaty is embodied;

(c) it appears from the full powers of the representatives of the State in question, from the preparatory work or from the circumstances in which the treaty was concluded, that the other States concerned were informed of that State's intention that the treaty should be subject to ratification.”

71. That formula avoided the pitfalls of the Special Rapporteur's proposal; it stressed that it was the State's consent which was expressed in that way, and thus also met the points raised by Mr. Reuter. It was in fact possible that some particular treaty might come into force on being ratified by one State and only signed by the other.

72. Paragraph 2, which was the counterpart of paragraph 1, would read:

“The consent of the State to be bound by a treaty is expressed by signature of the treaty if

(a) the treaty itself expressly provides that it shall enter into force on signature;

(b) the intention that the treaty shall enter into force on signature appears from the nature of the treaty and from the form of the instrument in which the treaty is embodied;

(c) it appears from the full powers of the representatives of the State in question, from the preparatory work or from the circumstances in which the treaty was concluded, that the other States concerned were informed of that State's intention to bind itself by signature without ratification.”

73. The Commission, which should not express a preference for either of the two possibilities, would thus be taking a perfectly objective position between them. However, if the Commission still found it absolutely essential to insert a residual clause concerning ratification—although he personally was not in favour of it—it would be easy to add at the end of the article a clause providing that in the cases not covered by the paragraph on signature, there was a presumption that ratification was required.

74. Of course, if article 11 included, as it should, a statement of the cases in which consent was expressed by signature, article 12 could be greatly simplified and merely state the cases in which consent was expressed by ratification.

75. For the time being he had kept to the terms of the Special Rapporteur's proposal so far as instruments, full powers and circumstances were concerned, but he thought the Drafting Committee would be able to simplify the provision further.

76. Mr. REUTER said he fully agreed with the comments made by Mr. Castrén and Mr. Lachs, as amplified by Mr. Tunkin and Mr. de Luna; he thought the Commission could work out a sound text from the proposals submitted by the Special Rapporteur in his alternative B for paragraph 1.

77. It was possible to distinguish three relevant rules of international law. First, public international law recognized several procedures for the conclusion of treaties, and there it must be admitted that the major difficulty was how to say so. It could, of course, be merely implied. The Commission could refer to international practice without specifying the various procedures. Or, as Mr. Ago had suggested at the previous meeting, it could say that international law recognized three ways of concluding treaties: a very short procedure comprising a single act, a short procedure comprising two acts—the establishment of the text and the definite undertaking—and a long procedure consisting in establishing the text, expressing the intention to be bound, and becoming bound. It might not be wise to describe those different procedures in detail, though it would have the advantage of settling the question raised by Mr. Tunkin; for, from the point of view of international law, approval and ratification had exactly the same effect, since they were both declarations of a definitive undertaking.

78. Secondly—and that should also be stated somewhere—it was for every State to make clear, with respect to a given agreement, what form of procedure it would itself adopt. There was a right involved—the right of every State to prescribe in its constitution, in general terms, the procedure it adopted in each particular case—and an obligation (not yet stated), for a State must clearly indicate its choice. That might be considered to be a mandatory rule, in which case the third rule would not be necessary. As Mr. Tunkin had said, the most important elements for determining a State's choice were the text of the treaty and the full powers; that was clear, for it was through them that the State fulfilled its obligation to its partners to indicate the procedure it intended to follow. It would, of course,

be possible to go even further and say that the two rules he had just mentioned were sufficient; once a State was required to indicate the choice it had made, if it did not do so the presumption was that the agreement was valid.

79. The third rule was implied in the Special Rapporteur's attempt to specify certain criteria for determining the choice made. It would be for the Drafting Committee to enumerate those criteria; the problem of a residuary rule would then disappear. In his opinion, the Commission should not even touch on the question; the use of such an expression as "a treaty in simplified form", which was not to be found in constitutional law anywhere and which, although perhaps useful in some cases, introduced an element of confusion in the present context, should be deliberately avoided.

80. He agreed that the Commission should choose alternative B proposed by the Special Rapporteur, but he was not sure that it should not also state other rules.

81. Mr. EL-ERIAN said that in 1962, in stating his position on ratification,⁷ he had urged that the Commission should formulate a general residuary rule requiring ratification unless it was dispensed with explicitly or implicitly.

82. Some members now suggested that the Commission should adopt a pragmatic approach and avoid taking a position on issues of principle. In his opinion, the present instance was not one in which issues of principle should be avoided. Paragraph (4) of the commentary on article 12 said that total silence on the subject of ratification was exceptional, and that the number of cases that remained to be covered by a general rule was very small.⁸ It was accordingly clear that, if a general residuary rule were formulated on the matter, it would not, in practice, lead to the difficulties which some members feared.

83. The United Kingdom Government had commented that the complicated provisions of the article, as at present worded, might give rise to difficulties which did not at present exist (A/CN.4/175, section I.20). The issue was therefore not one of solving any existing difficulties in a pragmatic spirit, but rather one of principle. That issue of principle should be approached bearing in mind the role played by the institution of ratification in the relationship between the executive and the legislature in the treaty-making process. The requirement of parliamentary approval for ratification permitted parliament to control the acts of the executive in treaty-making. The Commission's draft should reflect constitutional developments with regard to treaty-making.

84. A number of questions had been put to the Commission by the Special Rapporteur. To the question whether it should state the residuary rule that ratification was required unless it was expressly or impliedly dispensed with, he would reply in the affirmative.

85. To the question whether the classical rule had now been so far eroded by the enormous growth of treaties concluded by simplified procedures that it should not be retained as the basic rule, he would reply that treaties in simplified form should not be given greater importance than they deserved. The expansion of intercourse between States, especially in economic and technical matters, had undoubtedly led to increasing use of the less formal types of treaty. However, those developments ought not to be allowed to affect the position of ratification as an institution.

86. The rules to be adopted should allow some flexibility. Certain treaties provided for provisional entry into force on signature and final entry into force on ratification. Even an exchange of letters or other informal agreement employed for convenience was often made subject to ratification, so that the conclusion of a treaty in simplified form did not necessarily imply an intention to dispense with ratification. For those reasons, he supported the Special Rapporteur's conclusion that there was no need to base the rules on a distinction between formal and informal treaties.

87. Paragraph 2 of article 12 in its revised form specified some of the circumstances of the conclusion of a treaty which could be taken into account in interpreting the intention of the parties with regard to ratification. In his opinion, that paragraph complicated the article unnecessarily; it dealt with a question of interpretation, which should be left to the courts. The task of the Commission was to draw up rules, not to try to interpret the intention of the parties.

88. The article should be simplified, but not by drawing a distinction between formal and informal treaties, as some governments had suggested, or by reversing the presumption stated in the article, as suggested by other governments. The purpose of the simplification should be to avoid drafting detailed provisions covering a complex set of specific situations and exceptions to them, and to state instead a general rule subject to certain exceptions.

89. He had listened with interest to the statements by Mr. Tunkin and Mr. Ago, but would reserve his position on their suggestions until he had seen them in writing.

The meeting rose at 12.55 p.m.

785th MEETING

Monday, 17 May 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessoa, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

⁷ *Yearbook of the International Law Commission, 1962, Vol. I, pp. 95-96, paras. 96-100.*

⁸ *Op. cit.*, Vol. II, p. 172.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 12 (Ratification) (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 12.¹

2. Mr. PAL said that during the discussion in 1962 the principle stated in paragraph 1 had not been accepted without controversy and the text, of the article as a whole represented a compromise solution. The comments of governments showed that they, like the Commission, were divided over the principle; some supported it, but others contested it. The Commission should therefore proceed with caution, at least in its approach to the principle of ratification. The requirement was certainly one based on some principle, perhaps a principle of necessary caution, for by its very nature the authority to enter into treaty relations was a sort of delegated authority demanding some precaution before the relation became final. The eloquent figures given by Mr. Lachs might only indicate a temporary swing not yet indicative of any radical change of attitude. Indeed, that had become possible even in a world still having two radically different orders, perhaps because, without the fundamental differences being in any way affected, both were functioning under the pressure of centralized planning. Yet so long as the types of order remained radically different, the requirements of caution embodied in the principle of ratification might not be superfluous.

3. Of the various proposals put forward, he preferred the Special Rapporteur's alternative B, with Mr. Tunkin's suggested amendments, as the least harmful.

4. Mr. BRIGGS said that the most useful course for the Commission would be to set out to provide guidance to States on the practical problem of determining when ratification was required and when it was not required for the entry into force of a treaty under international law. The Commission was not called upon to solve a theoretical problem of principle which divided States and which, because of the manner in which it had been presented, might even be insoluble. It would therefore be well advised to drop any statement to the effect that treaties in principle required, or did not require, ratification.

5. There was no need to deal with requirements of constitutional law or to attempt to incorporate such requirements in international law. The draft dealt with ratification in international law, which was defined by paragraph 1 (d) of article 1 as "the act . . . whereby a State establishes on the international plane its consent to be bound by a treaty". Consequently, the right of any State to require whatever internal or constitutional safeguards its policy might dictate was duly preserved.

6. The Commission should take as a basis the premise that States concluding a treaty had discretion to decide whether entry into force should take place on the

exchange or deposit of ratifications, or on signature. On that basis, attention should be focused on the expressed intention.

7. He therefore suggested that the article should contain two initial paragraphs, incorporating respectively the contents of paragraph 1 (a) of alternative A and paragraph 1 (a) of alternative B. The first of those paragraphs, based on alternative B, would read, roughly

"A treaty requires ratification where the treaty provides that it shall be subject to ratification."

There, he was merely suggesting that the words "expressly contemplates" in paragraph 1 (a) of alternative B should be replaced by the word "provides". The article should start with that provision because, as pointed out in the United States Government's comments (A/CN.4/175/section I.21) it was desirable first to state the cases requiring ratification, and then the exceptions.

8. The exceptions would appear in a second paragraph, containing the material from paragraph 1 (a) of alternative A, which would read, roughly

"A treaty does not require ratification where the treaty itself provides that it shall come into force upon signature or by a procedure other than ratification."

9. He had come across a few treaties which entered into force upon signature, but which still provided for subsequent ratification in order to meet constitutional requirements, but the term "ratification" was not then being used in the sense in which the Commission's draft defined it.

10. The Special Rapporteur had suggested, in paragraph 3 of his observations (A/CN.4/177) that a pragmatic approach might involve the risk of overlapping, of contradiction or of leaving a certain number of cases outside any rule. Personally, he believed that those dangers could be minimized by the Drafting Committee.

11. In paragraph 5 of his observations, the Special Rapporteur had drawn attention to the danger that, by logical implication, a contrary residual rule might follow from either alternative A or alternative B. If, however, the Commission were to submit both alternatives as a compromise solution, instead of one or the other exclusively, that logical dilemma would be avoided.

12. The main problem, however, was that of determining whether ratification was required when a treaty was silent on the subject. A number of court decisions and a considerable body of State practice could be adduced in support of the requirement of ratification. A strong contrary trend was, however, to be discerned in contemporary practice—one which, in the United States of America went back as far as 1790, and permitted resort to agreements in simplified form as well as to formal treaties, although the Constitution referred only to the latter. In fact, the practice of the United States comprised more "executive agreements", which had not been submitted to the Senate, than treaties which had been submitted.

13. He agreed that the attempt to base the draft on a distinction between formal and informal treaties should be abandoned; apart from the difficulties of definition,

¹ See 783rd meeting, following para. 81, and 784th meeting, para 2.

there was the possible implication of a fundamental legal distinction based on form, which could have misleading consequences. Since international law treated both formal and informal treaties as binding, and since both types of treaty continued to play an important role in contemporary practice, care should be taken not to hamper the use of either type.

14. Where the draughtsmen of a treaty had not taken care to cover the point, the answer to the question whether the treaty required ratification should be sought in evidence of intent, as pointed out by Mr. Tunkin. Such evidence must be stronger than a mere logical inference from a general principle. In that connexion, full powers deserved special mention, as in paragraphs 2 (b) and 3 (c) of the 1962 draft, and both those provisions, duly redrafted, should be retained in the final text of article 12. The Drafting Committee would also find useful some of the provisions of paragraph 1 (b) of both alternatives A and B.

15. The Special Rapporteur's new paragraphs 2 and 3 seemed hardly necessary. An argument on the lines of paragraph 2 had been put forward by Nicaragua in 1960 in the International Court of Justice, in the Case concerning the Arbitral Award made by the King of Spain on 23 December 1906;² but the Court, in its judgement, had declined to take into account prior treaties concluded between the parties. As to paragraph 3, the situations envisaged certainly occurred, but it was not necessary to include detailed provisions on them, since it was not proposed to prohibit the practice, which was implicitly covered by paragraphs 2 (b) and 3 (c) of the 1962 draft.

16. The text proposed for article 12 by Mr. Ago should be seriously considered. In 1962 he had himself suggested, at the 645th and 646th meetings, articles on signature and ratification³ which followed broadly the lines now suggested by Mr. Ago.⁴

17. He rejected the idea of choosing between alternatives A and B and urged that the essence of both alternatives be combined in a single article. The Commission could, if it wished, adopt the approach by Mr. Ago, and deal in two separate paragraphs, or separate articles, with the consent of the State to be bound by ratification and consent expressed by signature.

18. Mr. AMADO said he was repelled by an unnecessary invention like authentication, an arbitrary stage which the Commission wished to introduce into the treaty-making process, as much as he was attracted by the institution of ratification.

19. In the days when a sovereign's envoys had had to travel long distances to negotiate, the treaty had been concluded subject to ratification, so that the sovereign could examine the text before confirming it. In modern times, with the multiplication of relations between States and much faster means of communication, the institution of ratification had lost much of its prestige. It still existed, but it was only one of the processes by which

treaties entered into force. Many States held that signature of a treaty could be equivalent to ratification. It was for the State itself to say whether it wished to submit a treaty for parliamentary approval and subsequent ratification by the Head of State.

20. As there were a great many additional rules, and as the form of the instrument was not decisive—some treaties in simplified form were subject to ratification, whereas not all formal treaties were—the Commission's task was extremely difficult. He did not think it could lay down a residual rule. Consequently, he favoured the Special Rapporteur's alternative B, which reflected the state of international law.

21. With regard to sub-paragraph (b) of alternative B, he made the same reservation as Mr. Yasseen had made at the previous meeting.⁵ At the previous session he had objected to the Commission's tendency to attach excessive importance to the preparatory work;⁶ that work was a kind of battle in which States sometimes tried not to disclose their true objectives, with the result that, far from revealing the truth, it sometimes served to obscure it.

22. When the Commission had studied the interpretation of treaties, some members had been opposed to dealing with that question in the draft. It had then been a matter of stating principles of interpretation in the context of the application of treaties; would it not be far more dangerous to resort to interpretation even before the treaty had come into force in order to determine whether it need be ratified or not?

23. He associated himself with the arguments put forward by Mr. Tunkin, Mr. Lachs and Mr. de Luna, adding that, in formulating rules, the Commission should not forget that States were guided first and foremost by their own interests.

24. He accepted article 12 in principle, with alternative B, and was sure that the Drafting Committee would find a way of saying as much as possible in the fewest possible words.

25. Mr. JIMÉNEZ de ARÉCHAGA said that although the words "in principle" in paragraph 1 of article 12 might give the impression that it was intended to take a position in a doctrinal controversy, that had not been the Commission's purpose; its purpose had been to state the residuary rule which should apply where the intention of the parties with regard to ratification was neither expressed nor implied. It would have been in line with that original purpose to draft the residuary rule, as suggested by Mr. Ago at the previous meeting, in the form of a final paragraph stating the rule applicable in the case of total silence of the parties. Unfortunately, the text of Mr. Ago's proposal did not contain such a final paragraph.

26. He fully endorsed the Special Rapporteur's view that a residuary rule should be retained, it was necessary to avoid the so-called "neutral" formulation, which in practice would be merely evading the issue. The main purpose of the whole draft was, precisely, to state the

² *I.C.J. Reports 1960*, p. 213.

³ *Yearbook of the International Law Commission, 1962*, Vol. I, p. 99, para. 52, and p. 105, para. 30.

⁴ 784th meeting, paras. 70-72.

⁵ 784th meeting, para. 32.

⁶ *Yearbook of the International Law Commission, 1964*, Vol. I, p. 286, para. 55.

rules which should apply where the contracting parties were silent on certain points. The Commission should not change its approach or its method of codification merely because it was confronted with a problem on which the views of States were divided.

27. In 1962, after careful consideration, the Commission had taken as a starting point the traditional and well-established residuary rule that, unless a contrary intention appeared from the text, or from the form or circumstances of a treaty, ratification was necessary. Having received the comments of governments, the Commission was now engaged in what amounted to a review of a decision which represented a carefully drafted compromise.

28. In a substantial number of countries, including many in Latin America, constitutional law required parliamentary approval prior to the ratification of all, or nearly all, treaties. He had accordingly had some misgivings about the 1962 formula, because it did not go far enough in establishing the need for ratification. However, because of the inclusion of the residuary rule in paragraph 1, he had accepted article 12, even though it meant a considerable change in existing practice regarding treaties in simplified form, particularly exchanges of notes. That concession, which he and other members who held the same view had made in 1962 with regard to treaties in simplified form would, under alternative B, be extended to all treaties, whatever their form. If that alternative formula were adopted, the result would be that States whose constitutions required parliamentary approval prior to ratification would have to take care to insert a specific clause in every treaty, or in the full powers, to the effect that ratification was required: otherwise they might be caught unawares and give consent involuntarily. He therefore felt sure that alternative B would prove unacceptable to a large number of States, perhaps even to the majority of those which would be invited to attend a plenipotentiary conference on the law of treaties.

29. With regard to the suggestion that the classical rule had been eroded by the enormous growth of treaties concluded by simplified procedures, he contested the relevance of the argument that those treaties numerically outnumbered the more formal type of treaty. The truth of the matter was simply that in recent years there had been a tremendous growth in the number of agreements of secondary importance or of an administrative character, agreements which far outnumbered the treaties of political or economic importance which, in the majority of cases, were those requiring ratification. The classical rule was still firmly established, since it reflected the constitutional provisions of a large number of States Members of the United Nations.

30. A booklet entitled *Laws and Practices Concerning the Conclusion of Treaties* published by the United Nations in 1953⁷ in connexion with the codification of the law of treaties, showed that out of the 86 countries on which information had been obtained, only 20 did not require legislative approval prior to the ratification of treaties. The other 66 States required that approval in one form or another, 36 of them for all treaties

and the other 30 for certain specified types of treaty. In the latter type of constitution, however, the provisions on the subject were so broad that only the national constitutional organs could be expected to draw the line between treaties which required parliamentary approval and treaties which did not. Consequently, if the Commission were to adopt alternative B, even States with that type of constitution would have to include, in every international instrument they signed, a specific provision safeguarding the requirement of ratification; otherwise the negotiator might later find that he had irrevocably given consent in violation of his country's constitution. Those States would thus be deprived of the opportunity they now had, and duly exercised, of determining at leisure and after signature whether a given treaty fell within their constitutional provisions requiring parliamentary approval.

31. Of the government comments (A/CN.4/175), only four supported the contrary rule to that stated in paragraph 1. Apart from the fact that sixteen of the governments which had submitted comments favoured the rule, an examination of the views expressed by the Government of Denmark, showed that in its opinion the circumstances evidencing an intention to require ratification might include "the constitutional necessity of ratification". The Government of Denmark had thus taken an even more extreme position in support of the constitutionalist approach.

32. The Swedish Government's plea for a bold reversal of the rule in paragraph 1 seemed intended to make States include express clauses to the effect that ratification was required—a practice which was at present being followed by Sweden. He did not think the Commission should adopt a provision which would place a very large number of States in the position of having to include a provision of that kind in all their treaties. The whole purpose of residuary rules, in the law of contract as well as in the law of treaties, was that they should be presumed to be the rules which the parties would have inserted if they had foreseen the situation.

33. The United Kingdom Government's comments were very cautious: it had merely suggested that "there is much to be said for the contrary rule". It should be remembered that, as was explained in the booklet to which he had referred, the system of parliamentary control over the conclusion of treaties, which existed in many countries, did not exist in the United Kingdom; and it did not seem fair that the views of one or two States in a minority group of twenty should prevail over those of the majority. A residuary rule which would cause difficulties for the vast majority of States should not be adopted.

34. Mr. LACHS said that it was not desirable to impose on governments a duty to express their consent by means of ratification; the Commission should confine its attention to the question of evidence, where the intentions of the parties were not clear. It would also be wise not to get involved in constitutional issues, partly because of the great variety of constitutional provisions on the subject, and partly because no State would be prepared to amend its constitution merely in order to bring it into line with the draft articles.

⁷ ST/LEG/SER.B/3.

35. Moreover, it was not only constitutional provisions that were involved in the matter of ratification; there had been treaties, such as the treaty of 1904 between the United Kingdom and Japan, which had entered into force on signature, but still provided for ratification. He had come across a considerable number of treaties which did not require ratification, but had nevertheless been ratified by all the parties in order to emphasize their importance. On the other hand, ratification was sometimes avoided because it might involve complex issues of recognition.

36. Of the two alternatives put forward by the Special Rapporteur, he favoured alternative B. He was also attracted by the formulation proposed by Mr. Ago, which placed the emphasis not so much on the instrument as on the actual consent of the State to be bound by the treaty. If the Commission confined the provisions of article 12 to ratification, paragraph 1 of Mr. Ago's proposal could be taken as a basis for the work of the Drafting Committee, while paragraph 2 could be incorporated in article 10.

37. Mr. Tunkin had drawn attention to the increasing volume of State practice relating to approval as an institution similar to ratification. It might therefore be advisable to change the title of article 12 to "Ratification and approval". He had recently, however, seen a treaty in which neither term had been used; the relevant provision had referred to the formalities provided for by internal law.

38. The CHAIRMAN, speaking as a member of the Commission, said that in 1962 he had opposed article 12, though for other reasons than some members of the Commission.

39. In his opinion, the article should satisfy two fundamental requirements. The first requirement was to be sure, in international relations, that the will of the State had been expressed, and that the will expressed bound the State. The second requirement related to the will itself: everyone agreed on the principle that treaties must be applied, but if they were to be applied, the will expressed must truly be the will of the parties.

40. For both theoretical and practical reasons he supported the institution of ratification and considered that, with a view to the progressive development of international law, the Commission should require the will of the parties to be real, particularly in the case of small or medium-sized States. There were many examples in history of treaties concluded under pressure from one of the parties. In such cases, the State which sought to impose its will asked that the treaty should enter into force without ratification, because it did not wish to give the other party time to reflect or to consult the nation; that was an abuse, even if the treaty contained a clause dispensing with ratification and even if the negotiators had authority to express the State's consent. By abandoning the institution of ratification or approval, the Commission would be preparing the way for, and facilitating, the abuses of power it sought to prevent in Part II of its draft.

41. It had been said that the procedure for the entry into force of treaties should be simplified and accelerated. What mattered was not speed, however, but to

give States the assurance that their will would be respected. And the fact that a treaty was in simplified form was no reason for dispensing with ratification; the form of a treaty was of no importance, it was the substance that counted.

42. He was still opposed to article 12, both as drafted in 1962 and in the proposed new version, whether with alternative A or with alternative B.

43. Mr. TUNKIN said that some confusion had arisen between the requirements of municipal law and the requirements of international law; the term "treaty" had also given rise to misunderstanding. In the constitutional practice of the great majority of States, the term "treaty" was not applied to every inter-State agreement, but only to the more important instruments; those important instruments required ratification. The Commission's draft, however, used the term "treaty" to cover all inter-State agreements; among those agreements, "treaties" in the old and more restricted sense only constituted a minority. It was treaties in that older sense which required, for example, the consent of the United States Senate for their ratification; other instruments, such as executive agreements, constituted the bulk of the agreements entered into by the United States. In the USSR ratification was obligatory for certain treaties, but a great many agreements were concluded either by the government or by individual ministries and did not require ratification. For those reasons, it was important to bear in mind during the discussion that the term "treaty" as used in the draft articles covered the whole range of inter-State agreements.

44. Even if the constitutional requirements of a whole group of States concerning ratification were similar, that in itself was not evidence of the existence of an analogous rule of international law, though it might be evidence of established usage. Such usage might acquire the character of a rule binding on other States by virtue of its recognition as a rule of law.

45. An analysis of existing international practice showed that in fact there was no rule of international law which required States to ratify any treaty they concluded, nor would there be any justification for imposing such a requirement or for claiming that treaties not subject to ratification deviated from the general requirements of international law. For both theoretical and practical reasons, such a rule would be impossible to formulate, because the mode of expressing consent to be bound by a treaty came within the province of internal law and, as Mr. Lachs had pointed out, State practice in the matter differed widely.

46. The CHAIRMAN, speaking as a member of the Commission, pointed out that Article 102 of the Charter specifically referred to "every treaty and every international agreement" and that article 1 of the Regulations on the Registration and Publication of Treaties and International Agreements⁸ showed that they applied to "every treaty or international agreement, whatever its form and descriptive name". The Commission had also accepted that rule in article 1 (a) of its draft.

⁸ *Yearbook of the International Law Commission, 1962, Vol. II, p. 194.*

47. Furthermore, the Commission was not only trying to ascertain the rules that existed in practice, it was also working for the progressive development of international law. It was true that the rule requiring ratification was not universally accepted: the great powers were generally opposed to it, whereas small States were in favour of it. His own opinion was that, in order to safeguard the will of States, the Commission should formulate the ratification rule.

48. Mr. TUNKIN said he was unable to agree with the Chairman, because he subscribed to the majority view that the Commission's draft articles should be designed to cover all types of international agreement between States, not only treaties in the narrow sense.

49. Nor could he accept the Chairman's argument that in practice there was a difference between the position of great and small powers. As to the weight of existing practice, he had always been of the opinion that practice as such did not constitute a rule of law. Practice should be examined in the light of the fundamental principles of contemporary international law, and that had led him to the conclusion that there could be no rule that required treaties to be subject to ratification.

50. Mr. AMADO observed that the word "approval", to which Mr. Tunkin had made a passing reference at the previous meeting, had been given much more emphasis by Mr. Lachs and by Mr. Jiménez de Aréchaga. In the South American republics, "approval" was the act by which parliament approved a treaty, after which the President of the republic ratified it. Approval was therefore synonymous with acceptance by the State. It would be very regrettable if the term were used in the Commission's discussions without having been defined.

51. Mr. Jiménez de Aréchaga maintained that a treaty could not become binding until it had been ratified, even if neither the treaty itself nor the full powers of the negotiators specified that ratification was required. That was certainly the case in the South American republics; very many treaties had come into force between Brazil and the United Kingdom, which had only been signed by the United Kingdom but had been ratified by Brazil. But, as Mr. de Luna had rightly pointed out, there were also many treaties which were signed subject to ratification and then never ratified. That had happened to numerous draft treaties for a pan-American organization.

52. Mr. VERDROSS explained that under the Austrian constitution the President concluded international treaties, but could delegate that power to the Council of Ministers, or to a minister, for all treaties which did not require the consent of parliament. Ratification was required only in the case of treaties concluded by the President of the republic himself, for which the constitution required parliamentary approval; treaties concluded by a minister or by the Council of Ministers were not ratified.

53. In his opinion, everything depended on the competence of the minister or the full powers of the subordinate organ which concluded the treaty: if it

was competent to conclude a treaty, it could do so in any form whatsoever.

54. With regard to the pressures which might be exerted on small countries, he pointed out that the question of coercion was covered by articles 35 and 36.

55. Like Mr. Tunkin, he thought it could not be said that in principle all treaties required notification. There should be no restrictions as to form. All that mattered was the reality of the consent of all the States concluding the treaty.

56. Mr. JIMÉNEZ de ARÉCHAGA said he wished to dispel some misunderstandings to which his remarks seemed to have given rise. Mr. Tunkin had argued that internal constitutional provisions only related to treaties in the strict sense, whereas the draft articles were intended to cover all international agreements, which need not necessarily be subject to ratification. However, a number of constitutional instruments, including those of Uruguay and certain other Latin American countries, did in fact refer to treaties in the broad sense, and in any event the argument was not decisive because the draft articles also applied to treaties *stricto sensu*, many of which, particularly those of major political importance, would require ratification.

57. He had never contended that constitutional law was a source of international law, but had only wished to remind the Commission of the existence of certain internal constitutional rules which, in the majority of States, called for parliamentary approval before the State could give its consent to be bound by a treaty. Those States accordingly needed to make their final consent conditional on ratification, which provided the only opportunity of asking for parliamentary approval before becoming bound. His purpose in drawing attention to that point had been to emphasize that if the Commission were to propose a "residuary" rule—an expression criticized by Mr. Amado, but one that had gained currency—the requirements of the majority of States would have to be taken into account. Nor would he plead guilty to having confused the process of parliamentary approval with that of ratification.

58. The Chairman's observations provided an additional and pertinent argument: the danger of pressure being brought to bear on negotiators in order to prevent them from inserting a proviso calling for ratification. The provisions concerning ratification inserted in the 1928 Havana Convention on Treaties⁹ were intended precisely as a safeguard against pressures of that nature.

59. Mr. Amado had rightly deplored the fact that a number of agreements concluded between Latin American States had not been ratified, but that situation would not be remedied by simply eliminating provisions concerning ratification.

60. Mr. de LUNA said that if the Commission tried to reform the conduct of States it would be found to fail. Statistical arguments should not influence its decision; the States of Latin America did not all follow the same practice, and a rule stated by the Commission should not impair even a single treaty. The eminent professors of Latin America who had dealt with the

⁹ Hudson, *International Legislation*, Vol. IV, p. 2378.

subject were not just showing their book-learning: they had all been ambassadors or foreign ministers. From his own experience of seventeen years, he knew that unratified treaties were a necessity of international life; more often than not, it would be impossible to wait even one week for a treaty to enter into force.

61. In the rare cases in which a State considered that ratification was required, not in theory but in practice, by its constitution, it was at liberty to stipulate that requirement in the treaty; nobody would prevent it from doing so, and if it did not, it would not be through forgetfulness but because it had reasons for acting in that way.

62. If it was intended to establish that presumption, which was in keeping with practice and with the necessities of international life, it might be asked why the traditional formula should not be retained; or, as Mr. Jiménez de Aréchaga had suggested, the Commission could start from the opposite presumption; then, when States considered it advisable, they could stipulate that the treaty did not require express ratification.

63. The fact that the executive power had evolved the practice of "executive agreements" was not attributable to evil intentions, but to necessity, and each country had done so in its own way. At one time "approval" rather than ratification must have been necessary in the United States. The signification of a term was a matter of convention and, in law, depended only on whether it was or was not generally used in practice and in legal science.

64. Many States which were confronted with that necessity and did not ratify treaties would, if the Commission stated a presumption in favour of ratification, be strongly opposed to declaring expressly by that they did not require it and were satisfied with the procedure established by international practice whereby, in the absence of any provision on the subject, a treaty entered into force without having to be ratified.

65. The fact was that one school of thought feared that certain constitutional rules might be violated. Forgetting that international law and internal law were quite distinct from each other, States wanted international law to safeguard the observance of their own constitutions, which was both impossible and unnecessary.

66. In the practice of parliamentary control, there were many means of controlling the actions of the executive in foreign affairs; but the fact was that there was no institution of parliamentary control in internal public law. That was clear from the example of the Japanese Empire before 1945 or of the United Kingdom, where the executive occasionally submitted the text of a treaty to Parliament if the latter had to enact rules for its implementation. In other countries, for instance those where the executive power was collective, there were no constitutional institutions of internal law for parliamentary approval of the ratification of treaties.

67. He shared Mr. Bartoš's concern regarding the danger of the presumption. It might happen that a great Power exerted pressure, by force or by corruption, on the executive of a small country. But then the problem would be one of consent, not of ratification. No matter

what formula the Commission adopted, it would be unable to prevent the use of pressure.

68. Consequently, he was still convinced that the best solution was the Special Rapporteur's alternative B divided into two articles as Mr. Ago had suggested, from which everything that was not direct evidence should be omitted.

69. He wished to draw attention again to a formula which was used by many States to meet the imperative necessity of entering into an immediate obligation despite the constitutional requirements of parliamentary control and which he personally had preferred because he considered it more honest: signature with provisional entry into force and subsequent ratification. If it was not ratified, the treaty ceased to be in force. Unfortunately, it was not possible to add that formula to Mr. Ago's proposal.

70. Mr. YASSEEN said he had not changed his views since 1962; the discussions during the present session had not convinced him. What the Commission needed was not an extreme solution making ratification an international obligation of *jus cogens*, but a formula which would make it a kind of residuary rule—though the expression was not very orthodox—for cases in which the treaty was silent.

71. He supported the presumption in favour of ratification, an institution that still had its uses, for it added something to the solemnity which should surround treaty-making and provided an assurance that a State had given its consent. It was an additional formality which sometimes proved that consent had, or had not, been given. In the history of diplomacy there were many instances in which a government, misusing its prerogatives, had concluded a treaty and sought to impose it on a parliament chosen by a pseudo-democratic process. Since ratification was a very formal ceremony requiring action by parliament, the nation was made aware of the event and had sometimes been known to oppose ratification.

72. There was no question of making ratification obligatory, but where the treaty was silent it should be presumed that ratification was required. There was no danger in using that formula, for in other treaties provision could be made for the converse situation by an express provision or by an expression of the will of the parties that ratification was not required.

73. Some members of the Commission were opposed to recognizing that ratification was the rule. There was, however, a general constitutional practice requiring ratification, especially for certain important treaties. In many constitutions the word "treaty" was used in the broad sense; for instance, neither the former constitution of Iraq nor the new provisional constitution regarded an international agreement as anything other than a treaty; they used the word "treaty" in the broad sense and prescribed ratification.

74. In the case of less important treaties, States should not be obliged to ratify, but it should be stated that, if they did not wish ratification to be required they must say so clearly in the treaty, which would then come into force on signature. He was therefore in favour of the Special Rapporteur's alternative A.

75. Mr. Ago's proposal had many structural advantages, since it established a link between ratification and consent, which from the historical point of view was at the root of ratification. He could not accept that proposal, however, for it contained no rule for cases in which the treaty was silent and did not dispose of the difficulty; it was the Commission's duty to produce a draft which would, as far as possible, forestall any difficulties connected with the entry into force of treaties that might arise in future.

76. Mr. AGO said that only a few points remained to be cleared up before the article was sent to the Drafting Committee. There was still some confusion owing to the vague way in which certain terms were used in international law.

77. The word "ratification", which denoted an act performed under internal law, had different acceptations in certain constitutions and in the language of constitutional law. In the true sense it was, in internal law, an act by the executive expressing the final consent of the State to be bound by a treaty. It was wrong to speak of "parliamentary ratification" because parliament did no more than authorize the head of the executive to ratify. The Commission would therefore be well advised to ignore that aspect of the matter. What concerned the Commission was whether an act of ratification in the true sense of the term was required to express a State's consent.

78. International law laid down no rule on ratification and left the State full freedom to choose how its consent should be expressed. The Commission was not called upon to tell States which method they should prefer; it merely had to establish the method by which States expressed their consent to be bound.

79. He was opposed to any formula stating that ratification was required. The question was when did international law require States to resort to an act of ratification in order to establish the reality of their consent. On the one hand, ratification by all the parties could be necessary where they had agreed that it should take place, either because the treaty said so or because the circumstances showed that they had so agreed. On the other hand, if nothing had been laid down, each party would do as it wished; ratification would be necessary for a party if its constitution so provided and if it had given notice of that fact.

80. Several members of the Commission were anxious to establish a rule for cases in which the treaty and the parties were silent. He doubted whether it should be inferred from mere silence that ratification was necessary. That might make it too easy for a State to evade undertakings given in a treaty which the parties had intended not to require ratification, though they had not manifested that intention. It was hardly likely that a minister or an ambassador, knowing that ratification was necessary for a treaty to enter into force in his country, would not say so before signing it. That was why he had not included such a rule in his proposal.

81. As to the case referred to by Mr. Lachs and Mr. de Luna, in which a treaty came into force provisionally on signature and was subsequently ratified, his view was that it should be dealt with in connexion with

signature rather than with ratification; it would be necessary to mention that a treaty could come into force provisionally on signature, but still be subject to ratification.

82. Mr. ROSENNE said that the misgivings he had expressed at the beginning of the discussion on article 12 had proved justified; he still thought that the Commission's work on the law of treaties as a whole would be seriously prejudiced if it accepted the argument that it should take a definite position on certain theoretical aspects, instead of continuing to seek a practical compromise solution that would be acceptable.

83. There was force in some of the arguments put forward by Mr. Jiménez de Aréchaga, but statistics could be misleading. The problem must be viewed in the context of the draft as a whole, which already contained a number of provisions that would go far towards preventing the kind of abuses mentioned by the Chairman.

84. He himself was very much of the same mind as Mr. Ago regarding the position when the treaty was silent. If specific provisions were to be inserted in the draft to cover such cases, it would be necessary to elucidate the reasons for the treaty being silent and the reasons might vary widely. He doubted whether, at the present stage in the development of international law and State organization, the Commission ought to concern itself with the hypothesis of careless drafting, while for cases in which the reasons were political, there was little likelihood that a satisfactory formula could be devised.

85. Certain general considerations relating to the theoretical concept of a treaty mentioned by Mr. Tunkin should certainly be borne in mind by the Drafting Committee.

86. With regard to the text of the article itself, he had already expressed a preference for the Special Rapporteur's alternative B, and since then, Mr. Ago had put forward his own proposal, which was not very different and the structure of which was acceptable.

87. While not wishing to prolong the discussion, he would suggest that the Drafting Committee consider borrowing the phrase "in accordance with their respective constitutional processes", used in Articles 43, 108 and 110 of the Charter. As Mr. Verdross had pointed out at the 646th meeting,¹⁰ in the matter of the ratification of treaties, international law referred to the provisions of constitutional law actually applied by States, not to those merely existing on paper. The wording of both the Special Rapporteur's and Mr. Ago's text was somewhat heavy and the opening phrase might be amended to read "Ratification or approval, in accordance with the constitutional processes of the parties, shall be required . . ."; the cases in which it was required would then be stated.

88. The words "Ratification or approval" were intended to take account of the observations made about the two processes being on the same footing and of the comment by the Danish Government to the effect that

¹⁰ *Yearbook of the International Law Commission, 1962, Vol. I, p. 107, paras. 56-57.*

the parties' internal requirements as to ratification might differ.

89. The formula he was proposing, although occasionally criticized in scientific writings, had been used by the General Assembly in resolution 1991 (XVIII) concerning amendments to the Charter and in resolutions 91 (I), 363 (IV), 805 (VIII) and 806 (VIII) concerning applications of non-Member States to become parties to the Statute of the International Court of Justice.

90. Mr. TSURUOKA said he supported Mr. Ago's proposal, and hoped that the Commission would adopt it as the basis for the Drafting Committee's work. The formula was neutral and prejudged nothing. It was true that it made no reference to a presumption, but in his view that was a merit, not a defect; for every year dozens of countries concluded treaties and silence was very rarely a cause of dispute. If there was a dispute, the fault lay with the parties, of which there were generally only two, since the rare examples that could be found related to bilateral, not to multilateral, treaties. The two parties would be sure to agree on a settlement so he could not see what purpose would be served by stating a presumption.

91. Moreover, he thought it would be dangerous for the Commission to adopt either of the conflicting positions, for it might meet with complete lack of understanding at the international conference convened to adopt the text. If the conference were to adopt a rule of that kind, since the question was governed by constitutional rules in most countries, it would be difficult for the participating States to accept it; either they would not become parties to the treaty or they would enter reservations, and the Commission's work would be nullified.

92. The CHAIRMAN, speaking as a member of the Commission, said it was the Commission's duty to establish how the will of States to bind themselves was to be expressed. The Commission could accept signature, but it must be the signature of those authorized to sign: that was where international law referred back to internal law, as in the United Nations Charter itself.

93. As to the terms "approval" and "ratification", the meaning attached to them in internal law should be ignored. In international law, ratification was the instrument by which the competent authorities of a State confirmed that the State was bound. "Approval" meant that the competent organ had given its approval, which was not parliamentary approval. He remembered concluding sixteen conventions with Austria, which the Austrian Foreign Minister had not signed until they had been approved by the Austrian Council of Ministers.

94. The important point was to establish how States should express their will. If the members of the Commission thought it should be by signature, and believed that possible under the conditions of modern international life, he would agree. But since signature alone was not enough in all cases, what should be required? Ratification and approval, in the sense in which the terms were used in United Nations practice, were only guarantees that an organ expressed the will which bound the State. If the other hypothesis were adopted, it was

to be feared that the plenipotentiaries might take it upon themselves to express the will of the State and circumvent the control established by its constitution by saying or implying that ratification was not necessary. Hence the danger that the nation might be deprived of that opportunity of expressing its will which it was the duty of the Commission to safeguard. In his view, it would be a historic error to adopt that formula; it might perhaps correspond to the practice, but it was a practice which should be reformed.

95. Speaking as Chairman, he said it appeared that the majority of the Commission wished the Drafting Committee to base its work on the Special Rapporteur's alternative B and Mr. Ago's proposal.

96. Sir Humphrey WALDOCK, Special Rapporteur, said that the course suggested by the Chairman would place him in some difficulty. Before the Commission had been enlarged, he had often taken part in the exchange of views on individual articles, but since then he had deliberately refrained from doing so, in the belief that it would save time if he were to sum up and offer his own observations at the close of the discussion. He thought he should be given an opportunity of doing that before article 12, which was an important one, was referred to the Drafting Committee.

97. Mr. BRIGGS said he fully supported the Special Rapporteur. He could not altogether endorse the Chairman's summing up, as he considered that all the alternatives discussed by the Commission should be referred to the Drafting Committee for review, together with the Special Rapporteur's comments.

The meeting rose at 6 p. m.

786th MEETING

Wednesday, 19 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Filling of a Casual Vacancy in the Commission (A/CN.4/178 and Add.1)

[Item 1 of the agenda]

1. The CHAIRMAN announced that at a private meeting the previous day, the Commission had held an election, in conformity with its Statute, to fill the vacancy caused by the resignation of Mr. Kanga. After considering the biographical data provided, the Commission had elected Mr. Bedjaoui, Minister of Justice of the

Democratic and Popular Republic of Algeria, by secret ballot. It had decided to send a telegram to Mr. Bedjaoui inviting him to take part in the Commission's proceedings.

Working Arrangements

2. The CHAIRMAN said that, at the same private meeting, after learning of a proposal that it should meet elsewhere than at the Palais des Nations, the Commission had decided to adopt an appropriate resolution, to be drafted by the General Rapporteur.

3. Mr. ELIAS, General Rapporteur, said that in accordance with the Commission's request, he had drafted a resolution on arrangements for the present session, which read :

“ The International Law Commission,
Recalling articles 12 and 14 of its Statute,
Requests the Secretary-General to make the necessary arrangements for the Commission to be provided with the accommodation and facilities essential for the work of members and of the Secretariat, so that its entire session can be held at the Palais des Nations. ”

4. The CHAIRMAN suggested that the officers of the Commission be authorized to transmit the resolution to the Director of the European Office of the United Nations.

It was so agreed.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

ARTICLE 12 (Ratification) *(continued)*¹

5. The CHAIRMAN invited the Commission to conclude consideration of article 12, so that the Special Rapporteur could sum up the discussion.

6. Mr. TUNKIN said there was one difficulty which the Commission had not considered and which might arise because of the fact that on the international level ratification was not the final act performed by the State in establishing its consent to be bound by a treaty. A change of government could occur between the time when a treaty was ratified and the time when the instruments of ratification were exchanged or deposited. If the new government did not wish to proceed with the matter, the State could not be regarded as bound by the terms of the treaty, because the final stage of consent on the international level had not been completed. He hoped that the Drafting Committee would be able to prepare a text setting out the different stages in the process of establishing consent to be bound.

7. He pointed out that the first part of paragraph 1 of Mr. Ago's proposal² had not been correctly rendered in English : the words “ *un acte de ratification* ” had been translated as “ an instrument of ratification ”.

8. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that two lines of thought

had emerged on the major issue of whether or not any rule requiring ratification in certain circumstances could be said to exist. Some members had emphasized the need to safeguard the internal constitutional provisions of States, while others—and fundamentally he agreed with their approach—were anxious that reasonable security in the treaty-making process should be assured, so that States could know with some degree of certainty when they could rely on acts that would commit both themselves and others to being bound by the terms of a treaty.

9. He did not subscribe to the Chairman's view that large and small States tended to adopt a different approach to the matter, and believed that such differences were primarily due to the different historical and political development of the countries concerned.

10. In drafting provisions about the institutions whereby States expressed their consent to be bound by a treaty, the Commission had to take account of the growth of differing procedures in modern times. In addition to the more traditional methods of signature and ratification, there were also accession, acceptance and approval, and other methods were also to be found in particular treaties, reflecting to some extent a development both on the national and on the international plane. The method of expressing consent by approval had been inspired by the practices of particular groups of States and each of the labels used to describe the process had acquired its own significance in international law. Although some relationship between national and international law on the matter could be discerned, in practice there was no exact correspondence between the two. To illustrate that point, it was enough to draw attention to the well-known fact that, if a treaty was made subject to approval, that did not necessarily entail, for each of the parties, submission of the instrument to their legislature.

11. At its fourteenth session the Commission had attempted to indicate in articles 12, 13 and 14 the cases in which a particular act expressing the consent of a State to be bound by a treaty was required, and in article 15 what process was required to complete the act; the legal effect of such acts had been dealt with in a somewhat disparate way in articles 11, 16 and 17. In his own country the institution of ratification did not possess the significance it had on the internal level for many States, but as Special Rapporteur he had been anxious to frame provisions that would be acceptable to the majority of States.

12. There was considerable force in the general view of Sir Gerald Fitzmaurice and others that it would be difficult to formulate any residuary rule in the matter because of the modern trend towards concluding treaties in simplified form.

13. If a rule had to be stated, perhaps it should be in favour of ratification, for the reasons given by Mr. Jiménez de Aréchaga at the previous meeting;³ such a rule would allay the concern of those States which might feel obliged to safeguard their internal constitutional requirements. That line had also been taken by McNair⁴ and Lauterpacht.⁵

¹ 785th meeting, paras. 25-33.

² *The Law of Treaties*, Oxford, 1961, p. 134.

³ *Yearbook of the International Law Commission, 1954*, Vol. II, p. 127.

¹ See 783rd meeting, following para. 81, and 784th meeting, para. 2.

² See 784th meeting, para. 70.

14. It had been solely for such pragmatic reasons that in his first report he had inclined towards a residuary rule in favour of ratification whenever an intention to the contrary had not been evinced by the parties. But after examining the comments of governments and listening to the discussion on article 12 at the present session, he had come round to thinking that it would be wiser not to formulate any definite residuary rule, even though one might be found to arise by implication from the rules stated concerning signature, ratification, etc.

15. One of the difficulties in trying to formulate a residuary rule was the tendency to regard signature and ratification as two complementary yet slightly opposed institutions, while in any event mention had to be made of such procedures as approval and acceptance.

16. As far as he could judge, there was a majority in the Commission in favour of alternative B of his proposal, namely, that signature was binding unless there was evidence of the parties' intention to follow some other procedure; there were also, however, some members who favoured alternative A or B, but at the same time were ready to accept a middle course on the lines advocated by Mr. Ago and Mr. Lachs. Possibly the best approach would be to express the provisions in terms of the intention of the parties, even though that might be open to the criticism that it left a gap in the draft where no evidence of intention could be found. Even that somewhat theoretical weakness could be overcome by adopting Mr. Ago's proposal to provide that in such cases treaties would be subject to ratification.

17. Those considerations led him to make a perhaps rather radical new suggestion for handling the whole problem. First would come an article on the rules concerning signature, which might read :

"Signature of a treaty establishes the consent of the State to be bound by the treaty when

(a) The treaty itself provides that it shall be binding on signature;

(b) The intention of the State concerned that the treaty shall be binding upon signature appears from the form of the instrument, from the full powers of the representatives or from the circumstances of the conclusion of the treaty;

(c) The intention of a particular State to bind itself by signature appears from the full powers of its representative or from statements made by the representative in the course of negotiations."

Possibly something would also have to be added to that article on the lines of paragraph 3 (b) of his earlier proposal for article 12.⁶

18. The next article might then read :

"Except as provided in the preceding article the consent of the State to be bound by a treaty is established by the completion of an act of ratification, accession, acceptance or approval, according as the particular act required may be

(a) specified in the treaty; or

(b) indicated in the full powers of the representatives or in statements made by them during the negotiations."

19. If that general scheme found favour, the Commission might be able to avoid the pitfalls of trying to be precise in a sphere in which modern practice was so diverse, as was demonstrated by contemporary multi-lateral treaties. An example of the difficulty of achieving precision in statement was provided even by the wording of articles 48, 49 and 50 of the Vienna Convention on Diplomatic Relations.⁷

20. Approval was becoming so common in practice that it must be mentioned. According to the figures given by Blix in an article published in the British Yearbook of International Law,⁸ 90 of the treaties published in the United Nations Treaty Series for the years 1946-1951 had been brought into force by approval.

21. A solution on the lines he had suggested would be consistent with existing practice; if it were generally acceptable and members did not wish to comment at great length on the procedures of acceptance or approval dealt with in article 14, articles 12 and 14 could be referred to the Drafting Committee together.

22. Article 13 would need to be taken up together with articles 8 and 9, and it might be found more convenient to put accession in an article by itself, separate from ratification, acceptance and approval. If his general scheme were followed, the legal effects of ratification, accession, acceptance and approval would have been covered, with the exception of the difficult problem of good faith, which had been discussed at length at the fifteenth session and was dealt with in article 17.

23. Mr. BRIGGS said he could agree to the Special Rapporteur's suggestion, except that he had misgivings about a very comprehensive new article 12, because that would mean going into considerable detail about the institutions of approval and acceptance.

24. With regard to Mr. Tunkin's point, he drew attention to the provision contained in article 11, paragraph 3 (a) and the definition in article 1, paragraph 1 (d) concerning the establishment on the international plane of a State's consent to be bound by a treaty. Clearly those provisions should be subject to the further proviso "when the treaty comes into force" and those words might have to be inserted in the text to be prepared on the legal effects of each institution. The only other possibility would be to make a clear distinction between a draft treaty, which was an instrument that had been signed but was not yet in force, and a treaty which by definition was one that had already entered into force. It was not quite accurate to state that consent was established by signature or by the deposit of an instrument of ratification before the entry into force of the treaty.

25. As the Special Rapporteur had suggested that article 14 be referred to the Drafting Committee together with article 12, he wished to draw attention to paragraph (1) of the commentary on article 14⁹ in which the Commission had said that "acceptance" had become established as a name given to two new procedures, one analogous to ratification and the other to accession, and

⁷ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. II, p. 87-88.

⁸ Vol. XXX, p. 352.

⁹ *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 173-174.

⁶ See 784th meeting, para. 2.

had gone on to add that on the international plane "acceptance" was an innovation more of terminology than of method. It had been said that where there was provision for a treaty being open to signature "subject to acceptance", the process was very like signature subject to ratification, and similarly that if it were made open to acceptance without prior signature, the process was very like accession.

26. He had been struck by the suggestion made by the Government of Luxembourg in the last paragraph of its comment on article 1 (A/CN.4/175, section I.12) that the Commission should take advantage of the opportunity to perfect the terminology used in the draft articles in order to eliminate the misunderstandings that had arisen as a result of the term "approval" being confused with "ratification". One possible explanation for terms being used loosely was that treaties made subject to ratification could involve constitutional difficulties for certain States; the Commission should not encourage efforts by officials to circumvent constitutional difficulties by such means. It seemed preferable to deal in article 12 itself with ratification as such and to indicate in the commentary what was meant by acceptance or approval.

27. Mr. VERDROSS said that the Austrian Government, in its comments (A/CN.4/175, section I.3 para. 6), had expressed regret that the draft articles did not define "ratification". As he had not been present during the earlier discussions, he did not know whether the Commission had considered the matter, but it seemed to him important.

28. The CHAIRMAN said the matter had been discussed several times and that it appeared that the term "ratification" could be easily misunderstood, since it did not have the same meaning in international law as it did in internal law. The Special Rapporteur had drawn attention to that point and had taken the Austrian Government's comment into account.

29. Mr. AGO said he fully agreed with the Special Rapporteur. The Drafting Committee would, of course, have to examine certain drafting problems, but the course suggested by the Special Rapporteur was the right one.

30. There could be an article 11 on signature and an article 12 on ratification, approval and acceptance. He would then have some doubts about the advisability of mentioning accession there too, and thought it could be better dealt with in a separate article; the other procedures would gain by being grouped together in a single article. The position would be different if the Commission were to proceed on a functional basis, grouping in one article all the forms of authentication and in another all the means of expressing the final consent of a State to be bound by a treaty.

31. If he had understood him aright, Mr. Briggs was concerned because when a State ratified, the treaty was not necessarily yet in force, so that the Commission might be adopting an incorrect formula if it said that a State's consent to be bound was established by ratification or signature. In his (Mr. Ago's) opinion, the formula proposed by the Special Rapporteur was correct. It did not say that ratification was evidence of the fact that the State was bound, but that ratification expressed the State's consent to be bound. The fact of giving its

consent did not mean that the State was bound automatically and immediately. Naturally, if twenty ratifications were necessary, when the twentieth had been deposited the treaty entered into force automatically and the consent previously expressed took effect at that moment. The Commission could therefore correctly say that ratification expressed the consent of the State to be bound.

32. The CHAIRMAN, speaking as a member of the Commission, observed that writers interested in the theory of the subject had recently examined the question whether a State could withdraw its consent in the interval between the deposit of its instrument of ratification and the date of entry into force of the treaty. Some held that a State gave final consent by ratification; others took the opposite view. The Commission had not discussed the point, however.

33. Mr. JIMÉNEZ de ARÉCHEGA said it was clear from the Special Rapporteur's summing up that the Commission was now faced with about six alternative proposals for article 12. Personally he was somewhat apprehensive about the Special Rapporteur's latest suggestion for dealing with signature in article 11 and with other methods of expressing consent in a comprehensive new article 12, because that might detract from the historical and political importance of ratification which, as an institution, was on a different footing from acceptance and approval—new institutions to which States could not resort except by express provision in the treaty itself.

34. In view of the turn which the discussion had taken it would be wise to follow the Commission's established practice and refer the whole problem, together with the various alternatives, to the Drafting Committee, leaving it wide discretion to prepare new texts; it would obviously be premature to try to determine where the majority view lay.

35. Sir Humphrey WALDOCK, Special Rapporteur, said he had assumed that the Commission would follow precisely that course and had only sought to indicate in his summing up the kind of shape his new proposal to the Drafting Committee might take. His aim was to arrive at a text that would gain as wide a degree of acceptance as possible, rather than one that might be finally approved by only a very narrow majority.

36. Mr. ROSENNE said he agreed that the matter could safely be referred to the Drafting Committee, though its task would be by no means easy. If the kind of rearrangement outlined by the Special Rapporteur were adopted, the articles in question should perhaps be closely followed by articles 23 and 24, as that would result in a more logical order than the present one, in which the section on reservations broke what he would regard as the proper sequence.

37. With regard to the point made by Mr. Briggs, he was not convinced that it would be either possible or desirable to eliminate terminological variants in current use, because they were due to the complexity of both national and international administration and to political exigencies. It should be remembered that, although towards the end of the treaty-making process the work was often in the hands of foreign ministry officials, during the

earlier stages it might be the responsibility of other government departments. Further terminological innovations could certainly be expected in the future.

38. The CHAIRMAN, speaking as a member of the Commission, said that in his view "ratification" established that the State had definitely expressed its will to be bound. The terms "acceptance" and "approval" were now widely used in practice and were no less valid than the term "ratification". They had the merit of placing later signatories on the same footing as the original signatories, whereas "accession" ranked them lower, since a State acceded only to an instrument which had already been concluded. Hence it was impossible to disregard those two institutions, which were already accepted in United Nations practice. Moreover, in the constitutional practice of some States, the declaration of acceptance or approval was given in the same form as ratification.

39. Some States distinguished between treaties that were ratified and treaties that were approved; so far as the international effects were concerned, however, it was the same thing—a definitive declaration by a State expressing its will to be bound by a treaty.

40. Irrespective of his position as to principle, he thought it convenient to treat ratification, approval and acceptance as means whereby a State expressed its will to be bound. He was not opposed to signature having the same effects, but thought that would have to be stated expressly in a rule of international law. If the Commission stopped half-way between two institutions, the misunderstanding would remain and it would still be uncertain what act bound a State. Some authorities even spoke of a "provisionally binding will", which was difficult to imagine, but could exist.

41. Mr. CASTRÉN said he thought articles 11 to 14 should be referred to the Drafting Committee; the Commission would thereby save time, and it would be in a better position to discuss the articles after they had been redrafted.

42. As Mr. Jiménez de Aréchaga had said, approval and ratification should not be linked too closely, because the term "approval", like "acceptance", had several meanings.

43. With regard to the procedure of ratification and other methods, he thought, like the Special Rapporteur, that there should be an article to settle the question. Article 15 should therefore be retained, but it should first be discussed, together with articles 16 and 17, which related to the effects of ratification.

44. Mr. TABIBI said he was in favour of referring articles 11 to 14 to the Drafting Committee as they were closely interrelated; Mr. Ago's proposal should be taken as the basis for the new draft.

45. In his part of the world important treaties were subject to ratification, but treaties in simplified form could enter into force on signature, even though they were generally submitted to the legislature afterwards.

46. Despite the difficulty of defining the latter type of treaty some mention should be made of it in the new article 12. It was also important to cover the point raised by Mr. Tunkin at the beginning of the discussion.

47. Mr. VERDROSS said he agreed with the Chairman's view that approval produced the same effects as ratification, but it must be admitted that in practice the terminology was fluid. The Commission should promote clarity in terminology; in order to avoid confusion it should reserve the term "ratification" for the act performed by the Head of State—or, if he did not have authority to ratify treaties, by the highest organ competent to do so—and the term "approval" for the act performed by another organ.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that when preparing his first report, he had felt the same urge to try to bring some order into the terminology. However, he had long since realized that it was neither possible nor even proper to try to dictate to States which terms they should employ, what institution they should use, or what appellation they should give it.

49. What really mattered, from the point of view of the draft articles, was to determine whether consent to be bound by a treaty had been given by a State. From that point of view, it would be sufficient for the relevant provision to state that, unless consent to be bound was given by signature alone, consent took the form of ratification, accession, approval or acceptance. The Drafting Committee should be able to prepare a formulation that would prove more acceptable than any proposed so far.

50. Mr. AMADO said he had serious doubts about the term "approval". When the Special Rapporteur referred, in article 15, paragraph 2, to an "instrument of ratification, accession, acceptance or approval", did he mean to place acceptance and approval on the same level? What was the difference in meaning?

51. For some States, approval was an act of internal law. Under the Constitution of Brazil, approval was the act by which the Senate approved the work of the negotiators, which was then submitted for ratification.

52. He was glad to note that Mr. Ago had set accession apart; for it was when a treaty had already been signed that States acceded to it; they could accede only to something which already existed.

53. Acceptance was a new procedure brought into being by practical necessities—by the difficulties of ratification, which were harmful to States, which complicated the political life of even the most advanced of them and which aggravated the struggle between the executive and the legislature.

54. As to approval, he was always concerned for clarity and was not convinced by the Special Rapporteur's arguments that "acceptance, at least, is sometimes used rather as a substitute for simple signature than for either of the other two procedures", namely, ratification and accession, and that "'acceptance' and 'approval' should be retained, where they are in the scheme of the draft articles" (A/CN.4/177, *ad* article 14). Apart from that, he agreed with the Special Rapporteur.

55. Sir Humphrey WALDOCK, Special Rapporteur, said it was essential to take into account the large number of recent treaties which provided for acceptance or approval. Both those institutions could have the same effect as ratification; they were variants of, or different names for, the act of giving consent to be bound by a

treaty. In view of that practice, it would be surprising if the Commission did not include any provision on acceptance or approval in its draft; it would be still more surprising if it included a provision on acceptance, but none on approval. The draft articles should reflect existing practice. In fact, there were treaties which were open to ratification, accession, acceptance and approval; the intention of that broad type of participation clause was to obtain the consent of the largest possible number of States to be bound by the treaty.

56. The CHAIRMAN, speaking as a member of the Commission, said, in reply to Mr. Amado, that the articles under study dealt with accession, acceptance and approval, not as internal acts, but only as written international instruments. Modern practice was for a State to deposit a written instrument issued by the appropriate authority—usually the Head of State—by which it affirmed to the other party its consent to be bound by the treaty.

57. Approval, which was now more common than ratification, was an act by which a State definitively bound itself when a treaty had been signed subject to approval by a competent authority other than the Head of State.

58. According to the terminology introduced by the United Nations Secretariat, where a treaty did not contain an accession clause, States other than the original signatories could only “accept” it, they could not accede.

59. If the Commission confined itself to experience before the second World War, it would be ignoring present practice, which was calculated to facilitate international relations. There had been a time when he had had the same doubts on the subject as Mr. Amado; but in the course of his work as legal adviser to the Yugoslav Ministry of Foreign Affairs, he had grown accustomed to the new practice and become convinced that accession—where it was possible—acceptance and approval produced the same legal effects as ratification. Each of those terms denoted the instrument by which a State expressed, at the international level, its will to be definitively bound by the treaty.

60. Mr. AMADO said that if, as he hoped, he had the honour to represent Brazil at the conference convened to consider the Commission's draft, he would use the arguments just advanced by the Chairman and the Special Rapporteur to reply to States which expressed doubt concerning approval.

61. The CHAIRMAN said that the Commission had before it a proposal by the Special Rapporteur that articles 12, 13 and 14 should be referred to the Drafting Committee. He took it that that proposal was acceptable, but he must first allow members of the Commission who had not yet commented on articles 13 and 14 to do so for the benefit of the Drafting Committee.

*It was so agreed.*¹⁰

ARTICLES 13 (Accession) and 14 (Acceptance of approval)

Article 13

Accession

A State may become a party to a treaty by accession in conformity with the provisions of articles 8 and 9 when :

(a) It has not signed the treaty and either the treaty specifies accession as the procedure to be used by such a State for becoming a party; or

(b) The treaty has become open to accession by the State in question under the provisions of article 9.

Article 14

Acceptance or approval

A State may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 8 and 9 when :

(a) The treaty provides that it shall be open to signature subject to acceptance or approval and the State in question has so signed the treaty; or

(b) The treaty provides that it shall be open to participation by simple acceptance or approval without prior signature.

62. Mr. PAREDES said that at a previous meeting he had stressed the importance of ratification from the point of view of constitutional law. Constitutional requirements had to be borne in mind when discussing the question whether ratification should be specified in the draft articles. His own view was still that, where the treaty was silent on the subject, the presumption was that ratification was necessary. As to whether that rule was internal or international in character, it was like many other provisions which were internal but governed international relations between States.

63. Clarity and precision of terminology were essential, as Mr. Amado had pointed out. A body like the Commission should always use accurate terms. Confusion in terminology could lead to confusion in regard to the institutions themselves. In particular, it was essential not to confuse approval and ratification; those two terms referred, in the vast majority of Latin American constitutions, to two completely different acts. Approval was an act by the legislature giving consent to ratification by the executive of a previous act performed in connexion with a treaty. If the terms “approval” and “ratification” were to be treated as interchangeable, the resulting confusion would give rise to the most serious problems of internal law.

64. There was undoubtedly a contemporary trend towards simplified treaty-making procedures, but such procedures were suited only to treaties which did not involve matters vitally important for the State. He therefore suggested that the Commission, without attempting to give directives to States, should encourage them to adopt a common approach to ratification.

65. For treaties that were silent on the question of ratification, the Commission should state the residuary rule that ratification was required. It was the Commission's duty to lay down residuary rules to fill such gaps in the expression of the parties' intention and a rule requiring ratification would take account of the fact that, in a great many States, including Ecuador, the constitution laid down that legislative approval was necessary for the ratification of all treaties.

66. Lastly, he fully agreed with the view expressed by the Chairman at the previous meeting, that weak countries should be protected against possible abuses by more powerful ones.¹¹

¹⁰ For resumption of discussion, see 812th meeting, paras. 35-64.

¹¹ 785th meeting, para. 40.

67. Mr. TSURUOKA said he hoped the Drafting Committee would try not to use the expression "become a party to a treaty" which appeared in the first line of article 14. That expression had no doubt been found convenient because it was applicable both where consent was expressed before the treaty's entry into force and where it was expressed afterwards. But to prevent any misunderstanding, it would be better to distinguish between those two cases. That also applied to articles 17, 18 (paragraph 3), 19 and 20, where the expression "become a party" was repeated.

68. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that, in his new formulation for the provisions on ratification, accession, acceptance and approval, the expression "become a party" had been avoided. He agreed, however, that throughout the draft articles the term "party to a treaty" had not always been used very precisely and the Drafting Committee would have to improve the text in that respect.

69. Mr. ROSENNE said that, from the trend of the discussion, it seemed that acceptance and approval would emerge as independent institutions, and he agreed with that. Since ratification had been dealt with in article 12 without any connexion with articles 8 and 9, it was also appropriate to consider article 14 apart from articles 8 and 9, which dealt with a different matter.

70. With regard to drafting, he did not like the use of the passive voice in the Special Rapporteur's revision of articles 13 and 14 (A/CN.4/177) and suggested that it be replaced by the active voice.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that both the points raised by Mr. Rosenne would be borne in mind by the Drafting Committee.

72. With regard to the first point, the formulation he had proposed at the present meeting did not contain any reference to articles 8 and 9. Those articles dealt with the right to become a party to a treaty and contained special substantive provisions; there was no need to link the question of acceptance or approval with those provisions.

73. The CHAIRMAN, speaking as a member of the Commission, said it was important that the Drafting Committee should bear in mind that the terms "acceptance" and "approval" had a particular meaning in international parlance, in order to avoid any confusion with usage in internal law.

74. Mr. JIMÉNEZ de ARÉCHAGA asked whether the Special Rapporteur was now proposing that ratification, accession, acceptance and approval should all four be dealt with in a single article.

75. Sir Humphrey WALDOCK, Special Rapporteur, said that that was his intention, subject to a reservation with regard to accession. In principle, his present proposal and that of Mr. Ago were intended to deal, in two separate sets of provisions, first, with signature as expressing consent to be bound and, second, with the other institutions which established consent. Personally, he would be prepared to include accession in the second set of provisions, but he realized that some members might wish to discuss the contents of articles 8 and 9 before they decided whether to agree to that or not.

76. Mr. JIMÉNEZ de ARÉCHAGA, thanking the Special Rapporteur for his explanation, said that accession was very different in character from ratification and therefore deserved separate treatment. If ratification, acceptance and approval were lumped together in a single provision, the result would be to depreciate ratification. At any conference convened to discuss the draft articles, the States which favoured the ratification requirement would probably form the majority and they would not accept any formulation that might detract from the importance of an institution to which they were attached.

77. Acceptance and approval were new institutions, with no historical background, which had emerged during the post-war years. Naturally, acceptance or approval were not required unless the treaty contained an express stipulation to that effect, but the traditional institution of ratification could not be put on the same plane; if it were, the inevitable effect would be to diminish the historical, political and constitutional importance of a long-established institution. If the Commission were to adopt that course, it would run the risk of being overruled by the conference of plenipotentiaries.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that the position would depend entirely on the language which the Drafting Committee adopted. He hoped, however, that its wording would meet Mr. Jiménez de Aréchaga's point.

79. Mr. BRIGGS suggested that article 13 be taken after articles 8 and 9; otherwise, he would find it extremely difficult to discuss. Both the preamble and subparagraph (b) of article 13 specifically referred to articles, while the revised text proposed by the Special Rapporteur for article 13 (A/CN.4/177) opened with a reference to them.

80. The CHAIRMAN pointed out that articles 12, 13 and 14 referred to procedures subsequent to signature and therefore at least presupposed the existence of a document that had been signed. In fact, article 12 was even more closely linked to articles 8 and 9 than article 13 was; but the Commission had decided to refer articles 12, 13 and 14 to the Drafting Committee.

81. If the Commission wished to adopt Mr. Briggs's suggestion, it would have to go back on its decision on article 13 in order to discuss it further in conjunction with articles 8, 9, 10 and 11.

82. Speaking as a member of the Commission, he said he could adduce further arguments in support of Mr. Briggs's view. In the new practice followed by international conferences and international organizations, there were cases in which a State was bound by mere accession, without any previous signature. The practice was to establish—in other words, to authenticate—the text of the treaty and to set a date until which the treaty would be open for signature. On closer analysis, the act of signing would be found to be equivalent to accession by those who had had an opportunity of influencing the drafting of the text. After the final date for signature, only accession was possible. That was an ingenious device invented by international officials in order to establish a distinction between signature and accession, but the distinction introduced no change of substance.

83. Moreover, the Special Rapporteur had stressed several times that accession was not an act of the same nature as ratification, acceptance and approval.
84. Sir Humphrey WALDOCK, Special Rapporteur, said he would be quite willing to discuss articles 13, 8 and 9 together. His own feeling was that articles 8 and 9 dealt with a completely different question from that with which article 13 was concerned, but some members obviously felt that a link existed between the two sets of provisions.
85. Mr. TUNKIN said that approval might be considered analogous to ratification; sometimes the same treaty was approved by one State and ratified by another. However, if members felt that the dignity of ratification might be diminished if it were mentioned in the same provision as approval, the two acts might perhaps be separated.
86. The provisions of article 13 were almost entirely descriptive; any substantive content was already covered by articles 8 and 9. As to the language, he agreed that the expression "a State may become a party" was inappropriate in the context.
87. Mr. AGO recognized that there was a connexion between article 13 and articles 8 and 9, but he did not think the Commission need discuss articles 8 and 9 before referring article 13 to the Drafting Committee. Articles 8 and 9 were substantive articles which specified the circumstances in which a State had the right to become a party to a treaty, whereas article 13 specified the act by which a State became party to a treaty when it had that right. The two things were thus different enough for the Commission to be able to discuss them separately.
88. With regard to the different acts referred to, there was certainly some confusion of terminology in State practice, and the Commission could not expect to clarify a matter that was confused in fact. For instance, the Special Rapporteur had said that acceptance was sometimes similar to ratification and sometimes to accession.
89. After some hesitation he had abandoned the idea that the Commission should deal with accession separately. If it chose the descriptive method, it would have to deal successively with signature, ratification, accession, acceptance and approval; but that method was too pedantic and would entail much repetition. If on the other hand the Commission considered the legal effects of the acts, it could deal with them in a single article, in which it would stress that they were all means by which States definitively expressed their consent to be bound by a treaty; and that was the only point of consequence in a set of articles such as the Commission was drafting.
90. Mr. EL-ERIAN said that his doubts about the terminology question had not been dispelled.
91. He also had misgivings concerning the relationship between the substantive provisions on participation in articles 8 and 9 and the procedural matters dealt with in article 13.
92. He was not convinced that ratification, accession and acceptance should be dealt with in a single article. The term "ratification" was used where a treaty had already been signed; in the case of accession, the State concerned did not sign the treaty, for the process of accession had the combined effects of signature and ratification.
93. As to signature subject to acceptance or approval, it could serve a purpose similar to that of signature subject to ratification. Ratification was applicable to both bilateral and multilateral treaties, but accession only to multilateral treaties. He did not believe that it was possible to treat ratification and accession in the same manner.
94. The CHAIRMAN said that in 1962 the Commission had taken as a basis the practice of the United Nations Office of Legal Affairs. According to that practice, ratification, where necessary, must always be preceded by signature, whereas accession was reserved for non-signatory States and was possible only if the treaty contained a clause providing that other States—whether specified or not—could accede to it. There had even been bilateral treaties which provided that a particular third State could accede to them subsequently. For example, a treaty concluded between Greece and Yugoslavia had provided that Italy and Bulgaria could accede to it with the agreement of the two parties. But the United Nations Office of Legal Affairs also accepted the thesis that accession created a provisional obligation which needed subsequent confirmation by ratification. On the other hand, it considered that acceptance was a definitive act requiring neither signature nor ratification, whereas approval was the act of a competent organ which confirmed the consent given by signature subject to that organ's approval.
95. The Commission was not bound to follow that practice, which it might consider illogical or ill-founded; but in taking it as a basis in 1962, it had sought to follow the direction of the new international law which was developing within the United Nations.
96. Speaking as a member of the Commission, he added that later researches had not convinced him that acceptance was truly a procedure calculated to simplify the conclusion of treaties.
97. Mr. ROSENNE, referring to the procedural issue raised by Mr. Briggs, said that the substance of articles 8 and 9 really affected all the articles from 10 to 14. He saw no need to reverse the decision to refer article 13 to the Drafting Committee.
98. Mr. BRIGGS said he could not agree with Mr. Ago and Mr. Rosenne. The legal content of articles 8 and 9 was principally a problem of accession. It would therefore be extremely difficult to discuss article 13 without articles 8 and 9. He accordingly reserved the right to revert to the matter at a later stage.
99. Sir Humphrey WALDOCK, Special Rapporteur, said that, in view of the somewhat confused terminology to be found in State practice, nothing that the Commission could say with regard to the use of the institutions under discussion would be fully true. The truth was that each of the various institutions was used when the parties decided to use it.
100. With regard to procedure, he suggested that, after completing its discussion of article 13, the Commission should proceed to discuss article 15. It could then pass on to deal with articles 8 and 9, on the understanding that, in the course of the discussion on those articles, any member could make a proposal on article 13 as well.

101. As to article 16, its contents would no longer be necessary if a formulation such as he proposed, or one on the lines proposed by Mr. Ago, were adopted.

The meeting rose at 1.5 p.m.

787th MEETING

Thursday, 20 May 1965 at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Filling of a Casual Vacancy in the Commission

(resumed from the previous meeting)

[Item 1 of the agenda]

1. The CHAIRMAN said he had received a telegram from Mr. Bedjaoui, the newly-elected member, asking that his most sincere thanks should be conveyed to the Commission for the honour it had done him and assuring the Commission of his full co-operation. He hoped that Mr. Bedjaoui would soon be taking part in the Commission's work.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

2. The CHAIRMAN, referring to the discussion at the end of the previous meeting, asked whether Mr. Briggs thought it essential for article 13 (Accession) to be considered in detail by the Commission before being referred to the Drafting Committee for examination with the rest of the group of articles 11-15.

3. Mr. BRIGGS said he could agree to article 13 being referred to the Drafting Committee, but reserved the right to revert to the question of its relationship with articles 8 and 9 at a later stage.

ARTICLE 15 (The procedure of ratification, accession, acceptance and approval)

Article 15

The procedure of ratification, accession, acceptance and approval

1. (a) Ratification, accession, acceptance or approval shall be carried out by means of a written instrument.

(b) Unless the treaty itself expressly contemplates that the participating States may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

(c) If a treaty offers to the participating States a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory States, the instrument shall become operative:

(a) In the case of a treaty for which there is no depositary, upon the formal communication of the instrument to the other party or parties, and in the case of a bilateral treaty normally by means of an exchange of the instrument in question, duly certified by the representatives of the States carrying out the exchange;

(b) In other cases, upon deposit of the instrument with the depositary of the treaty.

3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with paragraph 2 (b) above, the State in question shall be given an acknowledgement of the deposit of its instrument, and the other signatory States shall be notified promptly both of the fact of such deposit and the terms of the instrument.

4. The CHAIRMAN invited the Commission to consider article 15.

5. Sir Humphrey WALDOCK, Special Rapporteur, referring to the comments by governments (A/CN.4/175) and to the proposals in his report (A/CN.4/177) concerning the text of article 15, said that in response to the United States Government's contention that the words "by means of a written instrument" in paragraph 1 (a) did not go far enough, he had proposed the addition at the end of that paragraph of the words "signed by a representative possessing or furnished with the necessary authority under the provisions of article 4". Since his report had been prepared, the Commission had discussed article 4 and had decided to omit from it any reference to authority, so that the wording of his proposal would require modification; but that was a matter that could be left to the Drafting Committee, together with the rather delicate question whether reference should be made to the fact that the instrument ought to emanate from a person appearing to be furnished with full powers in accordance with article 4—a point which the Commission had tried to cover in article 31.

6. In paragraph 3 of his observations he had also raised a small point concerning paragraph 1 (b), which might leave room for doubt about the relationship between a provision dealing with election to become bound by part or parts of a treaty, and the right to make reservations on specific articles as expressly allowed in the treaty itself. The effect in practice might be substantially the same and the question was whether a proviso reading "Subject to article 18 and" should be inserted at the beginning of paragraph 1 (b) or whether it would suffice for the difference between the two procedures to emerge from the texts of the relevant articles themselves.

7. The Government of Luxembourg had rightly criticized the expression “two differing texts” in paragraph 1 (c): The Commission had certainly meant “alternative” texts. The practice of offering a choice between two texts was followed in a restricted number of treaties.

8. Some modification might be also needed to meet the Swedish Government’s objection that by saying nothing about what would happen when there was no indication as to which text had been subscribed to by a party, the Commission had failed to lay down a substantive rule in paragraph 1 (c). Members would find in his observations a suggested revision to meet that point, which read:

“If a treaty offers to the participating States a choice between two alternative texts, the instrument of ratification must indicate the text to which it relates. In the event of a failure to do so, the ratification shall not be considered as effective unless and until such indication has been given by the State concerned.”

That text would have to be amplified so as to refer not only to instruments of ratification, but also to instruments of accession, acceptance and approval. As there were cases in which alternative texts were offered for only part of a treaty, if any rule at all had to be stated perhaps it should be worded rather broadly.

9. With regard to paragraph 2, the Government of Luxembourg had questioned whether the distinction between an instrument of ratification producing its effects, and treaty obligations coming into force for the parties, had been adequately brought out; he had suggested that possibly other provisions which made that distinction clear, namely, articles 11, 16, 17 and 20, had been overlooked. That comment, of course, presupposed that those articles would be retained; but that might not be the case, particularly where article 16 was concerned. Should that article disappear, the Drafting Committee would have to see that the various stages in the process of establishing consent to be bound remained distinct. If the Commission adopted Mr. Rosenne’s suggestion that the articles on entry into force should follow directly after those dealing with the conclusion of treaties,¹ so as to emphasize the close links between the two groups, it would have gone a long way towards meeting the point made by the Government of Luxembourg.

10. Finally, he had suggested omitting paragraph 3, because its substance was already covered in article 29, paragraph 3 (d), which dealt with one of the duties of a depositary. The latter provision might have to be modified in order to take account of the point made by the United States Government concerning article 15, paragraph 3, but that was a matter which should be left for discussion at a later stage.

11. Mr. YASSEEN said that article 15 was useful in that it showed when the instruments of ratification, accession, acceptance and approval took effect—assuming that they were all mentioned in the draft. However, he shared the opinion expressed by the Japanese Government that some of the details did not merit special provisions; that applied particularly to paragraph 1 (b), and even to paragraph 1 (c).

12. As to the form the instrument should take, it must obviously be a written instrument, but as the United States Government had suggested he thought it might also be required to be signed.

13. He supported the Special Rapporteur’s proposal that paragraph 3 be deleted and its substance incorporated in the article on the functions of a depositary.

14. The comment by the Government of Luxembourg on paragraph 2 did not seem well-founded, for it was clear from the wording of the article that it related to the effect of the instrument of ratification, accession, acceptance or approval, not to the entry into force of the treaty.

15. Mr. CASTRÉN said he shared the view expressed by the Government of Sweden that while some of the provisions of article 15 contained important legal rules, others were exclusively procedural. In that respect the deletion of paragraph 3, proposed by the Special Rapporteur, would be an improvement.

16. Paragraph 2 was rather long and set out rules which were mostly self-evident, except, perhaps, that in subparagraph (b); the solution proposed in that subparagraph was correct, but others were possible. Mr. Rosenne had submitted a draft article 29 *bis* (A/CN.4/L.108) in which he proposed a different rule.

17. With regard to paragraph 1, he accepted the Special Rapporteur’s suggestions concerning subparagraphs (a) and (c), though he wondered whether it had, in fact, ever happened that a State ratifying a treaty which offered a choice between two alternative texts had failed to indicate which text its ratification referred to.

18. The CHAIRMAN said he could confirm that the question what a State had intended to bind itself to had arisen where its instrument of ratification had not specified which text it had chosen.

19. Mr. RUDA said that the first problem concerning article 15 was the general one raised by the Government of Japan in proposing the article’s deletion. He not only agreed with Mr. Yasseen that the article was useful, but he considered it to be necessary, because the draft would be incomplete without an article on the procedure of ratification, accession, acceptance and approval. Apart from that, however, article 15 raised several specific problems.

20. With regard to paragraph 1 (a), he shared the opinion expressed in paragraph (1) of the commentary adopted by the Commission in 1962, that “The actual form of the instrument is . . . a matter which is governed by the internal law and practice of each State”.² It would therefore suffice to retain the requirement of a “written instrument”. The United States proposal taken up by the Special Rapporteur would probably make for greater certainty in international relations; but from the point of view of theory the Commission should say whether the form of the instrument was a matter governed by international law or by the internal law and practice of each State; if it adopted the second solution, it would be for the State to choose the form of the instrument, and he was opposed to that.

¹ See 786th meeting, para. 36.

² *Yearbook of the International Law Commission, 1962, Vol. II, p. 174.*

21. The situation contemplated in paragraph 1 (*b*) was quite common, so the provision should stand, with the addition of the qualifying phrase "subject to article 18" proposed by the Special Rapporteur. The purport of paragraph 1 (*b*) was that if a treaty did not specify that States were free to elect to become bound by certain parts of the treaty only, a State which deposited an instrument of ratification not specifying whether it elected to become bound by the whole of the treaty or by only part of it, would be deemed to be bound by the whole treaty. The Commission might, however, also state what was the effect of a ratification which did not specify the scope of the undertaking, in cases where the treaty itself allowed partial ratification.
22. For paragraph 1 (*c*), he accepted the new text proposed by the Special Rapporteur in view of the comments made by the Governments of Luxembourg and Sweden.
23. Paragraph 2 dealt with the important problem of the date on which the instrument became operative; that date should be the date of deposit of the instrument, not the date when notice of the deposit was given, as the Commission had made clear in 1962, in paragraph (4) of its commentary.³ Furthermore, for the reasons given by the Special Rapporteur, he did not think it would be advisable to make the distinctions suggested by the Government of Luxembourg.
24. With regard to paragraph 3, he supported the Special Rapporteur's proposal that the substance of the paragraph should be transferred to article 29, paragraph 3 (*d*).
25. Mr. ROSENNE said he held no particularly strong views on article 15, but perhaps its various elements could be combined with other provisions. Subject to certain modifications, the United States Government's proposal requiring the instrument of ratification to be signed should be incorporated in the draft, possibly combined with article 1, paragraph 1 (*d*) and article 16. The problem of establishing the necessary link with article 4 might then be solved.
26. The Drafting Committee should be wary of using the word "text" in paragraph 1 (*b*) and (*c*) as it could lead to ambiguity, particularly if those sub-paragraphs were read in conjunction with the provisions dealing with authentication of the text and those distinguishing between the authentic and other texts, such as articles 72 and 73. His view, which he believed was shared by Mr. Briggs and others, was that there could only be one text of a treaty.
27. If the suggestion made by the Government of Luxembourg concerning paragraph 1 (*c*) were adopted, the word "alternative" need not be qualified by the word "two".
28. There seemed to be general agreement that paragraph 3, which expressed a legal rule, could be transferred to article 29, together with the provision in paragraph 2(*b*).
29. Mr. AGO said that the article did not raise any very serious problems of substance, but some drafting points and the interrelation between the paragraphs would have to be considered.
30. It was open to question whether the title should indicate that the article concerned procedure. In fact, apart from paragraph 1, it dealt with the effect produced by the instruments, which was something other than procedure. Moreover, paragraph 1 could perhaps be omitted if it was specified, either in the definitions or in one of the other articles preceding article 15, that the instrument must be in writing.
31. He suggested that in paragraph 1 (*b*) and (*c*) the passages "the instrument must apply . . ." and "the instrument of ratification must indicate . . ." should be amended to read "the instrument becomes operative only if it applies to the treaty as a whole" and "the instrument becomes operative only if it indicates to which text it refers"; for what mattered was the effect of the instrument.
32. In paragraph 2 (*a*), the phrase "by means of an exchange of the instrument" should perhaps be amended to show clearly that the important element was not the means or the procedure, but the time when the instrument became operative.
33. Mr. REUTER said that Mr. Ago had raised a very important question regarding paragraph 1 (*b*) and (*c*). Considered from the point of view of their effects, the situations contemplated in those provisions raised questions which should either be ignored entirely or dealt with more fully, if not in that article, then elsewhere.
34. Paragraph 1 (*b*) raised the question of the separability or unity of the obligations laid down in the treaty, and paragraph 1 (*c*) raised a question of principle which, as the draft then stood, was entirely disregarded, namely, whether an obligation could exist without any indication of its object. The Commission had eliminated that case from the provisions on the grounds for invalidity of treaties. In practice, however, the question did arise. There had, at least, been the case of States undertaking to apply the rules contained in the General Act of 1928⁴—they had not become parties to it—without choosing between the various combinations of obligations proposed in the Act. In such a case, the validity of the obligation might be open to question.
35. The Commission might do well to delete paragraph 1 (*b*) and (*c*) of article 15, but to keep those two problems in mind and deal with them elsewhere.
36. Mr. de LUNA said he agreed with the Special Rapporteur that paragraph 1 (*a*) should be amended on the lines he had suggested in order to take account of the United States Government's comment.
37. He subscribed to what Mr. Reuter had said concerning paragraph 1 (*b*), but he had not altogether understood the purport of Mr. Ago's remarks about the instrument of ratification only taking effect if it related to the whole treaty.
38. He endorsed the comment of the Government of Luxembourg concerning paragraph 1 (*c*) and the Special Rapporteur's suggestion for covering that point.
39. In conclusion, he wished to point out that the Spanish translation of paragraphs 1 (*b*) and (*c*) was not accurate.

³ *Ibid.*, p. 175.

⁴ League of Nations *Treaty Series*, Vol. XCIII, p. 345.

40. Mr. AGO, replying to Mr. de Luna, said he understood paragraph 1 (b), as it stood, to mean that if the treaty itself did not specify that States could elect to become bound by only some of its provisions, a State depositing an instrument of ratification must indicate therein that it was bound by the treaty as a whole. He considered such a clause unnecessary.

41. On the other hand, it was necessary to consider what would happen if a State indicated that its ratification applied to only part of the treaty. It would hardly be possible to coerce the will of the State by treating the ratification as applying to the whole treaty. What could be said, however, was that the ratification did not become operative because it did not fulfil a necessary condition. The State could then deposit a new instrument if it wished its ratification to be valid.

42. Mr. TUNKIN said he had some difficulty in accepting article 15. An examination of existing practice showed wide variations in the procedures followed by States for ratification, accession, etc. Paragraph 1 (a) surely referred to instruments as distinct from acts of ratification. The procedure might be determined in the treaty itself. The exchange of instruments of ratification and their deposit with the depositary might be regarded as the classical procedures, but there were others of more recent date, such as simple notification, sometimes by a *note verbale*, that a State had ratified or approved an international instrument; that procedure could be used, for example, for the recommendations and conventions of the International Labour Organisation.

43. He questioned the necessity, or the wisdom, of attempting to formulate a rigid rule in paragraph 1; such a rule was unlikely to be acceptable to States because it might hamper recourse to more flexible modern procedures, which were certainly beneficial to international relations. The Commission should do no more than state a residuary rule to the effect that, if no procedure was laid down in the treaty itself, or if none was prescribed by the applicable rules of an international organization, ratification, accession, acceptance or approval should be carried out by means of a written instrument.

44. The provision in sub-paragraph (b) might form a separate paragraph if the Commission felt that the matter was not adequately covered in a general provision of the kind he had suggested.

45. Sub-paragraph (c) ought to be dropped, as instances of alternative texts were rare and the practice should certainly not be encouraged. That being so, the best course was to keep silent.

46. He agreed with the Special Rapporteur and certain governments that paragraph 3 was superfluous, its content being covered by article 29.

47. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin that States were making less and less use of formal instruments of ratification, accession, acceptance and approval. Sometimes the text of a treaty itself provided that States which ratified, acceded, accepted or approved must declare in a written communication that that condition had been fulfilled. The Scandinavian States did not generally deposit a formal instrument, but merely addressed a *note verbale* to the other parties. Some States did not produce

the original of the document, which remained in the national archives, but only a certified copy. The United States of America, on the other hand, followed a very solemn procedure and always required the submission of a formal instrument.

48. Thus the question arose whether the Commission should or should not favour the simplified form. For his part, he was inclined to think it would be sufficient to say that the instrument must be in writing—which would cover *notes verbales*—for if it were added that it must be signed, it would be necessary to say by whom.

49. Mr. Ago's proposal for paragraph 1 (b) was too rigid. There were many cases in which States were willing to be bound by only some of the provisions of a treaty and that situation was accepted. If the Commission laid down that in such cases the instrument of ratification was invalid, it would no doubt be providing a clear and correct solution, but he was not sure that it was necessary to be so strict. Even where the treaty did not contain a clause expressly authorizing States to become bound by some of its provisions only, it might be better to leave that possibility open to them if the other parties agreed. He would not give any opinion on that point for the time being.

50. The same question arose in regard to reservations. 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 held that reservations which were compatible with the object and purpose of the Convention were permissible.⁵

51. The case referred to in paragraph 1 (c) was perhaps comparatively rare, but not so rare as Mr. Tunkin maintained. The new text proposed by the Special Rapporteur for that sub-paragraph was acceptable, because the second sentence left it open to a State to indicate its position in a subsequent explanation; it would, however, be better to speak of "a choice between alternative texts", for sometimes there were more than two.

52. Paragraph 2 was an important substantive provision. He would not repeat Mr. de Luna's arguments on the point; he took the word "normally" in sub-paragraph (a) to mean that the procedure mentioned was not the only one possible. The essential element of the sub-paragraph was the phrase "upon the formal communication of the instrument to the other party or parties".

53. Paragraph 3 also dealt with a most important legal question. The position of that provision in the draft was of no great importance; what mattered was that it should be included.

54. Reverting to what he regarded as the most important problem raised by the article, he urged the Commission not to include a nullity clause unless it was absolutely necessary, for once an instrument had been declared null and void, there was no further remedy. It would be better to allow some flexibility, even if the security of the parties might suffer.

55. Mr. AGO thought that the matter raised by the Chairman concerned substance, not drafting. The question was whether a ratification which related to part of a

⁵ *I.C.J. Reports 1951*, p. 29.

treaty only could be accepted as valid if such ratifications had not been provided for at the time of the treaty's conclusion.

56. His proposal for that case did not include nullity of the treaty, only nullity of the act of ratification. There were many ways of remedying such a situation: the other parties would tell the State in question that it was not possible to ratify only a part of the treaty; the State in question would reply; there would be a discussion and then possibly an agreement would be reached. But it would be a serious matter to provide for the possibility of partial ratification even where the treaty did not contemplate it, for that would offer a means of circumventing the clauses concerning reservations. A State wishing to make reservations should make them known at the time of ratification, and it could not evade the reservations clauses and their consequences by declaring that it ratified only part of the treaty. Moreover, a State which ratified subject to reservations was ratifying the treaty as a whole, with the exception of certain articles; that was quite different from ratifying only part of the treaty—assuming that it was separable into various parts and that the Contracting States were free to decide that it could be ratified in parts.

57. The CHAIRMAN observed that the United States had ratified only certain parts of the Treaty of Versailles—with serious political consequences.

58. Mr. BRIGGS said he was in general agreement with Special Rapporteur's suggestions for improving the text of article 15; he urged the Drafting Committee also to give full weight to the drafting changes proposed by Mr. Ago.

59. He believed that the United States Government would be satisfied if the concluding words of paragraph 1 (a) were amended to read "by means of a signed instrument", as its objection had been prompted by the fact that the original text seemed to condone what was an admittedly infrequent practice, but one that nevertheless occurred: that of submitting a written instrument bearing only a stamped seal. There was no need for the further condition suggested by the Special Rapporteur that the signature should be that of "a representative possessing or furnished with the necessary authority under the provisions of article 4".

60. The reference to "texts" in the Special Rapporteur's suggested revision of paragraph 1 (c) was not correct, since the choice was not between texts, or even versions, but between alternative provisions of the treaty. As Mr. Reuter had pointed out, there were treaties, such as the General Act for the Pacific Settlement of International Disputes, from which the parties could select certain portions for ratification.

61. Paragraph 3 ought to be deleted entirely.

62. Mr. AMADO thought it hardly conceivable that an "instrument" should not be in writing.

63. The CHAIRMAN said that he regarded the expression "written instrument" as a pleonasm, but the text had been adopted by the whole Commission.

64. Mr. REUTER said he understood the purport of Mr. Tunkin's arguments: used with reference to a treaty, the word "instrument" was rather heavy and full of substance, since it meant "authentic act". It might

almost be better to say "an instrument or written communication".

65. Mr. AMADO observed that there were expressions which gradually gained acceptance through mere repetition. Mr. Reuter's comment had clarified the question.

66. The CHAIRMAN, speaking as a member of the Commission, said he could accept the formula proposed by Mr. Reuter, which accorded with the spirit of Mr. Tunkin's remarks.

67. Mr. YASSEEN thought that signature, at least, should be required. True, the treaty-making process should not be rendered unduly cumbersome, but signature did not constitute an intolerable burden for States, and in such a serious matter it was not excessive to require that the instrument be signed.

68. With regard to paragraph 2 (b), he would prefer the words "In other cases" to be replaced by the words "In the contrary case" or "Otherwise", for since paragraph 2 (a) related to the case in which there was no depositary, there could only be one other case.

69. Mr. TUNKIN, replying to Mr. Yasseen, said that to require communications concerning ratification to be signed by a person with the necessary authority might hamper certain modern simplified procedures. There was no reason why the Commission should cling too closely to the traditional procedure of ratification. The only possibility was a residuary rule, because States must be left complete freedom to determine what procedure they wished to follow in any particular case.

70. He was also opposed to any rigid rule being inserted in paragraph 1 (b) on the lines suggested by Mr. Ago, because the possibility of States ratifying part of a treaty only and not the whole instrument, in the sense ascribed to the term "treaty" by the Commission, must not be prejudiced. For example, the Soviet Union had not ratified the Radio Regulations annexed to the International Telecommunication Convention, though the Convention provided for that possibility.

71. The CHAIRMAN, speaking as a member of the Commission, said that as a general rule *notes verbales* were initialled by States; they were very rarely signed. A noteworthy exception was the British Foreign Office, all of whose *notes verbales* bore the signature of the Principal Secretary of State for Foreign Affairs.

72. Mr. JIMÉNEZ de ARÉCHAGA said that, with respect to paragraph 1 (a), two views had emerged: one favoured giving States greater freedom in order to facilitate their entering into agreements, while the other favoured a stricter rule, with the requirement that the instrument must be signed. The latter view was based on the argument that if a signature was required, States would be better protected against the possibility of ratification by mistake. For his part, he believed that it was the function of national law, not international law, to protect States against such dangers. He therefore supported Mr. Ruda's remarks and proposed that the concluding words of the paragraph be amended to read "must be made in writing, pursuant to the legislation of the State". Those words had been taken from the corresponding provision of the Havana Convention of

1928;⁶ they would leave it to each State to determine the method of drawing up the instrument. The provision should then be sufficiently flexible to meet the purpose expressed by Mr. Tunkin.

73. Paragraph 1 (b) contained a useful and necessary rule, which he preferred to that included in the corresponding article of the Havana Convention, which stated that ratification must embrace the treaty in its entirety.

74. Mr. ELIAS said there was no place in article 15 for the contents of paragraph 3. Perhaps when the Commission came to examine article 29, it could consider whether any element from that paragraph could be included in it.

75. As to paragraph 1 (a), he was not in favour of including the requirement that the instrument must be signed by an appropriate authority. He suggested that the words "written instrument" should be replaced by the words "written communication". The commentary would explain that the written communication must come from a person having authority to make it.

76. He also suggested that the concluding portion of paragraph 1 (b) should be reworded to read: "... part or parts only of the treaty, the written communication shall be considered as applying to the treaty as a whole."

77. He agreed with Mr. Rosenne and Mr. Briggs that paragraph 1 (c) should refer to two alternatives, not to two differing texts. He suggested that the provision should be reworded to read: "If a treaty offers to the participating States a choice between two alternative sets of provisions, the written communication regarding ratification must indicate to which alternative it refers".

78. He did not think there was much force in the argument that paragraph 2 (b) could be omitted. He agreed with Mr. Yasseen that the words "In other cases" should be replaced by the word "Otherwise".

79. Subject to the amendments he had suggested, he found article 15 both necessary and useful.

80. Mr. AGO said he wished to clear up the misunderstanding which seemed to have arisen between Mr. Tunkin and himself. He had not proposed that ratification must always apply to the treaty as a whole, thus ruling out the possibility that the treaty itself might provide that only one part of it should be ratified. His proposal had related to the end of paragraph 1 (b), the remainder of which would remain unchanged.

81. Mr. ROSENNE said it was necessary to draw a distinction between the question of treaties in simplified form and the subject matter of article 15, which related to treaties in solemn form. There was much force in the suggestion that, even in the case of solemn treaties, it was not desirable to freeze the present practices regarding ratification, and that there should be some flexibility in admitting newer procedures.

82. At the same time, it was not desirable to go too far in the direction of informality. The United States Government, in its comments, had gone no further than saying that the communication should be signed. The Commission itself should avoid delving into the niceties of diplomatic protocol regarding the manner of drawing

up, signing and sealing communications, which often involved political nuances.

83. The consent given by a State to a treaty comprised four stages. First came the formation of consent, which was an internal matter and not one of international law. Second came the expression of consent, which was basically governed by article 4, although certain other provisions of the draft articles were also relevant; in addition, the 1961 Vienna Convention on Diplomatic Relations contained provisions on the powers of an ambassador and the legal effects of acts performed by him. Third came the communication of the expression of consent to other States, and fourth, the legal consequences of that communication. Article 15 dealt with the communication of consent and article 16 with its legal effects. He was not convinced that article 15 was really necessary, but he would not oppose its retention if other members wished to retain it.

84. Mr. YASSEEN said that, while it was not the function of international law to protect States, neither should it diminish the constitutional protection they sometimes established, for themselves, particularly in view of the preference the Commission had given, in principle, to the internationalist theory.

85. For that reason, he was not opposed to the suggestion made by Mr. Jiménez de Aréchaga, which really gave effective protection to States. The addition of the proposed wording from article 6 of the Havana Convention on Treaties would make it superfluous to say whether the instrument should be signed or not, since the provision would refer back to internal law, which was intended to protect States from disagreeable surprises.

86. Mr. de LUNA said that, with the wording proposed by Mr. Jiménez de Aréchaga, the State whose legislation was referred to would indeed be protected, but that result would be achieved at the price of loss of security for the other party or parties to the treaty. From his experience of the negotiation of treaties, and from the experience of Spain as the depositary of certain treaties, he could safely say that it would be placing an unduly heavy burden upon the other parties to a treaty, particularly a multilateral treaty, to require them to ascertain what new practices might exist in the State concerned with regard to the form of instruments. Such practices tended to change frequently, often merely on the decision of an Under-Secretary of State. In Spain the practice had long been for *notes verbales* to be merely stamped with an embossed seal; during the Second World War, however, it had been decided that all such notes should thenceforth be initialled.

87. What was of overriding importance was the need for clarity and security in international relations. When a representative participated in negotiations on behalf of his State, or exercised the functions of depositary, it was essential that he should not be in any uncertainty regarding the other parties with which he was dealing; he should not be required to make an investigation of the internal practices of States in order to be satisfied that their instruments were in order.

88. Mr. TSURUOKA said he did not always support the draft submitted by the Japanese Government (A/CN.4/175, section I.11), but there were sound reasons

⁶ Hudson, *International Legislation*, Vol. IV, p. 2381, article 6.

for deleting almost all of article 15 and transferring the remainder elsewhere.

89. The discussions which had taken place showed the need to safeguard the security of international relations, but also the need to facilitate diplomatic activity and to promote progress in international intercourse. Where security was involved, signature or any other solemn form was the best guarantee; but it would still be necessary to inquire into current practice, which depended on many factors.

90. He doubted whether it was really necessary to lay down rules; it might be better to leave some freedom of action to States, which would certainly look after their own interests and would consequently give immediate attention to the security of their relations and the most progressive way to facilitate diplomatic activity. He urged the Commission to give careful consideration to the Japanese Government's proposals concerning article 15.

91. Sir Humphrey WALDOCK, Special Rapporteur, said there appeared to be general agreement that paragraph 3 should be dropped; its contents would be covered by the provisions which the Commission would adopt for article 29.

92. The contents of paragraph 1 (b) should constitute a separate article. He did not believe it would be appropriate to drop that provision; the Commission had devoted no less than five articles to the question of reservations, and it would be surprising if it were to omit all reference to the ratification of part of a treaty, a situation which was very close to that created by the formulation of reservations. It was not uncommon for a ratification or acceptance to refer only to part of a convention, especially in the case of conventions dealing with technical matters. He was in favour of retaining the provision, but thought the formulation suggested by Mr. Ago was an improvement.

93. With regard to Mr. Tunkin's suggestion that a more flexible rule should be introduced, it would not be advisable to encourage the idea that it was possible, in the absence of a provision of the treaty permitting it, for a State to become a party only to part of the treaty otherwise than through the operation of reservations.

94. Paragraph 1 (c) should be redrafted on the lines suggested by Mr. Ago and should form a separate article, also covering the question of signature.

95. It remained to decide the fate of paragraphs 1 (a) and 2, in the light of the Commission's decision to rearrange all the articles on signature, accession, ratification, acceptance and approval. Those paragraphs would deal with the manner in which the act of ratification was completed. The Drafting Committee would have to consider, in particular, whether it was desirable to prescribe that the instrument must be signed. Without going into the niceties of protocol, it would be necessary to decide whether the instrument should not have some clear authentication in the form of a signature. A rule on the lines of paragraph 1 (a) would be useful, but it should be formulated as a residuary rule, prefaced by a proviso to the effect that it applied unless the parties agreed on another procedure.

96. With regard to paragraph 2, the suggestion had been made that the residuary character of the rule in sub-paragraph (a) should be further stressed. Very great flexibility had been introduced into the rule by the last sentence in the opening section of paragraph 2: "If no procedure has been specified in the treaty or otherwise agreed by the signatory States . . ."

97. Towards the end of the debate, the suggestion had been made that a reference to the legislation of individual States should be included in paragraph 1 (a). He was strongly opposed to any such reference, which would dangerously weaken the security of the treaty-making process: it would make it possible to claim that a treaty was null and void because of non-compliance with some local provision. He would urge that, as in the discussion on article 4,⁷ that matter should be omitted from the discussion on article 15, and left to be fully debated when the Commission came to consider article 31.

98. He proposed that article 15 be referred to the Drafting Committee with the suggestions made during the discussion.

*It was so agreed.*⁸

ARTICLE 16 (Legal effects of ratification, accession, acceptance and approval)

Article 16

Legal effects of ratification, accession, acceptance and approval

The communication of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 13:

(a) Establishes the consent of the ratifying, acceding, accepting or approving State to be bound by the treaty; and

(b) If the treaty is not yet in force, brings into operation the applicable provisions of article 17, paragraph 2.

99. The CHAIRMAN invited the Commission to consider article 16.

100. Sir Humphrey WALDOCK, Special Rapporteur, said that the most substantial effect of ratification, accession, acceptance and approval, which was to establish the consent of the State concerned to be bound by the treaty—the idea expressed in sub-paragraph (a) of article 16—would be covered in the provisions on ratification, accession, acceptance and approval in articles 12-14 when those articles had been redrafted. The contents of sub-paragraph (b) merely anticipated the provisions of article 17, paragraph 2. Hence article 16 would no longer be necessary in the new formulation of the draft articles.

101. Mr. RUDA said that sub-paragraph (b) could well be dropped, because it merely referred to the rule in article 17 and therefore constituted an unnecessary repetition. Sub-paragraph (a) set out the essential rule in the matter, which was that the communication or deposit of an instrument of ratification, accession, acceptance or approval established the consent of the State concerned to be bound by the treaty. That rule must be stated somewhere in the draft articles and he would only be

⁷ 780th and 781st meetings.

⁸ For resumption of discussion, see 812th meeting, paras. 65-77.

prepared to accept the complete deletion of article 16 if the rule were included in another article.

102. Mr. AGO said that the Special Rapporteur was quite right. Since the Commission had decided to draft a comprehensive article on ratification, which would begin by specifying how the consent of States was established, article 16 was entirely unnecessary.

103. The CHAIRMAN, speaking as a member of the Commission, said he shared Mr. Ruda's opinion. Even if article 16 were deleted, the idea in sub-paragraph (a) must be stated expressly, perhaps at the beginning of article 15, so as to lay down that the operations in question established the will of the State to be bound by the text of the treaty.

104. Sir Humphrey WALDOCK, Special Rapporteur, said it was not desirable to instruct the Drafting Committee to include in article 15 the idea contained in sub-paragraph (a) of article 16. That idea was already embodied in the definition in article 1, paragraph 1 (d) and would appear again in articles 11, 12 and 14. He could assure Mr. Ruda that the substance of sub-paragraph (a) would be retained in the draft articles, but he urged that its position be left to the Drafting Committee.

105. Mr. AMADO thought that article 15 might open with the provision that ratification, accession, acceptance and approval established the consent of the State.

106. Mr. CASTRÉN said he agreed with the Special Rapporteur that the idea in sub-paragraph (a) was contained in the definition in article 1, so that article 16 could be deleted entirely.

107. The CHAIRMAN pointed out that the Commission had referred only paragraph 1 (a) of article 1 to the Drafting Committee and had reserved the rest.

108. Sir Humphrey WALDOCK, Special Rapporteur, said his earlier reference to the definition in article 1, though correct, had perhaps misled members as to his suggestion; it was not at all his view that the idea in article 16, sub-paragraph (a) should be incorporated in the definitions article. He now wished to emphasize that, from the formulations which had been discussed for articles 11 onwards, it was clear that there was every intention of including the idea in that group of articles.

109. Mr. TSURUOKA said he supported the Special Rapporteur's proposal. He hoped that the Drafting Committee would place the formula chosen not among the definitions, but in the body of another article.

110. The CHAIRMAN said that, in the light of the discussion, he took it the Commission agreed that article 16 should be deleted, and that the Drafting Committee should be instructed to incorporate the idea in sub-paragraph (a) in an appropriate place in the draft articles.

*It was so agreed.*⁹

111. Sir Humphrey WALDOCK, Special Rapporteur, said he would like to have the views of the Commission on the order in which the remaining articles should be discussed. Article 17 dealt with a matter which was connected not with the conclusion of treaties, but with an

obligation of good faith pending the entry into force of a treaty. Articles 18-22 dealt with reservations and interrupted the logical sequence; articles 23 and 24 could perhaps be discussed first, so as to complete the examination of the provisions on the conclusion of treaties before proceeding to those on reservations. Articles 8 and 9, dealing with participation, were also still outstanding.

112. Mr. TUNKIN said he had no strong objections to considering articles 23 and 24 before articles 18-22, but he thought it would be easier to deal with the articles in their numerical order and leave the question of rearrangement to the Drafting Committee.

113. Mr. ROSENNE said it would facilitate discussion if the Commission were to discuss the articles in the following order: first, article 17; second, articles 23 and 24 on entry into force; third, articles 8 and 9 on participation; fourth, articles 18-22 on reservations; and fifth, articles 25-29.

114. Mr. BRIGGS supported that proposal.

115. Sir Humphrey WALDOCK, Special Rapporteur, said that the order proposed would be convenient, as it would enable the Commission to dispose of articles 17, 23 and 24 before beginning its discussion on reservations, which was bound to take some time.

116. The CHAIRMAN said that the proposed order would be provisionally adopted, but the Commission need not consider itself bound to adhere to it.

The meeting rose at 1 p.m.

788th MEETING

Friday, 21 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(continued)

[Item 2 of the agenda]

ARTICLE 17 (The rights and obligations of States prior to the entry into force of the treaty)

Article 17

The rights and obligations of States prior to the entry into force of the treaty

1. A State which takes part in the negotiation, drawing up or adoption of a treaty, or which has signed a treaty subject to ratification, acceptance or approval, is under

⁹ See 812th meeting, paras. 35-38.

an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

2. Pending the entry into force of a treaty and provided that such entry into force is not unduly delayed, the same obligation shall apply to the State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty.

1. The CHAIRMAN invited the Commission to consider article 17, for which the Special Rapporteur had suggested the following revised text :

1. Prior to the entry into force of a treaty

(a) A State which has signed the treaty subject to ratification, acceptance or approval is under an obligation of good faith to refrain from acts calculated to frustrate its objects unless such State shall have notified the other signatory States of the renunciation of its right to ratify or, as the case may be, to accept or approve the treaty;

(b) A State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty is under the same obligation, unless the treaty is subject to denunciation and that State shall have notified the other States concerned of its withdrawal from the treaty.

2. However, the obligations referred to in the preceding paragraph shall cease to apply ten years after the date of a State's signature, ratification, acceptance, or approval of the treaty if the treaty is not then in force.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that with the exception of those of the United States and the United Kingdom, all the government comments (A/CN.4/175 and Add.1-3) had been to the effect that the rule stated in article 17 was too wide, in that it subjected a State to the obligation of good faith merely because of its participation in the negotiation, regardless of whether it had given any support to the text. The rule might seem to apply, at any rate for a short period, even to a State which had left the negotiating conference or had protested strongly against the adoption of a particular provision. Even the United States Government took the view that article 17 went beyond what was generally considered to be the existing position, though it would be a desirable improvement in the law.

3. In the light of those comments, he had reduced the scope of article 17 and proposed a revised text, paragraph 1 (a) of which limited the application of the rule to States which had signed the treaty subject to ratification, acceptance or approval.

4. Paragraph 1 (b) covered the point raised by the Finnish Government regarding withdrawal of consent in cases where the treaty was subject to denunciation and where notification of withdrawal was given to the other States concerned.

5. Mr. CASTRÉN said that the almost unanimous criticisms made by governments showed that the Commission had gone too far in 1962, when it had laid an "obligation of good faith" on States which had merely taken part in the negotiation or drawing up of a treaty or in the adoption of its text. The Special Rapporteur had revised the text accordingly, and made other changes which constituted a real improvement.

6. For instance, his revised paragraph 1 (b) provided that a State which had established its consent to be bound by the treaty could revoke that consent before the entry into force of the treaty and thereby divest itself of the obligation to refrain from acts calculated to frustrate the treaty's objects. The comments by the Netherlands Government on article 16 (A/CN.4/175/Add.1) showed that there had already been two instances of instruments of ratification being withdrawn a short time after they had been deposited.

7. He also noted with satisfaction that the Special Rapporteur had added a paragraph 2 setting a time-limit after which the obligations referred to in paragraph 1 would cease to apply if the treaty was not then in force. The time-limit seemed rather long, but since the procedure for ratification, acceptance or approval often took some time, and since several modern conventions would not enter into force until a fairly large number of States had established their consent to be bound, it would probably be difficult to shorten the period by more than two or three years.

8. He accepted the main lines of the new text proposed by the Special Rapporteur.

9. Mr. de LUNA said he noted that certain governments had criticized article 17 as imposing an unduly heavy obligation on States; they had pointed out that its application depended on a necessarily imprecise subjective criterion. Those governments had accordingly proposed that the article should be deleted altogether, but he did not favour that course.

10. He supported the Special Rapporteur's new formulation, which took account of the pertinent comments of certain governments. Some of the comments, however, would suggest that governments had forgotten that the duty to fulfil obligations in good faith was embodied in article 2 of the United Nations Charter itself. That provision of the Charter had been criticized by some writers as otiose, on the grounds that it was unnecessary to reiterate an obvious rule of *jus cogens*. In fact, as the government comments on article 17 of the present draft had shown, there was everything to be gained by reiterating that rule of *jus cogens*, which, in his view, governed even such fundamental rules of international law as *pacta sunt servanda* and *consuetudo est servanda*.

11. The duty to fulfil obligations in good faith was stated in article 1 of the Constitution of UNESCO. The rule that good faith should govern the relations between States was laid down in article 5 (c) of the Charter of the Organization of American States.¹ The Rome Treaty establishing the European Economic Community stipulated in article 5 that the Member States undertook to "abstain from any measures likely to jeopardise the attainment of the objectives" of the treaty,² a provision which was identical in content with article 17 of the draft. A similar rule was contained in article 86 of the treaty instituting the European Coal and Steel Community.³ A provision on the same lines had also been included in the draft Convention on the Protection of Foreign Property

¹ United Nations *Treaty Series*, Vol. 119, p. 52.

² *Op. cit.*, Vol. 298, p. 17.

³ *Op. cit.*, Vol. 261, p. 221.

prepared by the Organization for Economic Co-operation and Development.

12. International case-law provided no instances of the direct application of the principle, but a number of rulings on the legal character of recommendations made by international organizations were relevant; they provided some legal criteria on the question of obligations of good faith. For instance, Sir Hersch Lauterpacht, in his separate opinion in the South West Africa—Voting Procedure—case of 7 June 1955, had said that the State in question, while not bound to accept the recommendation, was “bound to give it due consideration in good faith.”⁴ In the same case Judge Klaestad, in his dissenting opinion, had gone even further and said that the State was in duty bound not only to consider the recommendation in good faith, but also to inform the General Assembly of the attitude it had decided to take,⁵ in other words in the event of its not accepting the recommendation, to give the reasons for such non-acceptance. On the latter point, however, he was unable to follow the learned judge.

13. Equally relevant to the issue was the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which had met at Mexico City from 27 August to 2 October 1964. He himself preferred to describe the subject-matter of that meeting as the principles of peaceful co-existence—to use a brief and expressive formula which had gained general acceptance. The Special Committee had only been able to agree on two fundamental principles: first, 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;”⁶ and, secondly, the “principle of sovereign equality of States,”⁷ which implied that the structure of the international community was one of co-ordination, and in no wise one of subordination.

14. Personally, he was a firm believer in integration, but was resolutely opposed to the idea of a world State and therefore welcomed the Special Committee’s conclusions. The decisions of the Committee on those two agreed principles, and its discussions on the other two fundamental principles on which no agreement had been reached—those relating to the peaceful settlement of disputes and to non-intervention—provided abundant evidence of recognition of the obligation to carry out international obligations in good faith, as provided in article 17.

15. That obligation was a necessary corollary to the existence of sovereign States forming an international community; without it, there could be no international society.

16. He supported the new formulation of article 17 proposed by the Special Rapporteur, which took into account the valid point raised by governments, that the obligation to act in good faith existed only where there

was an intention on the part of the State to undertake obligations in the future. It was not enough that the State should have taken part in the negotiations; the obligation resulted from a pre-contractual agreement of the *pactum de contrahendo* type.

17. Mr. YASSEEN said that the Commission would have to abandon its 1962 position in view of the almost unanimous opposition of States to the scope of the rule it had formulated.

18. That attitude of States was understandable. They were not considering an obligation to refrain from acts which were unlawful in themselves, or responsibility based on some intrinsically unlawful act, but another obligation which produced another responsibility: the obligation not to undermine the confidence created by the act of entering into talks or negotiations for the conclusion of a treaty.

19. For the purposes of international relations it would be very useful to recognize the obligation of good faith, but the Commission had been too bold. States had accepted the obligation only to a limited extent and, without condemning it outright, had sought to restrict its scope. The obligation of good faith existed if the treaty was only signed subject to ratification, because then the treaty was not binding until ratified. In his view, it would be enough to recognize the obligation of good faith to that extent only; for the reasons given by governments in their comments and largely approved by the Special Rapporteur, the Commission should not go too far.

20. Paragraph 1 (a) of the revised text was well proportioned and well drafted: it established the obligation of good faith to an extent that could be accepted by many of the States which had commented on the 1962 draft, and by a large number of States in general.

21. Paragraph 1 (b), which reflected a suggestion by the Government of Finland, also seemed justified. If a State could withdraw from a treaty after ratification, then *a fortiori* it could do so before the treaty had entered into force.

22. The idea underlying paragraph 2 was fully justified; an obligation of good faith could not be imposed on a State indefinitely. The innovation in the new text, which consisted in replacing the idea of “unduly delayed” entry into force by a specific period—ten years—was justified in principle, for a codification should avoid formulae which might give rise to too many disputes. In view of the institutional inadequacy of the international legal order, it was preferable to lay down specific criteria where possible. The time-limit of ten years seemed to him to be acceptable, for history showed that many treaties had entered into force long after signature.

23. In general, he was satisfied with the new text proposed by the Special Rapporteur for article 17.

24. Mr. TABIBI said there was general agreement that good faith should be shown by all those participating in treaty negotiations. But that was not the subject matter of article 17: even in the new version proposed by the Special Rapporteur, the article purported to create a binding obligation on States prior to the entry into force of the treaty. The comments of governments showed that, with the exception of those of the United States of

⁴ *I.C.J. Reports 1955*, p. 119.

⁵ *Ibid.*, p. 88.

⁶ A/5746, para. 106.

⁷ *Ibid.*, para. 339.

America and the United Kingdom, they were not in favour of introducing that new rule.

25. By virtue of their sovereignty, States were entirely free to assume or not to assume obligations. State responsibility could not be invoked on the basis of a unilateral act performed by a State prior to the entry into force of a treaty. The Commission should be concerned only with legal matters; the proposed new rule invaded the field of morals.

26. The Polish Government had commented that the introduction of a rule which would impose an obligation upon States merely because they had participated in negotiations, might deter them from taking part in negotiations for the conclusion of international multi-lateral treaties. The Swedish Government had pointed out that the proposed new rule was couched in such broad terms that it would cover States which had only reluctantly taken part in the negotiation of a treaty and States which had expressed reservations, or even voted against the adoption of the text.

27. As he had stressed during the discussion in 1962 and again a few meetings previously, ratification was extremely important in that it gave States time for reflection and study; only thus could they appreciate the full implications of a treaty. Certain agreements which had seemed satisfactory at the time of their conclusion could prove unsatisfactory on further examination. That was particularly true of treaties involving scientific problems; the number of such treaties was constantly increasing and the smaller countries were not equipped to decide on their implications immediately. One example was an agreement for sharing the waters of a river separating Afghanistan from a neighbouring country, which, on examination of the scientific problems involved, had proved quite unfavourable, although the apportionment of the waters had seemed at first sight rather generous to Afghanistan.

28. The *Polish Upper Silesia Case*,⁸ mentioned by the Special Rapporteur in paragraph 1 of his observations (A/CN.4/177) did not seem relevant: it related to a treaty which had come into force, whereas article 17 applied to a treaty which had not yet entered into force.

29. It was significant that the only two countries which had expressed support for the proposed new rule were large, well-equipped countries, which were in a position to appreciate in advance the implications of a treaty under negotiation. It was recognized by all that the proposed rule was entirely new: the United States Government considered that the article went beyond existing law, but regarded the innovation as a desirable progressive development.

30. In his opinion, article 17 should be dropped, because its provisions would create more problems than they would solve and were contrary to a rule of *jus cogens*.

31. Mr. RUDA said he was in favour of retaining article 17, which provided for an obligation of good faith not to frustrate the objects of the treaty in advance.

32. Many governments had urged, in their comments, that States which had merely taken part in the negotiation, drawing up or adoption of a treaty should be

excluded from the obligations set out in article 17. They held that a State which had voted against the adoption of a text or had otherwise expressed its disapproval should not be subject to the obligation of good faith. He agreed with that view, but thought it was already covered in the original text by the proviso "unless and until it shall have signified that it does not intend to become a party to the treaty". Since the position was perhaps not fully clear in the original text, however, he was prepared to support the new formulation proposed by the Special Rapporteur, which was intended to avoid giving the impression that States in the situation described could be made subject to the obligation of good faith.

33. The Government of Finland had raised the interesting question of the withdrawal of ratification, particularly in cases of treaties containing a denunciation clause. He supported the Finnish Government's comments and the Special Rapporteur's new formulation, which took them into account.

34. With regard to paragraph 2 of the revised text, he was not in favour of the time-limit of ten years. First, it was too long, and secondly, treaties varied greatly in character and did not lend themselves to the application of a uniform time-limit. He therefore urged the Commission to revert to the former flexible formula "provided that such entry into force is not unduly delayed". Only a flexible formula of that kind was suitable for application to all types of treaty.

35. Mr. REUTER observed that two members of the Commission had perhaps quite legitimately argued, on the basis of *jus cogens*, one for retaining and the other for deleting the article. Personally, he thought it should be retained, since no legal system had ever been based on bad faith, and he congratulated the Special Rapporteur on his revised text.

36. It should be noted that, while the provision related to the obligation of good faith, it also related to what should be called a transitional period. The draft articles contained other provisions concerning transitional periods: they too had been difficult to formulate and were not very satisfactory. The provision under discussion was concerned with the transitional period which began when a State had expressed its will to be bound—the situation dealt with in paragraph 1 (a)—or when it had expressed that will without yet having found a corresponding will among its partners—the situation dealt with in paragraph 1 (b). States which drafted a treaty were well aware of that transitional period and included provisions designed to solve the problem, either by the immediate, provisional entry into force of the treaty or by rules which gave it some degree of retroactive effect. Consequently, some of the problems raised by article 17 could be solved by agreed clauses in the treaty: the matter should be left to States.

37. Paragraph 1 (b) required a State wishing to be released from its obligation—a heavier one than that provided for in paragraph 1 (a)—to give notice of the fact; but notice was also required under paragraph 1 (a), and he doubted whether it was necessary to be so strict in the latter case.

38. The most important part of the article was the passage stating the "obligation of good faith to refrain

⁸ P.C.I.J., 1926, Series A, No. 7.

from acts calculated to frustrate its [the treaty's] objects" —the French text of which, incidentally, did not exactly correspond to the English. That was the passage on which the Commission should concentrate. It had a choice between adopting an objective criterion or a subjective criterion.

39. In conformity with the Commission's wishes, the Special Rapporteur had adopted an objective criterion by referring to the treaty—a solution which linked the obligation created to the treaty itself. If the objective criterion was chosen, he [Mr. Reuter] had doubts about the words "its objects": would the acts in question have to be contrary to all the objects or to only one of them? Perhaps the Commission could adopt the better balanced though hardly more precise formula used by the International Court of Justice in connexion with reservations and speak of acts calculated to frustrate the "object or purpose" of the treaty;⁹ the problem was not entirely different, for there was an analogy with the question of compatibility of reservations.

40. Another problem arose in that connexion: with respect to whom were the objects frustrated? Was it with respect to the States which had actually become parties to the treaty, or only with respect to the State which was to become a party subsequently, but which had reduced its obligation? If the Commission chose the objective criterion, it should retain paragraph 2, subject to discussing the question of the time-limit.

41. Perhaps a better solution would be to adopt a subjective criterion. Instead of referring to the text of the treaty, which had the disadvantage of leaving some doubt as to whether a fresh obligation was created, the Commission might take the position that when a State definitively expressed its will to be bound, it created a certain expectation in its partners, and that it was the non-fulfilment of that expectation that was incompatible with good faith.

42. By adopting some such wording as "to refrain from acts calculated to disappoint the legitimate expectation of its partners", the Commission would show that the question of a breach of good faith must be considered in each individual case in the light of the statements made, the object of the treaty and the circumstances as a whole. For instance, in the very common case of an economic treaty comprising undertakings concerning tariffs, if a State made heavy imports or exports before the treaty entered into force, so as to suffer less when fulfilling its undertakings, that action might or might not be incompatible with good faith: it would depend on the circumstances. Such a formula might perhaps be too loose, but it would seem to have the advantage of better respecting the independence of the principle of good faith and better separating the observance of that principle from the actual execution of the treaty.

43. If the Commission adopted such a formula, paragraph 2 would become unnecessary; for during the initial period following the conclusion of a treaty, it was the normal practice to refrain from certain acts. It was later, as time went on, that States, believing the treaty would never be ratified, might be tempted to act in a

manner at variance with the treaty. Yet it had sometimes happened that a treaty which, it had been thought, would never be ratified, had nevertheless eventually entered into force through a last ratification made for political reasons.

44. He therefore had a slight preference for the subjective formulation and the deletion of paragraph 2; but for the time being he did not wish to be more positive than the Special Rapporteur himself had been.

45. Mr. BRIGGS said that article 17 was a useful one and the Special Rapporteur's revision in the light of government comments was an improvement on the former text. He welcomed the limitation introduced in paragraph 1 (a).

46. He had some doubts, though he was unable to substantiate them with positive facts, about the time-limit of ten years proposed in paragraph 2.

47. His other comments related mainly to drafting. The phrase "obligation of good faith" had always seemed to him juridically imprecise. It could be avoided if the words "Good faith requires" were inserted at the beginning of paragraph 1 (a) and the rest of the text appropriately modified. The words "as the case may be" could with advantage be dropped.

48. In the context of paragraph 1 (b), it would be premature to provide for withdrawal from the treaty itself and he suggested referring to withdrawal of the State's consent to be bound by the treaty.

49. Mr. ROSENNE said he had some serious misgivings about the revised text of article 17. The Special Rapporteur had rightly pared down the original text, but in so doing had created new difficulties, some of which had already been mentioned by other speakers.

50. First, the Special Rapporteur had perhaps been mistaken in taking signature as the starting point for bringing the obligation into play, since provision was often made in multilateral conventions for the original parties to choose between signature followed by ratification and accession without signature, the two being treated on an equal footing.

51. If the article were to be recast, the obligation should be made to attach to States which had declared themselves positively in favour of supporting the adoption of the treaty. While a multilateral convention was being negotiated States could, and did, vote against individual clauses or articles, but at the close of the proceedings it was rare for participants to vote against the text as a whole; the more usual practice was to abstain and, unless a roll-call vote was taken, it might not always be possible to determine which States had done so. In view of the growing practice of accession without signature, there seemed no justification for basing the article on the classical procedure of signature followed by ratification.

52. Another objection to giving such prominence to signature and its consequences was that some treaties were not signed at all, but only authenticated; that was true of the international labour conventions, and the recent Convention on Settlement of Investment Disputes between States and Nationals of Other States drawn up by the International Bank for Reconstruction and Development. Of course, the Constitution of the

⁹ *I.C.J. Reports 1951*, p. 29.

International Labour Organisation did contain detailed provisions on the entry into force of the conventions, but he was uncertain whether the point would be fully covered in the Special Rapporteur's new proposal for article 3 (*bis*) (A/CN.4/177).

53. The second difficulty was that there was a real difference of substance between the provisos in paragraph 1 of the earlier text and paragraph 1 (*a*) of the revised text. Was the renunciation of the right to ratify referred to in the latter to be understood as a renunciation once and for all, so that the State could not subsequently go back on its decision and proceed to ratify? That hypothesis seemed to be too far-reaching.

54. Nor could he agree to the Special Rapporteur's proposal to impose upon States which merely signed a treaty subject to ratification, a general duty to notify others whether they intended to take the necessary steps to become parties to the treaty after the actual negotiation and adoption of the text, unless such a requirement had been written into the treaty itself. He thought it would be going too far to attach legal consequences of such a character to mere signature in those circumstances.

55. The difficulty of expressing the idea of "acts calculated to frustrate the objects of the treaty" had been discussed at great length at the previous session in the slightly different context of article 55.¹⁰

56. Paragraph 1 (*b*) dealt with an entirely separate matter which had nothing to do with the subject of article 17 and might need to be considered in conjunction either with articles 15 and 16 or with article 38.

57. He shared the doubts expressed about the time-limit provided for in paragraph 2. Ten years might be too long and five years too short.

58. The underlying idea of article 17 should be retained, at all events for the time being, despite the difficulty of giving it appropriate form, but the provision should be more closely linked with articles 30 and 55, so as to bring out its purport more clearly. The Commission should perhaps postpone a final decision until those two articles had been examined.

59. Mr. AGO said that when he had seen the Special Rapporteur's conclusions and the revised text proposed for article 17, he could not help regretting that what he had regarded as an important achievement by the Commission was being given up so easily, simply because of the objections raised by six of the eight governments which had commented.

60. It seemed that—perhaps partly owing to the drafting—those governments had not always grasped the point at issue. As Mr. Reuter had pointed out the phrase "*réduire à néant les objets du traité*", which accurately expressed the Commission's intention, had not been very satisfactorily rendered in English or Spanish.

61. The objections of governments related mainly to multilateral treaties. For where such treaties were concerned, it was difficult to accept the idea that between the time when the treaty was adopted, or even negotiated, and the time when it was ratified, a single State could

commit acts which "frustrated" its objects. When drafting article 17 the Commission had been thinking mainly of bilateral treaties. Among the examples given had been a treaty providing for the cession by a State of installations owned by it in the territory of another State, and a treaty relating to the return by a State of works of art formerly taken from the territory of another State. If the State which was to cede the installations or return the works of art destroyed them or allowed them to be destroyed during the negotiation of the treaty, that was obviously a breach of the obligation of good faith. Was it necessary for the treaty to be signed before that obligation could come into being?

62. If one considered, not the obligation of good faith, but an obligation to observe the clauses of the treaty in advance, even the time of signature would be too early for that obligation to come into being. But in fact the obligation did not derive from the treaty or its provisions at all; it derived from a general rule of international law. He would accept the majority view, but he urged the Commission to consider carefully the basic purpose of the provision.

63. He would not comment on the drafting of the article, since his concern went deeper than that. He was in favour of deleting paragraph 2, however, for any time-limit would be arbitrary: it was bound to be too long in some cases and too short in others. The question must be decided by what was reasonable, and that test would apply automatically: after a certain time it would appear perfectly natural for the obligation to lapse.

64. Mr. PAL said that the elements of what had now become article 17 had originally appeared in articles 5 and 9 of the draft submitted by the Special Rapporteur in his first report.¹¹ After examination of those provisions and some discussion on the source of the obligation of good faith, the Commission had referred the matter to the Drafting Committee with the request that a separate article be prepared, and the outcome had been article 19 (*bis*), which had ultimately become article 17. At the 668th meeting, Mr. Bartoš had expressed appreciation of the way in which the Drafting Committee and the Special Rapporteur had found suitable language to express the obligation of good faith to be observed between the signature and the entry into force of a treaty¹² and the Commission as a whole had appeared satisfied with the text.

65. What might be described as interim obligations were recognized in virtually all systems of law, so that the principle stated in what had now become article 17 was no innovation, even though some governments might have criticized the way in which it had been expressed. He was wholly in favour of retaining the principle of interim obligations, but the wording could certainly be improved; the article should therefore be referred to the Drafting Committee, together with the suggestions made during the discussion. Care should be taken to ensure that, in redrafting, the principle was not extended beyond its interim character and that it was not capable of abuse to serve hidden interests or purposes.

¹⁰ *Yearbook of the International Law Commission, 1964, Vol. I, p. 162 et seq.*

¹¹ *Yearbook of the International Law Commission, 1962, Vol. II, pp. 39 and 46.*

¹² *Op. cit.*, Vol. I, p. 258, para. 33.

66. Mr. TUNKIN said that his misgivings about article 17 had increased during the discussion. While accepting the underlying principle of the article, he shared the views of those who feared that it might entail certain consequences not easily discernible at the outset. The Special Rapporteur's revised text was certainly an improvement, but as Mr. Ago had pointed out, greater attention should be given to the negotiating stage.

67. The Drafting Committee would be well advised to consider bilateral treaties separately from multilateral treaties, because the obligations set out in article 17 certainly applied to the former for States taking part in the negotiations leading up to the adoption of a text, but applicability to the latter might vary widely according to the circumstances. In regard to multilateral treaties, one case that should be examined was that of a Member State of an international organization taking part in a conference held to draft an international convention, even though it disapproved of the whole object of the convention. How would the obligation of good faith operate then?

68. It was not clear from paragraph 1 (a) at what precise stage in the formation of the agreement the obligation began to be operative. Signature was mentioned, but sometimes a text was only initialled.

69. He shared Mr. Rosenne's view of paragraph 1 (b), in which an attempt had been made to introduce by the back door an entirely new rule having no connexion with the subject of article 17. It had not yet been discussed by the Commission and though some case might be made out for such an obligation, it could create uncertainty that might seriously hamper international relations. Sometimes a State considering ratification was influenced by the actions of others, and it could be placed in an exceedingly awkward position if in the meantime certain other ratifications had been withdrawn.

70. The question of a time-limit, dealt with in paragraph 2, would certainly need further examination.

71. Mr. JIMÉNEZ de ARÉCHAGA said that the comments of some governments might point to the need to distinguish, in separate paragraphs, between the kind of loose restriction on the complete freedom of States that might derive from the act of participating in the negotiations, and the more serious restrictions created by signature. The Drafting Committee would have to explore ways of bringing out that distinction and of retaining in some form the requirement of good faith in negotiation, since a rule was obviously necessary to ensure that, while engaged in negotiations, States would refrain from conduct inimical to the principal object of the treaty.

72. Mr. Tunkin had already drawn attention to the difficulties that would result from the withdrawal of instruments of ratification already deposited, before the entry into force of the treaty. Another instance of such difficulties would be when a State ratified a treaty on the sole consideration that another State had already done so, and later found that the other State's ratification had been withdrawn. Some way should, however, be found to meet the point raised by the Finnish Government concerning paragraph 1.

73. Mr. EL-ERIAN said that the Special Rapporteur in his revised text had tried to narrow the wide scope of

the obligation embodied in article 17, to give precision to some of the general terms and to set a time-limit for its application. He agreed that some revision was necessary so as to avoid an excessively rigid obligation prior to the adoption of the text of the treaty, because the true objects of a treaty could not be said to be finally defined or legally established until its text had been adopted by the negotiating States.

74. The Special Rapporteur had been right to take signature as the starting point for the obligation coming into existence, rather than the earlier stages in the creation of a treaty. The position of Member States of an international organization which opposed the instrument it adopted was but one illustration of the varied circumstances in which, and the complex network of institutions through which, treaty-making took place. But the proposal that States should be required to notify others of their intention was not acceptable, as it might lead to unnecessary difficulties.

75. The expression "unduly delayed", in paragraph 2 of the original text, had been criticized by governments as lacking in precision. Nevertheless it was an expression that possessed a definite legal connotation. Its exact meaning would have to be interpreted in the context of each case.

76. It was by no means easy to define precisely what was meant by good faith, but the words did appear in Article 2, paragraph 2, of the Charter and had also been used by the Commission itself in article 55. For the purposes of article 17, greater precision would not be desirable.

77. He also shared the doubts expressed regarding the desirability of setting a time-limit in paragraph 2.

78. The CHAIRMAN, speaking as a member of the Commission, said he had little to add concerning substance, as the attitude he had taken in 1962 had been so aptly recalled by Mr. Pal. He was still convinced that the rule accepted by the Commission in 1962 fulfilled a need—that of strengthening the obligations of the parties from the moment negotiations began. Article 17 did credit to the Commission and contributed to the progressive development of international law.

79. In the course of informal discussions, he had learned that some people found it surprising that the Commission should amend its articles to take account of certain comments by governments, when very often, particularly among the Latin American States, absence of comment implied support for the draft. Thus, in deferring to a few States, the Commission might be going against the wishes of the majority. It should, of course, consider all comments on substance, irrespective of how many States had made them, but he expected that in many cases the diplomatic conference which considered the draft would decide to revert to the text adopted in 1962.

80. For some time, the Commission had been asking itself whether the 1962 text reflected existing legal rules or not. What had been enthusiastically accepted as a contribution to the progressive development of international law was being called in question again, not because the value of that progressive development was in doubt, but on the pretext that the rule did not exist in positive law. He feared that at the present session the Commission was confining itself to pure codification instead of combining

codification with the progressive development of international law as it had done before. As he had often pointed out, those of the conventions on the law of the sea which had clearly contributed to the progressive development of international law had satisfied many States, whereas the others had given rise to many objections on the ground that they were contrary to existing law.

81. During the second reading of the draft, the Commission could certainly ask itself whether what it had laid down was logical and corresponded to the facts; it could also correct certain mistakes and fill certain gaps. In article 17, for example, it had completely disregarded change of circumstances, whereas in article 44 it had laid down a rule to the effect that a treaty already in force could lose its validity by reason of a change of circumstances. That example showed that the draft should be examined with great care and attention.

82. With regard to paragraph 2, he shared the view of Mr. Ago and Mr. Briggs on the question of the time-limit.

83. He agreed with Mr. Ago and Mr. Tunkin that the same rule should not be applied indiscriminately to bilateral and to multilateral treaties. Furthermore, he found it hard to accept that certain States should be able to release themselves from their obligations, while others continued to be bound for the sole reason that they had not given express notification of withdrawal from the treaty.

The meeting rose at 1 p.m.

789th MEETING

Monday, 24 May 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(continued)

[Item 2 of the agenda]

ARTICLE 17 (The rights and obligations of States prior to the entry into force of the treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 17.

2. Mr. CASTRÉN said he would like first to make a few general remarks about the value and implications of the comments by governments (A/CN.4/175 and

Add.1-3) and the attitude he thought the Commission should adopt concerning them.

3. No one would deny that the members of the Commission met in their personal capacities and not as representatives of their countries; they were therefore completely free to express their personal opinions on every problem that had to be solved. But the Commission must bear in mind that it was a United Nations body whose principal task was to prepare draft conventions to be placed before diplomatic conferences. Under article 22 of its Statute, the Commission was required to take comments by governments into consideration when preparing the final draft on the topic being codified. That meant that during the second reading of its drafts, the Commission was required to pay special attention to the comments made by governments.

4. It was regrettable that, generally, whatever the reasons might be, only relatively few governments submitted comments on the Commission's drafts. The Commission should express its gratitude to governments which stated opinions during a preliminary stage of codification, for as outsiders they sometimes saw things more clearly than those who had been studying the subject for a long time. Moreover, in preparing their comments, governments usually consulted distinguished experts—the Commission itself had on several occasions recognized that its work was defective in certain respects.

5. It mattered little that only a few—perhaps six out of ten—of the governments which has submitted comments had criticized the Commission's proposals; it must not be concluded that all the other Members of the United Nations—more than one hundred—approved of the draft. When the diplomatic conference was convened, a number of those who had kept silent would express dissent if the Commission had not acted on the well-founded suggestions put forward by governments which had taken an active interest from the outset.

6. True, the Commission had the right and the duty also to propose progressive rules if it thought fit, but in order to achieve practical results, it should proceed with moderation.

7. The Special Rapporteur's new text of article 17² marked a considerable advance in the development of international law on treaties, and was a reasonable compromise likely to be accepted by States. Why revert to the 1962 text and risk losing all that had been gained since then? He readily acknowledged that the new text, too, could be improved, both in substance and in form; for example, it might be that some obligations of good faith could also be placed on States which had done no more than participate in the negotiation of a treaty, but as Mr. Jiménez de Aréchaga had rightly said, those obligations were of a different nature from the obligations attaching to States which had already expressed their will to be bound by the treaty.

8. He agreed with Mr. Reuter that in paragraph 1 (a) of the new text, the words "its objects" should be replaced by the words "its object or purpose". On the

¹ See 788th meeting, preceding para. 1.

² *Ibid.*, para. 1.

other hand, he thought the requirements of good faith operated in the same way for all treaties, bilateral or multilateral; for there were several kinds of treaty in each category, and it was possible that several States which were parties to the same treaty, or one State which was in a key position, might act in a manner contrary to the treaty's object or purpose. It would also be better to require clear notification by a State which renounced its right to ratify, accept or approve the treaty in order to be released from its obligation of good faith.

9. With regard to paragraph 1 (b), he was not opposed to the suggestion that a certain period should be fixed before the expiry of which a State having already manifested its consent to be bound by the treaty could not divest itself of its obligation. The period could be five years, or it could be prescribed in the treaty provisions on denunciation. He had no objection, either, to the rule stated in that paragraph being inserted in another article. The Government of Finland had put forward its proposal in connexion with article 16, but the Special Rapporteur had preferred to introduce it into article 17.

10. He (Mr. Castrén) was still convinced that paragraph 2, which was not open to interpretation, as the equivalent provision of the 1962 draft had been, should be adopted, since Commission was not drafting a code, but a convention embodying precise rules.

11. The CHAIRMAN, speaking as a member of the Commission, said that on a former occasion Sir Humphrey Waldock had expressed regret that more States did not submit comments. In view of that remark, more than sixty States had considered whether they ought to comment on the draft or not. Except for those whose comments were before the Commission, they had decided in the negative, fearing that otherwise they might make it difficult to adopt a text. Every government unquestionably had the right to make comments, but if the text was greatly altered, the States attending the conference might prefer to revert to the original version.

12. In his opinion, the Commission was called upon to consider the content of the objections, not their number or which States had commented. They had all certainly studied the draft, which had been discussed at national seminars and in lectures, even before the Special Rapporteur's remark. The Commission should therefore leave statistical considerations aside and confine itself to a completely impartial examination of the legal arguments contained in the comments.

13. Mr. REUTER said he thought article 17 contained too much matter for a single article.

14. First, there was the situation referred to by Mr. Rosenne and Mr. Tunkin, where one State manifested its final will to be bound but there was no corresponding will on the part of a sufficient number of other States to make the treaty binding: that case should be dealt with in a separate article.

15. So far as time-limits were concerned, the Commission should assume that the final will of a State was accepted as being equivalent to an offer. He would be inclined to say that the State was obliged to keep that offer open for a certain, fairly short period, running not from the date of signature or ratification, but from

the date on which the State gave notice of its intention to withdraw its offer. That would be simpler and fairer than making the period run from the date of signature.

16. After carefully studying the new text, he had understood its true purposes. He had believed that paragraph 1 (a) was intended to cover the case in which a State signed the treaty and then carried out certain acts which frustrated the other signatory States. He had thought that perhaps the Commission's intention was, in the name of good faith, to prohibit certain acts by which a State, between signature and entry into force of the treaty, would diminish the scope of the obligations it had assumed. That was why he had proposed his amendment.³

17. But he had seen that the other members of the Commission were thinking of a different situation—that in which a State signed a treaty and then acted in such a way that no purpose would be served by becoming a party and it would not do so. In the first case, the problem depended on interpretation of the treaty; in the second, the problem was whether any obligations had been created on a unilateral basis, and he had doubts about the proper formula to use.

18. The last and most important case was that of negotiation: the case in which a State negotiated, but acted in such a way that the negotiation became pointless and never became a party to the treaty. Should the Commission therefore lay down a rule that a State which had begun negotiations could not break them off? Yet, time and again negotiations had been interrupted by events which had resulted in a State not concluding a treaty or concluding it with a third State or with another group of States. Was it intended to condemn negotiations carried on simultaneously on the same subject with two different groups of States because the conclusion of a treaty with one group would preclude its conclusion with the other?

19. He was not opposed to including an article on obligations during negotiations, but it should appear in a different context. He recognized that in negotiations there was an obligation to act honestly which it would be well to express in the draft; that was what he had tried to convey by his formula "legitimate expectation", which took account of the fact that when a State acted in a certain way it led its partners to entertain certain hopes. He was not opposed to the rule condemning the wrongful breaking off of negotiations, although the word "wrongful" was open to very broad interpretation; but he wondered whether the Commission should not go farther and say that, in all negotiations, the legitimate interests of the partners must be taken into account. He was prepared to agree to that, especially where an international obligation to negotiate existed prior to the negotiation.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that he, too, had been pondering over article 17 since the previous meeting. As Mr. Reuter had pointed out, there was more in it than met the eye.

21. In order to dispel any misunderstanding, he must make it clear that he had not complained that too few

³ *Ibid.*, para. 42.

governments had submitted comments. Their comments, when pertinent, were, of course, extremely enlightening, but his task as Special Rapporteur would have been more difficult had they been very much more numerous. In his fourth report (A/CN.4/177) he had tried to analyse the comments on their merits and to reduce them to essentials, but as he had pointed out in paragraph 6 of the introduction, it was difficult to know how much weight to attach to the absence of any comment by a government. The figures given by Mr. Ago at the previous meeting were not quite correct: of the nine governments that had commented on article 17, seven had objected to extending the obligation of good faith to the negotiating phase, while the United States Government, which had favoured the original text of article 17, had pointed out that such an extension of the principle would go beyond what was generally considered to be the existing position in international law, and the United Kingdom Government had asked for an explanation of what was meant by taking part in the negotiations.

22. It had been suggested, during the discussion, that the meaning of the phrase "to refrain from acts calculated to frustrate the objects of the treaty" in paragraph 1 of the original text had not been fully understood by all governments, but he doubted whether that was really the case. Possibly the rendering in the French text was more vivid, but in English the phrase "frustrate the objects" was commonly used in the context of contract law and was well understood to mean much the same as the French phrase.

23. After examining their comments he had concluded that governments would probably be opposed to a provision on the lines of the original text, which made the obligation of good faith apply to the negotiating phase both in bilateral and multilateral treaties, and thus extended the obligation to States which subsequently did not associate themselves with the provisions of the treaty. Mr. Castrén had rightly emphasized that the Commission would run into difficulties if it sought to make a distinction between bilateral and other types of treaty, and he was far from convinced that in the present context such a distinction was justified in principle. It was enough to point out that such matters as tariff reductions, which had been mentioned as one of the examples, could just as well form the subject of a multilateral as of a bilateral treaty.

24. In his report he had touched on the point raised by Mr. Reuter concerning the real nature of the obligation. The question was whether the obligation extended to the negotiating phase from the moment the negotiations began, assuming that that moment could be determined, or whether it was an obligation that became operative when a State definitely associated itself with the text evolved during the negotiations. The difficulty lay in deciding whether an obligation existed independently and could of its own force bind the State before any steps had been taken whereby the State expressed its consent to be bound by the terms of the treaty.

25. If the Commission decided that the obligation of good faith during negotiations should be written into the draft, it would be necessary to set a limit for its duration—a point which he regarded as very important

—and it might be found advisable to separate the provision from those relating to the subsequent steps of signature, ratification, etc. Some thought must also be given to the situation arising when entry into force was delayed, and to whether the State's responsibility would be involved if its actions during that period were such as to prevent it from fulfilling the obligations it had assumed once the treaty did enter into force. Perhaps the Commission had not been fully alive to the possible implications of article 17 and some further discussion was needed to clear up outstanding points before the article could usefully be referred to the Drafting Committee, or alternatively to the Special Rapporteur with the request that he prepare a revised text.

26. Mr. AGO said he thought that the discussion should be carried a little further in order to avoid placing the Drafting Committee in a difficult position. Mr. Reuter had rightly pointed out that article 17 contained all kinds of different ideas; but they were linked together by certain common elements, even though they called for separate treatment.

27. The first of those common elements was that in none of the situations contemplated was it right to regard the treaty as the source of the obligation, for the treaty was not yet in force. The second common element was the concept of good faith with which all the situations were associated.

28. There were three hypothetical situations. In the first, the State had expressed its final consent to be bound, but the treaty was not yet in force. Even in that case, it was not right to speak of an obligation deriving from the treaty, but the obligation of good faith envisaged could be regarded as very far-reaching between the time when the State expressed its consent and the time when, other States having expressed their consent also, the treaty came into force.

29. In the second—and most interesting—situation, the State had signed the treaty but had not yet expressed its final consent. There again it was wrong to speak of an obligation deriving from the treaty, and there was a problem of good faith. To take Mr. Reuter's example, a State negotiating a treaty under which it was to import certain goods from one group of States only, might import large quantities of those goods from other States in the interval between signing the treaty and giving its final consent; thus at the time it gave its consent, it would have reduced the scope of its obligation and to some extent have frustrated the legitimate expectations of its partners. Was there an obligation of good faith not to act in that way? Governments seemed to agree that there was, but the Commission should make sure that it was clear what was meant by the terms "*réduire à néant*" and "frustrate".

30. In the third situation, the parties were still only at the negotiating stage. He did not think it was correct in that case to link the breach of good faith referred to with wrongful breaking off of negotiations. A State might perceive, after negotiations had been proceeding for some time, that if it continued to negotiate, it would be led into something to which it did not wish to agree; it could then break off the negotiations and be completely free, without having acted in breach of good

faith. The question to be decided was the very different one whether a State had the right to perform certain acts which would destroy the whole purpose of the negotiations while they were actually proceeding, in other words, while keeping its partner under the impression that the negotiations would be successful.

31. He then reverted to the example he had given at the previous meeting, that of negotiations between two States for the cession of installations owned by the first State in the territory of the second. The first State could refuse to negotiate, or it could break off negotiations after having begun them; but was it entitled to destroy its installations while the negotiations were proceeding?

32. He agreed that the Commission could refrain from formulating any rule on the subject, since the obligation contemplated derived from a general principle and not from the treaty itself. Nevertheless, he feared that if the Commission restricted the obligation of good faith to only one or two of the stages he had distinguished, wrong conclusions might be drawn from its action. For example, if the Commission decided that the obligation of good faith began at the moment of signature, it might be argued that it could not be broken during the negotiations. The problem was sufficiently serious to warrant the Commission's continuing to discuss it.

33. Mr. JIMÉNEZ de ARÉCHAGA said that the discussion had certainly thrown some light on the subject. He agreed with the view that the obligation to act in good faith during the negotiations did not arise from the treaty itself and could not be described as a strict legal duty whose dereliction would involve the responsibility of the State. Good faith required that while taking part in the negotiations of a treaty a State should abstain from acts that would nullify the essential purpose of the treaty. But that *bona fide* requirement had a limited duration, since it clearly could not outlast the existence of a duty to negotiate. States were normally free to withdraw from or suspend negotiations and that would put an end to the *bona fide* requirement. The exception would lie in those cases in which States were bound to negotiate either by virtue of a prior obligation or by reason of the action of an international organ.

34. He agreed with the Special Rapporteur that it might not be easy to define that *bona fide* requirement, but nevertheless the attempt should be made, either by the Drafting Committee or by the Special Rapporteur himself, so that the principle of good faith during negotiations could be retained in the draft. To drop it entirely after having proposed it might be interpreted as a denial of its existence by the Commission.

35. Mr. REUTER said that, in the example given by Mr. Ago, the State which owned the installations could break off the negotiations and destroy the installations the following night. That was why Mr. Ago had specified that the obligation of good faith existed so long as the negotiations continued. If the State destroyed its installations while it was negotiating, it would be deceiving its partner. The Commission could prohibit such an act by stating that the negotiations must be conducted honestly.

36. There were, however, many cases in which the situation was not so clear as in that example. It often happened that a State negotiated with another State and "reinsured" itself, as it were, by simultaneously negotiating on the same subject with a third State. When a private person wished to sell a house, he could grant an option for a certain number of days to a potential buyer; but he could also sell to the highest bidder. Should the Commission prohibit similar practices by States? He left it to those members who were diplomats to answer that question.

37. Mr. ROSENNE said that of course the principle that negotiations should be conducted in good faith was applicable to States just as it was to individuals, but he was not convinced that any such rule could be formulated for inclusion in a codification of the law of treaties. If anything were said on the subject, the proper place would be in article 5 and the obligation, if included, should be closely linked with the object and consequences of the treaty, even though, as others had pointed out, it did not derive from the text of the treaty itself.

38. Mr. LACHS said that, in principle, he agreed with the theory underlying article 17, but he saw some difficulty in reconciling the legal and other consequences of the requirements laid down in paragraph 1 of the Special Rapporteur's revised text. The obligation in paragraph 1 (b) was definitive, because the consent to be bound by the treaty had already been given by the State, whereas the obligation in paragraph 1 (a) was of an interim character, because at that stage there was no knowing whether the State would become bound, since the acts necessary to express its consent had not yet taken place. There was a clear difference between the two sub-paragraphs and their order ought to be reversed, so as to give first place to the more binding obligation.

39. An example of the kind of question that would need to be considered was the situation in which ten States signed a disarmament treaty in 1965 and entered into an obligation to reduce their armies by one third, the treaty to enter into force on 1 January 1966. Meanwhile one of the parties increased its army during the remaining months of 1965. Was it enough to say that the State had to refrain from any action calculated to frustrate the treaty? Was not the position that, if there was no specific provision on the subject, signatory States were under an obligation to maintain the *status quo*, so as not to invalidate the basic presumption of the agreement? If one State acted contrary to that presumption, certain rights would be acquired by the other States as a result of its action, provided that its consent to be bound had been definitely established.

40. Mr. AGO said that the idea which the Commission had tried to express in article 17 in 1962 was not conveyed by a vague formula such as "negotiation must be in good faith". The Commission had meant to cover the very specific case in which, during the negotiations, and taking advantage of the position in which the other party consequently found itself, a State frustrated the very object of the negotiations. He was rather against the idea of using such a vague formula, which was intended to say everything and in fact said nothing.

41. Mr. TABIBI said he was becoming more and more convinced that the article, whether in its original form or in the new version proposed by the Special Rapporteur, would create more problems than it would solve. He still wondered whether it would prove possible to formulate a rule defining an obligation of good faith during the negotiating stage. At all events, if such an attempt were made, both the title and the position of article 17 would have to be changed. Possibly some elements from it could be transferred to article 5, as Mr. Rosenne had suggested, but it was unlikely that States would be willing to accept a provision imposing obligations in respect of a treaty that had not yet come into force. Nor could they be forced to enter into negotiations against their own interests.

42. Mr. ROSENNE said that his view should perhaps be elucidated further: it was that a provision concerning good faith at the negotiating stage had no place in a draft on the law of treaties. The example given by Mr. Lachs illustrated the kind of problem for which provision should be made, but no obligation could attach to States which had not taken part in the approval or adoption of the text of a treaty. For those which had done so, however, there was an obligation for a period of time, or at least until it became clear that entry into force was unlikely, not to act in a way that would frustrate the purposes of the treaty.

43. Mr. AMADO said that when the Commission had discussed the problem in 1962 Mr. Bartoš had stressed that good faith was the honour of international law. The rule of good faith was essential and fundamental. It should be stated with all possible clarity and force, and not be overloaded with details that would reduce its value. The absolute could not be made relative; hence the Commission should not seek perfection by trying to fit the general principle to the realities of political life. Unfortunately, States were guided solely by their own interests. They could not be prevented from resorting to certain manoeuvres, but they could be asked to observe the principle of good faith when pursuing their interests.

44. He hoped the Commission would be able to draft an article it could adopt unanimously. The Special Rapporteur had already sacrificed the period of negotiation. He was probably right, for it was unlikely that States would agree to bind themselves at that stage in the preparation of a treaty. If the Commission wished to revert to the idea of imposing certain obligations during the negotiations, it should follow Mr. Rosenne's suggestion and draft a separate article or section dealing with the period of negotiation; but that would be very difficult.

45. Mr. YASSEEN said that the debate had raised the question of the foundation of the obligation referred to in article 17. It was an important question, on which the Commission must take a position.

46. Inasmuch as the treaty had not yet entered into force, it was, *ex hypothesi*, idle to look for the foundation of that obligation in the treaty itself. It had been said that it lay in the confidence created by a certain situation, the legitimate expectation of the partner; but that was an explanation or social foundation, rather than

the legal basis of the rule. It was also useless to resort to constructions of internal law to support the article—to say, for example, that a tacit contract preceded the final contract, for such constructions took little account of the facts of the international juridical order.

47. In his opinion, the legal basis of the obligation would undoubtedly be in article 17 itself. It was open to question whether the rule existed at present in positive international law, but from the point of view of progressive development of international law, it was desirable to formulate such a rule, which would be favourable to international transactions. If it was decided to include that rule in the convention, the scope of the obligation created should be defined.

48. It was noteworthy that very few of the governments which had commented, and very few members of the Commission, had questioned the basic idea of article 17. What was in dispute was the premise of the obligation which the Commission had established in 1962 for the negotiation stage. If the Commission wished to propose a rule that would be acceptable to a conference of plenipotentiaries, it should make the obligation begin with signature. It would no doubt be more progressive to lay down a more extensive obligation, but in making that suggestion he was adopting a practical point of view.

49. Mr. ELIAS said that the Commission should be careful not to carry the principle embodied in article 17 too far. Nearly all the comments by governments were against extending it to cover the period of negotiation; the United States Government itself recognized that the article went beyond what was generally considered to be the existing position and the United Kingdom Government had raised some important queries.

50. The examples given during the discussion of acts which were considered unjustified during negotiations would appear to involve questions of State responsibility.

51. He was opposed to the inclusion in article 17 of a provision imposing an obligation of good faith for the period of negotiation; it was obvious that such a provision was unlikely to attract sufficient support at a diplomatic conference. Nor did he favour dealing with the matter in article 5. If any provision on the subject was to be included it should be made a separate paragraph, which would be easier to delete if it encountered opposition at the diplomatic conference.

52. The CHAIRMAN, speaking as a member of the Commission, observed that it was a common practice to submit to diplomatic conferences not only alternative texts between which they could choose, but also texts from which certain provisions could be detached. The Commission might perhaps add to article 17 a paragraph concerning negotiation, which the conference could delete without changing the rest of the article.

53. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that States had accepted the general lines of article 17 to a surprising extent. No objection had been made to the provisions of the article in so far as they provided for an obligation of good faith from the signature of the treaty onwards. Perhaps the title of the article appeared to establish too strong a

link between its contents and the obligations of the treaty and should be simplified to read: "Good faith in the conclusion of treaties". The Drafting Committee should also examine the question of the placing of the article, since it was not at all certain that its present position in the draft was satisfactory.

54. Mr. Ago had made a strong plea for the retention of an obligation of good faith during negotiations. He himself did not favour that course and he believed that the majority of the Commission did not do so either. However, if an attempt were made to formulate a rule covering the negotiations period, it would perhaps be necessary to distinguish, in regard to the duration of the obligation of good faith, between three situations: first, negotiations; secondly, signature subject to ratification; and thirdly, signature plus ratification or other act establishing consent to be bound. In the case of negotiations, the duration of the obligation would be very limited; if the negotiations did not lead to any result, the obligation necessarily fell. In the other two cases, the duration of the obligation would differ.

55. Perhaps the best course would be to leave it to the Drafting Committee to decide whether it was possible to formulate a text covering the period of negotiations. Such a text might state that, during the negotiations and so long as the negotiations continued, a limited obligation of good faith could exist. If the Drafting Committee found it possible to formulate a provision, the Commission would decide, by a vote, whether to include it or not.

56. As to the Finnish Government's comment regarding the right of withdrawal, although it might have some relevance to the contents of article 17, it undoubtedly raised a different substantive point. If the Commission wished to deal with it, it should be covered by a separate article, to be placed after article 15. There was certainly some force in the Finnish Government's argument, since if the treaty itself provided for the right of denunciation it would seem strange not to mention the possibility of withdrawal of the ratification. At the same time, it would be unwise to appear to encourage the idea that a ratification could lightly be withdrawn.

57. The Drafting Committee would no doubt take into account the point raised by Mr. Rosenne that it might not be sufficient, from the technical point of view, to take signature as the starting point, because in the case of certain treaties the act of signature was replaced by the adoption of the treaty in an organ of an international organization.

58. The CHAIRMAN suggested that article 17 and all the related problems be referred to the Drafting Committee with the comments made during the discussion.

*It was so decided.*⁴

59. The CHAIRMAN invited the Commission to consider next articles 23 and 24, as agreed at the close of its 787th meeting.

ARTICLE 23 (Entry into force of treaties)

Article 23

Entry into force of treaties

1. A treaty enters into force in such manner and on such date as the treaty itself may prescribe.

2. (a) Where a treaty, without specifying the date upon which it is to come into force, fixes a date by which ratification, acceptance, or approval is to take place, it shall come into force upon that date if the exchange or deposit of the instruments in question shall have taken place.

(b) The same rule applies *mutatis mutandis* where a treaty, which is not subject to ratification, acceptance or approval, fixes a date by which signature is to take place.

(c) However, where the treaty specifies that its entry into force is conditional upon a given number, or a given category, of States having signed, ratified, acceded to, accepted or approved the treaty and this has not yet occurred, the treaty shall not come into force until the condition shall have been fulfilled.

3. In other cases, where a treaty does not specify the date of its entry into force, the date shall be determined by agreement between the States which took part in the adoption of the text.

4. The rights and obligations contained in a treaty effective for each party as from the date when the treaty enters into force with respect to that party, unless the treaty expressly provides otherwise.

60. Sir Humphrey WALDOCK, Special Rapporteur, said that article 23 had not attracted much comment from governments and new proposals had been comparatively few.

61. To take account of the Japanese Government's comment on paragraph 2 (A/CN.4/175, section I.11), he proposed that the words "without the States concerned having agreed upon another date" be added at the end of paragraph 2 (a). The purpose of that addition was to give recognition to the freedom of States in the matter.

62. To take account of the suggestion by the Swedish and United Kingdom Governments that it should be made clear that paragraph 3 embodied a residuary rule, he had revised that paragraph to read:

3. In other cases where a treaty does not specify the date of its entry into force, the date shall be the date of the signature of the treaty or, if the treaty is subject to ratification, acceptance or approval, the date upon which all the necessary ratifications, acceptances or approvals shall have been completed, unless another date shall have been agreed by the States concerned.

63. He suggested that the proposal for a new article made by the Government of Luxembourg (A/CN.4/175, section I.12) be left aside for the time being, since its subject-matter was more relevant to article 55.

64. Mr. TABIBI said that the comments of governments on article 23 were mostly favourable. He had the impression, however, that it should be possible to shorten the text and combine the provisions of paragraphs 1 and 2.

65. He was opposed to the insertion of the new article proposed by the Government of Luxembourg, which

⁴ For resumption of discussion, see 812th meeting, paras. 97-118.

could be interpreted as a sort of colonial clause, and agreed with the Special Rapporteur that its contents were more relevant to article 55 than to article 23.

66. Mr. ELIAS said he was in favour of retaining article 23 almost in its entirety. Paragraph 2 (c) should be dropped, however, because it stated a self-evident fact. As to the Special Rapporteur's proposed new paragraph 3, he doubted whether it was a real improvement. He would like some slight amendment, but saw no reason to go so far to meet the views of the Swedish and United Kingdom Governments. Paragraph 4 should be retained: it stated the legal effects of entry into force.

67. He agreed that the new article proposed by the Government of Luxembourg should be discussed in connection with article 55 rather than article 23.

68. Mr. TUNKIN said he had some doubts regarding a number of points in paragraph 2, on which he would be grateful if the Special Rapporteur could give some explanations.

69. He did not believe that the situation referred to in paragraph 2 (a) arose at all frequently in practice. Moreover, the final proviso "if the exchange or deposit of the instruments in question shall have taken place" governed the entry into force, so that it was difficult to see what effect to attach to the previous words "it shall come into force upon that date". If, as he believed, the operative provision was in the concluding proviso, the matter would appear to be already covered by paragraph 1, which stated that a treaty entered force "in such manner and on such date as the treaty itself may prescribe". Similar considerations applied to paragraph 2 (b), which stated that the same rule applied where a treaty, which was not subject to ratification, acceptance or approval, fixed a date by which signature was to take place.

70. The situation referred to in paragraph 2 (c) was clearly covered by the rule in paragraph 1.

71. Paragraph 3, whether in its original form or in the new formulation proposed by the Special Rapporteur, stated a useful rule and should be retained.

72. Apart from that, much of article 23 was descriptive and went into details somewhat remote from reality.

73. Mr. AGO said that in paragraph 2 (a) the Commission had provided for the case in which the treaty fixed the date by which ratification was to take place; in those circumstances, if the treaty was ratified earlier, it would enter into force on the date on which ratification took place, not on the final date for ratification laid down in the treaty.

74. Without committing himself as to the drafting, he thought that the Commission should prefer the revised text of paragraph 3 proposed by the Special Rapporteur. The basic rule was certainly that if the date of entry into force was not specified in the treaty itself, the treaty would enter into force automatically when the parties gave their consent. The text adopted in 1962, appeared to make entry into force depend on a further agreement between the parties, which was wrong.

The meeting rose at 6 p.m.

790th MEETING

Tuesday, 25 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Ca-dieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 23 (Entry into force of treaties) (continued)¹

1. The CHAIRMAN invited the Commission to continue consideration of article 23.

2. Sir Humphrey WALDOCK, Special Rapporteur, said he could not reply in detail to the questions put to him by Mr. Tunkin at the previous meeting,² because he had not had time to look up examples of the types of treaty which paragraph 2 was designed to cover; he could, however, provide some explanation of how that paragraph had taken shape. In his first report, Sir Gerald Fitzmaurice, the previous Special Rapporteur on the law of treaties, had inserted more elaborate provisions in article 41, paragraph 3,³ and had explained in his commentary⁴ that it seemed necessary to try to propound a rule *de lege ferenda* for the not uncommon case where a treaty provided that the ratifications were to be exchanged or deposited by a certain date, but said no more, and when the date arrived the ratifications had not been exchanged, or not all of them had been deposited. That situation was not uncommon for treaties concluded by a small group of States, but was less frequent for multilateral treaties. When the point had been discussed at the fourteenth session the existence of such treaties had not been challenged, but the Commission had decided not to go into so much detail.

3. The real problem was whether or not the Commission wished to formulate rules *de lege ferenda* that would depend upon making certain assumptions about the intention of the parties when no provisions concerning entry into force had been written into the treaty itself. Should the Commission decide against that course, article 23 could be greatly simplified.

4. Mr. TUNKIN said that after further reflection he had some suggestions to make concerning article 23. Paragraph 1 was acceptable as it stood. Paragraph 2 could be dropped, as its content could be covered in

¹ See 789th meeting, para. 59.

² *Ibid.*, paras. 68 *et seq.*

³ *Yearbook of the International Law Commission, 1956*, Vol. II, p. 116.

⁴ *Ibid.*, p. 127.

paragraphs 1, 3 and 4. The revised text proposed by the Special Rapporteur⁵ could form the basis for the new paragraph 3, but some modification would be necessary. For example, the reference to “all the necessary ratifications, acceptances or approvals” was extremely vague, if not incomprehensible. The United Kingdom Government’s suggestion (A/CN.4/175, section I.20) that the rule for treaties not covered by the original paragraphs 1 and 2 should be that they entered into force on the date of signature, or, if subject to ratification, acceptance or approval, when ratified, accepted or approved by “all the participants”, would make the meaning much clearer.

5. With regard to the Special Rapporteur’s revised text of paragraph 3 and his proposal concerning entry into force on the date of signature in certain circumstances, he wondered what would be the position if no actual date or time-limit for signature had been set in the treaty. Presumably the same rule could be applied, namely, that the treaty entered into force once it had been signed by all the participants. In the other case, where a treaty did specify a time limit for signature but said nothing about entry into force, the rule might be that it entered into force on the date when the time-limit expired. The Special Rapporteur’s proposal, if revised on those lines by the Drafting Committee, might be acceptable.

6. Paragraph 4 could be retained as it stood.

7. Mr. CASTRÉN said that, in principle, he supported the ideas embodied in article 23. The starting point stated in paragraph 1 was correct; the first thing to do was, of course, to consult the provisions of the treaty itself concerning its entry into force.

8. The other paragraphs contained residuary rules for application when the treaty was silent; but some of them were so obvious that they need hardly be mentioned expressly: the Commission itself had recognized, in its commentary on the 1962 draft, that the condition laid down in paragraph 2 (c) “must of course also have been fulfilled” and that the rule contained in paragraph 4 was “undisputed”.⁶ Paragraph 2 (c) could therefore be deleted, especially as its content was covered by the general rule in paragraph 1.

9. Paragraph 4 was perhaps justified in that it ruled out the idea that ratification might have retroactive effect from the date of signature even where the treaty itself did not expressly so provide.

10. It would be easy to combine sub-paragraphs (a) and (b) of paragraph 2, and that would make it possible to avoid using the expression “*mutatis mutandis*”, which had already been criticized in another context.

11. The Special Rapporteur’s new proposal for paragraph 3 seemed to be an improvement, but it contained the vague expression “the States concerned”—used, it was true, in several other articles.

12. With regard to the proposal by the Government of Luxembourg (A/CN.4/175, section I.12) that a new article should be inserted after article 23, emphasizing

the obligation of the States Parties to a treaty to secure its application in full in their territories, he shared the view of the Special Rapporteur and other speakers that the proposal should not be adopted, or that consideration of it should at least be deferred until the 1966 session.

13. Mr. ROSENNE said that his views accorded closely with those of Mr. Tunkin. He suggested that the Drafting Committee should consider whether the reference to the “manner” of entry into force ought to be retained in paragraph 1, since the remainder of the article really dealt with the “date” of entry into force.

14. Paragraph 2 could be dropped if a revised paragraph 3 covered the case of treaties which contained no provision as to the time of entry into force; the new text would need to be prefaced by some such wording as “whenever a treaty does not specify . . .”. Paragraph 4 could be retained.

15. With regard to entry into force on signature, it was interesting to note from the United Nations Treaty Series the increasing practice, particularly with bilateral treaties or treaties between a small group of countries, of performing the act of signature in different places, sometimes very far apart, and on different dates. In such cases entry into force should take effect on the latest of the various dates.

16. Mr. RUDA said he found paragraphs 1 and 4 of article 23 acceptable, but paragraph 2 was unnecessary. The analysis of its provisions made by Mr. Tunkin had shown that it dealt with a number of cases in which the treaty itself specified, albeit in an indirect manner, the date on which it would enter into force. Those cases were therefore already covered by paragraph 1, so paragraph 2 could be dropped.

17. Paragraph 3 dealt with cases in which the treaty did not specify the date of entry into force, and the Commission had two proposals before it. The first was to lay down, as suggested by the Special Rapporteur, that the treaty entered into force when the necessary ratifications were received. That formulation, however, would not solve the problem, because it merely referred the matter back to the provisions of the treaty itself, which would determine the “necessary” number of ratifications. Thus the treaty would itself indirectly lay down the date of entry into force.

18. He himself preferred the second proposal, suggested by the United Kingdom Government, that paragraph 3 should specify that the treaty entered into force when it had been ratified, accepted or approved by all the participants. Caution would have to be exercised in drafting the provision, however, because it would have some bearing on the matter of reservations.

19. Mr. BRIGGS said that article 23 was an important one and ought to be retained. Paragraph 1 was acceptable and he saw no particular objection to mentioning the manner as well as the date of entry into force. It was also desirable to include detailed provisions to cover cases in which the date of entry into force had not been specified in the treaty itself.

20. It was arguable that the original text of paragraph 2 (a) and (b) was not sufficiently comprehensive and

⁵ See 789th meeting, para. 62.

⁶ *Yearbook of the International Law Commission, 1962, Vol. II, p. 182.*

did not cover such a case as that of the 1894 Treaty between Nicaragua and Honduras which, to the best of his recollection, was subject to ratification, but contained no express provision as to the date of entry into force, though it did stipulate that instruments of ratification should be exchanged within sixty days of the constitutional requirements in respect of ratification having been met. There were other treaties that set no precise date for ratification, and, while subject to ratification, established no date for their entry into force or for the exchange or deposit of instruments of ratification.

21. He accordingly wished to propose an alternative text as a substitute for paragraphs 2 and 3, and the revised paragraph 3 suggested by the Special Rapporteur. The text he proposed read :

“ 2. Where the treaty does *not specify* the date of its entry into force :

(a) If the treaty provides for ratification, acceptance or approval as a condition precedent to its entry into force, the treaty shall *not* enter into force prior to the date upon which all *necessary* instruments of ratification, acceptance, or approval shall have been exchanged or deposited;

(b) If the treaty is intended to enter into force upon signature, it shall *not* enter into force prior to the date upon which all the necessary signatures have been appended.”

22. He had framed the paragraph in negative form as a means of retaining the useful elements in the original paragraph 2 (a) and (b). In his new sub-paragraph (a) he had sought to circumvent the difficulty arising from the Special Rapporteur's new draft of paragraph 3, namely, that signature might take place on different dates thus creating uncertainty or controversy as to when entry into force actually took place.

23. Should the Commission favour the Special Rapporteur's suggestion concerning “ necessary ” ratifications, acceptances or approvals, it would not have to choose between the requirement that a certain proportion of the instruments had to be deposited in order to bring a treaty into force, or that all of them had to be deposited. In trying to frame a residuary rule for cases in which the treaty was silent, it would be difficult to opt for the second alternative, particularly where multilateral treaties with a large number of signatories were concerned. On that point his text was deliberately vague, as was the Special Rapporteur's formula “ necessary ratifications ”. The wisest course was probably to leave the matter open to interpretation.

24. In his proposed new text for paragraph 2 (b) he had attempted to cover the case in which the date for signature was fixed in the treaty itself, but no stipulation was made concerning the moment of entry into force, and the case in which the treaty provided merely that it should be signed.

25. As to paragraph 4 of the original text, he questioned whether it was at all relevant to the subject of entry into force, because it was really concerned with the point at which a particular State became bound by the terms of the treaty, which, in his opinion, was the moment when it became a party. That being so, he

proposed that paragraph 4 be re-drafted to become the new paragraph 3, reading :

“ 3. The rights and obligations stipulated by a treaty become binding on a State as from the date when that State becomes a party to the treaty.”

26. The Commission might ultimately decide to incorporate a provision of that kind in a separate article, in which case the wording could be amplified to include some reference to the manner of entry into force.

27. Mr. LACHS said that, as article 23 dealt with entry into force in a general way, the reference to “ manner ” in paragraph 1 could stand.

28. But the main problem was how to deal with the contents of paragraphs 2 and 3. At the previous meeting he had been tempted to agree with Mr. Elias that a closer link should be established between paragraphs 2 (a) and 2 (b) of the original text, or, better still, that the whole of paragraph 2 should be omitted. He now saw considerable merit in the Special Rapporteur's new draft of paragraph 3 and in Mr. Briggs's proposal, the sub-paragraphs of which were acceptable. Of course, if something on the lines of Mr. Briggs's text were approved, the words “ in other cases ” in the Special Rapporteur's new paragraph 3 would have to go.

29. In regard to the latter text, the word “ necessary ” qualifying the words “ ratifications, acceptances or approvals ” raised serious doubts, because it was imprecise. The requirements as to the date, and as to the number, or possibly even the category, of States that had to deposit instruments before a treaty could come into force differed widely. If the parties refrained from laying down any special conditions on entry into force in the treaty itself, there was, if the present text was accepted, a strong presumption that their intention was that only ratification, acceptance or approval by *all* the participants could bring the treaty into force. The point was of crucial importance.

30. The final clause “ unless another date shall have been agreed by the States concerned ”, in the Special Rapporteur's revised text of paragraph 3, was redundant, as the point was already covered in paragraph 1.

31. Mr. Briggs had raised some very pertinent points about the methods adopted by States to bring a treaty into force. The Commission should devise an objective rule based on the treaty itself, rather than a subjective one in terms of action by the parties; examples were to be found in article 74 of the Universal Postal Convention of 5 July 1947⁷ and article 49 of the International Telecommunication Convention of 2 October 1947.⁸ For sometimes States failed to fix a date for the entry into force of a treaty and additional instruments had to be signed laying down conditions for entry into force, as had been done in the case of the Pan-American Sanitary Code of 1924.⁹

32. He favoured Mr. Briggs's proposal for a revised paragraph 4 that would become the new paragraph 3, because the article was concerned with the entry into

⁷ *British and Foreign State Papers*, Vol. CXLVIII, p. 556.

⁸ *United Nations Treaty Series*, Vol. 193, p. 241.

⁹ *League of Nations Treaty Series*, Vol. LXXXVI, p. 44 (Code). Vol. LXXXVII, p. 458 (Additional Protocol).

force of the treaty itself, not with the moment of its entry into force for individual States. Perhaps a separate article on the subject was required: the original paragraph 4 certainly had no place in article 23.

33. Mr. YASSEEN thought the article should contain three elements, corresponding to the methods by which entry into force was regulated. First, it could be the treaty itself that prescribed the date, manner and conditions of entry into force. Secondly, if the treaty was silent on the subject, there was another method: that of a special agreement between all the parties. Thirdly, if the treaty was silent and the parties had not come to any agreement on the matter, a residuary rule was needed; it was the Commission's delicate task to formulate such a rule.

34. Paragraph 1 clearly stated the first method, which applied where the treaty gave the necessary particulars. Perhaps it should refer to the "conditions" as well as the "manner" of entry into force, in so far as the second term might not cover the first, especially in the English text.

35. Paragraph 2 should be deleted, for it only added details which could easily be covered by paragraph 1. Of all those details the only case which was fairly common in modern practice was that referred to in subparagraph (c), where a treaty entered into force when it had been signed or ratified by a certain number of the parties. But if the word "manner" covered the idea of "conditions", or if a reference to "conditions" were added, then paragraph 1 would cover all the cases contemplated in paragraph 2.

36. The second method—that of a special agreement on the entry into force of a treaty already concluded—should be clearly stated, for it might happen that the treaty was silent but the parties later agreed on certain details of the manner in which the pre-existing treaty should enter into force.

37. There remained the third case, for which a residuary rule was needed. His view was that the Commission should go back to the general principles of the law of treaties, the basic rule of which was still that of unanimity. He therefore approved of the new text of paragraph 3 proposed by the Special Rapporteur. The last phrase would be omitted and, if the Commission wished to cover the case it referred to, could be made into a separate sub-paragraph providing for the possibility of a special agreement to settle the date and manner of entry into force of a treaty that already existed.

38. With regard to paragraph 4, he shared the doubts expressed by Mr. Briggs and Mr. Lachs. True, the rule stated in that paragraph was correct and unassailable: the rights and obligations arising under a treaty became effective for each party as from the date when the treaty entered into force with respect to that party, but that was quite a different matter from the entry into force of the treaty. Paragraph 4 was therefore out of place, and its subject-matter ought perhaps to be dealt with in a separate article.

39. Mr. AMADO said that the preceding speakers had raised most of the points he had had in mind. One that remained to be cleared up, however, was whether the

French expression "*suivant les modalités*" really corresponded to "in such manner" and to "*en la forma*".

40. None of the speakers after Mr. Rosenne had commented on the possibility that a treaty might have different dates of signature. He would like some clarification on that point, although there was no lack of rules of interpretation or rules based on common sense.

41. In his opinion, too, the word "necessary" in the revised text of paragraph 3 proposed by the Special Rapporteur was superfluous and the phrase "unless another date shall have been agreed by the States concerned" was tautological. He would prefer the expression "*fixée par le traité*" to "*fixée par les dispositions du traité*".

42. As to paragraph 4, he approved of Mr. Briggs's suggestions: for what was the use of saying that a State was bound when it was bound. He did not even think it necessary to include that paragraph elsewhere.

43. Mr. REUTER said that paragraph 1 would be clearer if the order of the references to the date and the manner, which was purely accessory to the date, was reversed. The term "*modalités*" was perhaps broader than the words used in the English and Spanish texts. What the drafters had meant to convey was that the date was closely connected with the carrying out of certain processes.

44. The CHAIRMAN, speaking as a member of the Commission and referring to the question raised by Mr. Rosenne, said he knew of cases in which there had been a difference of several years between two dates of signature of the same treaty by different States.

45. Mr. JIMÉNEZ de ARÉCHAGA said that, as the discussion had shown, there was more in article 23 than was immediately apparent. Paragraph 1 contained the fundamental rule and he was not altogether convinced that Mr. Rosenne was right in wishing to delete the reference to the manner of entry into force which the treaty itself might prescribe. In his view, by the word "manner" the draft contemplated specific provisions such as that in paragraph 2 (c), and it might perhaps be better to replace that word by "conditions" as Mr. Yasseen had suggested. Paragraph 2 (c) could then be relegated to the commentary as an illustration of the conditions which the parties might prescribe in the treaty for its entry into force, such as a specific number of ratifications, or a minimum number of a specified category of States. The point about the provisions on entry into force being agreed upon subsequently by the parties, which the Special Rapporteur had covered at the end of his new paragraph 3, should perhaps be transferred to paragraph 1.

46. In his view, it was vital for the Commission to formulate residuary rules to cover the cases dealt with in paragraphs 2 and 3, because they provided solutions which were difficult to reach after disagreement between the parties or at least a divergence of view had arisen. The original purpose of those two paragraphs had been to provide for two different cases: where the treaty was entirely silent about entry into force, and where it set some time-limit for signature or ratification, though there was no specific provision on entry into force.

47. The Commission would have to decide whether it wished to follow the line taken by Sir Gerald Fitzmaurice, the previous Special Rapporteur, and insert two different subsidiary rules; first, that when a treaty was entirely silent the parties could be presumed to have intended that signature or ratification by all the participants was needed to bring it into force, and secondly, that when a final date for signature or ratification was laid down in a treaty, the intention was presumed to be that it should enter into force on that date for the States which by that date had signed or ratified it.
48. Mr. PESSOU said he thought that all the situations described by the preceding speakers were already covered by article 23. It remained to be decided whether the difficulties arising lay in the drafting or the substance.
49. In his opinion, the merging of paragraphs 2 (a) and 2 (b) suggested by some members would not be very satisfactory, because they related to two entirely different cases: multilateral treaties and agreements in simplified form.
50. The essential paragraph was still paragraph 3, which might be amended to read: "The date of entry into force of a treaty shall be determined by agreement between the States which took part in the adoption of the text of that treaty, after the exchange or deposit of the instruments of ratification or accession". So as to call things by their proper names and avoid confusion, paragraph 2 (b) would read: "The same rule applies *mutatis mutandis* when a treaty is drawn up in simplified form". Paragraph 2 (c) would then read: "In cases where the entry into force of multilateral treaties depends on the number of participants, such treaties shall not enter into force until the prescribed quorum has been obtained". Those were correct rules, covering all the situations in question.
51. Mr. ROSENNE said that the Drafting Committee would need to consider carefully Mr. Lachs's suggestion that the final proviso in the Special Rapporteur's new text of paragraph 3 could be dropped because the point was covered in paragraph 1. He himself was not at all sure that that was so, because paragraph 1 dealt exclusively with the case in which the treaty itself contained provisions concerning entry into force, whereas the proviso in question referred to the opposite case, where the treaty was silent and the parties subsequently and independently reached some form of agreement on entry into force. Possibly the latter case could be covered in paragraph 1, but careful drafting would be needed.
52. Since paragraph 1 contained the fundamental rule, it should be as precise and succinct as possible. Certainly Mr. Reuter's suggestion for reversing the order of the references to the manner and date of entry into force would make for greater clarity.
53. Mr. LACHS, replying to Mr. Rosenne, said that in his view the real subject of paragraph 1 of the draft was the manner in which the parties expressed their will as to the date of entry into force, and they did so either by means of an express provision in the treaty itself or in some other way outside the treaty. But surely the main difficulty lay in providing for the case in which the parties had made no definite stipulation and their intention was not clear.
54. He still thought that the point dealt with in the proviso at the end of the Special Rapporteur's new paragraph 3 was already covered in paragraph 1.
55. Mr. ROSENNE said that there was probably no substantial disagreement between himself and Mr. Lachs, but great care would have to be exercised in the drafting of paragraph 1.
56. Mr. RUDA said he supported Mr. Reuter's suggestion that in paragraph 1 the date of entry into force should be mentioned before the manner in which it took place. The Spanish text was defective in that the term "*forma*" did not mean "manner". Nor was it possible to speak of "*modalidades*", because that term could only be applied to the performance of obligations, not to the entry into force of an instrument. He therefore suggested that the Spanish text should read, approximately:
- "... *en la fecha y cuando se cumplan las condiciones que el mismo tratado prescribiere*".
57. Mr. AMADO said he distrusted the word "conditions" to which several members had referred. In law, that word was fraught with meaning and it should be used advisedly.
58. Sir Humphrey WALDOCK, Special Rapporteur, said that, in the main, the discussion had centred on paragraphs 1, 2 and 3, the main problem being, as Mr. Jiménez de Aréchaga had pointed out, whether or not residuary rules should be formulated. When drafting article 23 at its fourteenth session, the Commission had made certain presumptions about the intentions that could be attributed to the parties in certain circumstances, when no provision existed in the treaty itself concerning entry into force and when there was no subsequent agreement on the matter. Perhaps on further consideration the Commission would not wish to go as far as it had done in the 1962 text.
59. The proposals he had submitted in his first report¹⁰ had been very detailed precisely because of the many different kinds of situation in which the parties failed to give any precise indication of intention on which any presumptions could be based. He gathered from the present discussion that the majority now seemed to be in favour of reducing the scope of the article, retaining the essence of paragraph 1 and combining it with some residuary rules. Mr. Jiménez de Aréchaga had rightly emphasized that it would not be entirely satisfactory to formulate a residuary rule without making certain distinctions, at least between the situation when no indication of intention could be discerned and that when some indication did exist. In the former case, the presumption that the parties intended the treaty to come into force once all the participants had signed was justifiable. If that line of approach were adopted the main problem would be one of drafting.
60. He had no objection to changing the order in paragraph 1 so as to mention the date before the "manner" of entry into force, a term which was intended

¹⁰ Yearbook of the International Law Commission, 1962, Vol. II, p. 68 et seq.

to cover such details as place of signature etc. However, the Commission would need to be cautious about substituting the word "conditions" because, as Mr. Amado had said, that word had special legal connotations.

61. As to whether the reference to subsequent agreement between the parties concerning entry into force should be transferred from his new text of paragraph 3 to paragraph 1, there would be no strong objection provided that the possibility was mentioned. If there were any uncertainty on the matter owing to an omission in the treaty itself, it would be natural for the parties to consult each other at a later stage. Perhaps the point would have to be repeated in a new paragraph 3 designed to deal in general terms with the situation when the treaty was silent or when there had been disagreement between the parties. It was important to bring out the real difference between the situation when an express provision on entry into force which left no room for argument had been inserted in the treaty and the situation when a subsequent agreement had become necessary, because the latter situation could give rise to controversy as to whether an agreement had in fact been reached.

62. He assumed from the discussion that most members wished to drop paragraphs 2 (a) and 2 (b) which, although not particularly elegantly drafted, did contain some useful elements as to the presumptions which could be made when a treaty was silent. The United Kingdom comment on paragraph 3, which he regarded as justified, was based on the assumption that paragraphs 2 (a) and 2 (b) would be retained.

63. In view of the turn which the discussion had taken, it was perhaps salutary to note that the United States view was that the article was clear and reflected accepted present-day practices that were recognized as desirable.

64. Some members wished to eliminate paragraph 4, but he was not convinced that that was a good idea, because of the difference between the entry into force of a treaty for a party and the date on which a party became bound by the terms of the treaty, in other words, the moment from which the obligations imposed by the treaty began to operate. That nuance should not be lost sight of and had been carefully brought out in article 56, dealing with the application of a treaty in point of time (A/CN.4/L.107). An obvious example of the importance of that distinction was the European Convention of Human Rights.¹¹

65. Article 23 as a whole, together with all the suggestions made during the discussion, could, he thought, now be referred to the Drafting Committee with the request that it seek a means of combining paragraphs 2 and 3 in some abbreviated form and retaining paragraph 4 with certain drafting changes.

66. Mr. BRIGGS said he would have no objection to article 23 being referred to the Drafting Committee, but he was not altogether convinced by the Special Rapporteur's reasons for retaining paragraph 4, as he found it difficult to accept the distinction he had drawn. There were several relevant dates such as that

referred to in article 11, paragraph 3, namely, the moment when a State established its consent to be bound, but was not in fact bound by the provisions of the treaty because the treaty had not yet entered into force, and sometimes the provisions of a treaty did not become immediately operative even on its entry into force. An example of the latter case was the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,¹² the provisions of which presumably did not become operative until war broke out.

67. In article 56 the Commission had included the objectionable phrase "before the date of entry into force of the treaty with respect to that party" and he hoped such wording need not be used in article 23. He had no objection at all to the content of paragraph 4; he had only questioned whether it properly belonged to an article on entry into force. Surely the matter should be dealt with in a separate article relating to the date on which States became bound by the terms of a treaty, in which some indication would be given that the provisions might not be operative for the parties until the time stipulated in the treaty itself.

68. The CHAIRMAN, speaking as a member of the Commission, said he remembered having taught that the Conventions on the Laws of War were a typical example of positive treaty law in the latent state. An examination of the Geneva Conventions of 1949 showed that they were applicable even in peacetime, because the Parties had an obligation to make certain preparations which had to be made in peacetime and were required to inform their armed forces of the provisions of the conventions.

69. Sir Humphrey WALDOCK, Special Rapporteur, said that the point raised by Mr. Briggs might well prove to be an argument about words. It was true that the treaty entered into force as an instrument, but he could see no objection to using the expression "enter into force with respect to a party". That was in fact what happened when a particular party gave its consent to be bound by a treaty. He was not suggesting that there was a treaty, but it was quite proper to refer to the entry into force of the treaty with respect to the party concerned. The Commission had certainly had no objection to using that phrase, either in 1962 or in 1964, and he still believed that it was appropriate.

70. The CHAIRMAN suggested that the Commission should refer article 23 to the Drafting Committee without any precise instructions, asking it to take account of all the comments and proposals made and of the conclusions stated by the Special Rapporteur.

*It was so decided.*¹³

ARTICLE 24 (Provisional entry into force)

Article 24

Provisional entry into force

A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force

¹¹ United Nations, *Treaty Series*, Vol. 213, p. 222.

¹² *Ibid.*, Vol. 75, p. 31.

¹³ For resumption of discussion, see 814th meeting, paras. 31-37.

provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.

71. The CHAIRMAN invited the Commission to consider article 24.

72. Sir Humphrey WALDOCK, Special Rapporteur, said that article 24, on provisional entry into force, had been introduced in order to cover a fairly common contemporary State practice. The proposed text had attracted only three government comments (A/CN.4/175). The Japanese Government had found that the precise legal nature of provisional entry into force was not clear and had suggested that, unless it could be better defined, the article should be dropped. The United States Government, while recognizing that the article corresponded to a contemporary practice, had questioned whether there was any need to include it in a convention on the law of treaties. The Swedish Government, while making some useful comments on the formulation, had not expressed any objection to the article.

73. On the assumption that the Commission would wish to maintain an article of that kind, he had reworded it so as to take the Swedish Government's comments into account. The new text read :

A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty or the specified part shall come into force as prescribed or agreed, and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it.

74. Mr. REUTER said he agreed with the Special Rapporteur and would have no objection to a provision on the lines of article 24.

75. Nevertheless, by making a small drafting amendment, which might also affect the substance, the Commission could propose to governments a formula that would better meet the points they had made. The expression "provisional entry into force" no doubt corresponded to practice, but it was quite incorrect, for entry into force was something entirely different from the application of the rules of a treaty. Entry into force might depend on certain conditions, a specified term or procedure, which dissociated it from the application of the rules of the treaty. The practice to which the article referred was not to bring the whole treaty into force with its conventional machinery, including, in particular, the final clauses, but to make arrangements for the immediate application of the substantive rules contained in the treaty. If it used some such wording as "A treaty may prescribe, or the parties may otherwise agree that, pending its entry into force . . . its rules shall be applied provisionally for a specified period", the Commission would not be taking a position on the

legal source of such application, but would avoid using an expression which was a contradiction in terms.

76. Mr. JIMÉNEZ de ARÉCHAGA said that from a logical point of view he would agree with Mr. Reuter that there was some inconsistency in the institution of provisional entry into force. The practice was a common one, however, and provided a way out for a State whose constitutional requirements for ratification caused delay in bringing treaties into force. In cases of that sort, the State would inform the other party of the position. For example, in the case of air transit agreements, implementation was in the hands of the executive authorities, who could accept provisional entry into force pending legislative approval for ratification.

77. As to drafting, he accepted the new formulation by the Special Rapporteur, which covered the case where it became clear that one of the parties would not ratify the treaty. However, that formulation was more suited to bilateral treaties; a multilateral treaty would not necessarily lapse for the other parties concerned.

78. Mr. CASTRÉN said that, in spite of the criticism of one government, article 24 was useful and should stand as a separate article in the draft. On the whole he was in favour of the revised version proposed by the Special Rapporteur partly in order to satisfy certain governments.

79. It appeared, however, that the Special Rapporteur had gone further than the Swedish Government required; that Government, referring to the commentary which the Commission had appended to the article in 1962,¹⁴ had merely suggested that the provisional entry into force of a treaty should also terminate if it became clear that the treaty was not going to be ratified or approved by *any* of the parties.¹⁵ According to the Special Rapporteur's revised version, all that was needed to terminate the provisional entry into force was that it should become clear that *one* of the parties was not going to ratify or approve the treaty.

80. That formula was, in fact, much closer to the one proposed by the Netherlands Government (A/CN.4/175/Add.1). But although the Netherlands proposal was more precise in saying that provisional entry into force terminated if one of the States notified the other State or States that it had decided not to be party to the treaty, he thought that it, too, went too far.

81. Mr. VERDROSS endorsed Mr. Reuter's comments. What was involved was obviously the application of some of the provisions of the treaty, not the treaty as a whole and certainly not the final clauses.

82. He had no objection to the idea underlying article 24, but thought that the article should be drafted rather differently; it might provide, for instance, that the rules contained in the treaty could be applied provisionally until a date agreed upon by the parties.

83. The CHAIRMAN, speaking as a member of the Commission, agreed that the final clauses were affected by the arrangements for provisional application of the treaty. It sometimes happened, however, that the whole

¹⁴ Yearbook of the International Law Commission, 1962, Vol. II, p. 182.

¹⁵ See 791st meeting, para. 13.

treaty was applied provisionally: for instance, treaties on judicial assistance. Moreover, such provisional application sometimes continued for a long time.

84. Mr. ELIAS said he could see no reason why article 24 need be retained. The issues which had been raised were not likely to be settled, either by the original formulation or by the new text proposed by the Special Rapporteur, and in any case they appeared to be covered by paragraphs 1 and 3 of article 23 in the form proposed by the Special Rapporteur during the discussion.

85. Mr. RUDA said that article 24 raised two questions of substance. The first was whether or not the article should be included in the draft. He admitted that he had at first been attracted by the Japanese Government's argument that article 24 could be dispensed because the idea it expressed was already covered by article 23, paragraph 1. For practical reasons, however, he agreed with the Special Rapporteur that it would be convenient to retain article 24.

86. The second question of substance was the time when the provisional application came to an end. First, it terminated when the treaty entered into force definitively, as a result of ratification or approval; that was stated in the Special Rapporteur's revised text. Secondly, when that condition was not fulfilled, two solutions were possible: the provisional application would terminate either when the parties agreed to terminate it, as provided in the Commission's 1962 text; or, as the Special Rapporteur now proposed in compliance with the Swedish Government's suggestion, when "it shall have become clear that one of the parties will not ratify or, as the case may be, approve it". He definitely preferred the latter solution.

87. In his own experience he had met with the case of an agreement between Argentina and a Great Power, which had entered into force provisionally upon signature. As a result of a change of government, Argentina had wished to be released, and the question had arisen whether the agreement of both parties was needed to terminate the provisional application. From the point of view of legal theory, so long as definitive consent had not been given, each of the parties should remain free to withdraw from the treaty and, consequently, to terminate its provisional application.

88. So far as drafting was concerned, the Special Rapporteur's new text was, on the whole, satisfactory, though he would like him to explain the meaning of the word "otherwise" in the first sentence. Could the agreement of the parties take any other form than the treaty itself?

89. Finally, it should be possible, without affecting the substance, to simplify the wording for the article, which at present introduced the idea of provisional entry into force three times.

90. Sir Humphrey WALDOCK, Special Rapporteur, explained that the word "otherwise" was intended to cover the case in which there was no provision on the subject in the treaty itself, but the parties made a separate agreement, for example, by an exchange of notes. That agreement would itself constitute a treaty, but would not be the treaty whose provisional entry into force was in question. It would perhaps be necessary

to improve the drafting, so as to avoid any risk of misunderstanding.

91. Mr. de LUNA said he was in favour of retaining article 24, subject to drafting changes, particularly in the Spanish text. At the same time, he agreed with Mr. Reuter about the inappropriateness of the expression "provisional entry into force".

92. From his experience of treaty-making, he could say that the method referred to in article 24 was a much more elegant means of overcoming the difficulties raised by constitutional requirements for ratification than the method of using a special terminology so as to avoid the terms "treaty" and "ratification".

93. Four different cases were to be found in the practice of States. The first was where the treaty entered into force immediately upon signature, but was subject to ratification by the parties; in the event of a decision not to ratify it, it ceased to be in force. However, it was not all uncommon for States to leave the matter pending and not to give a decision one way or the other; some treaties signed by Spain had remained provisionally in force for over twenty years in that way. The second case was where the treaty entered into force immediately, but was subject to ratification and contained a provision to the effect that it would lapse in the event of non-ratification within a specified period of time. The third case was that contemplated by the Special Rapporteur: a treaty which entered into force immediately, but was subject to a condition or time-limit. The fourth was that of provisional entry into force of part of the treaty.

94. Mr. ROSENNE pointed out that Article 102 of the Charter laid down the requirement of registration for "every treaty and every international agreement entered into by any Member of the United Nations". However, the regulations to give effect to that provision, which had been adopted by the General Assembly in 1946 and were annexed to the Commission's 1962 report,¹⁶ laid down, in article 1, paragraph 2 that "Registration shall not take place until the treaty or international agreement has come into force between two or more of the parties thereto". When the codification of the law of treaties was completed, the General Assembly would have to consider re-examining that paragraph.

95. With regard to the wording of article 24, he was prepared to accept the Special Rapporteur's proposal, which reflected the views of the Commission when it had adopted the article on provisional entry into force—then article 21—at its 668th meeting.¹⁷ It might perhaps be possible, however, to shorten the text of the first sentence to read, approximately: "The parties may agree that, pending its definitive entry into force, the treaty shall come into force provisionally, in whole or in part..." The reference to the agreement of the parties would also cover the case where the treaty itself provided for provisional entry into force.

96. Mr. EL-ERIAN said he maintained the view he had expressed in 1962, that article 24 should be retained. The inclusion of a clause on provisional entry into force

¹⁶ *Yearbook of the International Law Commission, 1962, Vol. II, p. 194.*

¹⁷ *Op. cit.*, Vol. I, p. 259.

in a treaty served a useful purpose where the subject matter was urgent, the immediate implementation of the treaty was of great political significance, or it was psychologically important not to wait for completion of the lengthy process of compliance with constitutional requirements.

97. The question whether provisional entry into force had its source in the treaty itself or in a subsidiary agreement was a doctrinal issue, which could be left to interpretation.

98. An interesting example of the possible usefulness of provisional entry into force was provided by the work of the Committee of Experts on the Organization of African Unity, which in 1964 had worked on drafting the Protocol of the Commission of Mediation, Conciliation and Arbitration. The Charter of the Organization of African Unity provided that the Commission should be one of the principal organs of the Organization and that the Protocol should become an integral part of the Charter on its approval by the Assembly of Heads of State and Heads of Government of African States. On the basis of that text, it had been argued by some that the Protocol came into force immediately on its approval, but others maintained that in view of the importance of the subject-matter ratification was necessary. The latter view had ultimately prevailed but, in the meantime, as a member of the Committee of Experts which had drafted the Protocol, he had thought of the possibility of solving the problem by including a clause on provisional entry into force in the Protocol. A clause of that type represented a useful intermediate position between a treaty in simplified form and a treaty which entered into force only after all requirements as to ratification had been satisfied.

99. In his view, article 24 should be retained in the form in which it had been adopted in 1962, subject only to changes of drafting, not changes of substance.

100. Mr. LACHS said he agreed with Mr. Reuter regarding the wording of the first part of the article; the provision really related to application of the clauses of the treaty on a provisional basis.

101. With regard to Mr. Rosenne's suggestion for shortening the opening passage, he must point out that the passage dealt with two different cases: first, the case in which the treaty contained a provision to the effect that it would itself provisionally enter into force, and secondly, the case in which, by virtue of another or subsequent instrument, the provisions of the treaty were provisionally brought into force.

102. He agreed with Mr. de Luna that in some cases the position as to ratification or non-ratification by a State would never become clear. Where a treaty involved only one action, the position might be clarified soon, but where a number of different actions were involved, the matter might remain in abeyance for a long time. There were many cases in which treaties had remained for years on the agenda of the legislative bodies empowered to ratify them, without any action being taken. Perhaps the point could be covered by specifying that a State must clarify its position within a certain period of time.

103. In cases of that sort, the question of the right of initiative arose; in his view, it should be left to each State concerned. Some States might prefer a provisional treaty to no treaty at all, while others might prefer to terminate the provisional bonds if no ratification was forthcoming from the other party. It was a delicate matter, and nothing should be done to force States to take action one way or the other. The whole structure of treaty relations called for a most careful approach, as so many elements were involved and it was difficult to foresee the circumstances in which they might arise.

The meeting rose at 1 p.m.

791st MEETING

Wednesday, 26 May 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 24 (Provisional entry into force) (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 24.

2. Mr. BRIGGS said that article 24 was different from article 17, which set out certain obligations that good faith imposed, pending the entry into force of the treaty, on States which had participated in the preparation of its text. In the case envisaged in article 24, on the other hand, the participants had prescribed that certain parts of the treaty would apply pending the exchange of ratifications. Cases could be cited of treaties which provided that certain clauses, on the delimitation of frontiers, for instance, would take immediate effect. The 1946 Treaty between the United States and the Philippines, which was of a different kind, specified that entry into force would take place upon the exchange of ratifications, but that articles II and III would receive immediate application.²

3. From the point of view of drafting, he much preferred a formulation of the kind suggested by Mr. Reuter, such as "... certain provisions of the treaty shall

¹ See 790th meeting, para. 70.

² United Nations Treaty Series, Vol. 7, p. 10.

receive application pending its entry into force". Incidentally, in such a context it was somewhat incorrect as well as ambiguous to use the term "parties", as was done in the first and last lines of the revised text proposed by the Special Rapporteur, since a State became a party only when it became bound by a treaty. That criticism applied particularly to the last line, which referred to non-ratification by a State, which was incorrectly referred to as a "party".

4. His own feeling was that there existed an ancillary or collateral agreement on the provisional application of all or part of the clauses of the treaty, and that there were "parties" to that agreement. If the provisional application was prescribed by the treaty itself, the States concerned could be said to be parties to an informal understanding on such application. The legal nature of the operation could also be described by saying that one and the same instrument contained two transactions: the treaty itself and the agreement on provisional application pending its formal entry into force.

5. Mr. AGO said that article 24 dealt with two entirely different situations. The first, to which Mr. Reuter had referred at the previous meeting, was that where the treaty itself did not enter into force until the exchange of the instruments of ratification or approval; it was by a kind of secondary agreement, separate from the treaty, that the parties, at the time of signing, agreed to apply provisionally certain or even all of the treaty's clauses.

6. The second, and more important, situation was that which the Commission had envisaged in 1962 and which the Special Rapporteur had had in mind when proposing his redraft, the case where the treaty actually entered into force at the time of signature but was subject to subsequent ratification; the ratification did no more than confirm what had existed ever since the time of signature. It might be said that in such a case the treaty entered into force subject to a resolutive condition. If the ratification did not take place within the prescribed time, the treaty would cease to be in force; but it would have been in force and produced its effects from the time of signature up to the time when it ceased to be in force through the absence of ratification.

7. The Commission should not use such a formulation as: "pending its entry into force . . . , it shall come into force provisionally", for entry into force could not occur twice. If entry into force took place at the time of signature, then it was merely confirmed by ratification, and in default of ratification the treaty ceased to be in force through the operation of the resolutive condition. If, on the other hand, the entry into force did not take place until the time of ratification, what happened during the interim between signature and ratification was that certain of the treaty's clauses were applied provisionally by virtue of a secondary agreement between the parties, and it was only that agreement which entered into force.

8. The article was of very great importance in view of the practice of States. He had personal knowledge of certain treaty provisions in which it was stated clearly that the treaty entered into force on signature, but would subsequently be submitted for ratification. One treaty of that kind was still in force at the moment, ten years after signature, although it had not yet been ratified.

9. Mr. TSURUOKA said that he did not consider the article as so very important.

10. If the treaty entered into force upon signature, as in the second of the situations described by Mr. Ago, then surely the case was governed by article 23, according to which a treaty entered into force in the manner specified by its provisions. Whether thereafter the entry into force was confirmed by ratification, or the treaty ceased to be in force owing to the absence of ratification, all that happened was that the treaty's own clauses concerning ratification operated. He was not sure that his interpretation was recognized by the writers, but it was possible in practice.

11. In the first of the situations mentioned by Mr. Ago, what happened was that an agreement distinct from the treaty entered into force in conformity with article 23; the treaty was then applied provisionally according to the conditions provided for in that subsidiary agreement.

12. All that should remain of article 24 would therefore be the rule that, in the absence of provisions concerning the termination of the provisional application of the treaty by virtue of the subsidiary agreement, the entry into force of the treaty would be presumed to terminate when one of the parties had given notice that it would not ratify the treaty. But omission to lay down that rule would not expose international transactions to any great risk. For that reason, he was inclined to think that article 24, or at least a good part of it, should be dropped.

13. Mr. CASTRÉN, supplementing his remarks at the preceding meeting, said that on studying more closely the commentary which the Commission had attached to article 24 in 1962, and the written comments by governments on that article, had had noticed that the French translation of paragraph (2) of the commentary³ differed from the original English text on a point which was taken up in the Swedish Government's comments (A/CN.4/175, section I.17). According to the English text, the provisional application of the treaty terminated, among other cases, when it was clear that the treaty was not going to be ratified or approved by *one* of the parties, whereas the French translation read: *lorsqu'il devient évident que le traité ne sera ratifié ou approuvé par aucune des parties* [i.e. by *none* of the parties]. According to the view which he had expressed at the preceding meeting, however—a view which seemed to be shared by Mr. Lachs—a provision based on the latter text would in fact be preferable.

14. A third, and perhaps better, solution might be to replace the words "one of the parties", in the Special Rapporteur's redraft by the words "a specified number or class of States whose participation in the treaty is necessary for its entry into force".

15. He supported the observations which Mr. Lachs had made at the previous meeting on other points connected with article 24.

16. Mr. AGO, in reply to Mr. Tsuruoka, said he would not press the Commission to include in article 24 a provision covering the second of the situations of which

³ *Yearbook of the International Law Commission, 1962, Vol. II, English text p. 182, French text p. 202.*

he had spoken, namely, the case where the treaty entered into force on signature and was to be ratified later. As Mr. Lachs and Mr. de Luna had said during the discussion on the article on signature, that situation could be dealt with in the context of provisions concerning the effects of signature, although in his own opinion what had to be determined in the particular case was at what point the treaty entered into force, rather than at what point the State gave its consent to be bound by the treaty.

17. At all events, the first of the situations of which he had spoken, that of the provisional application referred to by Mr. Reuter, should be mentioned in article 24. If the States decided that the treaty would not enter into force until it had been ratified, but agreed to apply some of its clauses forthwith, it was easy to explain the situation by saying that there was a secondary agreement, distinct from the treaty even if it was laid down in a clause of the treaty or was implied in the text. However, for that purpose one of the clauses of the treaty itself had to be so interpreted, and that clause would have to be isolated from the treaty as a whole. The question was sufficiently important for the Commission to deal with it explicitly rather than to rely on interpretation of the treaty.

18. The CHAIRMAN, speaking as a member of the Commission, said he was certain that the article was of great importance not only in practice but also from the theoretical and legal points of view. In the course of thirteen years' practice at the Ministry of Foreign Affairs, he had seen many cases where treaties had entered into force provisionally.

19. A distinction should be drawn between the two situations contemplated in article 24 and another situation for which the Commission had made no provision; the situation where, during the negotiations, the parties agreed on a provisional régime applicable until the conclusion of the negotiations. That situation had nothing in common with the provisional entry into force of a treaty.

20. Recent theory also drew a distinction between provisional entry into force and the case where the treaty took the dual form of a provisional treaty and a definitive treaty, the purposes of the two being different.

21. The question of the provisional entry into force of treaties arose not only at the international level, but also at the national level. If the treaty had truly entered into force, its provisions automatically prevailed over those of internal law in the increasingly numerous countries which acknowledged the supremacy of international law. If, on the other hand, the treaty was applied only provisionally, most legal systems would regard that situation as a practical expedient which did not introduce the rules of international law into internal law.

22. Moreover, if there were only a provisional application of rules which were not those of the treaty, would the most-favoured-nation clause operate in practice, or not?

23. After the Second World War, Yugoslavia had concluded peace treaties with several countries which provided in identical terms first, that upon signature of the treaty the state of war between the two countries

ceased and, secondly, that the treaty would be ratified. Immediately upon signature, therefore, the two countries had been able to establish diplomatic, commercial and maritime relations, conclude treaties, etc., and the solemn act of ratification of the peace treaty had not taken place until later. As between those two countries, the question of the state of peace or the state of war had depended upon a complicated parliamentary procedure, but under the pressure of the requirements of daily life they had rid themselves of everything connected with the state of war, even in the technical meaning of the term. In that case, had there been a resolutive condition? And what would have happened if the peace treaty had not been ratified? In law, had the treaty been provisionally valid, and would that situation have ceased to exist if ratification had become unlikely?

24. The problems to which he had just referred showed how necessary it was to lay down a rule of the kind proposed in article 24. International relations would be made easier if States were given the possibility of putting certain treaties into force provisionally, before ratification, not as a mere practical expedient but with all the legal consequences of entry into force. He appreciated why Mr. Reuter was reluctant to create, in law, something which might subsequently be annulled without any violation of the rules. Personally, however, he was convinced that the provisional entry into force really conferred validity and a legal obligation; even if the treaty subsequently lapsed owing to lack of ratification, that dissolution of the treaty would not be retroactive and did not prevent the treaty from having been in force during a certain time. There had been a legal position which had produced its effects, and situations had been created under that régime; consequently, the question could not be said to be purely abstract.

25. He supported the basic idea of article 24, while recognizing the justice of many of the objections on points of drafting. It would be for the Drafting Committee to propose a redraft which would meet those objections.

26. Mr. TSURUOKA said that he had in no way meant to deny that, in the practice of international relations, cases occurred which came within the provisions of article 24. Nevertheless, in spite of the very scholarly explanations given by Mr. Ago and the Chairman, he was not convinced that those cases were not governed by paragraph 1 of article 23 and by the provisions concerning the application and termination of treaties. That was why he had suggested that article 24 should be deleted, or heavily amended.

27. If the Commission retained the article, it should specify very clearly what was the nature of the obligation binding the two States parties to the treaty when it was put into force provisionally. He thought that in that case there was a clear, legal obligation which was derived from a collateral agreement, very often in simplified form, or from a tacit agreement between the parties concerned.

28. Mr. TUNKIN said that he was not opposed to article 24, although its provisions were descriptive of an existing practice rather than expressive of a rule of

law. His own experience showed that it was not uncommon for a bilateral treaty to be subject to ratification but to enter into force immediately upon signature. The provisional character of entry into force was sometimes expressed, but very often merely implied.

29. He did not agree with Mr. Reuter that the case was one of provisional application of certain clauses of the treaty rather than of its entry into force. The treaty itself entered into force, but in that case there were in fact two sets of final clauses. Thus, the treaty would provide for termination after a certain lapse of time and by giving notice in a prescribed manner. So far as the provisional entry into force was concerned, however, there was a parallel possibility: non-ratification would have the effect of denunciation.

30. With regard to the revised text proposed by the Special Rapporteur, he had misgivings over the final proviso "or it shall have become clear that one of the parties will not ratify or, as the case may be, approve it". The Drafting Committee should formulate a more rigid rule. Some clear statement was necessary on the part of the State concerned; the matter could not be left to a mere inference. He therefore suggested some such wording as "... when one of the parties informs the other parties that it will not ratify or, as the case may be, will not approve the treaty".

31. Mr. PESSOU said that in 1963 fourteen African States had signed a Convention of Association with the European Economic Community. While the whole of the Convention, and notably the provisions concerning the right of establishment of nationals of member States and of companies domiciled in their territories, had not become applicable immediately, certain other provisions had come into force at once. In the light of that and of other examples he thought that article 24 should stand.

32. Mr. ROSENNE said that there was much force in the remark by Mr. Tunkin that the State which did not propose to ratify should be required to give some indication of its decision, particularly in the case of bilateral treaties; perhaps a provision on the subject should be included elsewhere in the draft. He could quote from his own experience the case of a treaty between Israel and a European country with a bicameral legislature, in which one of the Houses of Parliament had given its approval to the ratification of the treaty but the other had not; owing to an administrative oversight, no indication of the position had been given by the Government of the country concerned and it had only been discovered several years later that the treaty was buried in the parliamentary archives. There was, in cases of that sort, at least a courtesy requirement to make some notification to the other party of what was happening.

33. He wished to repair an omission in his statement at the previous meeting, and to make it clear that he supported the remark by Mr. Jiménez de Aréchaga that article 24 should not be couched in terms that might convey the impression that it applied only to bilateral treaties. A provision on provisional entry into force might usefully be included in certain multilateral treaties, such as codification treaties of the type of the two

Vienna Conventions on diplomatic and consular relations.

34. Mr. REUTER said it was not clear to him whether the Commission wished to remind States of certain possibilities open to them or whether it wished to restrict those possibilities. His personal opinion was that those possibilities should not be restricted and, if others agreed, the Commission should be careful not to draft a provision restricting them, for a great variety of such possibilities existed in practice. The wide range of solutions to be found in practice stretched from those involving the most stringent to some containing only extremely loose obligations.

35. For example, it might happen that a treaty contained certain integral obligations concerning the immediate application of certain provisions, in which case the clauses concerning entry into force and the termination of entry into force would be regarded as variants of other clauses. The latitude left to States in such a case was not great for the rules of constitutional law would necessarily be the same for all the obligations laid down in a single instrument.

36. Another case was that where the text was so drafted that it was clear that the immediate implementation of certain rules was the subject of a separate commitment, even though incorporated in the text. Such a solution could be extremely useful because, from the point of view of constitutional law, such a commitment might be more easily acceptable than a definitive commitment.

37. A third case was conceivable: that of a less strict commitment, for example where there was no real treaty but a kind of unilateral declaration by each State affirming its intention to follow a certain line of conduct, a practice known as parallel undertakings. In that way, States could express their intention to apply certain rules for so long as they did not give notice that they ceased to apply them. That was an example of a clause depending solely upon the will of a party, and there was no reason why such a method should be ruled out if it could be useful.

38. Consequently, if the Commission could devise wording to express the wide range of possibilities open to States, he would be in favour of retaining the article, but if it failed to do so, the article should be dropped, for otherwise its effect would be not to extend the scope of a useful institution, but to hamper its operation in certain cases.

39. Mr. ELIAS said that he fully agreed with Mr. Reuter's remarks. It was precisely because he had foreseen the possibility indicated by Mr. Reuter that he had himself suggested at the previous meeting the deletion of article 24. He doubted whether it would be possible for the Commission to agree on a text for the article.

40. Mr. AGO said that he fully agreed with Mr. Reuter that the Commission should draft one or two separate articles to cover two different cases.

41. One was that where the treaty entered into force at the time of signature but was subject to ratification, with the consequence that it entered into force under a resolute condition. The case, far from being theoretical, was a very important one.

42. The other case was that where, in order to leave the parties greater freedom of action, the treaty did not enter into force, but some of its clauses did, by virtue of a separate agreement. The treaty itself would enter into force at the time of ratification, but the parties agreed to apply certain clauses provisionally. From the point of view of theory, what happened in that case was that another agreement—one in simplified form—came into existence.
43. Mr. TSURUOKA said that the word “provisional” was not very felicitous in the context and should be replaced by another term.
44. Mr. LACHS said that there did not appear to be any very great difference between the views of a number of members and the alternative suggested by Mr. Reuter. He did not believe that any member had advocated a limitation of the freedom of States in the matter. There was every intention to leave States maximum freedom both with regard to the provisional application of treaties and with regard to the modalities of such application, while protecting the rights of others. The Special Rapporteur’s approach to the draft seemed to provide the necessary balance in that respect. The article was a useful one and could now be referred to the Drafting Committee for it to work out a satisfactory text.
45. Mr. CADIEUX suggested that different designations for different types of agreements should be used to reflect the distinction drawn by Mr. Ago.
46. If the treaty was regarded as a principal treaty binding the will of the parties, all the clauses of which were to enter into force on signature—subject to late confirmation or cancellation—then it would be a conditional agreement. A secondary question would then arise: at what point would the condition operate? For the purpose of answering that question the wording “until . . . it shall have become clear” in the Special Rapporteur’s new text would not give States enough guidance. The Drafting Committee should consider that point with particular care.
47. The other, subsidiary treaty or agreement was indeed provisional, for it would disappear when the principal treaty definitively came into operation. It would be less objectionable to describe that agreement as “provisional”, in order to distinguish it from the other and to leave States completely free to choose how many of the provisions of the principal agreement they wished to embody in the subsidiary or collateral agreement.
48. If that distinction were feasible, the next question would be whether those provisional agreements should be mentioned in the text itself. Possibly the question was related to the freedom of the parties to the negotiations; consequently, it might be enough to indicate that they had fairly wide latitude and that the preliminary arrangements might take different forms, without the need for an express provision on the matter in the text itself.
49. Mr. AMADO said that States were at liberty to prescribe anything they wished in the treaty itself and they could provide that it would enter into force pending the completion of certain other instruments. He thought the article should stand, although he disliked the word “provisional”; but that was a linguistic weakness that could be cured.
50. Mr. JIMÉNEZ de ARÉCHAGA said that it was because of the constitutional difficulties which sometimes delayed ratification that he considered article 24 particularly useful. The article would make it possible for a State to endeavour to solve its constitutional difficulties by agreeing to the provisional entry into force of the treaty. Though the provisions of the article were largely descriptive of an existing practice it was precisely for that reason that they fulfilled a very useful purpose: they would enable States which had constitutional difficulties to prove the legitimacy of the practice.
51. He also agreed with Mr. Tunkin that some requirement of notification should be laid down for a State which decided not to ratify a treaty.
52. He strongly urged that the term “provisional” should be retained to qualify “entry into force”; the Commission should not, in the interests of theoretical precision, depart from the terminology in current use in existing State practice.
53. With regard to the distinction proposed by Mr. Ago he was not convinced that there existed any practical, difference between the two situations that he had mentioned. States like the Latin-American States, if they wished to overcome their constitutional difficulties, could decide to put the whole treaty into provisional operation. The only real difference was in respect of the final clauses, which had a status of their own, as had been recognized by the International Court of Justice.
54. Mr. TUNKIN said he agreed with Mr. Ago that two possibilities existed but, on practical grounds, he did not consider that both should be covered in article 24. Provisional entry into force was of importance and article 24 should be retained to deal with it; on the other hand, where the parties agreed to put into force some of the provisions of the treaty, there was really a separate agreement. Agreements of that kind could be very varied in character and it would be impractical to cover only one type; if the case envisaged were not mentioned in article 24, that would not mean that the parties could not make an agreement to the effect that certain articles would apply prior to the final entry into force of the treaty.
55. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had not disclosed any very great divergence of views, although members might differ on what ought to be included in the article. Some of the Commission’s difficulties no doubt arose from the feeling of novelty which the Commission had had when it introduced an article on provisional entry into force in 1962. There had then been a feeling that extra care should be taken because of the constitutional implications. The discussion in 1962 had accordingly shown some diffidence regarding the use of the expression “entry into force”, without any qualification, because from the constitutional point of view, the treaty might well be one that could not be concluded without ratification, yet the application of the clauses of the treaty was a matter of urgency. The situation had now somewhat changed and the Commission as a whole appeared

to be firmly of the opinion that it was dealing with a common phenomenon which had become an ordinary part of existing treaty practice.

56. It was important to specify to what situations the article referred. The provisions of the article endeavoured to cover both the situation where the treaty itself provided for provisional entry into force and that in which a separate agreement was made to that effect. In dealing with those two situations in general terms, the Commission had perhaps overlooked the existence of a third situation, the one to which Mr. Reuter had drawn attention, where the intention of the parties was not to bring the treaty into force but to apply parts only of the treaty on a provisional basis. Article 24 should be drafted so as to cover the first two situations and the Drafting Committee should perhaps endeavour to cover the third as well, although it might not be easy to draft such a provision since the article was concerned with the provisional entry into force of the treaty rather than with the application of its clauses.

57. The Drafting Committee should also consider the question whether article 24 ought to deal, as it did, not only with provisional entry into force but also with the termination of the treaty. In 1962, when the Commission adopted article 24, it had not yet drafted the provisions on termination. Perhaps it would now be necessary to re-examine the references to termination in the article in the light of those provisions.

58. From the point of view of language, it would be more correct to speak of "temporary" rather than "provisional" entry into force, since it was the time element that was involved. The position could also be described as that created by a "*condition résolutoire*" However, he agreed with Mr. Jiménez de Aréchaga that it was desirable to retain the term "provisional" because it was almost invariably used by States in the instruments they signed.

59. He accepted the suggestion that the provisions of article 24 should not be confined to bilateral treaties; that had not been his intention and the drafting would have to be improved so as to remove any risk of giving that impression. There existed a number of multilateral treaties which provided for provisional entry into force.

60. The CHAIRMAN suggested that the Special Rapporteur's proposal be referred to the Drafting Committee, which should consider it in the light of all the suggestions and objections put forward during the discussion.

*It was so agreed.*⁴

ARTICLE 8 (Participation in a treaty)

Article 8

Participation in a treaty

1. In the case of a general multilateral treaty, every State may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.

2. In all other cases, every State may become a party to the treaty :

- (a) Which took part in the adoption of its text, or
- (b) To which the treaty is expressly made open by its terms, or
- (c) Which although it did not participate in the adoption of the text was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.

61. The CHAIRMAN invited the Commission to consider article 8. Before asking the Special Rapporteur to introduce his revised version of the article, however, he wished to draw attention to the answers prepared by the Secretariat to the questions asked by Mr. Rosenne at the 782nd meeting; the questions and answers were as follows :

Questions

A. What is the practice of the Secretary-General, as registering authority under Article 102 of the Charter, when he receives for registration or filing and recording treaties concluded (a) between a Member of the United Nations and a State neither a Member of the United Nations or of any of the specialized agencies; and (b) between two or more States none of which are Members of the United Nations or of any of the specialized agencies? If he has accepted such treaties for registration and/or filing and recording, is the Secretary-General in a position to furnish information concerning the reactions of Governments to the registration of treaties by States falling into this latter category?

B. Can the Secretary-General inform the Commission whether any other depositary authorities—Governments and Secretariats—have adopted a position similar to that of the State Department indicated in paragraph 5 of the Observations and Proposals of the Special Rapporteur on article 8 in his Fourth Report (A/CN.4/177)?

Replies

A.1. The Secretary-General has not infrequently received for registration treaties concluded by a Member of the United Nations and a non-member of either the United Nations or a specialized agency. When the treaty was submitted by a Member, the fact that one of the parties was a non-member has never precluded registration.

2. An early case (*Repertory of United Nations Practice*, vol. V, Art. 102, paras. 41-42) involved the registration by a Member of an agreement concluded with Spain, then not yet a Member of the Organization. Another Member made a communication to the Secretary-General contending that registration of such an agreement conflicted with General Assembly resolutions 23 (I) and 39 (I), and requesting deletion of the corresponding number in the Register. In reply the Secretary-General regretted that he was unable to consider deletion of the registration. The arguments are summarized in the *Repertory*.

3. Further cases (*Repertory of United Nations Practice, Supplement No. 1*, vol. II, Art. 102, paras. 12-23) related to registration in 1955 and 1956 by a Member of agreements with the Democratic People's Republic of Korea, the German Democratic Republic, and the People's Republic of China. The issues of the monthly *Statement of Treaties and International Agreements Registered or Filed and Recorded with the Secretariat* (those for November 1955 and January 1956), which referred to those registrations, and all subsequent issues of the *Statement*, contain a prefatory note explaining the position of the Secretariat. This note states in part :

⁴ For resumption of discussion, see 814th meeting, paras. 38-56.

" 5 . . . In respect of *ex officio* registration and filing and recording, where the Secretariat has responsibility for initiating action under the Regulations, it necessarily has authority for dealing with all aspects of the question. " 6. In other cases, when treaties and international agreements are submitted by a party for the purpose of registration, or filing and recording, they are first examined by the Secretariat in order to ascertain whether they fall within the category of agreements requiring registration or are susceptible of filing and recording, and also to ascertain whether the technical requirements of the Regulations are met . . . However, since the terms 'treaty' and 'international agreement' have not been defined either in the Charter or in the Regulations, the Secretariat, under the Charter and the Regulations, follows the principle that it acts in accordance with the position of the Member State submitting an instrument for registration that so far as that party is concerned the instrument is a treaty or an international agreement within the meaning of Article 102. Registration of an instrument submitted by a Member State, therefore, does not imply a judgement by the Secretariat on the nature of the instrument, the status of a party, or any similar question. It is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status and does not confer on a party a status which it would not otherwise have. "

4. Following the publication of the *Statements* for November 1955 and January 1956, the representatives of the United States, the United Kingdom, the Republic of China, the USSR, and the Philippines made communications to the Secretary-General which are summarized in the passage of the *Repertory Supplement* which is cited above. They all stressed that registration of a treaty with the Secretariat had no legal effect in respect of the status of régimes which they did not recognize; several of them also declared that their silence about such registrations would not prejudice their positions on the status of such régimes.

5. As for more recent cases, only one instance is recalled. In connexion with the registration by Poland of the Hague Protocol of 28 September 1955 amending the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air, the Permanent Observer of the Federal Republic of Germany, in a *note verbale* to the Secretary-General, referring to the fact that the list of parties submitted by Poland included the German Democratic Republic, stated that the latter 'cannot have become a party to that Protocol since, according to its articles 20 and 22, it constitutes an agreement among States, whereas the so-called German Democratic Republic is not a State but only a part of Germany under foreign occupation'. He further requested that his communication be brought to the attention of all States parties to the Protocol.

6. The Secretary-General replied that the above-mentioned note

" . . . concerns a matter in regard to which the normal means of communication with the interested States or of registering an objection, would be through the depositary of the Protocol in question. Not being the depositary of this Protocol, the Secretary-General does not feel it appropriate to his functions under

Article 102 of the Charter of the United Nations to circulate the communication of the Permanent Observer to the States parties to the Protocol. "

Subsequently, in reference to that reply, the Permanent Observer of the Federal Republic of Germany informed the Secretary-General that upon request of his Government the Government of the United States of America had forwarded to the Polish Government a statement in which it was pointed out 'that the so-called German Democratic Republic, not being a State, cannot have become a party to that Protocol, and therefore cannot be included in the list of States parties to that Protocol which was registered with the Secretary-General of the United Nations'. He added that all States parties to the Protocol in question had been informed of that statement. No action was taken by the Secretary-General on that communication.

7. It will be noted that all the above cases relate to treaties submitted for registration by a Member of the United Nations. No treaty with a Member has ever been submitted for registration by a non-member.

8. As regards the second part of the question, the Secretary-General has never received for filing and recording a treaty between two or more States none of which are Members of the United Nations or of any of the specialized agencies.

B.1 The Secretary-General has no information about the practice of States when they receive instruments relating to treaties of which they are depositaries from Governments which they do not recognize.

2. A case which may be mentioned, however, is that of Switzerland, which is the High Authority of the Berne Union for the Protection of Literary and Artistic Property, and as such is responsible for making notifications concerning the conventions of the Union, even though the texts and related instruments are deposited with other Governments. After the War the Federal Republic of Germany made a declaration that the Rome Convention, to which the German Reich had become a party, was again applicable to its territory. Switzerland, as High Authority, notified the parties of this action, and a number of them, which did not recognize the Federal Republic, protested. Some months later the German Democratic Republic also made a declaration that the Rome Convention was again applicable to its territory, and the High Authority again circulated a notice to the parties. A number of them, which did not recognize the Democratic Republic, made protests. Switzerland then circulated a communication in which it stated that it had circulated the notification as High Authority, and that in doing so it had not prejudiced its own position with regard to the recognition of the Democratic Republic. The Swiss Government added that in its view the question should be settled by the Conference of the Union.

62. Written comments on article 8 had been received from Mr. Liu, whose views were very briefly that, considered from the standpoint both of theory and of State practice, the idea of universality, in other words, that any State or entity had a right to become a party to a treaty, was in fact in contradiction with the very nature of treaties, and that the correct view was the one contained in the comments of the Government of Japan, namely, that the question of participation in a treaty should always be left to the decision of the States participating in a conference.

63. Sir Humphrey WALDOCK, Special Rapporteur, said that at the fourteenth session article 8 had revealed considerable divergence of view and after a long discussion the final text had only been approved by a small majority. In his fourth report, he had briefly analysed the comments made by governments or by members of delegations to the Sixth Committee, which reflected a similar divergence of view on the subject of the article. Though himself of the minority view, he had considered it to be his duty as Special Rapporteur to act on the basis of the view of the majority in 1962 and he had accordingly offered a revised text on much the same lines as that of 1962 but shortened and slightly adjusted in order to meet what he regarded as a valid point made by the Swedish Government. The revised text read :

If it does not appear from a treaty which States may become parties to it —

(a) in the case of general multilateral treaties, any State may become a party;

(b) in other cases, any State may become a party which took part in the drawing up of the treaty or which was invited to the conference at which it was drawn up.

64. In his observations, he had drawn attention to certain practices of depositaries, about which useful information had recently been published in the *American Journal of International Law*,⁵ relevant to a point that had engaged the Commission's attention at its fourteenth session, namely, the delicate position of a depositary when the treaty contained the "any State" formula concerning participation. There had been two schools of thought in the Commission, one being in favour of a rule of the kind finally included in article 8, that when the treaty was silent the "any State" formula applied, and the other considering that account ought to be taken of United Nations practice in regard to general multilateral treaties drawn up under its auspices.

65. The new material furnished by the Secretariat in response to Mr. Rosenne's request at the 782nd meeting threw further light on the points that had been discussed but it did not add very much to the information which he had given in his report. It indicated that the "any State" formula would, for obvious reasons, create greater difficulties for the Secretary-General of the United Nations acting as a depositary, or for any other secretariat of an international organization in the same position, than for a government, should the status of an entity be in doubt. Some of the material assembled by the Secretariat related to the functions of the Secretary-General as a registrar of treaties, which of course was a separate matter.

66. The Commission would also wish to take into account the comments by Mr. Liu.

67. Mr. BRIGGS said that he had prepared a new draft of article 13 (Accession) to replace the existing articles 8, 9, and 13. It read :

"1. For the purposes of the present articles, accession is an act by which a State which has not signed, ratified or approved a treaty, accepts as binding the provisions of the treaty.

"2. Unless otherwise provided in the treaty itself, a State may accede to a treaty

(a) only after the treaty has entered into force, and

(b) either

(i) with the consent of all the parties to the treaty; or

(ii) in conformity with any provisions opening the treaty to accession, adopted in accordance with articles 65 and 66."

68. Nevertheless he would not comment at that time on the close relationship between articles 8 and 9—in a sense some members regarded the latter as a substitute for the former—or the connexion between articles 9 and 13, but would confine himself to article 8 as such and the principal issue it raised, namely, the definition of a general multilateral treaty.

69. The Commission had decided to deal separately with the problem of the accession of new States to old multilateral treaties which, such as those concluded under the auspices of the League of Nations, had by force of circumstances become closed, but he himself wondered whether all those League of Nations treaties could be classified as general multilateral treaties, despite the title of the Secretary-General's report on "General multilateral treaties concluded under the auspices of the League of Nations."⁶ The Special Rapporteur in paragraph 3 of his observations on article 9 had treated the problem as one of accession.

70. The second point raised by article 8 was that dealt with in paragraph 2 (c) of the original draft and in sub-paragraph (b) of the Special Rapporteur's new text, but neither the original text nor the 1962 commentary had been particularly enlightening as to why the Commission should have thought it important to extend special privileges to States which had participated in the drafting of a treaty but had not signed the text, or which had been invited to attend the Conference at which the treaty had been drawn up but had not in fact done so. Surely there was no need for such treatment provided that the treaty was open to accession.

71. Similarly, the exact purport of the phrase "in other cases" in the Special Rapporteur's new text of sub-paragraph (b) was not clear: presumably his intention was to say "in all cases".

72. Leaving aside the political aspects, there were two legal questions to consider. The usual way in which a State which had not participated in the drafting of the text could become a party was by accession, or more rarely by an equivalent process for which some treaties made provision, namely, accession by signature. That apart, the so-called right of participation was not so much a matter of treaty law as of the right to participate in an international conference. To the extent to which the alleged right of participation was a legal question, it could be dealt with in an article dealing with accession and need not be covered in article 8 at all. The Special Rapporteur, in paragraph 3 of his observations on article 9, had indicated that the Commission's intention had been to facilitate the opening of certain categories of closed multilateral treaties to new States. But surely that could be achieved without recourse to such a

⁵ *American Journal of International Law*, Vol. 58 (1964), pp. 170-175.

⁶ Document A/5759.

vague general principle as that advanced in article 8, paragraph 1.

73. The second question was whether it would be possible to devise a definition of a general multilateral treaty on which to base a new rule *de lege ferenda* permitting every State to become a party, except where otherwise provided whether in the treaty itself or by the rules and practices of an international organization. At its fourteenth session, the Commission without attempting to define a multilateral treaty had tried its hand at defining a general multilateral treaty, primarily by reference to its content, and implying at least by way of a tacit assumption that such treaties must involve a large number of parties. With justification, the formula arrived at had been criticized by governments. Personally he was prompted to ask how many more than three States were needed to transform a multilateral into a general multilateral treaty: the Commission's definition gave no guidance. Attempts to make legal distinctions between different categories of treaty on the basis of content had always failed, including the effort made by Lord McNair in an interesting article that had appeared in *The British Yearbook of International Law* some years previously.

74. The definition set out in article 1 (c) of the 1962 draft was vague and legally imprecise. The criterion that such a treaty must deal with matters of general interest to States as a whole was unworkable because it could apply to any bilateral treaty of peace or armistice or to a regional security pact. Owing to the objections of several governments that particular criterion had been dropped by the Special Rapporteur. There was now left the other, namely, that a general multilateral treaty was one which concerned general norms of international law. But that characteristic was also to be found in a wide range of other classes, for example, bilateral treaties such as the Treaty of Washington of 1871 between the United Kingdom and the United States of America,⁷ prior to the submission of the Alabama Claims to arbitration, certain regional treaties, and codification conventions such as the Vienna Conventions of 1961 and 1963. As Mr. Gros had pointed out in the Commission, there was not one but several categories of general multilateral conventions⁸ so that the first criterion in article 1, paragraph 1 (c) could not be relied on. That proposition was further substantiated by the very heterogeneous list of treaties concluded under the auspices of the League of Nations mentioned in part II of the Secretary General's report (A/5759).

75. Another category of general multilateral treaties, namely, the United Nations Charter and the constitutions of specialized agencies, were not open to all States because of the conditions imposed concerning membership. A third category of more recent date were open to virtually universal accession; for example, the 1961 Single Convention on Narcotic Drugs or certain commodity agreements drawn up within the United Nations.

76. Probably the objections to the United Nations formula and the support for the "any State" formula were aimed less at the exclusion of States than at certain entities whose doubtful status as States was the precise point at issue, but the rule proposed in article 8, paragraph 1, of the original draft or in the Special Rapporteur's new text could not in any case authorize accession by such entities because of the provisions in the treaties themselves that used the United Nations formula, or the explicit proviso written into both versions of article 8. Even if that proviso were dropped, as some governments proposed, any inference that the "all States" formula implied universality would clearly run counter to United Nations policy of not regarding as States entities the inhabitants of which had been denied the opportunity for self-determination.

77. He therefore proposed that article 8 should be eliminated; to the extent that it dealt with any legal questions at all, they were relevant to accession and could be covered in a separate article on that matter. The Commission should also abandon its attempts to try and define general multilateral treaties because any such attempts were doomed to failure.

78. Mr. CASTRÉN said that article 8 had caused a good deal of difficulty in 1962. After long discussions, the majority of the Commission had agreed on the compromise embodied in the present text. The compromise was a modest one and the field of application of the article was obviously very narrow.

79. Personally, he would have liked the article to go farther, for he considered that, in principle, general multilateral treaties should be open to all States members of the international community. In particular, if general multilateral treaties were defined as meaning only general law-making treaties, as the Special Rapporteur had suggested in his observations on article 1 (c) (A/CN.4/177), there would be no reason for preventing all such States from becoming parties to such treaties.

80. The difficulties of the depositaries of treaties were very great indeed in cases where, for example, they received notifications of accession from the government of an entity whose statehood or status as a subject of international law was contested or not recognized by all members of the international community. In his observations on article 8 (A/CN.4/177, para. 5), the Special Rapporteur said that those obstacles were not insuperable and, in his (Mr. Castrén's) opinion, recognition was a separate problem not having a decisive bearing on the problem under discussion at the moment. Nor did he believe that it happened very often that entities not possessing international personality expressed the desire to become parties to international treaties.

81. The problem in article 8 was different from that dealt with in article 3 (Capacity to conclude treaties), where the Commission had had to formulate a definition, more of a theoretical kind, which would not be open to criticism. In article 8 the Commission had to settle a practical question which also involved a very important question of principle. The reason why he made that observation was that, having proposed the deletion of article 3, he would not like to be accused of being illogical.

⁷ *British and Foreign State Papers*, Vol. LXI, p. 40.

⁸ *Yearbook of the International Law Commission, 1962*, Vol. I, 667th meeting, para. 45.

82. In the general practice of States, and particularly in that of the United Nations, it was not admitted that all States were at liberty to accede to the treaties of others, regardless of the nature of those treaties. The Charter itself laid down specific conditions. From the comments of governments on article 8, it appeared that their views ranged from one extreme to the other. Some governments, like that of Denmark, accepted the Commission's proposal. It was difficult to satisfy everybody. The Commission could, of course, take the line of least resistance and simply submit an article which did no more than confirm the present practice.

83. In his opinion, the Commission should, by virtue of its terms of reference, propose progressive rules and take a first step towards extending the right of States to participate in important general multilateral treaties. Accordingly, he suggested that the Commission should not reverse its decision of 1962 and should accept the substance of article 8.

84. So far as the drafting was concerned, he agreed with the proposals by the Special Rapporteur and the Swedish Government, among others, for drafting the article more clearly and concisely. Subject to some drafting improvements, he was prepared to accept the revised version proposed by the Special Rapporteur, which scarcely differed from that suggested by the Swedish Government.

85. Mr. TUNKIN said that paragraph 1 of the article dealt with one of the fundamental principles of the law of treaties and the fate of the Commission's whole draft might hinge upon the way it was formulated. All members were aware of the practice resulting from the cold war whereby certain States had been debarred from participating in general multilateral treaties. From the legal point of view his categorical answer to the question whether States were free to exclude certain members of the international community in that way was in the negative.

86. The Commission's recognition of the existence of a principle that general multilateral treaties should be open to the participation of all States had been a substantial contribution to the development of contemporary international law. It was an aspect of a fundamental principle of *jus cogens*, namely, the sovereign equality of States. By virtue of the definition in article 1 (c), each State must have the right to participate in elaborating general norms of international law designed to be binding on all. To close general multilateral treaties to the participation of some States by whatever means, direct or indirect, would be inconsistent with the very nature of such treaties and injurious to the progress of international law. That being so, paragraph 1 of article 8 must be modified so as to consist of nothing more than the statement "In the case of a general multilateral treaty, every State may become a party to the treaty". The rest of the paragraph should be deleted.

The meeting rose at 12.45 p.m.

792nd MEETING

Monday, 31 May 1965, at 5 p.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. LACHS said that he proposed to comment on the fundamental issues raised by article 8 and to leave drafting questions aside. The text drawn up by the Commission at its fourteenth session achieved something less than a compromise between two principles, namely, the so-called freedom of States to choose their partners in an international instrument, and the universal character of general norms of international law that were the concern of all States. His view was borne out by the observations of governments and the Special Rapporteur's commentary on them. Many governments had argued that the article did not go far enough, some, like that of Japan, had advocated its deletion, while others had criticized it on the ground that it did violence to the freedom of contracting States to determine the scope of the treaty. At the previous meeting, Mr. Briggs had presented a carefully reasoned case for dropping the article altogether.

3. In his own opinion, traditional solutions were wholly inadequate and the Commission should face the fact that the discussion in 1962 and the considerations put forward since that date had centred on the real crux of the problem, which was recognition, though that had never been explicitly avowed. The time had come to call a spade a spade and to admit that States wished to keep a free hand where the issue of recognition was concerned and were therefore reluctant to enter into treaty relations with governments they did not wish to recognize, or with entities which they refused to admit possessed the status of a State lest that implied recognition. Recognition was a political fact which the Commission should bear in mind.

4. If he were right in his diagnosis of the difficulty, the solution would be to reassure States that the draft article would not imply recognition. That would be consistent with practice before the adoption of the

¹ See 791st meeting, preceding para. 61, and para. 63.

United Nations formula, when States concluding treaties had used two main devices for the purpose of retaining their freedom of action. One was to refuse to accept the obligations flowing from a treaty vis-à-vis a State or government that they did not recognize; that had been done in the case of the International Sanitary Convention of 1926,² the 1929 Convention for the Safety of Life at Sea³ and the 1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs.⁴ The other was to make a declaration that participation in a treaty did not imply recognition; that course had been followed by Austria, at the 1863 Conference on the Scheldt, and by Colombia, with regard to Panama's membership of the League of Nations. There had also been cases where admission to a treaty as such had been refused "until recognition", as for example, to the Spitsbergen treaty signed at Paris on 9 February 1920, but even then "nationals and companies" of the State whose government had not been recognized were admitted to "enjoy the same rights as nationals of the High Contracting Parties".⁵ But there were treaties in which even such a reservation would be out of place, for it would frustrate the very object of the treaty; an instance was the Paris Treaty of 1928 for the renunciation of war as instrument of national policy, which in fact contained no such reservation.⁶

5. During the period between the two wars, there had been many more cases of non-recognized governments being admitted to international instruments with the reservations he had mentioned than of refusals to admit them. Participation in multilateral treaties without implying recognition had come to be accepted as a general principle of contemporary international law. That view was substantiated by the information submitted to the Foreign Relations Committee of the United States Senate in 1963 by the Legal Adviser of the State Department.

6. The reason why States were apprehensive about the "every State" formula was probably the fear lest admission to a treaty would strengthen the position of a government they did not wish to recognize, but that objection ought to fall once the Commission clearly stated what were the true implications of the article on participation.

7. The proposition that States were free to choose their potential partners in a treaty did not necessarily apply to all categories of treaty, because by definition a general multilateral treaty concerned with general norms of international law or of general interest to all States ought to be open to universal participation. Examples of such instruments were the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, and the Briand-Kellogg Pact. The advantage of admitting non-recognized entities to instruments creating new rules of law, or confirming existing ones, clearly outweighed the disadvantages because it secured mutual commitments

and guarantees of fundamental importance which would not otherwise be obtainable. It would be both contrary to logic and law to debar such governments or States from adhering to such instruments as the Genocide Convention, the Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery or the Moscow Nuclear Test Ban Treaty because treaties enunciating general or new norms of law must by their very nature be universal and open to unrestricted participation. Were it otherwise, they would fail to meet the purpose for which they were intended. Could the outlawing of genocide be confined to certain areas of the globe simply because certain governments were not recognized by other governments? That was surely not a reason for refusing protection to men wherever they lived or for obstructing co-operation by all in the prevention or prosecution of that crime.

8. The Commission should make an explicit statement to the effect that the mere fact of non-recognition did not deprive the entity in question from being a factor in international relations: its mere existence ensured that. Facts were stubborn, and the proper legal consequence must be drawn from them. To exclude such entities from the law-making process would mean dividing the world into two categories of States, to which two sets of rules would apply, thus creating a most unwelcome duality or plurality and introducing political considerations into a domain in which the legal elements ought to predominate.

9. The argument that the principle of universality would create difficulties for the depositary, and thereby render a provision on those lines unacceptable to the majority of governments could have no bearing on the subject as it was procedural rather than substantive in character, and experience with the recent Nuclear Test Ban Treaty showed how easily such difficulties could be overcome. Eighty States had signed it in all three capitals, namely, Moscow, Washington and London; two in both Washington and Moscow; one in Moscow and London; seven in Washington and London; three in Moscow only, and thirteen in Washington only. Further signatures had been added later. A similar procedure had been advocated in the Committee on the Peaceful Uses of Outer Space in regard to the draft international agreement on the rescue of astronauts and spaceships in the event of accident and emergency landing. Thus a depositary's difficulties were capable of solution and were indeed being solved; the "every State" formula was not an insuperable obstacle, even when the depositary was an international organization.

10. His conclusions therefore were, first, that the Commission should make it clearer in its commentary that participation in a multilateral treaty did not imply recognition; secondly, that the freedom of States to select their partners in a treaty could not apply to general multilateral treaties which, by definition, were universal; thirdly, that the criteria adopted hitherto by the United Nations for admission to international treaties concluded under its auspices, because clearly of a political nature, could not be applied to general multilateral law-making treaties, since that would introduce a two-stage political filter in a legal process; fourthly,

² League of Nations *Treaty Series*, Vol. LXXVIII, p. 231.

³ *Ibid.*, Vol. CXXXVI, p. 82.

⁴ *Ibid.*, Vol. CXXXIX, p. 303.

⁵ *Ibid.*, Vol. II, p. 14.

⁶ *Ibid.*, Vol. XCIV, p. 59.

that the special category designated as general multilateral treaties should be maintained in the Commission's text; and fifthly, that the "every State" formula should be reinforced and extended.

11. Mr. TSURUOKA said that, while he acknowledged that the arguments put forward by Mr. Lachs included certain points that deserved to be borne in mind, he regretted that he was unable to endorse Mr. Lachs's opinion entirely.

12. He attached great importance to the principle, in international law, of the independence of the will of the parties in the matter of contractual relations. According to that principle, States were entirely free to choose their partners when concluding a treaty; the principle promoted international activity and the establishment of closer relations between States. Neither the doctrine nor the practice was opposed to that principle, which was simply the corollary of State sovereignty and the equality of independent States; both those concepts were confirmed by the Charter of the United Nations, which also upheld their corollary. The fact that the right of States freely to choose their contractual partners flowed directly and necessarily from the notion of sovereignty required no explanation; it was inconceivable that an independent State should be required to accept, without its consent, treaty partners imposed on it by other States. The consent of the States parties to the treaty was necessary if the treaty was to be open to participation by "any State", and that rule applied both to ordinary multilateral treaties and to general multilateral treaties.

13. It did not follow from that that the opening of a multilateral treaty to third States always required the unanimous consent of all the States participating in the conference which drew up the treaty. States saw in a relaxation of the unanimity rule in that matter a consequence of the social needs of the international community. In modern times, an overwhelming majority of the community's members acknowledged that a conference convened to draw up a multilateral treaty was free to determine what majority was required to settle the question whether the treaty should be open to States not participating in the conference, just as it was free to determine the majority necessary for the adoption of other provisions of the treaty. It was for the conference to decide whether it wished to open the treaty to all States, or to a more or less restricted category of States.

14. That was quite different from saying that every multilateral treaty, if it was a general treaty, must, regardless of the will of the States participating in a conference convened to draw up the treaty, be open to all States. The least that could be said was that many States did not recognize that thesis as being the rule of international law.

15. Could those States, then, reasonably be expected to recognize it as a rule *de lege ferenda*? He thought not. Those States would not see either the necessity or the desirability of such a rule in international law. They would even fear that they might, for insufficient reason, be deprived of a part of their recognized freedom; and the fact that they did not know precisely what was

and what was not a general multilateral treaty would accentuate their fears.

16. The reason why States considered such a rule as neither necessary nor desirable was that they knew that the conference had no need of such a rule to settle the question of the opening of a treaty to wider participation; the conference could settle that question itself in complete freedom, and always had done so. Besides, in so far as the purpose of opening the general multilateral treaty to "any State" was to ensure universal participation in the treaty, it had to be admitted that States had serious doubts about the efficacy of such a measure in practice. The Treaty of Moscow had been open to all States, yet the two States which many would have liked to accede to that Treaty had not done so and were still not parties to it, nor had they manifested any intention of becoming parties. In other words, the "any State" formula, which might be interpreted as a generous invitation, was no such thing.

17. Nor should it be overlooked that the "any State" formula might cause some States to hesitate to become parties to a treaty containing the formula, with the consequence that the number of participating States would be smaller. Furthermore, any State could conclude, with the partners of its choice, a multilateral treaty covering the same ground as the general multilateral treaty.

18. He was therefore convinced that the inclusion of the "any State" formula presented a very difficult problem; it restricted the independence of the will of States in their contractual relations, which was one of the cardinal principles of international law, and it might infringe the principles established by the United Nations Charter, in particular, the principle of respect for the sovereignty of independent States.

19. States could easily dispense with the "any State" formula for at a conference they were free to adopt that formula whenever they wanted to. The prospect that the use of the formula might reduce the number of States participating in the treaty would probably make it difficult for a conference of plenipotentiaries to adopt it, which was yet another reason for advising the Commission against it.

20. In the opinion of some members the "any State" formula should be regarded if not as a rule of *jus cogens*, then at least as a presumptive rule or as a rule of interpretation covering cases where a multilateral treaty was silent with respect to the possible participation of States other than those which had been concerned in its drafting. He did not see any need for that. As far as interpretation was concerned, the draft articles concerning the interpretation of treaties were amply sufficient. A presumption in favour of the "any State" formula might sometimes even betray the real intention of the States convened in an international conference to draft the treaty. He was thinking of what happened at international conferences held for the purpose of drafting general multilateral treaties. It was unthinkable that at some point one or two States at least out of the hundred or so countries participating in the conference would not inquire about which States would be eligible to join in the treaty. The question would therefore be discussed

and voted on by all conferences convened to draw up general multilateral treaties. Why, then, should any such treaties be silent on that question? Only because proposals on the subject had been rejected. It was not irrelevant to recall that at most conferences, a two-thirds majority was needed for the adoption of any provision of substance. A one-third minority, plus one vote, was therefore enough to reject any proposal of that kind. Consequently, it was not unreasonable to say that a proposal similar to the formula currently prevailing in international practice could be rejected by a minority, plus one vote, supporting the "any State" formula, with the consequence that the treaty would not contain any provision concerning the States to which it would be opened. In such a case, it would be absurd to argue that the will of most of the States participating in the conference was presumed to be in favour of the "any State" formula.

21. In his opinion, therefore, the "any State" formula, as a presumptive rule, was often unjustified, and the argument advanced for its inclusion in the draft convention was unsound.

22. Article 8, paragraph 1, should either be drastically amended or else be omitted altogether.

23. The CHAIRMAN, speaking as a member of the Commission, said that at a diplomatic conference to which a text prepared by the International Law Commission was submitted a two-thirds majority would be needed to reject it; if there was no such text, a simple majority would be sufficient to approve a text in committee, and a two-thirds majority would be necessary to adopt it in the plenary. It was therefore the forces at work in a diplomatic assembly rather than the drafting which were the decisive factor.

24. Accordingly, the problem for the Drafting Committee was to find one formula or two alternatives. If the Commission rejected every formula, however, as from time to time it was inclined to do, it would leave the diplomatic conference in a most embarrassing position for at such meetings the major obstacle was often the lack of a basic text.

The meeting rose at 5.50 p.m.

793rd MEETING

Tuesday, 1 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. CADIEUX said that he would base his statement on his experience as an adviser to the Government of his country, not only on the legal aspects of the problem but also on its broad foreign policy aspects, particularly as it raised closely interrelated legal and policy considerations.

3. Neither the comments submitted by governments nor the arguments which had been adduced in support of article 8, paragraph 1, had caused him to alter the views which he had expressed in 1962.²

4. In support of the formulation of article 8, it had been suggested that it constituted an acceptable compromise. In fact, that formulation did not represent a compromise between the view that general multilateral conventions should be open to any State and the view that the article should reflect the existing United Nations practice on the question. A real compromise would favour neither position, and might, for instance, leave it to the States to decide the issue at each conference, with no presumption either way. Even such a solution, however, would depart from the existing practice and, to that extent, would take sides on the issue. In the circumstances, the deletion of the article was perhaps the only compromise that the Commission could reach. At any rate, neither the 1962 version nor the new text proposed by the Special Rapporteur constituted a compromise, since they laid down a presumption contrary to the existing United Nations practice and put the onus on every conference of accepting or rebutting that presumption.

5. It had also been suggested that article 8 constituted progressive development. In his view, the mere desirability of developing an article on participation was by no means universally accepted, and the formulation of a rule on what was a highly contentious question could well exacerbate the very dispute which the Commission was trying to solve. The discussions in the Commission and in the Sixth Committee, and the written comments by Governments all showed that the question constituted a serious political problem, a fact which must be accepted.

6. From the practical point of view, since the Commission had not provided an adequate legal definition of the term "general multilateral treaty", article 8 would open for every conference the question whether a general multilateral treaty was in issue. An unnecessary complication would be introduced into the multilateral treaty-making processes. The question of participation in a conference would be debated in the United Nations, then that of accession would be debated in the conference

¹ See 791st meeting, preceding para. 61, and para. 63.

² See *Yearbook of the International Law Commission, 1962, Vol. I, 667th meeting, paras. 7-10.*

and, finally, it would be left to the Secretary-General to determine whether various entities constituted "any State" or not; in many cases it might be necessary for him to raise the matter again in the United Nations.

7. Moreover, the Commission, as the organ of the United Nations, could not lightly create for the Secretary-General, as depositary, problems which were well illustrated by the conclusion of the statement made by the Secretary-General in the General Assembly in 1963;

"... if the 'any State' formula were to be adopted, I would be able to implement it only if the General Assembly provided me with the complete list of the States coming within that formula, other than those which are Members of the United Nations or the specialized agencies, or parties to the Statute of the International Court of Justice".³

8. To the argument that the fate of the draft convention on the law of treaties was at stake, he would reply that it was precisely the 1962 formulation which could jeopardize the position of the convention, and that the more extreme formulations since proposed could effectively kill its chances of general acceptance. The existing practice reflected the majority view and it would be unwise to favour what so far had in effect been the minority view. The proposed formula would give one-third plus one of the States in a conference the right to dictate to the others who should be allowed to accede to the treaty, so that it was not the majority view which would necessarily prevail. Some governments might well decline to participate in certain conferences in the face of the presumption embodied in article 8.

9. With regard to the problem of recognition, it was unquestionable, from the legal point of view, that participation with an unrecognized régime in a multilateral treaty open to general accession did not give rise to an implication of recognition. At the same time, it was not possible to ignore the fact that certain unrecognized régimes did use their participation in multilateral treaties as an argument to enhance their status. It was therefore an over-simplification to say that the question of recognition could be ignored: it was part of the complex political problem raised by article 8.

10. The most important argument adduced in support of the 1962 formulation, however, or a more extreme version of it, was that it was of the essence of general multilateral treaties that they should be open to acceptance by all States, and that to state otherwise would be contrary to the principle of the sovereign equality of all States. In fact, it would be illogical to exclude certain entities from a conference and subsequently permit them to accede to the treaty resulting from that conference. Treaties resulted from the meeting of minds and the establishing of a consensual relation; the question of participation in a treaty should therefore always be left to the decision of the States participating in a conference, as the only solution consistent with their sovereign equality.

11. It had also been suggested that all States must be permitted to participate in the formulation of rules of

jus cogens. That argument presupposed that the entities which were being excluded constituted States; it also assumed that a State must accede to a multilateral convention in order to participate in the law-making process. In fact, the universality theory did not apply either to the codification of customary international law or to the conventional law-making processes.

12. It was generally accepted that a rule of customary law could develop through the practice of a large number of important States, or even relatively small numbers of States important in a particular field, such as, for instance, the maritime nations. Rules of customary international law developed whether or not every member of the international community accepted them. Entities claiming recognition as independent States must in any case apply the customary rules of international law; otherwise the question would arise for some States whether they should ever be recognized.

13. As for conventional rules, if they were the result of codification, every entity claiming to be a State was already bound to accept them: if they constituted progressive development, there was nothing to prevent those entities from declaring unilaterally their intention to be bound by them.

14. It was therefore clear that for those entities to become bound by generally accepted rules of international law or by rules considered desirable by the international community as a whole, it was not necessary to depart from the well-established practice of the organized international community.

15. While it was thus scientifically inaccurate to say that every State must participate in the formulation of a peremptory norm, it was clear that such a theory benefited the larger States more than the smaller ones: a large and powerful State could perhaps refuse to be bound by a norm accepted by virtually all other States, but not so a small State.

16. The Nuclear Test Ban Treaty, and the unusual depositary arrangements adopted for it, showed that when political considerations militated in favour of opening a general multilateral treaty to all States, that result would be achieved with or without an article such as article 8. Furthermore, making accession available to all States did not mean that all States would in fact accede.

17. Experience had shown that the "any State" provision was not a decisive element in determining whether the provisions of the treaty were, or could develop into, a binding rule of international law. The Charter of the United Nations, which was the classic example of a law-making treaty, enshrined many fundamental principles of international law, some of which were perhaps *de lege ferenda* at the time of its drafting, while others were already *lex lata*. Yet no one could doubt that the Charter constituted a general multilateral treaty laying down rules of *jus cogens*, despite the restrictions on accession contained in its Article 4.

18. It had been suggested that the present practice in the matter was an outcome of the cold war, but regardless of the position in that respect, it was obvious that the Commission could not eliminate the cold war

³ See *Official Records of the General Assembly, Eighteenth Session, Plenary Meetings*, 1258th meeting, para. 101.

by adopting article 8. The members of the international community, as Members of the United Nations, could not refuse to allow certain entities to accede to the Charter, which was the most important of all law-making treaties, and at the same time allow those same entities to accede to less important law-making conventions.

19. The Commission was not called upon to take sides in an important political dispute, but to see whether it could devise a formula which could be of assistance to the international community. If the Commission was unable thus to be of assistance, it was better to abandon the attempt than to adopt a formulation which ran counter to the existing practice and did not seem to meet the requirements of a new rule, in other words, to be incontrovertible on purely scientific grounds and broadly acceptable politically. He had therefore reached the conclusion that it was best to omit article 8 altogether.

20. Mr. YASSEEN said he did not think that the Commission should change the decisions it had taken in 1962 with regard to article 8. Paragraph 1, in particular, embodied a reasonable rule so far as general multilateral treaties were concerned. Admittedly, the unanimity rule existed and dominated the whole of the law of treaties; its consequence was that every State was free to choose its partners and that no State could be compelled to conclude a treaty with a partner not of its own choice. Yet general multilateral treaties were in a class apart, in that they related to questions affecting the entire international community or were designed to codify, or even to create, general rules of international law. How then, should the question of participation in such treaties be settled?

21. In his view, paragraph 1, as adopted by the Commission in 1962, reconciled the unanimity principle with the special requirements of treaties that were intended to be universal. The paragraph was cautious, for it did no more than raise the presumption—applicable not in all cases, but only in those where the treaty itself contained no provisions on participation—that all States could become parties to the treaty by reason of the treaty's object and nature.

22. Furthermore, paragraph 1 achieved a compromise between two opposing schools of thought. According to one, general multilateral treaties were open by virtue of the international public order and of *jus cogens*. Without expressing a value judgement on that theory he would emphasize that it did exist and that it was supported by strong arguments. According to the opposing theory, no participation was possible except by virtue of the treaty itself; if, therefore, the treaty was silent, its silence was construed as meaning that the treaty was not open to all States. In his opinion, that theory went too far, for it disregarded the realities of the modern world. On the contrary, paragraph 1 recognized the role which general multilateral treaties were called upon to play in international relations.

23. Various practical objections had been advanced against the proposed rule. It had been said, in particular that it would cause many difficulties. But those difficulties would disappear if, in accordance with a principle that had gained acceptance, participation in general

multilateral treaties were dissociated from the question of recognition.

24. It had also been said that the rule would place the depositary in an embarrassing position. He did not think that that argument was sound, for the depositary could not decide whether an entity wishing to participate in a treaty was or was not a State. The Secretary-General and the Legal Counsel had been right to stress that that was a highly political question that fell outside the competence of the United Nations Secretariat as depositary. It also fell outside the competence of the depositary if the depositary was a State. While it was true that the question of participation by an entity whose status was contested might cause disputes between the parties, it was equally true that many other disputes could arise in the application of the rules of international law.

25. The paragraph was cautious, it did not go too far, and, as the Special Rapporteur himself had said, it did not raise insurmountable difficulties. The Commission should remember that in drafting a general convention on the law of treaties it was working for an unlimited future; it should not therefore allow itself to be influenced by ephemeral political considerations or by political attitudes which could change unexpectedly fast.

26. Mr. ELIAS said that in 1962, he had taken the view that general multilateral treaties should be open to participation on as wide a basis as possible. He therefore regarded paragraph 1 of article 8, which had been accepted in that form by the majority of the Commission, as an acceptable compromise between the two opposing views on the subject.

27. The main argument put forward against the provisions of article 8 was that they violated the principle of the freedom of the original parties to a treaty to determine who could become a party to it. But there were other ways of protecting interests of a non-universal character. The Commission had considered in 1962 the notion of a "plurilateral treaty",⁴ a notion which it had wisely dropped, to describe such multilateral treaties of a special character as the Charter of the Organization of American States and the Charter of the Organization of African Unity. In fact, the original parties could always conclude a treaty in such a form as to exclude the possibility of accession by certain parties to whom they might have objection. To take one example, no State in Africa, Asia or Europe would wish that the Organization of American States should be open to it. There was no suggestion either that article 8 should affect in any way such organizations as the North Atlantic Treaty Organization or the South-East Asia Treaty Organization which, by their very nature, were specialized and limited to a certain area or to certain group interests. It was merely suggested that, in the case of general multilateral treaties of universal interest, it was the principle of the open door that must be maintained.

28. A previous speaker had stated that non-participation in a general multilateral treaty would not necessarily affect the universal character of the rules that might emerge from that treaty. That argument might

⁴ See *Yearbook of the International Law Commission, 1962*, Vol. I, 642nd and 643rd meetings.

have been valid before the outbreak of the Second World War, when a group of States could lay down rules regarded as binding upon all States. The modern trend, since 1945, was that, as far as possible, international organizations and international treaty-making processes should be open to as great a number of States as possible. In other words, there should be an increasing participation by the newer States in the United Nations, in its organs such as the Security Council, and in the specialized agencies. Such participation would not, of course, of itself make those States follow or accept the rules laid down; they did not need to have participated in order to be bound by generally-accepted rules of international law. However, it was desirable that, as far as possible, there should be an increasing participation by States other than those which had had responsibility for making the rules of international law, whether conventional or customary. In particular, the possibility of becoming parties to multilateral treaties was particularly important to the new nations, and it was inconceivable that they would henceforth accept any development in the international field that might still appear to reserve the process of law-making to a group of States.

29. Another speaker, who had expressed a preference for maintaining the present United Nations arrangements in the matter, had admitted that the United Nations Charter could be regarded as containing elements that were both *de lege ferenda* and *lex lata*. Since the Charter contained elements of progressive development, there was no reason why that process should not continue, and the Commission would do no violence to the development of international law if it adopted the principle embodied in paragraph 1 of article 8.

30. With regard to the problem of the depositary, he had not been convinced by the arguments derived from the practice of the League of Nations with regard to multilateral treaties. General Assembly resolution 1903 (XVIII) of 18 November 1963, which the Special Rapporteur cited in his report, did not go much further than the Vienna Convention on Consular Relations⁵ concluded in April of that year, and merely confirmed the pre-existing restrictive practice. Personally, he felt that it was possible for the United Nations to be persuaded to abandon that restrictive practice.

31. In paragraph 3 of his observations on the article (A/CN.4/177) the Special Rapporteur said that if the residuary principle in paragraph 1 were made absolute, it would override the expressed will of the contracting States, thereby denying the principle of the freedom of the parties to decide by the clauses of the treaty itself which States could become a party to it. In fact, all that was being urged by advocates of as nearly universal participation as possible was that the practice of restrictive provisions should be discouraged for the purpose of future general multilateral treaties involving universal interests.

32. He agreed that the definition adopted by the Commission of a "general multilateral treaty" was far from satisfactory, and should be improved.

33. Opening treaties to as wide a participation as possible did not necessarily mean that participation in a general treaty implied recognition. If any misgivings were felt on that point, they could easily be allayed by introducing a clause, inspired by an understanding reached in connexion with the adoption of the Constitution of the World Health Organization and of certain other important instruments, that participation of a State in a general multilateral treaty should in no way imply recognition of the government of such a State by the other parties to the treaty. Under article 3 of the Constitution of the World Health Organization, membership was open to all States. The point was an important one and had been the subject of comments by a number of governments, but he would not go so far as to suggest, as had been done by the Venezuelan delegation in the Sixth Committee (A/CN.4/177), that it should be the subject of a separate article. It should, however, be emphasized in a separate paragraph of article 8.

34. Mr. VERDROSS said that in 1962, during the first reading of what was now article 8, he had drawn attention to an apparent contradiction between the will of an international conference to codify general international law or enunciate new rules of general international law, and yet at the same time to exclude certain States by preventing them from becoming parties to the treaty. Since, however, the wording proposed by the Special Rapporteur corresponded to current international practice, the question had to be asked, what was the reason for that apparently contradictory practice?

35. At first glance, it might be explained by the present division of some States into two political entities, one of which was considered a State by one group of States and the other a State by another group. In his opinion, however, there was a deeper reason for the practice: it was that as yet there was no international organ competent to determine, by a ruling binding on all States of the international community, whether a political entity was a State within the meaning of international law. It was still a matter for each individual State to make that determination.

36. Consequently, it could happen that a political entity was considered a State by one group of States, whereas another group of States took the view that that entity did not fulfil all the conditions laid down by international law to qualify for recognition as an independent State. That determination was quite distinct from political recognition, although the two acts were normally connected.

37. So long, therefore, as the imperfection of international law in that respect remained, the wording proposed by the Special Rapporteur would be correct. At the same time, however, it had to be conceded that if certain States were denied the possibility of becoming parties to such an international convention, the rules laid down in the convention would bind only the contracting States and, consequently, would not be general rules of international law, for a rule of international law could not be imposed on a State which had not freely accepted it.

38. That did not mean that an international conference was obliged by international law to permit all States to

⁵ *United Nations Conference on Consular Relations, Official Records*, vol. II, p. 175.

become parties to such a convention. The only consequence of the exclusion of certain States was that such a convention was incapable of creating, by the treaty-making process, rules of truly general international law.

39. For those reasons, he proposed that the compromise worked out during the first reading of article 8 should be retained.

40. Mr. EL-ERIAN said that, by its formulation of the rule contained in article 8 and the related provisions of article 1 (c) on "general multilateral treaty" and article 13 on "accession", the Commission had incorporated a fundamental principle of contemporary treaty law. It was therefore not surprising that that formulation should have given rise to theoretical discussions, political controversy and practical difficulties.

41. The comments by governments and the discussions in the Commission had shown that four main issues were involved. The first was the philosophical basis and juridical logic of the right of accession; the second was the relationship of that right to sovereign equality, which entitled all States to participation in the formulation of the general rules of international law; the third was the bearing of the "any State" formula on the problem of recognition; and the fourth was the complications which that formula might involve from the point of view of the functions of a depositary. Since Mr. Lachs and other speakers had adequately dealt with the third point, and since the fourth point had been the subject of considerable comment by other members, he would confine his remarks to the first and second points.

42. On the first point, the Commission had adopted an approach which consisted in specifying a certain category of treaties as "general multilateral treaties" by its definition in article 1 (c), a definition which had been criticized by governments.

43. The first Special Rapporteur on the law of treaties, Mr. Brierly, in his first report had not put forward any classification of treaties but on the subject of accession had proposed the following provision as article 7 (3): "Unless the contrary is indicated in a treaty, a State . . . which has not taken part in its negotiation may accept that treaty only with the consent of all the parties thereto."⁶ In his second report he had put forward a similar proposal in his article 9.⁷

44. The second Special Rapporteur on the law of treaties, Sir Hersch Lauterpacht, in his first report submitted in 1953, had not included in his draft articles any classification of treaties but had proposed an article 2 reading: "Agreements, as defined in article 1, constitute treaties regardless of their form and designation," and in his article 7, on accession, had included a paragraph 2, reading: "Accession is admissible only subject to the provisions of the treaty."⁸ On the issues involved, that learned writer had stated in his report:

"In so far as the original instrument makes accession dependent upon some subsequent action or condition, there is room, so far as the future development of the law is concerned for relaxing in cases of doubt the requirement of unanimous consent. In theory there is force in the view that every contracting party must possess the right to agree to—or reject—the participation of a new party in the contractual relation. However, multilateral treaties regulating matters in the sphere of the general interest of the international community cannot properly be viewed as mere contractual bargains. There is in them an inherent tendency to universality which deserves encouragement. . . . Except where the treaty contains rigid provisions to the contrary, the result ought to be avoided which would permit a single contracting party to prevent the accession of a State to a humanitarian and non-political convention intrinsically aiming at general application."⁹

45. In his second report, Sir Hersch Lauterpacht had introduced into paragraph 2 of article 7 a provision making accession possible by a decision taken by a two-thirds majority of the States parties to the treaty, unless otherwise expressly provided by the treaty itself.¹⁰ By thus making an exception and admitting two-thirds majority rule, that eminent writer had departed from the contractual approach which would require unanimity for purposes of accession.

46. His own view was that the right of accession did not derive from a contractual relationship but from the character of treaties as a general source of international law, in the formulation and consolidation of which all States had the right to participate.

47. The judgment of the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia*¹¹ was frequently cited against the inherent right of accession to a treaty. In fact, that judgment concerned the particular case of an armistice convention and it was implicit in the Court's ruling that there might be certain categories of treaties which were subject to the right of accession. An armistice convention was by its very nature not a general multilateral treaty.

48. In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice had stated: "The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope." The Court had gone on to say:

"In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention . . . The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States

⁶ *Yearbook of the International Law Commission, 1950, Vol. II, p. 223.*

⁷ *Yearbook of the International Law Commission, 1951, Vol. II, p. 70.*

⁸ *Yearbook of the International Law Commission, 1953, Vol. II, pp. 90 and 91.*

⁹ *Ibid.*, p. 119, para. 6.

¹⁰ *Yearbook of the International Law Commission, 1954, Vol. II, p. 129.*

¹¹ *P.C.I.J.*, 1926, Series A, No. 7.

which adopted it that as many States as possible should participate.”¹²

49. What was involved was the right of participation in general multilateral treaties, a right which derived not from a contractual relationship but from the sovereign equality of States. The issue was that of the right to be heard in the formulation and consolidation of general rules of international law, a right which was particularly significant at the present time, when conventions were becoming a more important source of international law than customary rules and international legislation was coming to the fore as a result of multilateral and parliamentary diplomacy.

50. It had been suggested that the rule in the matter should be adapted to practice. But it must be remembered that the practice of limiting participation in a treaty to States that were Members of the United Nations or of any of the specialized agencies, or parties to the Statute of the International Court of Justice, was strongly contested. Whenever the United Nations discussed the question of convening a conference, that practice had invariably given rise to controversy in the Sixth Committee. In 1963, at the Vienna Conference on Consular Relations, an attempt to discard that restrictive practice had almost succeeded.

51. To conclude, he would quote from the personal message of the Secretary-General to a symposium held recently at Nice, a message transmitted by the Legal Counsel of the United Nations: “The very title of this colloquy, ‘The adaptation of the United Nations to the world of today’, poses a basic question. Is it the United Nations, its Charter and its main organs which should adapt themselves to the world of today? Is it not also the world of today which should try to conform to the ideals and objectives of the Charter?” The Secretary-General had thereby drawn attention to the need not only to adapt principles to practice, but also to consider adapting practice to principle. The basic principle involved in article 8 was that of universality, so fundamental to the United Nations and its Charter. With that principle in mind, the Commission should lay down universal rules that would contribute to the development of international relations.

52. Mr. TABIBI said that the division of opinion in the Commission on the question of the participation of States in general multilateral treaties proceeded mainly from the traditional concepts and practice of participation, from the difficulties that the acceptance of the “any State” formula might involve for the depositary, from the different purposes and interests of States when concluding treaties, from the conflicts of treaties concluded by member nations with different objectives and national policies and, lastly, from the problem of reconciling the principle of universality of treaties, now regarded by many States as a rule of *jus cogens*, with the principle of the freedom of States to choose their own partners when concluding a multilateral treaty.

53. The problem facing the Commission was one which involved legal, practical, economic and humanitarian

elements; as a result, it was all the more difficult to formulate a rule acceptable to all, whether as a residual rule or as a rule of *jus cogens*.

54. The difficulties arising for the depositary from the “any State” formula could be overcome by some technical device, as had been done in the case of the Moscow Nuclear Test Ban Treaty. The major obstacle, however, was the problem of non-recognition, which made it difficult for some States to accept the rule of universality for participation in multilateral treaties.

55. What the Commission had to decide was whether it should formulate a rule or leave it to the plenipotentiary conference of States to deal with the issue. In his view, the Commission should formulate a rule which was in the interests of international law and which would strengthen relations between States; it should therefore depart from the United Nations practice, which had been inspired mainly by political motives.

56. It was not in the interests of any State to cling to the rule of the freedom of States to choose their own partners, up to the point of extending it to treaty-making processes which were vital to mankind. It was inadmissible that States should have such freedom in the case of conventions such as those which outlawed slavery and genocide or the great 1949 humanitarian conventions of Geneva. Any approach of that kind would be contrary to the interests of mankind as a whole and would constitute a violation of the rule of law.

57. Acceptance of the rule of free participation by all States in no way conflicted with the policy of non-recognition; that policy could be safeguarded by a declaration of non-recognition, as had been done in the case of many treaties, or by establishing machinery such as that devised for the Moscow Nuclear Test Ban Treaty.

58. Since the Commission could not permit itself to sacrifice the interests of humanity to the principle of the freedom of contracting States or to the political practice evolved in the United Nations since 1949, it should adopt a rule such as that embodied in paragraph 1, as now proposed by the Special Rapporteur. That text presented a compromise solution, accepted by the majority of the Commission and approved as progressive development of international law by the bulk of those States which had submitted comments. He sincerely believed that acceptance of the rule in paragraph 1 would in no way compromise the purpose of regional treaties or the universal character of other legal rules such as the rule of the freedom of choosing contracting States, but would contribute to understanding among nations and to the strengthening of the rule of law.

59. Mr. PAL said that Mr. Cadieux’s statement had revealed that the cleavage of opinion in the Commission was rather more profound than Mr. Lachs had thought. Mr. Lachs held that the main difficulty felt by those who opposed the 1962 text was the fear that the rule, if accepted, would open the door to unmerited recognition and he thought that the gulf could easily be bridged by giving an assurance that the rule carried with it no such implication of recognition. Mr. Cadieux, however, had made it clear that the gulf was much wider and involved broader issues of foreign policy.

¹² *I.C.J. Reports 1951*, pp. 23 and 24.

60. He (Mr. Pal) thought that there was no need to pursue the question to such lengths. In article 8 the Commission had simply attempted to express a residuary rule concerning participation, in the event of a general multilateral treaty being silent on the matter. Since the proposed rule was limited to a specific category of treaties and, even then, only to cases where the treaty was silent on the point, there seemed to be no reason for ascribing hidden intentions to it. Two texts were now before the Commission, namely, the one it had adopted in 1962 as article 8, and the revised formulation suggested by the Special Rapporteur after considering the comments of Governments. If the Special Rapporteur considered that drafting changes were needed to make it clear that the rule was to be only a residuary rule, the matter should be submitted to the Drafting Committee with instructions to that effect. The Commission should also note that a third draft had been suggested by the Swedish Government (A/CN.4/177).

61. Personally, he would have thought that the residual character of the rule could have been brought out by some such opening formula as "Unless otherwise provided in the treaty itself or by the established rules of an international organization, any State may become a party to the treaty . . ." He did not consider that the Special Rapporteur's suggestion improved the text; he preferred the language adopted by the Commission in 1962.

62. In order to assist a better understanding of the real nature of the disagreement in the Commission he would recapitulate the history of article 8, which had originally been article 7 in the Special Rapporteur's first report considered by the Commission in 1962.¹³ In that report, the Special Rapporteur had not included in the article the question of participation as such; his article 7 had been devoted to the question which States were entitled to sign the treaty, his article 13 to participation in a treaty by accession, and his article 16 to participation by acceptance. He had offered no definition of a general multilateral treaty in that report, but had defined accession and acceptance in article 1 (j) and (k). When article 7 in the Special Rapporteur's first text had come up for discussion, Mr. Briggs had suggested that consideration of it should be postponed until the Commission discussed the articles on accession or participation. Ultimately the article had been taken up together with article 13, the Special Rapporteur having suggested that it would be easier to reach a decision on article 7 if the Commission first settled some of the problems raised by article 13, for which alternative texts had been put forward by Mr. Briggs and Mr. Jiménez de Aréchaga. The discussion had disclosed that the Commission was sharply divided on several issues. Ultimately, without taking any decision on controversial points, the articles had been referred to the Drafting Committee, which had produced new texts numbered articles 7, 7 *bis* and 7 *ter*.¹⁴ At that point, a definition of a general multilateral treaty had been incorporated without much argument. The new draft of article 7 had purported to deal with the question of

participation in general, but had not dealt with the specific case of general multilateral treaties, which was the real source of controversy; that question was covered by article 7 *bis*, on the opening of a treaty to the participation of additional States. When the Commission came to discuss the Drafting Committee's new proposals, Mr. Elias had put forward a redraft of article 7¹⁵ which had eventually formed the basis of the present article 8.

63. In view of the extremely circumscribed scope of the rule thus introduced, it was surprising that article 8 should still arouse such strong objections. The rule it contained was only a residuary rule and was in the domain of progressive development rather than in that of pure codification. Those who accepted the article in the form finally given to it in 1962 did so because it represented the progressive development required as a result of the changing situation in the world community; but even so they had taken care to ensure that it was only a residuary rule. If the Commission had responded to Mr. Yasseen's appeal at the fourteenth session to view the whole question of participation in a treaty in the proper perspective and had treated article 8 as a residuary rule of very limited scope, the discussion would not have been so protracted.

64. He himself would urge members of the Commission to avoid confusing the issue by claiming that their individual views represented finality, and thus in effect overlooking the possibility of unconscious bias. The essentially partial nature of human knowledge should lead each to supplement his information by considering the views of others, biased though they might also be. The Commission should not shirk considering whether the scope of the article should be extended in the interests of progressive development; and progressive development must not serve hidden sectional interests, as it was sometimes claimed to do. What were alleged to be fundamental principles were certainly not immutable; even if they were fundamental, that was no reason why they should obstruct all development. Technically, it might be said to be open to dispute whether any real right of accession or participation existed. A treaty might indeed be described as being always the result of a meeting of wills involving the principle of freedom of choice. But even that principle was not immutable in all circumstances. The way must always be left open for remedying any unjust result of changing conditions and for the peaceful revision of all relationships. That indeed was fundamental.

65. Even if there were grounds for disputing the existence of a right of participation *stricto sensu* because the treaty-making process presupposed a free choice of partners, States had a duty in contemporary society to collaborate with each other on a footing of equality, as Mr. Bartoš had said at the fourteenth session. It had to be conceded that every State in the contemporary world community had the right to participate actively in the life of that community; it was the duty of all States to co-operate in promoting universality in international community life. The principle of universality should no longer be relegated to the background. Social objectives on the world community level certainly

¹³ See *Yearbook of the International Law Commission, 1962*, Vol. II, p. 42.

¹⁴ *Ibid.*, Vol. I, 660th meeting, para. 51.

¹⁵ *Ibid.*, Vol. I, 667th meeting, para. 2.

demanded and deserved greater attention. The time had come to show a capacity for new thinking and to cease following well-trodden paths; that was so even where politics were concerned. Enough had happened in the world in recent times to impair mankind's philosophical and optimistic belief that real progress could be achieved without adequate exertion. It was necessary to shake established opinion out of its rut, since the responsibilities created by life itself could never be discharged by clinging to abstract principles. The peoples of the newly-independent States were aware that, if their freedom was to have any significance, the entire economic and political structure of their countries would have to be re-examined. Admittedly he was entering the realm of philosophy, which might not always yield either precise knowledge or practical suggestions, plans or programmes; but the philosophical approach could nevertheless create a disposition to seek guiding principles.

66. The principle expressed in article 8 as adopted in 1962 did not conflict with any fundamental principle that could be deduced from contemporary practice. On the other hand it did reflect the need for the law on the subject to evolve. The obligation to build and to perfect community life on a universal basis was forced on the people of the world by the need to come to terms with the many changed circumstances. The principle of universality was no longer a piece of rhetoric, however commendable. The many new forces at work in the international community, not always with beneficial results, rendered it imperative that the world should direct its efforts towards finding a new unity on a universal basis.

67. He was therefore in favour of retaining the article, subject to redrafting changes that would make its meaning clearer. He would also be prepared to go to the length of supporting Mr. Tunkin's proposal, should that be necessary.

68. Mr. ROSENNE said that he had carefully re-examined his own views on articles 8 and 9, which had caused him more perplexity than any of the articles formulated by the Commission during the past three years. After hearing some of the uncompromising statements made during the present discussion, he wondered whether the whole question of participation in a treaty had been adequately analysed so as to bring out all the elements.

69. Unlike some members of the Commission, he would find it difficult to confine his remarks to paragraph 1, because generalizations about a single, and possibly not the most important issue, could engender an emotional approach which in turn might distort the Commission's whole work on the law of treaties. He would try to list in a systematic way the points at issue without suggesting that all need be dealt with in the article. They were; first, who were the parties; secondly, who might become parties and thirdly, could other States not within the first two categories ever become parties? In each case a distinction must be drawn between bilateral and other types of treaty. For the purposes of article 8, there was no need to deal with bilateral treaties because the position was clear and at most merited a mention in the commentary. Any further

secondary points pertaining to bilateral treaties could be dealt with, if that were at all necessary, in connexion with articles 58 to 61.

70. As far as the other types of treaty were concerned, a practical distinction must be drawn between those for which there was a depositary and those for which there was none. Though it would have to be tackled later, for the time being the first point could be left aside and he would merely suggest that the essential elements of a definition already existed in article 1 (c) of the Special Rapporteur's first report in which he had defined a "party" as a State which had definitively given its consent to be bound by a treaty in force.¹⁶ That definition was more accurate than the one proposed by the Netherlands Government in its comments on article 1 (A/CN.4/175/Add.1)

71. The second point was who might become a party; in principle that was determined by the States which "made the treaty". He used that neutral expression advisedly in order to avoid, for the purposes of the present discussion, the problems created by definitions in terms of participants in the adoption of the text, for example, which only complicated the issue. Such a principle had been laid down in the original version of article 8 and in the new text proposed by the Special Rapporteur, which he (Mr. Rosenne) found preferable. The principle, which placed some emphasis on the text of the treaty itself, though perhaps not quite enough, ought to be retained as the point of departure for all treaties. There was nothing to prevent the makers of a treaty from agreeing at the outset to include the "all States" formula if that were regarded as appropriate and if the necessary majority support were forthcoming, but the decision as to whether that formula was desirable must always remain a political one, to be reached only in the light of the exigencies of the particular case. In that connexion the Commission would be wise to adopt the same approach as the International Court of Justice which consistently refused to substitute its own judgment for a political judgment which it found right and appropriate in any given set of circumstances.

72. The next question for consideration was whether there were any exceptions to that principle, and if so, what kind of exceptions and on what basis they existed. In particular, did so-called general multilateral treaties, within the definition agreed upon at the fourteenth session, constitute a real exception? In his opinion, the Commission had answered the question in the negative when drafting article 8 in its present form, though the language could certainly be improved and rendered clearer.

73. As to what was the *lex lata* in the matter, some guidance could be obtained from the Court's Advisory Opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. That Convention had come to be regarded as an example of a general multilateral treaty *par excellence*. The Court had pointed out that "the right to become a party to the Convention does not express any very clear notion"¹⁷ and had concluded that such

¹⁶ *Yearbook of the International Law Commission, 1962, Vol. II, p. 31.*

¹⁷ *I.C.J. Reports, 1951, p. 28.*

a right did not derive either from the Convention or from any other source. While he was open to persuasion, he was not yet able to discern any clear foundation in existing law for the contention that participation in a general multilateral convention or any other treaty existed as of right.

74. Throughout the Commission's discussion on the draft article, strong emphasis had been placed on the essentially contractual features of an international treaty and he had a vivid recollection of the forceful objections put forward at the sixteenth session to the Special Rapporteur's proposal for the inclusion of an article recognizing what he had called objective international régimes.¹⁸ One argument had been that the world was not yet ready to accept anything analogous to the legislative process on the internal level, and that the concept of a treaty creating something so objective that it was applicable to all States did violence to the essentially contractual nature of international instruments, whatever the number of parties. The Commission must draw the logical conclusion from that approach. Furthermore, the matter under discussion must not be confused with the entirely different one raised earlier in the meeting about treaties as a source of international law.

75. In regard to participation in general multilateral treaties, he was even less able to find any element of a *jus cogens* principle within his own definition of such principles as put forward at the fifteenth session.¹⁹ Possibly the Commission might suggest that, if enough States were interested in doing so, the issue was one that would be worth referring to the International Court for an advisory opinion.

76. It remained to consider what guidance could be sought in practice for framing a rule *de lege ferenda*. It was evident from the Secretariat's memorandum about resolutions of the General Assembly concerning the law of treaties,²⁰ and more particularly from paragraphs 60-65, that the views of the majority of Member States had not undergone any radical change but had remained consistent since the inception of the United Nations and during the successive extensions of its membership. That fact, coupled with the conflicting opinions of governments submitted to the Commission in document A/CN.4/175, led him to doubt whether any kind of "all States" rule would secure a two-thirds majority in the General Assembly or at a diplomatic conference on the law of treaties. As far as he could see, there did not exist any preponderant weight of opinion in favour of changing the *lex lata* as he saw it or even less any kind of agreement as to what change was necessary. Accordingly it was important for the Commission not to obfuscate the issue, as had been done in the case of the article concerning the breadth of the territorial sea in its 1956 draft on the law of the sea, which had led to such serious confusion at the Conference in 1958. He had noted that the practice concerning participation, described in the Secretariat's memorandum, applied both to convening conferences and to accession clauses.

¹⁸ See *Yearbook of the International Law Commission, 1964*, Vol. I, 738th-740th meetings.

¹⁹ See *Yearbook of the International Law Commission, 1963*, Vol. I, 685th meeting.

²⁰ *Ibid.*, vol. II, p. 1.

That was entirely logical since the two aspects were closely related and neither was susceptible of general *a priori* regulation: each must always depend upon practical requirements.

77. He agreed with Mr. Lachs that the issue of recognition did arise in connexion with article 8 but disputed his contention that it had never been mentioned during the discussions, in view of the express references to it made by Mr. Gros at the fourteenth session.²¹ Certainly the Commission would perform a useful service if it could succeed in dissociating that issue from the question of participation in treaties, so as to allay the apprehensions expressed by certain governments. Treaty registers, both national and international, were getting cluttered up with unnecessary declarations, counter-declarations and so-called reservations concerning recognition, all of which were irrelevant and confusing and some of which created tension. As the Commission had decided in 1949 to include the recognition of States and governments in its provisional list of topics for study,²² until that task was broached it should take care not to prejudice the outcome and should reserve that aspect of article 8, as had been done at the previous session with article 64.

78. However, recognition was by no means the only issue at stake. The difficulties of a depositary should not be overlooked, but he was unable to subscribe to the argument that they were procedural and not substantive in character, because he maintained the view he had expounded in 1957 that the distinction between procedure and substance did not exist with any degree of precision in international law.²³

79. He thanked the Secretariat for the material it had furnished in answer to the questions he had asked at the 782nd meeting, concerning the two classic examples of governments or of the secretariats of international organizations acting as depositaries and the related problem of the Secretariat as registrar. It had shown that the difficulties were as great in either case, even though they might take different forms. At its fourteenth session the Commission's general view had been against allowing excessive discretionary powers to the depositary, on which subject Mr. Jiménez de Aréchaga had made some wise observations.²⁴ The position in law and practice had in no way been altered by what had happened over the Moscow Nuclear Test Ban Treaty of 1963. Perhaps those members of the Commission who asserted that what they described as procedural difficulties could be easily overcome, even when an international organization was the depositary, ought to explain how in fact that could be done. Personally, he had found the Secretary-General's statement at the 1258th plenary meeting of the General Assembly²⁵ extremely convincing on that point, which had also

²¹ See *Yearbook of the International Law Commission, 1962*, Vol. I, 667th meeting, para. 46.

²² See *Yearbook of the International Law Commission, 1949*, p. 39.

²³ *The International Court of Justice, An Essay in Political and Legal Theory* (Leyden: Sijthoff's, 1957), p. 210; repeated in *The Law and Practice of the International Court* (Leyden: Sijthoff's, 1965), p. 541.

²⁴ See *Yearbook of the International Law Commission, 1962*, Vol. I, 658th meeting, paras. 26 and 27.

²⁵ See above, para. 7.

been touched upon by the Swedish Government in its comments.

80. On the question whether articles 8 and 9 could be jettisoned altogether, as proposed by the Japanese Government, the difficulty was that, in law, the distinction between the original parties and subsequent parties, by whatever process they became parties, was a fundamental one, especially from the point of view of interpretation, and clearly most of the articles in the draft had been drawn up with that distinction in mind. If those two articles were dropped, nearly all the remaining ones would call for some structural modification, a difficult though not impossible task.

81. The controversy really arose over the question of participation in general multilateral treaties. He reserved his position regarding the change in the definition of such treaties proposed by the Special Rapporteur, not having been very convinced by some of the objections to the original definition arrived at in 1962. If article 8 were retained, it must be made plain that participation in multilateral treaties of whatever kind had nothing whatever to do with the entirely different process of admission to international organizations, whether small or large, regional or universal. Illuminating material on that process was to be found in the dissenting opinion of 1948 of Judges Basdevant, Winiarski, McNair and Read on the conditions of admission of a State to membership in the United Nations²⁶ and in Morelli's book "*Nozioni di diritto internazionale*".²⁷ The comments of certain governments revealed some confusion on that cardinal issue which ought to be clarified in the commentary.

82. The significance of the problems connected with general multilateral conventions should not be exaggerated now that the Commission had formulated article 62, which went a long way towards preventing the dangers of the dualism mentioned by Mr. Lachs at the previous meeting.

83. To conclude, the material concerning participation in a treaty ought to be rearranged. One provision should be devoted to original participation, even though that might later be found redundant. A second provision should deal with additional participation under the terms of the treaty, and might be drafted on the lines of the text now being proposed by the Special Rapporteur but with greater emphasis on the supremacy of the text of the treaty. A third provision should deal with extended participation, the subject covered in article 9, but in simplified form. Such a rearrangement would avoid the present distortion of certain essential elements in the law of treaties as a whole, and would place a controversial matter in its right perspective. The mechanics of participation could be dealt with in subsequent articles, and even accession ought to be handled separately from the subject-matter of articles 8 and 9.

84. As any "all States" formula was unlikely to be acceptable because there was insufficient justification

for it either *de lege lata* or *de lege ferenda*, the Commission ought to reach a clear decision on that point at an early stage, by vote if necessary, in order to avoid a repetition of what had happened over its provision concerning the breadth of the territorial sea.

The meeting rose at 12.55 p.m.

794th MEETING

Wednesday, 2 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Ca-dieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. PAREDES said that during the earlier discussion on other articles he had expressed the opinion that, in a codification, each article should contain only a single precept relating to a single question. If an article dealt with several questions, the formula adopted, however flexible it might be, could not cover all the aspects of the problems considered.

3. The expression "general multilateral treaty" in paragraph 1 of article 8 really covered treaties of an entirely different nature which called for different rules. First, there were treaties which recognized and stated a universally binding international practice; secondly, there were treaties relating to special interests of nations.

4. The former concerned the very foundations of the co-existence of States and established universally binding laws. Mr. Lachs had said that there were certain types of treaty which were binding on all States, even when they had not been parties to drawing them up, such as the Conventions on the abolition of slavery or the Convention on the Prevention and Punishment of the Crime of Genocide, or the Moscow Nuclear Test Ban Treaty. He (Mr. Paredes) thought that those treaties were legislative and required the observance of a certain

²⁶ *I.C.J. Reports 1948*, p. 84.

²⁷ G. Morelli, *Nozioni di diritto internazionale*, 6th ed. (1963), p. 313.

¹ See 791st meeting, preceding para. 61, and para. 63.

kind of conduct, not only on the part of the States which had participated in drawing them up but on the part of all States. Moreover, those treaties did not even formulate any new rules and obligations: they did no more than recognize, define and delimit the international practice. In that sense, they could be accepted and recognized by all peoples, but were they universally binding? They related, perforce, not to the special interests of any one State but to the general interests of mankind; an example was the Convention on the Prevention and Punishment of the Crime of Genocide. Consequently, they could and should be opened to accession by all the countries in the world, whether States possessing all the characteristics of a State or mere groups performing political functions and governed by the same kind of laws.

5. If the States making those treaties created nothing and simply recognized and proclaimed what those international obligations consisted of, was a declaration of that kind binding on all States which did not participate and did not want to participate in the treaties? In his opinion, the principles involved were so fundamental to the life of nations that nobody could deviate from them without creating great dangers for the international public order. Consequently, every State, every international entity, could and should accede to those treaties. The question remaining to be answered was who possessed the authority or right to lay down laws which were binding on the whole world. The question was easy to answer if the norms were adopted by a great international body like the United Nations.

6. The same was not true of the other treaties covered by the expression "general multilateral treaties". There were treaties which related to special interests, but since life imposed the same needs on all human beings, those treaties concerned the whole world. Examples were the conventions concerning the regulation of fisheries, the limits of the territorial sea and consular privileges and immunities. Those were matters of special general interest; but since each State had its own interests, those general treaties were not universally binding and were subject to the autonomy of the will of the parties.

7. Treaties of the first group laid down a rule which might be described as obligatory: they were prohibitory law-making treaties, the prohibition involving a sanction against anyone not conforming to it. If a State, in spite of the international conventions, continued to engage in the white slave traffic, for example, it could be proceeded against by all other States. In the case of treaties in the second group, on the other hand, if a State which was not a member of an international organization and had not participated in the adoption of the conventions on fisheries or consular immunities refused to accept the rules laid down in those instruments, who was going to enforce those rules? Nobody had the power to do so, for such enforcement would be contrary to the principle of the equality of States and of freedom of conduct. The States which had joined in formulating treaties in that second category could, in keeping with the principle of free will, choose those with whom they wished to negotiate in the matter and those with whom they did not wish to negotiate.

8. There was an appreciable difference between the two categories of treaties which he had just distinguished; for that reason, objections which might be valid for the second category did not apply to the first. The subject-matter of paragraph 1 of article 8 should be dealt with in two articles, each of which would cover one of those two completely different questions.

9. Mr. JIMÉNEZ de ARÉCHAGA said that article 8, paragraph 1 had not been discussed and adopted till towards the end of the fourteenth session and he himself had been unable to take part in its elaboration. He could therefore comment on it as an uncommitted member of the Commission, having followed the illuminating debate during the past few days with an open mind.

10. The Commission should not be swayed in reaching a decision on an important question by contemporary difficulties of a political nature. It had to take a longer view, knowing that its work of codification must be based on more permanent considerations, though that did not mean that as lawyers they should disregard certain aspects of State policy which in the long run would prevail.

11. The issue of participation in multilateral treaties should not be used as a political weapon by an unrecognized régime to establish treaty relations with States unwilling to recognize it as a political entity, in an endeavour to force their hand, acquire prestige or improve its political status. Nor should it be used as a means of ostracizing unrecognized political entities and debarring them from legitimate participation in the life of the international community, to which they might be entitled merely by reason of the existence and efficacy of their governments.

12. After hearing the views of members at the present session, he had become convinced that the 1962 formula, possibly with some drafting changes of the kind suggested by the Special Rapporteur, should be maintained.

13. He was unable to agree with those who wished to transform the article into a rule of *jus cogens*. Whenever the Commission laid down a *jus cogens* principle it was tampering with a fundamental tenet of international law, *pacta sunt servanda*, that States were free to reach agreement between themselves and what they agreed upon was the law for them.

14. However, the division of opinion in the Commission must not deter it from pursuing what was its major task in codifying the law of treaties, namely, the establishment of residuary rules that ought to prevail in the event of the parties failing to reach agreement. The compromise formula arrived at in 1962 was precisely such a rule and was, moreover, restricted in scope, since it would only apply to general multilateral treaties laying down rules of international law capable of general application and quasi-legislative in character and function.

15. One of the features of international law was that fundamental principles or rules requiring universal compliance could be formulated and put into effect by means of treaties entered into by "States representing the vast majority of the members of the international community", to use the words of the International

Court of Justice, and such instruments might establish legal norms of an objective universal character that required compliance by States which had not had occasion to participate in the adoption of the text. If, as Article 38 of the Court's Statute provided, general practice could constitute customary law binding even on States which had had no chance of participating in its formulation, it could legitimately be inferred that a similar legal effect could be brought about by the treaty-making process when used by the vast majority of the international community. On the other hand, there was no legal justification, and it would also be highly inconvenient from the practical point of view, to exclude States for political reasons from participating in the elaboration of quasi-legislative agreements or to deny them the right to accede to such agreements so as to establish their express consent to rules with which they were expected to comply.

16. The Nuclear Test Ban Treaty of 1963 was a striking illustration of the proposition that, so far as certain vital rules of general international law were concerned, the advantage of universal acceptance must outweigh any short-term considerations about recognition. That treaty also demonstrated that certain procedural difficulties for the depositary could be solved, either by arranging for parallel depositaries or by means of specific instructions in the treaty itself. However, there was no escaping the fact that practical difficulties could arise over the very concepts of statehood and of general multilateral treaty. He accordingly believed that the principle embodied in article 8, paragraph 1, must remain a residuary rule and not one that could override the express will of the parties.

17. Finally, with regard to the relationship between article 8, paragraph 1 and article 3, paragraph 2, concerning the capacity of the member states of a federal union to conclude treaties, a capacity that was defined by reference to constitutional law, he wished to draw attention to the possibility of a federal State conferring such capacity upon its member states and of the latter then seeking to accede to general multilateral treaties under article 8, paragraph 1. The result might be that the federal State, without altering its substantive obligations under a particular instrument, could secure an increase in the number of parties or votes in the treaty-making process, thus acquiring a greater say, or possibly even a decisive voice, in such matters as amendment and termination that depended on the numerical strength of the parties. The potential danger was not due to any defect in article 8, paragraph 1, but to the Commission's failure to include anything in article 3, paragraph 2, about international recognition by other States, an element that was inherent in the concept of statehood and the capacity to enter into treaties.

18. Mr. RUDA said that article 8 distinguished between "the case of a general multilateral treaty" and "all other cases"; the latter description seemed to him unclear. The draft articles did not classify treaties, not even into bilateral and multilateral treaties; only in article 1 (c) was the meaning of "general multilateral treaty" defined. Article 8, paragraph 2, manifestly related to a "special" multilateral treaty, by contrast

with a general multilateral treaty or what in article 9 was simply referred to as a "multilateral treaty".

19. The fundamental purpose of article 8 was to attempt to define a procedure by which a particular kind of treaty, on account of the importance of its content and its universal interest, would be open to participation by all States, or at least by the largest possible number of States. He entirely agreed that the scope of application of certain rules of international treaty law should be extended to the utmost; that should be the objective in the case of important treaties, but it was a matter which transcended the sphere of law and had no place in a statement of rules.

20. Article 1 (c) defined "general multilateral treaty" as a multilateral treaty which "concerns general norms of international law or deals with matters of general interest to States as a whole". If the expression "general norms of international law" was intended to mean norms valid for all States, and if treaties were, in principle, binding only on the parties, then it followed that existing general international law was customary, for there was not a single treaty to which all States had acceded — though, in theory, such treaties might come into being in the future if a convention norm were unanimously accepted.

21. In his view, the expression "deals with matters of general interest to States as a whole" had no precise meaning in law; it was a mere value judgement which might differentiate that kind of treaty on political, economic or social grounds from other multilateral treaties but could not differentiate them, in absolute terms and from the strictly legal point of view, from other multilateral treaties so far as the rules governing the process of their formation was concerned.

22. International treaty law was based on the autonomy and consent of the parties: it was a law created by the parties which bound themselves. A treaty was a legal instrument creating international rules whose characteristic formative element was the meeting of minds expressed by the competent authorities; it was the outward manifestation, the form assumed by the agreement of the wills of two or more States.

23. From the legal point of view, treaties could not lose their contractual character and become law-making, and however important for international life the rule stated by so-called general multilateral treaties might be, they were still treaties, agreements expressing the will of States.

24. In his opinion, it was reasonable to include in treaties of great political, social or economic importance a formula extending their field of application to "any State", as in the case of the Moscow Nuclear Test Ban Treaty; but that norm should not be laid down in the treaty except by the will of the contracting parties. In such cases it was possible to use procedures for avoiding the problem of recognition or devices for facilitating the task of the depositary, as indeed had already been done; but such procedures and devices had to be in conformity with the will of the parties.

25. There were no customary international norms obliging States to accept, in the treaties they concluded or in a particular kind of treaty, those who were to

become parties to those treaties; nor was there any presumption that "any State" could become a party to such treaties. To lay down such a rule *de lege ferenda* would be to modify the contractual nature of treaties and to give them a law-making character which they did not possess: it would be necessary to modify drastically the structure of existing public international law, which was based on the equality of sovereign States.

26. Mr. AMADO said he fully agreed with Mr. Ruda's remarks. He was glad to see that, in paragraph 3 of his observations on article 8 (A/CN.4/177), the Special Rapporteur said that "if the concept of universality in the application of general multilateral treaties were to be considered as a rule of *jus cogens*, it might be necessary for the Commission to re-examine a number of other articles, such as those dealing with reservations and with the modification of treaties, in the light of this concept". If the Commission tried to convert *jus cogens* into another natural law, it would get itself into serious difficulties both of theory and of practice.

27. In 1962 Mr. Bartoš, speaking in support of an amendment proposed by Mr. de Luna, had said that "States could not be denied the right to choose their partners in treaty relations, but they could be expected to indicate in advance an intention to exclude certain others from participating in any treaty they were drawing up".² At the same meeting he (Mr. Amado) had expressed the opinion that "the general multilateral treaties described by some members of the Commission were more in the nature of international legislation than treaties. They perhaps conformed to an ideal which all truly international jurists had in mind, but if participants were not free to choose their partners, they could no longer be strictly regarded as treaties".³ In such cases there had been no bargaining—no one had given anything and no one had received anything. In the Convention on the Prevention and Punishment of the Crime of Genocide, for instance, the parties exchanged nothing, no services were rendered, there was simply a matter that was dealt with in the Convention.

28. International law had made progress. The institution of accession had gained wide currency. The treaty was there, it had been signed, and was open for acceptance by any State wishing to accept it, under certain conditions. With so many opportunities for universalizing treaties, was the Commission going to adopt an article which, though inspired by generous sentiments, satisfied hardly anybody? Article 9 pointed the way which should be followed, and like Mr. Tsuruoka, Mr. Briggs and Mr. Cadieux, he hoped that the Commission would follow it.

29. The CHAIRMAN, speaking as a member of the Commission, said that the statement he had made in 1962 had not always been correctly understood. What he had meant to convey was, first that in principle every State had the right to choose its partners in treaty relations, but that, secondly, if certain States claimed to be laying down universally binding rules in a treaty, they could surely not criticize States which they had not

allowed to accede to that treaty for breaking those rules. What sanctions could be applied to States which violated multilateral rules of general interest if they had no right to invoke those rules against others? It was impossible simultaneously to refuse to accept certain States as partners and to expect those States to comply with the rules imposed on them. To admit such conduct would mean admitting that some States had the right to make rules whereas others had no choice but to accept the rules laid down, without being given an opportunity to express their consent to those rules.

30. Those remarks applied equally to the regional law-making treaties, of which some clauses were in fact binding upon all States in the region because they stated general rules applicable to the particular region, even if they differed from universal rules.

31. He was still convinced, not only for idealistic reasons but also by reason of the necessities of international life, that the Commission should lay down as a general rule that treaties which aspired to be universal law-making treaties should be open to all States. That rule would have to be accepted by all States; it could not be imposed on them. If it should prove impossible to adopt the rule, he would accept the compromise leaving States free to choose their partners but only as an exception to the general rule which he had mentioned. In other words, in all cases where no restriction was laid down regarding the States eligible to become parties to the treaty, the rule that multilateral treaties were open to all States, without distinction, should be applied.

32. Mr. AGO said that article 8 touched one of the most delicate points in the whole of that part of the law of treaties being dealt with by the Commission at the current session. The compromise agreed upon at the 1962 session satisfied only a few governments and only a few members of the Commission, and even those who said that they were satisfied, did so for differing reasons. Sometimes, if a solution was criticized from several sides at once, that meant that it was sound. In the particular case, however, in spite of all his esteem for the General Rapporteur, Mr. Elias, who had proposed that compromise late in the 1962 session to help the Commission out of the impasse in which it had found itself, he thought that the article 8 which had been adopted in 1962 by 10 votes to 7, with 3 abstentions, was a poor solution.

33. The supporters of that solution argued that every State had an actual right to become a party to a general multilateral treaty; but he denied that such a right existed. In the field of treaty law, every State had the right to make an offer or to accept an offer, but it was not true that every State had the right to become a party to a treaty against the will of the other parties.

34. It had even been claimed that the right of every State to accede to a general multilateral treaty was a rule of *jus cogens*. He was glad that Mr. Amado had quoted the very judicious commentary of the Special Rapporteur on that point. If the Commission tried to lay down too many rules of *jus cogens*, it might destroy that notion, which was still in its infancy and not readily acceptable to the majority of States; the Commission would then lose the fruits of all its efforts to win re-

² *Yearbook of the International Law Commission, 1962, Vol. I, 667th meeting, para. 16.*

³ *Ibid.*, para. 20.

cognition, as a rule of *jus cogens*, for what really deserved such recognition. As Mr. Ruda had said, the only principle on which reliance could be placed in the matter of the law of treaties was the will of States. And surely a State could not be obliged to enter into treaty relations with another State if that was not its will.

35. It was true, as Mr. Lachs had observed, that it was generally desirable to obtain the broadest participation possible in general multilateral treaties, especially in treaties stating rules of general international law. But the Commission should take care not to throw away with one hand what it would gain with the other by laying down a rule obliging States to agree, against their will, that certain entities should become their partners. As a result of such a rule, those entities would perhaps become parties to treaties, but certain States would not become parties because they would not wish to enter into treaty relations with those entities. He used the word "entities" deliberately, because the question which most frequently arose in connexion with them was whether they were or were not States from the point of view of international law.

36. It had been rightly observed by the Chairman that a State could not be criticized for breaking rules if it were denied the opportunity of subscribing to those rules. It seldom happened, however, that a State was blamed for violating treaty rules to which it had not subscribed; what it was blamed for was for violating customary rules of general international law, rules which existed independently of treaties.

37. It had also been said that the principle of universality should be the guiding principle. He was sometimes regarded as a champion of universality and so could not be charged with any hostility to that principle. But that principle could not be pleaded for the purpose of compelling States to enter into treaty relations, by means of a treaty, with certain entities which they did not consider acceptable partners.

38. Several members of the Commission, particularly Mr. Lachs, had said that the problem should be simplified by making it clear that the fact of admitting a State to participation in a general multilateral treaty did not imply recognition of that State. But the problem was not essentially one of recognition. In all the concrete cases in which the problem had arisen, it had been apparent, as Mr. Verdross had said at the previous meeting, that the difficulty was due rather to the existence of entities whose statehood, within the meaning of international law, was in dispute. Consequently, by stating as a rule that every State had the right to participate in general multilateral treaties, the Commission would only be begging the question, since it would still remain to be decided whether a given entity was a State or not.

39. Moreover, in some cases, although statehood was recognized, a certain government's capacity to represent the State was contested. Mr. Rosenne had therefore been right in pointing out that the adoption of the proposed rule would confront the depositary with serious difficulties.

40. Such a rule would give rise to other concrete difficulties. For example, it might so happen that an international organization expelled one of its members. Was it conceivable, in that case, that the State expelled from an organization had the right to become a party to a treaty concluded under the auspices or within the framework of that organization?

41. When the Commission spoke of general multilateral treaties, it was thinking mainly of those it prepared itself. But there were other kinds of multilateral treaty, for example international labour conventions; the latter were open to all States members of the International Labour Organisation, but they were not open to States not members of that Organisation, because the ILO had set up machinery to control the observance of those conventions by member States, whereas there was no such control machinery with respect to non-member States.

42. His frank opinion was that it was neither possible nor desirable to try to settle political problems—which, incidentally, he hoped were transient—by bringing them into the field of the codification of international law. Those problems would not be solved by a legal rule concerning participation in general multilateral treaties; they should rather be dealt with by the competent political organs.

43. The fundamental principle governing participation in treaties was that of the will of States to enter into treaty relations with other States; that will should not be coerced. The question of participation was generally discussed and settled at the time of the convening of the international conference called to conclude a treaty on a particular topic. The decision was then taken on the basis of political criteria which it was not for the Commission to judge. The important point was that the question was settled then and not later. In that connexion, Mr. Cadieux had put forward an irrefutable argument: the question having been settled by a two-thirds majority at a meeting called to take the decision to convene the conference, the treaty's silence on the question of participation could be achieved by the votes of only one third, plus one, of those participating in the conference. The residuary rule adopted by the Commission in 1962 would therefore have the absurd result that a minority would be capable of achieving a situation where certain States had the right to become parties to the treaty, whereas the majority had wished to exclude those States.

44. A State which had been excluded from the negotiations could not be admitted to participation in the treaty unless the majority which had excluded it decided to withdraw its opposition. Accordingly, he proposed that article 8 be drafted to read:

" 1. Any State which took part in the drawing up of a multilateral treaty or which was invited to the conference at which it was drawn up may become a party to the treaty.

2. In addition, any other State to which the treaty was made open by its terms may become a party to a multilateral treaty."

45. That wording differed only slightly from that originally proposed by the Special Rapporteur and from

that submitted by the Drafting Committee to the Commission in 1962.⁴ It would probably not please some of the Commission's members, especially Mr. Tunkin, but he regretted to say that he, for his part, could not accept Mr. Tunkin's own proposal.

46. He could only urge the Commission, once again, to exercise the utmost caution in the formulation of so important an article.

47. Mr. TUNKIN said that article 8 was closely related to the problem of the treaty as a contemporary source of general international law. The position in that respect had materially changed in the last few decades, for whereas previously general international law was almost wholly customary, at the present time it was becoming increasingly conventional in character. The treaty was now playing a predominant role in developing, creating and amending rules of general international law. Moreover, the same norm of general international law could often be conventional for some States and customary for others.

48. The general multilateral treaty was a comparatively new phenomenon in international law and, in 1962, the Commission had taken a step forward when it had singled out that type of treaty for consideration and had furnished a definition, which stressed its specific position within the framework of general international law.

49. Another conclusion which could be drawn from contemporary international law was that that law was based on agreement to a greater extent than was the old international law. Contemporary general international law was universal or quasi-universal: it was based on the agreement of all, or nearly all, States. The present international society was composed of sovereign States, and agreement between them was the only possible way of creating norms of international law binding upon all States. The time had passed when a group of States could create and enforce norms which they claimed to be binding on all States regardless of their consent. It had been suggested, or at least implied, by some members that the majority of States could preclude a minority from participating in international affairs of interest to all States. His own view was that all those who favoured the progressive development of international law should support the "all States" formula.

50. It would be an obvious contradiction to formulate norms intended to be norms of general international law and at the same time bar some States from participating in their formulation; that was tantamount to saying in advance that those rules could not be accepted as binding by the States thus excluded.

51. The "all States" formula was consistent with the basic principles of contemporary international law, in particular with that of the sovereign equality of States. Some members had inferred that sovereign equality implied freedom of action in the conclusion of treaties. But it should be remembered that in any society, the freedom of action of a person or State could not have the effect of denying freedom of action to others. If

certain States excluded certain others from participating in general multilateral treaties, they asserted their sovereignty but thereby violated the sovereignty of the States which had been excluded.

52. The definition of "general multilateral treaty" given in article 1 (c) was a fruitful one in that it referred to treaties which concerned general norms of international law or dealt with matters of general interest to States as a whole. The inference to be drawn from that definition was that, in the case of such treaties and their subject matter, it would be a denial of the sovereign equality of States to try to settle problems which were of concern to all States by a decision of only a group of them, however large.

53. The restrictive practices now current were an outcome of the policies of the cold war. The freedom to choose partners in the conclusion of treaties, like any other liberty, could not be absolute. That remark applied not only to general multilateral treaties, but also to other treaties: even three States could not settle a matter which also concerned a fourth State without allowing that State to participate in the settlement.

54. Since a general multilateral treaty as defined in article 1 concerned all States, then any State, even if recognized by some States and not by others, had the right to participate. As had been pointed out by Mr. Pal. what was involved was the right of a State to take part in international relations and its duty to maintain friendly relations with other States. The restrictive practices with respect to participation constituted a denial of that right and that duty.

55. The suggestion that the "all States" formula might have the effect of limiting the participation of States in a treaty was not borne out by practice. The Moscow Test Ban Treaty contained the "all States" formula, yet it had been signed by 108 States, none of which had objected to that formula. The few States which had not signed the Moscow Treaty had abstained for entirely different reasons.

56. It had been suggested that the "all States" formula would not contribute to the development of friendly relations between States and might even provoke discord. That was a most surprising suggestion. The practice of debarring some States from participation in international relations went back to the nineteenth century, when the international community was regarded as a sort of closed club, a club to which countries such as Turkey and Japan had had to be formally admitted. That concept of a closed international community had now been revived by the cold war. In those circumstances it was clear that abandonment of the present restrictive practices would materially contribute to international co-operation.

57. Much had been said about the difficulties that might be created for a depositary by the "all States" formula. In fact, many treaties contained that formula and it had not led to any difficulties for the depositary. In particular, it had been suggested that the depositary would be faced with the problem of deciding whether a particular entity constituted a State for purposes of participation in a treaty. That problem was one which arose in all branches of international law and would

⁴ *Yearbook of the International Law Commission, 1962, Vol. I, 666th meeting, para. 105.*

arise whatever the formula adopted in respect of participation; it arose, for example, in respect of the Vienna Convention on Consular Relations of 1963. In point of fact, it was not for the depositary to solve that problem but for each State to decide for itself whether it regarded another signatory as a State.

58. With regard to the problem of recognition, he had little to add to the remarks of Mr. Lachs. All experts on international law agreed that participation in a multilateral treaty did not involve recognition of the States or governments signing the treaty. For example, the Nuclear Test Ban Treaty had been signed by many States, some of which did not recognize each other, and the agreements of 1954 on Viet-Nam and of 1962 on Laos had been signed by both the United States and the People's Republic of China.

59. But although he was convinced that the preoccupations of certain members with regard to recognition were totally unfounded, he would have no objection to a proviso being included in article 8 to the effect that participation in a multilateral treaty did not involve recognition; a proviso of that type would serve to dispel any remaining fears on that score.

60. It had been suggested that the issue now under discussion was a political matter and required a political decision. But international law governed relations between States and those relations were, in a very broad sense, always of a political character. Even if in international relations there were problems that were either political, economic or legal, that did not mean that political matters should be settled without regard for international law, in other words, on the basis of purely political considerations. Such an approach would be reminiscent of the so-called "political realism" philosophy which had no scientific foundation but was nonetheless very dangerous. Advocates of that philosophy, such as Professor Hans Morgenthau, approached human actions on the basis that there was a political man, a religious man or a legal man: when a man took a decision as a political man, it was considered that he should be guided by political considerations, by the so-called "national interest". That dangerous philosophy provided an easy justification for arbitrary decisions and arbitrary actions taken in violation of international law. In fact, the only valid philosophy was that which held that all political decisions should conform with international law.

61. With regard to the legal content of the "all States" formula, he noted that the Special Rapporteur had suggested in paragraph 3 of his observations on the draft article (A/CN.4/177) that it would have the effect of abrogating all existing final clauses which were in contradiction with that rule. Personally, he would like to see those final clauses abrogated, but would be prepared to accept a formula that did not go quite so far. He could therefore accept the inclusion of a proviso to the effect that the formula in question did not apply to treaties concluded "before the entry into force of the present convention".

62. Some members had said that the Commission would be treading on dangerous ground if it tried to introduce new rules of *jus cogens* in the matter. It was not, however,

rules of *jus cogens* but ordinary rules of international law which were involved, and those rules should still be respected. No one claimed, for example, that all the provisions of the four Geneva Conventions of 1958 on the law of the sea were rules of *jus cogens*, but, as ordinary rules of international law, they should be respected.

63. In short, the problem in article 8 went right to the very foundations of contemporary international law. The "all States" formula was dictated by the requirements of contemporary international law and by the overriding necessity to develop international relations in order to consolidate world peace.

The meeting rose at 1.5 p.m.

795th MEETING

Thursday, 3 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. REUTER said he did not think that the points considered in connexion with article 8 had been clarified sufficiently to be embodied in a rule stated in an article. He was not able to support either the definition of a general multilateral treaty given in article 1 (c), or the rule proposed in article 8, paragraph 1. If the Commission had to make a choice among the several proposals which had been put forward, he would choose that submitted by Mr. Ago.²

3. What was the trend of the present discussion? He had pondered that question, to which there were three possible replies. The first was that the discussion had related to the definition of the international community; in other words, there were doubts about the universality of that community. But that reply was manifestly not the right one: the Commission's debate was taking place against the background of modern times, and it was irrefutable at the present time not only that the international community

¹ See 791st meeting, preceding para. 61, and para. 63.

² See 794th meeting, para. 44.

was universal, but also that the newly-independent or newly-established States had a large share of responsibility, at least in law, in the community of which they were an important component.

4. The second possible reply was that since in the modern world there were three or four examples of cases where, in consequence of the Second World War and of the conflicts which had occurred since, territories and populations found themselves in a distressing and even tragic situation, it might be thought that the Commission was endeavouring to work out a principle by which those difficulties could be removed. But that idea, which he did not attribute to anyone, was as erroneous as the first. It was noteworthy that States—and not only the States most closely concerned—had adopted an attitude of extreme caution with regard to those situations and merely endeavoured to do what they could to overcome the difficulties in each individual case. There was a lesson in that attitude, for a hundred States weighed more heavily in the balance than twenty-five legal experts. The problems were difficult in fact only. In law they were simple, and could be solved merely by using the machinery available in the international organizations.

5. Consequently, it was necessary to fall back on a third explanation. The discussion was in fact a discussion of international constitutional law. Inevitably, when preparing a draft convention on the law of treaties, problems were encountered which bore on the innermost structure of the international community. The basic principle underlying all the new ideas that had been proposed to the Commission was that a State had the right to be a party to all treaties that affected its interests. That principle found only partial expression in the definition of a general multilateral treaty and in the rule stated in article 8, paragraph 1; but it certainly embodied the new spirit in which the problem was being approached.

6. In that connexion, two opposing trends had become manifest in the Commission; first, the many problems associated with the question under study had gradually been brought to light, and secondly, and sometimes simultaneously, there had been a tendency to shy away from the far-reaching consequences of the rule contemplated. In recalling some of the difficulties which had been mentioned, he would merely attempt to assess their magnitude, not to solve them.

7. As Mr. Lachs had rightly observed, if the Commission said that every State had a right to participate in treaties, questions concerning the recognition of States would inevitably arise. Mr. Lachs had made a suggestion for eliminating that problem, by the means used by States in certain special cases. That question would, however, call for a very careful consideration, for it was not just a matter of finding an expedient which could be used in special cases; it was necessary to solve, in a general way, the whole problem of the different kinds of recognition, and to see whether States were willing to leave the whole problem in abeyance.

8. It appeared from a remark by Mr. Ago that the Commission was not discussing the enlargement of the international community but rather the possibility of excluding certain States from it. If the Commission

formulated a rule applicable to "every State", either that principle was automatic—which would be revolutionary—or it was not automatic, and then the question would necessarily arise whether the international community had the right to apply sanctions to a certain State, to expel members, and whether such acts were compatible with the dignity of the State. The Commission had not discussed that important question.

9. Several members of the Commission, sensitive to the hesitancy to which he had just referred, had tried to remove regional agreements from the operation of the proposed rule. In that respect, he was inclined to share the view of the Chairman: if a principle was good for the international community, it was also good for the region. Besides, according to the definition of a general multilateral treaty given in the draft, questions of general interest to all States might well form the subject of a regional agreement; every State would therefore have the right to become a party to such an agreement. That was not a theoretical question, but one which had arisen in practice: States had asked to accede to certain treaties of military alliance which had not contained any clause providing for the accession of other States; they had argued that peace was indivisible and could not be a regional matter.

10. The problem was the same in the case of trade agreements: was it conceded that six States, for example, had the right to conclude such agreements and, in that case, did other States, whether neighbours or far-removed, have the right to participate in those agreements? Another example was that of agreements concerning international canals; formerly, the rules governing the administration of such canals had often been drawn up by bilateral agreement between two great States, but today was it admitted that those rules could be drawn up by a single State; or must all States participate in drawing them up for the reason that a problem of general interest was involved?

11. The definition of a general multilateral treaty given in the draft was full of good intentions, but it raised the question where interests began and ended. If two very great Powers concluded a bilateral treaty on a question affecting the interests of all States, that treaty would not come within the terms of the definition. He was not opposed to such a possibility; peace was beyond price and worth making sacrifices for. But at that point a question of law arose: did the Commission admit that two very great Powers could conclude a treaty and that subsequently that treaty should simply be offered to other States? Or, as certain members wished, should the other States be allowed to participate in the drafting of such a treaty? He would not attempt to answer those questions, but he thought they at least deserved consideration.

12. There was a logical answer to those questions, but it was one that the world was not yet ready to accept. It was to create an international parliament where all treaties would be discussed by all States; those which considered that their interests were at stake would decide for or against them, and the others would abstain.

13. Obviously some adjustments were needed for certain very complicated questions. The attempt to split a

principle in two, however, might produce two principles, each just as strong as the one which was to be discarded. If he had understood the debate correctly, the Commission had tackled a very important problem, which he, at any rate, could not agree that they should pretend to settle by texts which created more problems than they solved.

14. The CHAIRMAN, speaking as a member of the Commission, said he wished to comment on one of the points Mr. Reuter had just raised. Principles, however well formulated, could not be fixed for ever, since they were continually evolving under the pressure of events. That was why even the supporters of certain principles might be persuaded, for tactical considerations, to accept a less rigid principle in order to take account of the circumstances of political life. For the time being, the link between international law and the foreign policy of States was indissoluble.

15. Any State had the right to participate in treaties of general interest. But, if it proved impossible to adopt a rule of that kind, he would go halfway and agree as a compromise that the rule should be that any State was entitled to participate in such treaties, except where the parties had excluded the other States, though such exclusion was perhaps an abuse of rights.

16. Mr. LACHS said that he wished to deal with two of the many points that had been raised during the discussion. The first was the freedom of States to select their partners. The existence of that freedom or right of selection was not disputed. Yet many examples could be given of States exercising that right and then changing their minds; open treaties had sometimes become closed and treaties meant to protect the parties against possible dangers from a given State had been later extended to that very State and thenceforth directed against another State altogether. Nor was there any legitimate reason to prevent States from thus exercising that freedom. History showed that States had first selected their partners individually; when Spain had wanted to accede to the Treaty of Aix-la-Chapelle of 1748, a special additional treaty had had to be signed in 1784. The next step had been the adoption of the method of exchange of declarations, till gradually the whole procedure had changed in favour of general formulas. Categories of treaties had been established; within them there had always been a few States which might not have been welcomed by some of the original parties. Thus the right of choice had in fact been seriously reduced. Now, as an obvious result of that trend, the whole process of treaty-making was influenced by the principle of universality of international law.

17. The question of regional treaties had been raised and the Chairman had already dealt with that question. The only point which he wished to make in that regard was that no regional treaty could monopolize world affairs; otherwise, it ceased to be a regional treaty, with all the consequences which that entailed.

18. It was within that framework that must be viewed the new notion of the general multilateral treaty, which in order to perform its task effectively was bound to be universal. The formula applied at present by the United Nations belonged to the past. Conditions had changed and that formula had now lost its usefulness and indeed

its very reason for existence. The law of yesterday had been superseded by events and could not be perpetuated.

19. The provisions of Article 4 of the Charter had been invoked. But there was an obvious difference between membership of the United Nations and the binding force of the Purposes and Principles of the Charter. That was precisely the meaning of Article 2 (6) of the Charter. Moreover, the conditions in which the Charter had been drafted were exceptional; not every multilateral treaty was drafted after a devastating world war and in circumstances like those of 1945. And the present membership of the United Nations was such that the founder States were outnumbered by those which had joined it later; its composition had altered as a result of the revolutionary changes of the past twenty years.

20. The second point was that of political considerations. He had always maintained that there was a close relationship between law and politics, but it was necessary to keep a balance between the two. There were issues which went beyond the individual, and sometimes selfish, interests of States and concerned humanity as a whole. Those issues related to such fundamental problems as peace and war, and it was precisely in that field that the idea of universality had gained expression in the concept of collective security, a concept that was intended to embrace all States, even potential aggressors. Certainly, there was no wish to repeat the experience of the Treaty of Paris of 15 April 1856³ by which three great Powers had guaranteed the independence and territorial integrity of Turkey; for when Turkey, the obvious and only beneficiary of that treaty, had invoked it, the reply had been that Turkey, not being a party to the treaty, was not entitled to avail itself of that right. Unlike that treaty of 1856, the treaties which had outlawed war, such as the Treaty of Paris of 1928⁴ or the Saavedra Lamas Treaty,⁵ had been made open to all. The same was true of treaties of a humanitarian nature or of such instruments as the Moscow Nuclear Test Ban Treaty. When such issues were at stake, no State could be excluded; all must have the right to take part in the treaty concerned. Mankind as a whole must be represented; anything short of that would mean that the principle of universality had been betrayed.

21. As he had already mentioned (792nd meeting, para. 9) a similar approach had been adopted in a draft international agreement on the rescue of astronauts and spaceships in the event of accident or emergency landing that had been proposed to the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, of which he was Chairman. That draft provided a classical example of the mutual relationship between rights and duties. At first sight, the beneficiaries of the agreement would be only the so-called space Powers, but the duties would apply to all States. Obviously, it would be contrary not only to logic but also to the fundamental duties owed by all to those men who ventured into space to expose them to the risks resulting from the exclusion of any areas of the world from the operation of a convention of a humanitarian character. To do so would expose astronauts to the danger of being left helpless if they landed in

³ *British and Foreign State Papers*, Vol. XLVI, p. 25.

⁴ League of Nations, *Treaty Series*, Vol. XCIV, p. 59.

⁵ *Ibid.*, Vol. CLXIII, p. 405.

certain areas, merely because, for political reasons, some States happened not to recognize other States. Ultimately, the real beneficiary of an agreement on assistance to astronauts and the return of spacecraft would be man himself. The life of an astronaut, the protection of basic rules of international law and their implementation were more important than the passing interests and policies of individual States.

22. Those considerations all militated in favour of the "all States" formula, which would translate the principle of universality into everyday life.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that in view of the nature of the question under discussion, he wished to give his personal opinion on article 8 before summing up as Special Rapporteur.

24. The problem underlying article 8 was a difficult one because it touched upon a number of fundamental institutions of international law. He had always been sympathetic to the idea of opening general multilateral treaties—although the concept of such treaties was perhaps not quite clear—to as large a number of States as possible, so as to ensure the widest application of their provisions. That was precisely the issue involved in article 8. But the Commission's discussion on universality had not always been very precise with regard to the implications of that idea as far as the text of the article was concerned.

25. One important point to be borne in mind was the distinction between the right to participate in the formulation of a rule of general international law, and the right to participate in the application of that rule; there was a difference in point of time between the exercise of the first right and the exercise of the second. Also, the problem of the right of participation in a conference was bound to be more pressing than that of accession to a treaty already concluded.

26. While he fully accepted the notion of the general multilateral treaty, he was bound to point out that it was difficult to dissociate that notion from another fundamental principle of international law, namely, the contractual basis of treaty-made law, even in regard to general multilateral treaties. Reference had been made to a number of treaties which were of universal interest, such as the Convention on the Prevention and Punishment of the Crime of Genocide,⁶ and the humanitarian conventions signed at Geneva in 1949. Unfortunately, every one of those Conventions contained a provision which reserved the right of individual States to denounce it. Although many writers, like himself, believed that such a denunciation would not release a country from its obligations under customary international law in respect of the matters governed by the Convention, the fact could not be ignored that that right of unilateral denunciation bore out the consensual character of those treaties, despite the fact that they were of universal concern.

27. On the question of the freedom of States to choose their partners in the conclusion of treaties, he noted that what might be called the most progressive proposal before the Commission would have the effect of laying down, as

a general rule of international law, that in a general multilateral treaty, the States concerned would no longer be free to specify definitively the States with which they were prepared to contract in that treaty. But whatever the causes of the present attitude of States, it was not possible to disregard the current situation as a factor when a codifying rule was being formulated.

28. United Nations practice in the matter had certain very well-defined tendencies. For example, in the United Nations rules for the calling of international conferences of States (General Assembly resolution 366 (IV)) it was laid down that the Economic and Social Council, when convening a conference, was to decide who should be invited to attend; of course, it was always open to the Council to invite all States to attend. In a whole series of invitations to conferences the United Nations had adopted an exceedingly wide formula, but one which left to the General Assembly the last word in determining which States should be asked to participate in a conference.⁷

29. It had been suggested that the present practice had originated in the cold war, but that was only a partial view of the matter. Underlying that practice, there was the basic problem that any international organization, at any period of its history, would always have to decide whom to invite to a conference convened under its auspices. Also, the Secretariat would have to know what action to take in the matter and normally it would not be prepared to take a decision itself.

30. He hoped that the General Assembly would continue in the future to act as the major parliamentary body of the international community; however, regardless of how that community might be organized in the future, the present practice represented a rule which was neither constitutionally nor politically unreasonable. That rule retained for the General Assembly, the body which was most representative of the international community, the right to take political decisions underlying participation. The matter had recently been dealt with at a number of conferences, and also in the General Assembly in connexion with the opening to wider participation of certain League of Nations treaties, and the rule to which he referred had been maintained. It was in fact the kind of rule that it would not be easy to dispense with in any international organization. Incidentally, he found it somewhat fanciful to talk of a "closed club" in connexion with an Assembly of some 120 member States, whose votes could not be controlled.

31. The most progressive of the proposals now before the Commission would recognize to every State a right of participation, which presumably could not be taken away by any particular decision. In his view, the adoption of such a proposal would overturn the consensual basis of general multilateral treaties and was not justified by any development in international law under the United Nations.

32. As for the compromise adopted in 1962, it purported to interpret the intentions of the States parties to the general multilateral treaty in those cases where the treaty itself was silent. From the point of view of principle and

⁶ United Nations Treaty Series, Vol. 78, p. 278.

⁷ See *Yearbook of the International Law Commission, 1963, Vol. II, p. 11 et seq.*

from that of State practice, that compromise formula was very much less objectionable than the more extreme proposals now put forward. Also, since many treaties contained specific provisions on the subject of participation, the rule adopted in 1962 would operate only as a residuary rule. Nevertheless, he did not feel that it would be justifiable to attribute to the parties to a general multilateral treaty an intention that was at variance with the existing practice, which was to reserve to the General Assembly the decision on the subject of participation.

33. For those reasons, his own views with regard to the compromise proposal had not changed since 1962 and he would not be able to support it, even as a residuary rule implying an intention, because it did not in fact reflect the general intention of States as seen in State practice. He favoured a formulation along the lines proposed by Mr. Ago; the question of extended participation should then be covered in article 9.

34. Speaking as Special Rapporteur, he said he would like to deal with a few points which had arisen during the discussion. First, it had been suggested that the problem of recognition was at the root of the issues raised by article 8. Personally, he did not believe that the question of recognition was a matter for inclusion in article 8, even in the form of an assurance that the provisions of the article did not affect recognition. Problems of recognition were political in character and no provision that the Commission could adopt on participation would effectively dispose of those problems. He fully accepted the view advanced by Mr. Lachs that under customary international law, when a State expressed its consent to be bound by a general multilateral treaty, it was not thereby considered to have impliedly recognized an entity which had similarly given its consent to be bound but to which it had refused recognition. However, the ramifications of the principle of recognition were very considerable and the topic of recognition was one which would require separate treatment by the Commission.

35. As to the difficulties of the depositary, they had perhaps been exaggerated in 1962. Where the depositary was a State, a formula could always be found to escape embarrassment, but the matter was more delicate for the secretariat of an international organization. The device of having three depositary States, adopted for the Moscow Nuclear Test Ban Treaty, was a useful one but it applied to a very special case; it greatly complicated the task of the depositary and he himself would therefore not like to see it used with any frequency.

36. It was also appropriate to consider the Moscow Treaty from the point of view of the distinction, which he had made earlier, between participation in the conference which formulated the law, and participation in a treaty, in other words, in the endorsement and application of the law after it had been formulated. From the point of view of the formulation of the law, the Moscow Treaty had been rather old-fashioned, because it represented essentially the drawing up of the law by a very small group of States which then invited other States to subscribe to it. Accordingly, it could hardly be regarded as a model precedent for the purposes of the present discussion.

37. The discussion in the Commission had shown that there were three different views held by members. The

first was the view that the existing article 8 should be retained, subject to drafting changes. The second was a more progressive view which would exclude the consensual element altogether. The third was the view, which he shared, that it was preferable to state the rule on participation in a more classical form and to cover the question of extended participation by means of the provisions of article 9. The Commission should therefore vote on the various proposals in order to give the Drafting Committee a basis for its work.

38. Whatever decision the Commission adopted on article 8 would necessarily affect the difficult question of the definition of general multilateral treaties. It was possible to adopt a very narrow definition which would confine them to law-making, codifying or fundamental treaties; on the other hand, a much wider definition could be adopted, such as that implicit in General Assembly resolution 1903 (XVIII) on participation in general multilateral treaties concluded under the auspices of the League of Nations.

39. The CHAIRMAN said that the Commission could either follow its usual practice of referring all the texts to the Drafting Committee which would then continue the discussion with a view to producing a single text, or else it could direct the Drafting Committee as to how it should proceed.

40. Mr. AMADO said that in his opinion the Commission had no choice but to take a vote. The discussion had been of a very high standard and a conciliatory spirit had been shown, but Mr. Reuter, after reviewing the problems of particular concern to individual members, had tried in vain to find a haven of compromise. Several members of the Commission, although they were progressively-minded and had the interests of international law very much at heart, could not go any further. The time had therefore come to take a vote.

41. The CHAIRMAN invited the Special Rapporteur to list the texts on which the Commission would have to vote.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission could begin by voting on Mr. Briggs's proposal,⁸ which was the most radical, and then on Mr. Tunkin's⁹ followed by Mr. Ago's.¹⁰ If none gained a majority it would have to fall back on either the 1962 text or his own proposed revision of it, both the latter being of course subject to drafting changes.

43. Mr. BRIGGS said he must make it clear that his proposal involved only the deletion of paragraph 1 in article 8 (sub-paragraph (a) in the Special Rapporteur's revised version).

44. Mr. TUNKIN asked for a roll-call vote in each case.

45. The CHAIRMAN put Mr. Briggs's proposal to the vote by roll-call.

In favour: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock.

⁸ See 791st meeting, para. 77.

⁹ *Ibid.*, para. 86.

¹⁰ See 794th meeting, para. 44.

Against: Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Tunkin, Mr. Verdross, Mr. Yasseen.

Mr. Briggs's proposal was rejected, 10 votes being cast in favour and 10 against.

46. Mr. TUNKIN explained that his proposal was that article 8 should consist of a paragraph 1 reading "In the case of a general multilateral treaty, every State may become a party to the treaty" followed by a provision concerning recognition, on the lines suggested by Mr. Lachs, and then by a new paragraph stipulating that the article did not apply to existing treaties, in other words, that it was not retrospective.

47. The CHAIRMAN put Mr. Tunkin's proposal to the vote by roll-call.

In favour: Mr. Bartoš, Mr. El-Erian, Mr. Lachs, Mr. Pal, Mr. Tunkin.

Against: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock.

Abstaining: Mr. Verdross, Mr. Yasseen.

Mr. Tunkin's proposal was rejected by 13 votes to 5, with 2 abstentions.

48. Mr. AGO said that, in the case of his own proposal, the Commission would be voting on the principle. If his proposal were adopted, it could be amended in any way the Drafting Committee might consider necessary.

49. Mr. TUNKIN asked whether he was right in thinking that Mr. Ago's intention was to exclude altogether from his proposal the distinction between general multilateral and multilateral treaties.

50. Mr. AGO said that his proposal made no distinction between a multilateral treaty and a general multilateral treaty.

51. Mr. ROSENNE said he presumed that Mr. Ago only wished to eliminate that distinction for the purposes of article 8 and not wherever it appeared in other articles.

52. The CHAIRMAN said that Mr. Ago's proposal was solely concerned with the free choice of partners in a treaty.

53. He put Mr. Ago's proposal to the vote by roll-call.

In favour: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock.

Against: Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Tunkin, Mr. Yasseen.

Abstaining: Mr. Pessou, Mr. Verdross.

Mr. Ago's proposal was rejected, 9 votes being cast in favour and 9 against, with 2 abstentions.

54. The CHAIRMAN said that the Commission was now left with the compromise formula adopted in 1962.¹¹

55. Mr. BRIGGS asked whether the intention was that the Commission should vote only on paragraph 1 or on the entire text of the article.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission need only vote on the principle contained in paragraph 1, which was the same as that in sub-paragraph (a) of his revised version.¹²

57. Mr. AGO suggested that the voting procedure should be interrupted to allow the Drafting Committee to concentrate on the text adopted in 1962 and try to improve it, as the result of the vote on it would depend to a great extent on the drafting. The Commission had so far been voting on texts which differed in one way or another from the compromise originally adopted and the fact that every text had been rejected showed that the Commission as a whole was in favour of a compromise; but that did not mean that it was in favour of the 1962 text.

58. Mr. TUNKIN said he thought that the Commission should continue with the voting, and so give a decision on all the proposals before it.

59. The CHAIRMAN said that the Commission had to give the Drafting Committee some guidance. He would therefore put to the vote by roll-call the principle expressed in paragraph 1 of the 1962 draft.

In favour: Mr. Bartoš, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Tunkin, Mr. Verdross, Mr. Yasseen.

Against: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Ruda, Mr. Tsuruoka, Sir Humphrey Waldock.

Abstaining: Mr. Rosenne.

The principle was rejected by 10 votes to 9, with 1 abstention.

60. The CHAIRMAN said that the only proposal remaining before the Commission was Mr. Ago's proposal that the whole matter be referred to the Drafting Committee, the Commission not having decided against the inclusion of an article on the subject of article 8.

61. Mr. CASTRÉN said that several members who, during the discussion, had spoken in support of the last text on which the Commission had voted were absent; he accordingly hoped that the Drafting Committee would bear in mind the views reported in the summary records as well as the results of the voting.

62. Mr. CADIEUX said that Mr. Ago's proposal had been made before the last vote had been taken. What the Drafting Committee was normally expected to do, when an idea was referred to it, was to select the wording which would best express that idea, but the Commission no longer had anything to refer to the Drafting Committee.

63. The CHAIRMAN said it was the Commission's normal practice, when it was unable to reach a conclusion, to seek advice from the Drafting Committee.

64. Mr. LACHS said that he understood Mr. Cadieux's anxiety but the course of the voting had demonstrated, with the rejection of Mr. Briggs's proposal, that the Commission wished to retain in its draft an article on the subject dealt with in article 8. As no formula so far proposed had won majority support, it remained for the Commission to devise another. Admittedly the situation

¹¹ i.e. the text reproduced in the record of the 791st meeting, preceding para. 61.

¹² See 791st meeting, para. 63.

that had arisen was a difficult one but some way out must be found.

65. Mr. BRIGGS said that, although on a number of occasions, after failing to reach agreement, the Commission had referred proposals to the Drafting Committee, he could remember no precedent for it doing so after formal votes had been taken and every alternative rejected. He was against the matter being referred to the Drafting Committee with a request that it formulate a new rule for which no clear support had been manifested in the Commission itself.

66. Mr. TUNKIN asked whether Mr. Cadieux and Mr. Briggs had any suggestion to offer as to the course the Commission might now take.

67. Mr. CADIEUX said that the Commission had discussed and voted on a very important issue and should not rush into a decision without further reflection.

68. The CHAIRMAN said he thought that was a very good suggestion and that the Commission would do better to wait and reflect on the matter.

69. Mr. YASSEEN said that one thing was certain from the rejection of Mr. Briggs's proposal: the Commission did want an article on the subject. So although the Commission had discussed it at great length, it should redouble its efforts to reach a satisfactory solution. It would be prudent, therefore, to leave the question in abeyance for a time and refer it to the Drafting Committee, which would report its conclusions in one or two weeks. By then, perhaps fewer members would be absent.

70. Mr. AGO said it might be argued that in principle the Commission would like to have an article; in other words, that by its equally divided vote on Mr. Briggs's proposal, it had simply refused to accept outright the idea of not having an article. Before admitting defeat, therefore, it should ask the Drafting Committee to work out a conciliatory formula which it might perhaps be able to adopt by a certain majority.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that in general he agreed that the matter should be considered by the Drafting Committee. The Commission had indicated that it wished to have an article on the subject covered by article 8. Indeed, it could be argued that otherwise there would be a gap in its work of codification, but the question remained as to what kind of provision was wanted. The only alternative to its usual practice would be to request the Special Rapporteur to prepare a new text for consideration by the Commission but he would not relish such a task on his own and believed it would be preferable for him to submit something to the Drafting Committee for prior consideration.

72. However, if that course were adopted, the Commission must first indicate whether the Special Rapporteur and the Drafting Committee were to be given a free hand in considering alternative proposals. In other words, was the legal consequence of the votes just taken to rule out certain propositions on the score that they had been definitely rejected on grounds of principle?

73. Mr. EL-ERIAN said it was important that the Commission should not interpret the voting in an excessively formal manner. An article had already been

adopted in 1962 for which the majority of governments had expressed support. Account must also be taken of the known views of certain members of the Commission who had not been present during the voting. He hoped the kind of situation which had arisen in the Commission over the controversial issue of the breadth of the territorial sea¹³ would not be repeated and that the whole problem raised by article 8 could be referred to the Drafting Committee.

74. Mr. TUNKIN said he agreed that, as the Commission had decided to include an article in its draft and no text was now available, it should ask the Special Rapporteur to prepare a new version for discussion first in the Drafting Committee and then in the Commission itself.

75. Mr. ROSENNE said that he was in favour of referring the matter to the Drafting Committee without more ado, and giving it *carte blanche* to take account of all the views expressed during the discussion as well as the voting. At the fourteenth session a similar situation had arisen over a tied vote on part of an article, and the difficulty had been resolved by the Commission unanimously adopting a proposal by Mr. Amado that the whole article be referred to the Drafting Committee.¹⁴

76. There were several possible interpretations of the significance of the votes taken on the present occasion and he could not agree with the conclusion that the Commission had definitely decided to include in its draft an article on the subject covered by article 8. It was, however, clearly in favour of pursuing the effort to elaborate a text that might prove acceptable.

77. Mr. TSURUOKA said that, to him, a ten-to-ten vote did not mean that the Commission wanted an article on the subject in question.

78. The CHAIRMAN said that, as Mr. Castrén had pointed out, two of the absent members, Mr. Jiménez de Aréchaga and Mr. Tabibi, had spoken in support of article 8.

79. Mr. AMADO said that the Drafting Committee could hardly draft something *ex nihilo*. Logically, it should be turned into a committee to draft a new text. Mr. Tunkin's proposal that the Special Rapporteur, who knew the subject thoroughly, be asked to find some way out of the impasse and submit his solution to the Commission was a reasonable one.

80. The CHAIRMAN, speaking as a member of the Commission, said he supported that idea.

81. Mr. LACHS said that the Commission was at least approaching agreement as to how to proceed. To put it no higher, the voting had expressed some kind of decision, even though not all the members had been present. They respected one another's views and some way out of the impasse should be sought. In the circumstances, as votes had already been taken, no harm would be done by entrusting the Special Rapporteur and the Drafting Committee, which after all was sufficiently representative, with the task of thrashing out the problem.

¹³ See *Yearbook of the International Law Commission, 1956*, Vol. I, p. 181.

¹⁴ See *Yearbook of the International Law Commission, 1962*, Vol. I, p. 98.

82. Mr. CADIEUX said the Commission should realize that it was in effect asking the Drafting Committee and the Special Rapporteur to exert themselves to find some way out of the impasse. He thought, like Mr. Tsuruoka, that since the Commission was divided as it was, the vote should not be interpreted as establishing any particular position. In his opinion, the Drafting Committee and the Special Rapporteur should consider all the possibilities open to the Commission, without assuming that a new text was asked for or that the Committee was expected to guide the deliberations of the Commission in a certain direction.

83. The CHAIRMAN said he noted that a new text had been neither asked for nor refused, and further, that the Commission would be prepared to ask the Special Rapporteur, with the assistance of the Drafting Committee, to try to submit a proposal for subsequent discussion, without prejudging the lines that proposal should take. He suggested that the Commission decide to adopt that procedure.

It was so decided.

The meeting rose at 1.5 p.m.

796th MEETING

Friday, 4 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) (continued)¹

1. The CHAIRMAN said that for the time being the discussion on article 8 should be regarded as closed, as it had been agreed that the whole matter should be referred to the Drafting Committee and that the Special Rapporteur should be asked to prepare a redraft in the light of the discussion and of the voting that had taken place at the previous meeting. However, as there had not been time then, he would give the floor to Mr. Paredes for an explanation of his vote.

2. Mr. PAREDES explained that he had been one of those who had thought that one or more articles should be drafted on the subject-matter of article 8. However difficult it might be to formulate the basic points in a

codification, no effort should be spared for that purpose. Fortunately, the Commission had some members, including the Special Rapporteur, capable of doing excellent work and they would surely succeed in working out a suitable provision. In a code, the essential problems should not be disregarded. A concise code might possibly be of some use, but in the long run it would become evident that it did not fulfil its task, which was to throw light, in particular, on the difficult points to be solved.

3. Although he had been greatly impressed by some of the suggestions made at the preceding meeting, none of them could possibly cover all the questions comprised under article 8.

4. There had been much discussion about the need to safeguard, in treaties, certain fundamental rights of States, notably the right to equality, which enabled any State to take part in the discussion of problems created by treaties, and contractual freedom, which gave countries the right to decide with whom they wished to negotiate. It had become evident that those two positions were in many respects diametrically opposed, owing to the existence, recognized by most specialists in international law, of two broad groups of treaties: law-making treaties (*traités-lois*) and contract-making treaties (*traités-contrats*).

5. The law-making treaty collected and summarized the customary practice or fundamental principles of international co-existence: hence it was binding on all and should therefore be open to all. It might emanate from a small group of States which had decided to clear up a point or to settle a question of international public order by an instrument that would bind not only the signatories but the entire world, for it only defined an idea of international morality that was universally recognized. The only contractual aspect of those treaties was their drafting and the determination of their scope, matters settled by the authors. As the Chairman had said, if those treaties, which were recognized and accepted by the majority but were drawn up by a small group of States, were to bind the whole world, then all States should be allowed to take part in discussing them. A rule of conduct having the force of *jus cogens* could not be laid down unless all States had an opportunity to express their opinion concerning the scope or extent of the proposed rule.

6. Consequently, in that respect he fully approved article 8, paragraph 1, according to which any State could take part in discussing the scope or extent of a rule implementing a principle of international law.

7. The situation was not the same with respect to contract-making treaties, which concerned special interests, however many international persons concluded them and were going to carry them out. Where special interests of States were concerned, one group of States could obviously decide with whom it wished to negotiate. At the 794th meeting he had referred to the treaties concerning questions of fisheries. A majority of the countries of the world could meet to conclude instruments of that kind, but they could also say that they did not wish to negotiate with some particular country. In that case, States obviously had a right to decide which persons could take part in the discussion and to whom the treaty should apply. Firstly, the treaty would not bind those who had not subscribed to it; secondly, in the light

¹ See 791st meeting, preceding para. 61, and para. 63.

of their interests States might consider that they should not enter into such treaties with particular countries. Consequently, he did not think that, in that case, all States should be invited to discuss such treaties; only those should be invited whose right to do so was recognized by the contracting parties.

8. He thought, therefore, that no single formula could cover both groups of treaties : the formula selected would always be partial or inadequate, for completely different questions were involved. For that reason, he thought that it would be better if the contents of article 8, paragraph 1, were split into two parts, one dealing with law-making treaties, the other with contract-making treaties.

SECTION III—Reservations

9. The CHAIRMAN invited debate on section III of the draft articles on the law of treaties, containing the articles on reservations.

10. Sir Humphrey WALDOCK, Special Rapporteur, said that in his fourth report (A/CN.4/177/Add.1) he had analysed the written comments of governments and the comments made by delegations in the Sixth Committee on the five articles concerning reservations adopted by the Commission at its fourteenth session. In the light of those comments he had prepared a reformulation of the articles involving a rearrangement of the material rather than modifications of substance, apart from certain minor changes on one or two points. Most governments seemed to support the general approach adopted by the Commission to an exceedingly difficult problem, and as Special Rapporteur he had therefore assumed that, broadly, the decisions it had taken at its fourteenth session would stand.

11. The information furnished by the Secretariat, in compliance with General Assembly resolution 1452 B (XIV), in its report on "Depositary Practice in relation to Reservations"² also seemed to confirm that the Commission was working on the right lines. One interesting point that had emerged from that report was that depositaries seemed consistent in treating instruments or signatures to which reservations were attached as documents tendered for deposit but not definitively deposited until some consultation had taken place with the other interested States.

12. The scheme of the five articles finally approved at the fourteenth session had with justice been criticized as being too complex and in some places repetitive, but no apology was needed for that as the lengthy discussions had helped members to sort out their own views and identify the fundamental issues. His object in rearranging the material had been to simplify the exposition of the rules.

13. Perhaps in discussing the whole subject of reservations the Commission might usefully consider first articles 18, 19 and 20 as they could be taken together, leaving until later articles 21 and 22 for which, apart from minor changes, the provisions he proposed were substantially similar to the previous texts.

14. Without prejudice to either substance or drafting, he thought that the Commission's task might be facilitated if it decided whether to take as the basis for discussion his new proposals for articles 18, 19 and 20 or the 1962 texts.

15. The CHAIRMAN called upon the members of the Commission to express their views on the Special Rapporteur's preliminary question.

16. Mr. TUNKIN said it was regrettable that the Commission should spend time on preliminary questions. It should follow its usual practice of not restricting the scope of the discussion on any article to any particular text but allow members to range freely over the whole subject.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the purpose of his suggestion had only been to facilitate discussion. He had too long an experience as Special Rapporteur on the law of treaties to expect much of his new text to survive, but he thought it might save time if the Commission could focus its attention primarily on the new scheme he was proposing for articles 18, 19 and 20 and on the principal issues at stake.

18. Mr. TUNKIN said that there was no real disagreement between him and the Special Rapporteur; he had been merely anxious that the Commission should not depart from its usual method.

19. Mr. CASTRÉN said that he was inclined to think, like the Special Rapporteur, that the Commission should first answer the preliminary question what text should form the basis of discussion. Having studied the latest report, the members could surely express a preference for the one or the other text and comment on it.

20. Mr. BRIGGS said that he was in general agreement with Mr. Tunkin that there was no need for the Commission to decide on a preliminary question, but he thought that members should address their remarks in the main to the Special Rapporteur's new scheme, though naturally they could always draw comparisons with, and comment on, the original texts.

21. Mr. TUNKIN said it would be wrong to assume that the comments of some twenty governments were representative. Nearly a hundred States had not yet expressed any opinion; even when States did make comments, they usually confined them to the articles to which they objected and passed over in silence those to which they took no exception. It would therefore be premature for the Commission to take as the basis for its discussion the Special Rapporteur's new scheme which had been devised in the light of the few observations which had been submitted.

22. Mr. ROSENNE said that in the interests of systematic discussion the Commission should restrict itself to the issues of principle as stated in the titles of the articles themselves. The question which of the two texts should be taken as the basis for the final text of the articles was essentially a drafting question.

23. The CHAIRMAN said that in his view the Commission had no right to impose limits on its members with respect to any particular question; members could proceed from elements to principles or could begin by establishing principles before proceeding to facts.

² Document A/5687.

24. Mr. VERDROSS expressed support for Mr. Tunkin's suggestion. The Commission had adopted the 1962 text after long discussions; should that text be amended in the light of the comments made by a few Governments?

25. Mr. TSURUOKA said that in his view the Commission had full liberty to discuss the draft articles while taking account of the Special Rapporteur's remarks.

26. Mr. ELIAS, supported by Mr. AMADO and Mr. LACHS, urged the Commission not to waste time on a point about which there was no real division of opinion. In keeping with its usual practice, it should take up forthwith article 18 together with the Special Rapporteur's new proposal and the comments by governments.

27. Mr. CASTRÉN said that, as the Special Rapporteur had pointed out, the articles drafted by the Commission in 1962 on the important and complex topic of reservations had in general been the subject of favourable comment by the governments which had expressed an opinion. The great majority of those governments accepted the system proposed and the principles on which it was based; however, they had put forward comments on details of both form and substance.

28. In order to take account of several suggestions by governments, the Special Rapporteur had proposed a revised version of the draft articles, especially draft articles 18 to 20, which he had reformulated; he had also deleted some provisions and had redrafted others in a more concise form. In his (Mr. Castrén's) opinion, the result was a great improvement over the 1962 text, and on the basis of that new version the Commission should be able, without much difficulty, to work out a text that would be acceptable both from the theoretical and from the practical points of view.

29. He was satisfied with the new title, "Reservations to multilateral treaties", which the Special Rapporteur proposed for the section on reservations.³ The section might be transferred so as to follow immediately upon the section dealing with the entry into force and registration of treaties, although there were admittedly reasons which argued for the retention of the existing order.

30. In general, he accepted the Special Rapporteur's redraft, but reserved the right to submit comments on the various articles.

31. Mr. ROSENNE and Mr. CADIEUX endorsed Mr. Castrén's observation.

32. The CHAIRMAN invited the Commission to discuss articles 18 to 20, which read:

ARTICLES 18 (Formulation of reservations), 19 (Acceptance of and objection to reservations) and 20 (The effect of reservations)

Article 18

Formulation of reservations

1. A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

(a) The making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

(b) The treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

(c) The treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

(d) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

2. (a) Reservations, which must be in writing, may be formulated:

(i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

(ii) Upon signing the treaty at a subsequent date; or

(iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.

(b) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving State, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation.

3. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated:

(a) In the case of a treaty for which there is no depositary, to every other State party to the treaty or to which it is open to become a party to the treaty; and

(b) In other cases, to the depositary which shall transmit the text of the reservation to every such State.

Article 19

Acceptance of and objection to reservations

1. Acceptance of a reservation not provided for by the treaty itself may be express or implied.

2. A reservation may be accepted expressly:

(a) In any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

(b) By a formal notification of the acceptance of the reservation addressed to the depositary of the treaty or, if there is no depositary, to the reserving State and every other State entitled to become a party to the treaty.

3. A reservation shall be regarded as having been accepted by a State if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

4. An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.

³ See document A/CN.4/177/Add.1.

5. An objection to a reservation shall be formulated in writing and shall be notified :

- (a) In the case of a treaty for which there is no depositary, to the reserving State and to every other State party to the treaty or to which it is open to become a party; and
- (b) In other cases, to the depositary.

Article 20

The effect of reservations

(a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.

(b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.

2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides :

(a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;

(b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.

3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty, which has been concluded between a small group of States, shall be conditional upon its acceptance by all the States concerned unless :

- (a) The treaty otherwise provides; or
- (b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.

4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.

33. The Special Rapporteur's reformulation of the articles read :

Article 18

Treaties permitting or prohibiting reservations

1. A reservation permitted by the terms of the treaty is effective without further acceptance by the interested States, unless the treaty otherwise provides.

2. Unless expressly agreed to by all the interested States, a reservation is inadmissible when :

(a) The making of the reservation is prohibited by the treaty or by the established rules of an international organization;

(b) The treaty expressly authorizes the making of specified reservations which do not include the reservation in question.

Article 19

Treaties silent concerning reservations

1. Where a treaty is silent on the question of reservations, reservations may be proposed provided that they are compatible with the object and purpose of the treaty.

In any such case the acceptance or rejection of the reservation shall be determined by the rules in the following paragraphs.

2. When it appears from the nature of a treaty, the fewness of its parties or the circumstances of its conclusion that the application of its provisions between all the parties is to be considered an essential condition of the treaty, the reservation shall be effective only on its acceptance by all the parties.

3. Subject to article 3 (*bis*), when a treaty is a constituent instrument of an international organization, acceptance of a reservation shall be determined by the competent organ of the international organization.

4. In other cases, unless the State concerned otherwise specifies :

(a) Acceptance of a reservation by any party constitutes the reserving State a party to the treaty in relation to such party;

(b) Objection to a reservation by any party precludes the entry into force of the treaty as between the objecting and the reserving State.

5. In cases falling under paragraph 4 a reserving State is to be considered a party to the treaty if and when one other State which has established its consent to be bound by the treaty shall have accepted the reservation.

Article 20

Procedure regarding reservations

1. A reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the other interested States.

2. A reservation put forward upon the occasion of the adoption of the text or upon signing a treaty subject to ratification, acceptance or approval, shall be effective only if the reserving State formally confirms the reservation when ratifying, accepting or approving the treaty.

3. Acceptance of a reservation, if express, takes place :

(a) In any appropriate formal manner on the occasion of the adoption of the text or signature of the treaty or of the exchange or deposit of an instrument of ratification, accession, acceptance or approval;

(b) By notification to the depositary or, if there is no depositary, to the reserving State and to the other interested States.

4. In cases falling under article 19, paragraph 4, a reservation shall be considered to have been accepted by any State :

(a) Which, having had notice of it for not less than twelve months, proceeds to establish its consent to be bound by the treaty without objecting to the reservation; or

(b) Which raises no objection to the reservation during a period of twelve months after it established its consent to be bound by the treaty.

5. An objection to a reservation must be in writing. If put forward subsequently to the adoption of the text of the treaty, it must be notified to the depositary or, where there is no depositary, to the reserving State and to the other interested States.

6. An objection to a reservation has effect only when the objecting State shall have established its consent to be bound by the treaty.

34. Mr. BRIGGS said that he was opposed to the flexible system of reservations, representing a modified form of the inter-American system, embodied in draft articles 18 to 20. He therefore reserved his right to speak later on those articles, but wished at that stage to raise a number of points, partly of drafting but partly also of principle. For convenience, he would make his comments on the basis of the Special Rapporteur's proposed redraft.

35. In article 18, paragraph 1, he was not satisfied with the use of the word "permitted". It would be more correct to say "authorized", a term which was also closer to the French "*autorisé*". In fact, it would be more accurate to say "A reservation expressly authorized by the terms of the treaty . . .". In the same paragraph, it was inappropriate to say that the reservation "is effective"; the expression "requires no acceptance" would be more correct.

36. In paragraph 2 of the same article, the opening sentence referred to all the "interested States". The reference should rather be to "parties", for a reservation could not in any case operate until the treaty was in force, by which time the interested States would be the parties to the treaty.

37. Paragraph 1 of article 19 as redrafted by the Special Rapporteur was ambiguous in referring to the case where a treaty "is silent on the question of reservations". Clearly, the treaty would not be silent if it prohibited all reservations, or if it authorized any reservation. However, a treaty could specifically authorize some reservations, thereby implicitly prohibiting others; or else, a treaty could expressly prohibit certain reservations, thereby implicitly authorizing others.

38. With regard to the same paragraph, he asked the Special Rapporteur to clarify the meaning of the opening words of the second sentence "In any such case". If those words were taken, in the light of the first sentence of the paragraph, to refer to the case of reservations "compatible with the object and purpose of the treaty", it would seem to follow that paragraphs 2, 3, 4 and 5 (which were governed by the second sentence of paragraph 1) would not apply in cases where the proposed reservation was incompatible with the object and purpose of the treaty. What, then, would be the rule to be applied where objection was made to a reservation on grounds other than its alleged incompatibility with the object and purpose of the treaty?

39. Subject to those remarks, and to his general attitude regarding the system of articles 18 to 20, he found paragraphs 2 and 3 of article 19 generally acceptable. He had some difficulty, however, with regard to the opening words of paragraph 4 "In other cases . . .". It should be made clear that the intention was to refer to cases other than those specified in paragraphs 2 and 3. The words in question could not mean "in cases other than those covered by paragraph 1", for paragraph 1 dealt with the case of a treaty that was silent on the question of reservations. In the same sentence, the expression "State concerned" referred to a State which accepted the reservation or objected thereto. The question therefore arose whether there might not be other States concerned.

40. In paragraph 4 (a), it was not accurate to suggest, as the language of that paragraph did, that the acceptance of

a reservation had the effect of making the reserving State "a party to the treaty". All that the acceptance of the reservation did, under the proposed system, was to permit that State to become a party to the treaty.

41. A similar problem arose with regard to the language used in paragraph 4 (b); an objection to a reservation did not preclude "the entry into force" of the treaty: it precluded the application of the provisions of the treaty as between the objecting State and the reserving State. Under the provisions of article 19, both States were parties to the treaty, once it had entered into force and its provisions were binding on them, but the provisions thereof were not applicable *inter se* in the circumstances of paragraph 4 (b).

42. Paragraph 5 of article 19 also spoke of a reserving State as being "considered a party to the treaty". Acceptance of a reservation by a State which had only "established its consent to be bound by the treaty" but which was not yet a party itself, could not make the reserving State a party. In fact, a State could only become a party to the treaty by ratification or other processes provided for and upon the entry into force of the treaty.

43. In the case of article 20, he would confine his remarks for the time being to its paragraph 6. The language of that paragraph should be brought into line with that of paragraph 4 (b) of article 19. The objection to a reservation became effective only when the objecting State actually became a party to the treaty.

44. Sir Humphrey WALDOCK, Special Rapporteur, explained that the drafting of all the draft articles would have to be reviewed carefully; he fully realized the inadequacy of the term "party" in the cases referred to by Mr. Briggs. It would probably be necessary either to refer to a State which had "expressed its consent to be bound" by the treaty or to include a proviso with regard to the entry into force of the treaty. However, that question of drafting did not affect the substance of the draft articles.

45. In commenting on paragraphs 2, 3, 4 and 5 of article 19, Mr. Briggs had raised the question whether a State could object to a reservation on grounds not necessarily related to the compatibility of the reservation with the object and purpose of the treaty; the objection might be made, for example, on political grounds. In reply, he wished to state that the intention was to make an objection possible on any grounds.

46. The CHAIRMAN said that several members wished to defer their comments on the draft articles under discussion until the next meeting, so as to have time for reflection. It might be that some of them were hesitant to express their views until they had been able to see whether there was any development in the thinking of other members.

47. Mr. AMADO said that the hesitancy of the Commission's members was readily understandable. The Commission had studied the problem of reservations thoroughly in 1962.⁴ Some members, including the Chairman and himself, had acknowledged that their thinking on the subject had developed. He himself had

⁴ See *Yearbook of the International Law Commission, 1962*, Vol. I, 651st-654th, 656th, 663rd, 664th, 667th, 668th and 672nd meetings.

initially been inclined to follow the traditional doctrine that unanimity was necessary for the acceptance of reservations.

48. To enable the discussion to advance, it was necessary that a general trend should take shape in the Commission and that certain details should become clearer. It was also necessary to see whether certain points of view were still held or not. Some problems which the Commission thought had been solved, such as the problem of the reservations to the Pan-American Conventions, were open to discussion again.

49. In considering the redraft proposed by the Special Rapporteur, he had been struck by several points. For example, the new draft article 18 opened with a reference to the effects of reservations, whereas the draft articles on reservations adopted in 1962 had started from a different point.

50. With regard to drafting, he considered a number of expressions in the Special Rapporteur's new text to be unsatisfactory, in particular, the word "fewness" in draft article 19, paragraph 2.

51. The CHAIRMAN, speaking as a member of the Commission, said that if his thinking on reservations had evolved, it had done so between 1950 and 1962, and in any case not in the matter of doctrine. During that period the Advisory Opinion of the International Court of Justice on the question of *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*⁶ had been published, an opinion which the General Assembly had taken into account in its resolution 598 (VI). He had revised his practical position in order to take account of the development of international law and because he had observed that his opinion was no longer compatible with the new positive rules of international law which had emerged from the jurisprudence of the Court and from the General Assembly resolution.

52. Mr. RUDA said that since he had not participated in the discussion on the articles on reservations at the 1962 session, he wished to state briefly his doctrinal position. The problem of reservations raised the question of how to reconcile two basic contemporary trends. The first trend was the expansion of international relations and the growth of international organizations, which involved an increasing use of multilateral treaties to regulate those relations. The second major trend was that of upholding the sovereignty of States; hence the need to preserve the integrity of treaties, pending the emergence of a world legislative organ.

53. Under the impact of those two trends, old theories which had previously seemed to be firmly established were crumbling. In particular, the theory that the unanimous consent of the parties was necessary for the validity of a reservation to a multilateral treaty could in no way be considered as existing law. On the contrary, there was every indication of a need to adopt a flexible and realistic procedure for reservations, on the premise that it was better that a State should become bound only by part of a multilateral treaty rather than that it should lose all interest in the treaty.

54. Accordingly, he favoured the very flexible formula which had been put forward by the Special Rapporteur in his first report⁶ and which had been inspired by the system adopted in 1959 by the Inter-American Council of Jurists at its fourth meeting. Such a system was well suited to an international community which comprised a very large and varied membership and satisfied the need to promote international relations. In that connexion, the idea of tacit consent to a reservation by passage of time was already generally accepted; the view was also taken that an objection to a reservation lapsed if the objecting State did not become a party to the treaty.

55. The requirement that a reservation must be "compatible with the object and purpose of the treaty" had no legal foundation. It was taken from a passage in the 1951 Advisory Opinion of the International Court of Justice on reservations to the Genocide Convention, but the Court itself had expressly stated that its opinion was limited strictly to the particular Convention.⁷

56. Moreover, a formula of that type could not be adopted under existing conditions; so long as there was no international judicial organ possessing compulsory jurisdiction, it was desirable to adhere to the flexible system which had produced such excellent results in inter-American relations.

57. He would be prepared to accept the exception set forth in paragraph 2 of article 19 of the Special Rapporteur's redraft, relating to treaties with a small number of parties, subject to the exception mentioned in article 20, paragraph 3 (b).

58. He reserved his right to comment on the provisions of particular articles.

The meeting rose at 12.40 p.m.

⁶ See *Yearbook of the International Law Commission, 1962, Vol. II, pp. 60-68.*

⁷ *I.C.J. Reports 1951, p. 20.*

797th MEETING

Tuesday, 8 June 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Welcome to Mr. Bedjaoui

1. The CHAIRMAN, on behalf of the Commission, extended a welcome to Mr. Bedjaoui, the newly-elected member of the Commission.

2. Mr. BEDJAOU, thanking the Chairman, said that by electing him the Commission had honoured, not

⁶ *I.C.J. Reports 1951, p. 15.*

only himself, but both Algeria and Africa. His predecessor had been prevented from performing his task as a member of the Commission by his many heavy responsibilities; he (Mr. Bedjaoui) would do his best to deserve the confidence which the Commission had shown in him and to make a contribution to the work which he hoped would be as fruitful as it was sincere. Wishing to ensure equitable geographic representation, the Commission had replaced one African by another African. He would endeavour to offer whatever knowledge he might have of the present problems of the African continent.

3. The Commission's task was to give juridical expression to, and so to confirm and strengthen, the major trends of all civilizations as reflected in the law of nations. More than ever, international law had to live up to its oecumenical vocation. The juridical expression which it should aim at would no longer be that of the will of a club of nations but that of the constructive, and therefore more lasting, will of a universal consensus. Since the end of the Second World War, the advent of peaceful coexistence and decolonization had characterized the development of international law, the physiognomy of which had inevitably been reshaped by the rise of the countries of Asia and Africa: a new international order had to be accompanied by a new juridical order. The Commission had a leading part to play in bringing that great and difficult task to a successful conclusion.

4. At one time it had not even been necessary to identify the rules of international law, for in so far as they had not simply reflected the internal law of a dominant nation, they had originated almost exclusively in treaties. During the last few decades, different views had arisen as to the foundation and sources of international law, which was no longer confined within the strict limits of conventions and treaties. The shrinking of the earth's dimensions had provided more varied sources of inspiration for law, while adapting it to the deep-seated aspirations of mankind, peace and progress. Law was becoming more and more the spontaneous product of an international community which was becoming less and less anarchical, and events had given birth to the new phenomenon of international solidarity. Only by the strengthening of that trend would the rule of law prevail.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(*resumed from the previous meeting*)

[Item 2 of the agenda]

5. The CHAIRMAN invited the Commission to resume its consideration of section III of the draft articles.

ARTICLE 18 (Formulation of reservations)¹

6. Mr. ROSENNE said that, as he had already indicated, the Special Rapporteur's new approach to the

articles on reservations was in general acceptable and his own comments would be directed to the Special Rapporteur's new text for article 18 rather than to the old. The Special Rapporteur was to be congratulated on his skill in reducing a complicated series of provisions to an orderly presentation of the material, and the Commission, being now engaged in its second reading, must scrutinize the new text in the light of the considerable volume of new material before it, particularly in the Secretary-General's report on "Depositary Practice in relation to Reservations"² and also in the context of the draft articles as a whole.

7. At its fourteenth session, the Commission had been troubled, and mention of that fact had been made in its report, about the application of the so-called flexibility principle to reservations, in the absence of compulsory adjudication in some form or another, and that point had been taken up by some of the governments which had sent in comments. But since the fourteenth session, article 51 had been formulated, and in due course the Commission might consider extending the scope of that article so as to cover disputes that might arise out of the application of whatever provisions concerning reservations were finally incorporated in its draft; that might help to allay the apprehension of certain governments and of some members of the Commission that otherwise the value of the draft as a whole as a contribution to the development of international law would be seriously impaired.

8. If the flexibility principle were adopted as a starting point, it would be logical to shift the focus of attention away from the question of whether or not the treaty was "in force" and whether, or for what purposes and under what conditions a State making a reservation was "a party", to the consequences of admitted or admissible reservations for the application of the treaty. Such a change of presentation might meet some of the pertinent observations made by Mr. Briggs at the previous meeting.³ That might be a more positive approach to the problem as a whole and, indeed, the Special Rapporteur appeared to have been working on those lines, though perhaps his new text had not been sufficiently explicit.

9. The suggested changes in the title of section III were acceptable but the whole section might be better placed after article 29 so as to form a bridge between that part of the draft that dealt with the formal aspects of the law of treaties, and that dealing with application, observance and interpretation, in accordance with the scheme outlined by the Special Rapporteur himself in the introduction to his fourth report (A/CN.4/177). That would also help to bring out the exceptional nature of the problem of reservations and at the same time to emphasize the practical issue of the consequences of admitted reservations for the application of the treaty.

10. Regarding article 18, paragraph 2 of the Special Rapporteur's new text, he was not yet quite convinced by the author's view, if he had understood it correctly, that it would be going too far, in framing rules regarding the parties' intentions, to contemplate applying the

¹ See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.

² Document A/5687.

³ See 796th meeting, paras. 34-43.

compatibility test to those reservations which were not covered by, or were outside the scope of, the reservations clause of a treaty. The very great variety of formulas used in reservation clauses must be borne in mind. There was no problem when a reservation clause clearly applied to the whole of a treaty, but it was fairly common for it to refer only to specific articles and to be entirely silent concerning the remainder of the text; in the latter case there would be some ground for incorporating the compatibility test as restricting the right to make reservations in respect of those parts of the treaty not expressly covered by the clause. At all events he failed to see why that particular right should be broader than in the case when a treaty was completely silent.

11. The phrase "the established rules of an international organization" must be interpreted as referring only to the rules about reservations, if any, applicable to the treaty in question. The point might seem an obvious one, but the phrase was used frequently in the draft and not always with quite the same shade of meaning; it was probably a matter of terminology that could be taken up later when the text as a whole was being polished.

12. He had been struck by the Special Rapporteur's use in paragraph 2 (b) of the phrase "the treaty expressly authorizes the making of specified reservations", because the case was rare. Admittedly, article 39 in the Revised General Act for the Pacific Settlement of International Disputes⁴ did contain a clause according to which States could make their acceptance of the treaty conditional upon the reservations "exhaustively enumerated in the following paragraph"; normally, however a treaty could not and did not authorize specified reservations but either permitted or prohibited reservations to specified articles, sometimes without particularizing further. Other treaties, however, contained complex reservations clauses which defined the kind of reservations that could be made, and such clauses were often drawn up in negative form. That was perhaps just another drafting point which could be left for the consideration of the Drafting Committee.

13. Mr. CASTRÉN said that he had suggested that the Commission should take the Special Rapporteur's redraft as the basis for its discussions on the question of reservations, but several members had preferred to discuss at the same time the texts adopted by the Commission in 1962. Following Mr. Briggs's example, he would take, as the starting point for his own comments, the Special Rapporteur's new text which seemed to him superior from the drafting point of view, though he would also refer to the 1962 text.

14. He approved the Special Rapporteur's idea of dealing first with the treaties permitting or prohibiting reservations, then with the cases where the treaties were silent. In the Special Rapporteur's redraft the provisions relating to prohibited reservations were expressed in simpler and more concise terms than in the 1962 draft; the excessively elaborate provisions in sub-paragraphs (b) and (c) of paragraph 1 of article 18 had been replaced by a single short phrase in sub-paragraph (b) of paragraph 2. From the point of view of

the form, however, the drafting might perhaps be improved even further by making the provision start with the words: "the treaty expressly authorizes only the making of specified reservations . . .".

15. The revised version of article 18 was also an improvement in that it expressly provided that even a reservation which was inadmissible, according to the provisions of the treaty, could be accepted if all the other States agreed to make that concession. The only displeasing feature, in that as in some other articles, was the expression "interested States" which occurred twice in article 18. In that respect, the 1962 text was more precise, since it spoke of States parties or States to which it was open to become parties to the treaty. But, as some governments had criticized that wording as being too broad, as far as the rights of States in the second category were concerned, the Special Rapporteur had chosen another expression which was very vague.

16. Mr. YASSEEN said he was glad that the comments by governments had corroborated the attitude which he had taken in 1962 in support of the freedom to make reservations. Clearly, the phenomenon of multilateral treaties had affected the institution of reservations and upset the presumption. As far as multilateral treaties were concerned, the general principle was that the making of a reservation was permitted unless it was prohibited by the treaty.

17. In his opinion, the Special Rapporteur's redraft was better because less cumbersome from the point of view of drafting, but it was not satisfactory from the point of view of the principle, for it did not make it clear that the principle was that of freedom to make reservations. The article adopted in 1962 had emphasized the right of the State to formulate a reservation, which, in his opinion, was in accord with the recent trend towards recognizing in principle the admissibility of reservations to multilateral treaties.

18. In any event, both the article adopted in 1962 and the revised version proposed by the Special Rapporteur left something to be desired, for they were too elaborate. The key being the treaty itself, it was enough to state: "Unless the making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization . . .". In other words, in paragraph 1 of the 1962 draft, sub-paragraphs (b) and (c) were not necessary since the first meant that the reservation was prohibited and the second that it was directly excluded, because the treaty authorized only certain specified categories of reservations and the reservation referred to in sub-paragraph (c) was in a different category.

19. In paragraph 1 (a) of the 1962 draft the words "the terms of" (*expressément*) could be deleted and it could read simply: "[unless] the making of reservations is prohibited by the treaty . . .". For it was enough that the treaty was not silent on the subject; it did not matter whether it referred to reservations implicitly or expressly.

20. Sub-paragraph (d) was indispensable. It was an essential point in the new law on reservations that, in the case where the treaty was silent on the question,

⁴ United Nations Treaty Series, Vol. 71, p. 122.

the reservation regarded as inadmissible had to be incompatible with the object and purpose of the treaty.

21. Mr. TUNKIN said that in considering section III, the Commission must bear in mind that the institution of reservations was a feature of contemporary international law and that the reasons for its existence were manifold. One was that it was not always possible at an international conference to reach a solution that was acceptable to all States—they now numbered over a hundred—and reservations provided a means for the minority to defend its position and interests. For obvious reasons the institution was of greater significance for attaining the universality of multilateral treaties but it was also an inducement for States to negotiate an agreement acceptable to all. That being so, the Commission should recognize the existence of the institution and admit that it served a useful purpose.

22. After all, States resorted to reservations only in exceptional circumstances and unwillingly, as he knew from personal experience. Whenever he had been called upon to formulate one on behalf of the Soviet Union Government, he had always been hesitant and had given the matter very careful thought.

23. At the fourteenth session, certain members of the Commission, more particularly Mr. Gros, now a judge of the International Court, had emphasized that reservations destroyed the unified régime provided for in a treaty. Of course there were certain drawbacks in the institution, but then nothing in life was free of some inconvenience and if applied reasonably and within certain limits, reservations were beneficial and contributed to the progressive development of international law. Those limits had been laid down by the Commission in its 1962 text, when it had stated the general principle that reservations incompatible with the object and purpose of the treaty were inadmissible. There could be no doubt that the advantages of the institution greatly outweighed the disadvantages.

24. When the provisions of a treaty were consonant with the true requirements of human society, in course of time certain reservations usually fell to the ground by sheer desuetude, as had been the case with the United Kingdom Government's reservations to the 1928 General Treaty for Renunciation of War as an Instrument of National Policy.⁵ They had been important and, as the Soviet Union Government had pointed out, to a great extent undermined the very purpose of the treaty: their fate was a matter of common knowledge and the rules laid down by that Treaty prohibiting aggressive war had prevailed.

25. Owing to the special significance of general multilateral treaties in the complex system of international law, it was highly desirable to lay down a general rule permitting reservations provided they were not incompatible with the object and purposes of the treaty, the reason being that general multilateral treaties were intended to be universal, and so long as reservations were not aimed at modifying elements of substance, they were useful and important as a means of extending the sphere of application of the treaty. For other types

of multilateral treaty, the formula worked out at the fourteenth session might do.

26. With regard to the actual text of the articles on reservations, he was concerned at the apparent ease with which the Special Rapporteur seemed to be contemplating modifying what had been accomplished with great difficulty in 1962. Members would not have forgotten how arduous a task it had been for the Drafting Committee to arrive at an acceptable formula after lengthy discussions in the Commission itself and, if his memory served him, the compromise had been finally approved without any dissentient voice though not giving entire satisfaction to anyone. Nothing in the observations submitted by governments led him to think that, drafting changes apart, there was any need for the Commission to recast completely the 1962 scheme with its logical arrangement of successive provisions on formulation, acceptance of, and objection to reservations, their effect, their application and finally their withdrawal which was still preferable to the revised text proposed by the Special Rapporteur in which that logic had in part been lost.

27. Paragraph 1 of the Special Rapporteur's revised text for article 18 should not be placed at the head of a section dealing with reservations as a whole and belonged to a later article.

28. Paragraph 2 was inconsistent and unnecessary. No such rule had been included in the 1962 draft. If he understood it rightly, that paragraph meant that, even if the terms of a treaty or the established rules of an international organization prohibited reservations, they could nevertheless still be made, but the State concerned would have to ascertain whether all other interested States would be in favour or against. That would entail a most complicated procedure for which there was no need whatever.

29. At that juncture he would confine his comments to the way in which article 18 of the 1962 text should be modified. He agreed with Mr. Yasseen that paragraphs 1 (b) and (c) could be dropped if paragraph 1 (a) were suitably redrafted so as to make clear in what circumstances either no reservations at all were permissible or reservations were permissible only to certain parts of a treaty.

30. Paragraph 2 could be considerably abbreviated while retaining the essence of the original and paragraph 3 should be dispensed with altogether, as it merely dealt with certain procedural details.

31. Sir Humphrey WALDOCK, Special Rapporteur, said that, as he had tried to explain in his introductory remarks on section III, he had no particular pride of authorship or preference for either of the two drafts, but was bound to point out to Mr. Tunkin that, of the two versions of article 18, that of 1962 was the more stringent because it must be interpreted as totally prohibiting even the formulation of, or a proposal to make, a reservation, when the treaty either expressly or impliedly did not allow it, whereas his new draft of article 18, while giving full effect to the provisions of the treaty, did not wholly exclude the possibility of a reservation being proposed. While not intended to alter

⁵ League of Nations *Treaty Series*, Vol. XCIV, p. 59.

in any way the general spirit of the original, none the less his new text was less rigorous.

32. He also felt bound to point out that, although it was true that the compromise worked out at the fourteenth session had not been achieved without some difficulty, much of the discussion had turned on paragraphs 1 (b) and (c) which Mr. Tunkin was now suggesting should be discarded. One of the bases of the agreement reached in 1962 had been the somewhat detailed provisions concerning the making of reservations to be found in the old paragraphs 1 (a), (b) and (c). His own approach to the problem of redrafting the articles, in the light of certain well-founded critical comments by governments on some points, had been to try and retain the general agreement reached at the fourteenth session, but to recast the articles in simpler form.

33. Mr. TUNKIN explained that he was not opposed to sub-paragraphs (b) and (c) in paragraph 1 but had only wished to suggest that their content could be covered by suitable modifications to sub-paragraph (a). If that were not feasible the sub-paragraphs could be retained.

34. Mr. ELIAS said that unless the Commission discussed articles 18, 19 and 20 together and members confined themselves to the essential issues, leaving the actual drafting to the Drafting Committee, it would never be able to keep to the time-table it had set itself for the present session. By restricting their comments to article 18, members were not considering the structure of the Special Rapporteur's new text for section III as a whole. Personally, the more he examined government comments the more he realized the justice of the Special Rapporteur's claim to have rearranged the subject matter while leaving the substance intact. A careful comparison of the two versions revealed that, apart from one or two points, the second was a distillation of the essence of the first. That did not mean of course that comparisons should be barred, but he did urge members to concentrate on deciding which elements must be retained and not to recapitulate general arguments already developed at length in 1962.

35. The CHAIRMAN said that he had considered the Special Rapporteur's practice of separating articles 18, 19 and 20 to be useful, because the three provisions related to completely different questions. Since, however, there appeared to be some uncertainty as to how best to proceed, he would ask the Commission to vote on the question whether or not to discuss articles 18, 19 and 20 separately.

It was decided by 5 votes to 4, with 10 abstentions, to continue to consider articles 18, 19 and 20 separately.

36. Mr. VERDROSS said he wished first to pay a tribute to the Special Rapporteur's efforts and to his redraft, which took account of comments by governments. However, like Mr. Tunkin, he thought that the Commission should maintain the articles which it had adopted at the first reading after a long discussion and which constituted a compromise between differing opinions. By constantly starting the discussion again *ab initio*, as though no text existed, the Commission was, like Penelope, undoing its earlier work. The Commission's members should limit themselves to proposing

such changes as had become necessary as a result of comments by governments.

37. He himself wished to comment on the idea advanced by the Japanese Government (A/CN.4/175), and developed by the Special Rapporteur, concerning the interpretative declaration by which a State, when signing or ratifying, indicated how it construed a particular provision. The Special Rapporteur stated in his observations on the three articles (A/CN.4/177/Add.1) that the problem was governed by articles 69 and 70 concerning the interpretation of treaties. In his (Mr. Verdross's) opinion, that was not the case: what those articles were concerned with was either the joint will of the parties or their common practice. But in the case of an interpretation given unilaterally by a State when signing or ratifying, the State declared unilaterally how it understood a particular article, and was consequently making a reservation within the meaning of article 1, paragraph 1 (f). It was therefore sufficient to state in the commentary that, if a State made a unilateral declaration as to the interpretation it attached to a particular article, it was in fact making a reservation which was governed by the articles on reservations.

38. Mr. AGO said that reservations were an institution which existed in practice and could not be eliminated, but the Commission should beware of treating it as an innovation representing an advance in international law. It was a necessary evil, but still an evil, for what an instrument gained in scope through the number of signatory States it lost in depth from the fact that, as a result of the reservations to it, it stated fewer rules. While, therefore, he was convinced that the Commission should do nothing to indicate hostility towards reservations, he was firmly opposed to the Commission's showing itself favourable towards them.

39. The Commission would be well advised not to depart too radically from the compromise achieved in 1962, which was probably the only solution likely to receive majority support in so delicate a matter. But he felt some concern about those general multilateral treaties whose purpose was to codify international law. He hoped that, where the Commission codified general rules that already existed, no far-reaching practice of reservations would be instituted since it could only mean a step back. He would not like doubt to be cast on the existence of a given customary rule through reservations made to it in its new form as a conventional rule.

40. The essence of article 18 was its paragraph 1; the remainder of the article related to application and procedure. If the Commission took the text adopted in 1962 as the basis, he would welcome the separation of paragraphs 1 and 2 into two separate articles. While the 1962 text and the redraft proposed by the Special Rapporteur both had their advantages, the earlier text was perhaps preferable in that it stated the principle directly by indicating all the circumstances in which a State had the right to formulate a reservation. The new text was rather more descriptive and would perhaps facilitate academic explanation. But it was not very easy to follow the Special Rapporteur's scheme entirely, for whereas he had headed the article "Treaties permitting or prohibiting reservations", he had had to

refer in the text to cases where the treaty was silent but where the reservation was nevertheless prohibited by the rules of the international organization within which the treaty was concluded. For the time being, therefore, he favoured the text adopted by the Commission in 1962.

41. In one respect, however, he preferred the redraft proposed by the Special Rapporteur; he was referring to the idea embodied in paragraph 2 of the Special Rapporteur's new article 19. That expressly specified the principle that, if the treaty was silent, the making of a reservation incompatible with the object and purpose of the treaty was prohibited; the new text also took account of a slightly different case—that where, the treaty being silent, it appeared from the nature of the treaty, the fewness of its parties or the circumstances of its conclusion that all possibility of making reservations was excluded, even on points which were not related to the object and purpose of the treaty. The wording was perhaps somewhat clumsy and could be simplified, but he thought the newer idea should be adopted.

42. With regard to drafting, he thought that the formula "A State may" used at the beginning of article 18 as adopted in 1962 should be avoided, because that phrase gave the impression that the provision decided which States had the right to make reservations, whereas in reality it determined which reservations could be made. It might be better to say "A reservation may be formulated by a State . . .".

43. It was not necessary to discuss at length paragraphs 1 (a), (b) and (c) of article 18 as adopted in 1962. Members were in agreement on the substance. There were three cases in which the making of a reservation was prohibited: first, if it was prohibited by the terms of the treaty itself; secondly, if the treaty expressly prohibited the making of reservations to specified provisions and the reservation sought related to one of those provisions; and, thirdly, if the treaty authorized the making of reservations to certain provisions and the reservation related to another provision. If those three cases could be dealt with satisfactorily in one paragraph, the text would be simplified; if not, it would be better to deal with them in three separate paragraphs.

44. Since members were in agreement on the principles, it ought to be possible, with a modicum of goodwill, to find a satisfactory form of words.

45. Mr. PAL said that none of the members appeared to favour any departure in substance from the 1962 draft. The Special Rapporteur, in proposing his new formulation, had made it clear that there was no intention to make any change of principle or substance, and had explained his reasons for proposing a rearrangement of the material.

46. The Commission had originally had before it, on the subject of reservations, articles 17-19 of the Special Rapporteur's first report.⁶ The discussion on those articles in 1962 had been long and strenuous and the texts had had to be referred more than once to the Drafting Committee; ultimately, a compromise had

been reached in the form of articles 18-22 in the 1962 report.⁷ The Special Rapporteur had said that the new texts he now proposed were merely a rearrangement of the 1962 material with consequential verbal changes; the Commission would have to be satisfied on that point. For the time being, he would confine his remarks to the proposed new article 18.

47. Paragraph 1 of the Special Rapporteur's text purported to replace the provisions of paragraph 1 (a) of article 20 of the 1962 text. However, the words "expressly or impliedly" had been omitted before "permitted"; also, the proviso "unless the treaty otherwise provides" had been added at the end. The Drafting Committee would have to examine whether any change in substance was involved and, if not, whether the proposed changes made the text any clearer.

48. The opening sentence of paragraph 2 would have the effect of reintroducing an idea contained in paragraph 1 (b) of article 17 as originally proposed by the Special Rapporteur in 1962. In the text adopted in 1962, the Commission had omitted that idea and it would be appropriate for the Drafting Committee to examine whether its reintroduction might involve any point of substance. Further, the words, "unless expressly agreed to by all the interested States" were in apparent variation from the substance of article 20, paragraph 2 (a) of the 1962 text. The Drafting Committee would have to satisfy itself that there was no real variation in substance. Paragraph 2 (a) of the Special Rapporteur's new article 18 represented a condensation of the contents of paragraphs 1 (a) and 1 (b) of article 18 as adopted in 1962. The Drafting Committee would have to examine whether the substance remained unaffected thereby. The position was similar with regard to the new paragraph 2 (b), which was said to embody the idea contained in paragraph 1 (c) of article 18 as adopted in 1962; it would have to be scrutinized in that respect.

49. In the circumstances, he suggested that the Commission decide that no change in substance should be made to the 1962 articles on reservations and that the Drafting Committee examine whether the proposed new text of articles 18 to 20 represented any departure in substance from the corresponding material in the 1962 draft articles.

50. Mr. CADIEUX said that, as one of those who had been hesitant in approving the compromise formula worked out in 1962, he had looked at the new formula proposed by the Special Rapporteur to see if it was in keeping with the spirit of that compromise and had finally decided that it was. He had also considered whether the Special Rapporteur had heeded the objections and suggestions which had been made, some of which were penetrating or constructive. In that respect, too, his impression was that the Special Rapporteur had succeeded brilliantly and had facilitated the Commission's work.

51. He welcomed the suggestion for simplifying article 18; he realized, in particular, that those members who supported the system of reservations would like that group of articles to begin in a way favourable to

⁶ See *Yearbook of the International Law Commission, 1962, Vol. II, pp. 60-68.*

⁷ *Ibid.*, Vol. I, 651st-654th, 656th, 663rd, 664th, 667th and 672nd meetings.

their position. In trying to condense, the Commission should, however, be careful not to upset the balance established in 1962. For example, it was slightly forcing the 1962 text to say that reservations were permitted in cases where the treaty was silent on the subject. The Drafting Committee would have to consider that point very carefully. What Mr. Ago had called the "descriptive" method made it possible to avoid that trap. To adopt an abstract approach and postulate a principle would be straying beyond the scope of article 18 to deal with matters which, in the Special Rapporteur's new version, were governed by article 19, on "Treaties silent concerning reservations".

52. He was convinced that the Commission as a whole did not want to change the text adopted in 1962 and that it would ask the Drafting Committee to work out a formula which would be slightly more condensed but which would be in keeping with the spirit of the text accepted by the majority at the time.

53. Mr. AMADO said he endorsed all that Mr. Pal and Mr. Cadieux had said. Even before Mr. Tunkin had spoken, he had decided to continue his support of the 1962 text. It was a good text. It was not perfect, but perfectionism was fraught with grave risks. He had opposed the use of expressions such as "small group of States" but, noting that governments had not expressed any objection, could resign himself to agreeing to that also.

54. On one point, however, he did have serious misgivings: the concept of the compatibility of a reservation with the object and purpose of the treaty, which left a great deal of room for subjective judgement by States and on which several governments had commented. The Special Rapporteur proposed an even more far-reaching formula in paragraph 2 of article 19. The question was connected with that dealt with in article 9, which was full of substance and concerning which there was still so much uncertainty.

55. He was very particular so far as drafting was concerned; he did not like vague expressions such as "in the case where the treaty is silent concerning the making of reservations". Such wording was not appropriate in the text of a treaty.

56. Mr. YASSEEN said he wished to elaborate on his earlier remarks in the light of Mr. Ago's statement. He had not said that reservations should be encouraged, for the good reason that in his view reservations should not be either encouraged or discouraged. Freedom to make reservations was in conformity with the development of the law relating to general multilateral treaties. He would hesitate to assert that reservations were an evil, whether necessary or not. Reservations filled a need in international relations; they were the counterpart of the new majority rule for the adoption of the text of general multilateral treaties.

57. The signature, ratification or approval of a treaty with many reservations was better than the absence of signature, ratification or approval. If there remained in a treaty only two articles accepted by all the parties, while some twenty articles were the subject of reservations, the result would be better than no treaty at all. Many States tended not to sign or ratify a treaty if the possibility of making reservations was not permitted

within reasonable limits, and in his opinion the only reasonable limits were those laid down by the provisions of the treaty itself and by the rule of compatibility with the object and purpose of the treaty. If those two limits were laid down very clearly, there was no danger in recognizing freedom to make reservations; in that way participation in the international community and the formulation of treaty law would be encouraged.

58. Mr. AGO said that to his regret he could not agree with Mr. Yasseen at all. If a treaty codifying rules of international law were accepted only with many reservations relating to most of the articles, it would be a real disaster, the very negation of the work of codification. It would have been better not to have undertaken the work at all, since it would mean that customary rules had been jettisoned and that nothing whatsoever was left.

59. Mr. Yasseen's argument might be tenable in the case of a treaty creating new rules, but was very dangerous where treaties codifying international law were concerned.

60. Mr. EL-ERIAN said that he accepted the Special Rapporteur's proposed new title for the section, "Reservations to multilateral treaties", for which there was a precedent in the report submitted in 1951 by Mr. Brierly, the first Special Rapporteur on the law of treaties.⁸ He also accepted the Special Rapporteur's position with regard to interpretative declarations.

61. Like some other members of the Commission, he preferred the 1962 formulation to the new text proposed by the Special Rapporteur. The 1962 text had been reached after considerable difficulty and represented a compromise which reconciled the two major aims, that of securing for a treaty the widest possible acceptance, and that of preserving the integrity and uniformity of the treaty obligations.

62. During the 1962 discussion, Mr. Bartoš had said that the Commission "should steer a middle course between two extremes: rejection of reservations unless accepted by all the signatory States, and absolute freedom to make reservations".⁹

63. The 1962 formulation represented a practical and conciliatory approach to a difficult and delicate subject. It had the merit of commencing the section by stating the basic principle in the matter in paragraph 1 of article 18. The Special Rapporteur had indicated that the 1962 text was rigorous in some respects, but its advantages certainly outweighed any shortcomings. It was particularly gratifying to note the generally favourable character of the government comments on the difficult section on reservations. The Danish Government, for example, had welcomed the Commission's proposals "as a constructive attempt to solve the intricate problem of reservations", while at the same time suggesting a simplification of the wording (A/CN.4/177/Add.1).

64. He fully agreed with Mr. Tunkin that governments did not make reservations lightly, and could give a

⁸ *Yearbook of the International Law Commission, 1951*, Vol. II, p. 1.

⁹ See *Yearbook of the International Law Commission, 1962*, Vol. I, 651st meeting, para. 44.

recent example taken from his experience as Legal Adviser to the Ministry of Foreign Affairs of the United Arab Republic. Ratification of the 1963 Vienna Convention on Consular Relations was under consideration and he had submitted to the Foreign Affairs Committee of the National Assembly certain objections by the Customs Department to the provisions dealing with the customs privileges of members of the household of a consular official. At the behest of the Customs Department, it had been suggested that a reservation be made to the effect that only persons below the age of twenty-one should be regarded as members of the household of an official and the Chairman of the Committee had been very concerned that no reservation should be made unless it was really indispensable. There could be no doubt that governments considered a treaty with great care before entering reservations. Reservations served a useful purpose because they sometimes constituted the only way to ensure the participation of a country in a general multilateral treaty.

65. So far as the text was concerned, he favoured that of 1962, subject to drafting improvements.

66. Mr. RUDA said that he had already expressed his general views on the subject of reservations; he would therefore confine his present remarks to article 18 and to the title of the section. On the latter point, he preferred the title "Reservations" because some of the provisions of the 1962 articles 18 to 22, such as paragraph 2 (b) of article 18, could apply both to bilateral and to multilateral treaties. The proposed new title "Reservations to multilateral treaties" would therefore be unsuitable.

67. In reformulating articles 18 to 22, the Special Rapporteur had made a great effort to simplify the wording, but had departed from the system of the 1962 articles. Personally, he found that the 1962 text conformed more to the canons of strict legal logic, and he would therefore comment on article 18 of that text.

68. Paragraph 1 stated the basic principle in the matter of reservations. That principle was not stated in the Special Rapporteur's new text and he urged that it should appear at the beginning of the section.

69. With regard to paragraph 1 (d), he agreed with Mr. Amado that the notion of compatibility with the object and purpose of the treaty, although it had been adopted by the International Court of Justice in its ruling on a particular case, tended to inject a subjective element which presupposed the existence of a judicial body to adjudicate on it. In the absence of any such body, it was impossible to determine whether a particular reservation was or was not compatible with the object and purpose of the treaty, so although the compatibility concept was a valuable one from the theoretical point of view, he could not support paragraph 1 (d).

70. He agreed with those members who thought that the contents of paragraphs 1 (b) and 1 (c) could be omitted; those concepts were already contained in paragraph 1 (a), which might require some verbal adjustment to make that fact clear.

71. Sub-paragraphs (i), (ii) and (iii) of paragraph 2 (a) dealt in detail with the question of the various moments at which reservations could be formulated; those

details could be dispensed with, since the essential provision was already contained in paragraph 1, which stated "A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation . . .".

72. Lastly, he agreed with Mr. Tunkin that paragraph 3, which dealt with minor matters, could be dropped.

73. The CHAIRMAN, speaking as a member of the Commission, explained that originally, in his system of international law, he had been hostile to reservations and had thought that every reservation took away something of the treaty's certainty. From the theoretical point of view he was still of that opinion, which he had expressed at the General Assembly in 1949 and in 1950.

74. He had, however come round to the view that, if reservations were accepted, the Latin-American system was preferable, for it admitted the possibility of formulating reservations in such a way that the reserving State was bound only with respect to the States which accepted those reservations. That system gave the treaty a partial validity which was not unimportant. After the General Assembly's adoption of resolution 598 (VI) on reservations to multilateral conventions, he had recognized that his position was no longer realistic and he had conceded that reservations could be made provided that they were not incompatible with the object and purpose of the treaty. He even thought that reservations to certain non-essential provisions in the treaty could be accepted, even if they were not provided for in the treaty itself. In other words, he remained a supporter of the formula adopted in 1962.

75. One question arose with respect to paragraph 2 (b) of article 18 in the Special Rapporteur's reformulation. If the treaty expressly authorized reservations to certain articles, did it necessarily follow that reservations to the other articles were prohibited? In his opinion, if the treaty specified that reservations were authorized *only* with respect to certain articles, then reservations to the other articles were expressly barred. Apart from that case, he was inclined to think that reservations to the other articles were subject to the general rule.

76. The words "or by the established rules of an international organization", in paragraph 2 (a) of the same article in the Special Rapporteur's revised text, raised the question whether that provision referred only to treaties concluded under the auspices or within the framework of the organization, or whether it meant that States members of an organization which prohibited certain reservations had not the right to make reservations of the same kind in their international relations in general. The question had arisen in the International Labour Organisation, certain States members of which had accused other States members of concluding bilateral treaties which were incompatible with certain rules of the ILO.

77. An example was the convention establishing the International Civil Aviation Organization (ICAO). Certain States, including Turkey, had ratified the Chicago Convention on International Civil Aviation¹⁰ without any reservations, but had stated that for a time

¹⁰ United Nations *Treaty Series*, Vol. 15, p. 296.

they would not grant overflying rights over their territory in conformity with article 5 of that Convention. The Organization had taken note of their ratification as a ratification without reservations. Other States, on the contrary, had made express reservations to article 5 and the Council of ICAO had refused to consider their instruments of ratification valid. Yugoslavia had decided to act similarly with respect to Turkey, without restricting the right of the aircraft of other States to fly over Yugoslav territory. That example showed that it was possible for reservations to have only a technical and secondary scope; the essential thing had been to accept the existence of an organization, to collaborate with it and not to contravene the system which it had established.

78. He was therefore inclined to consider reservations necessary in practice in international relations, but he agreed with Mr. Ago that it was sufficient to tolerate them without going so far as to make publicity in favour of reservations, for such publicity might destroy the principle *pacta sunt servanda*.

Membership of the Drafting Committee

79. Mr. AGO said that, in the absence of Mr. Jiménez de Aréchaga, Mr. de Luna sat on the Drafting Committee as the Spanish language member. Since Mr. de Luna was now himself absent, he proposed that the Commission appoint Mr. Ruda to replace him.

80. Mr. PAREDES proposed that, in order to relieve Mr. Jiménez de Aréchaga, who was Chairman of the Drafting Committee, and also in order to ensure a more equitable representation of the Spanish language in the Committee, Mr. Ruda be appointed a permanent member of the Drafting Committee.

It was so agreed.

The meeting rose at 6 p.m.

798th MEETING

Wednesday, 9 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L/107)
(continued)

[Item 2 of the agenda]

ARTICLE 18 (Formulation of reservations) (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 18.

¹ See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.

2. Mr. TSURUOKA said that the uniform world order should be defined in democratic terms and that each State should democratically agree to some sacrifices to safeguard it, since the idea of democracy was based on the principle of the equality of independent States in international law. The general multilateral treaty, which was discussed and adopted by an international conference by the requisite majority, normally a two-thirds majority, was part of the world order defined in democratic terms. The majority rule was a democratic institution and placed a moral duty on all States which had participated in the conference to preserve the treaty, whether they belonged to the majority or the minority, even at the cost of some special interest.

3. In the case of reservations, the Commission was expected to devise a democratic formula which would respect the will of the majority rather than proclaim the individual freedom of States. He preferred the so-called "unanimity" formula to that described as "flexible", as well as to the collegiate formula, although the latter was closer to the majority rule.

4. An individualist solution in cases where the treaty was silent was deplorable, for it conflicted with the democratic principle and its effects were all the more serious because silence, in a general multilateral treaty, was often the result of the manoeuvres of what was called the "blocking minority".

5. The unanimity rule, on the other hand, had the virtue of simplicity and was by no means obsolete, since it safeguarded the decision which had been reached democratically, nor was it conservative. Rather, it was progressive, if "progressive" was understood as meaning whatever furthered the interests of the majority, which in modern times was composed of the newly independent States and the small and medium-sized countries.

6. The unanimity rule was rigid in appearance only. If reservations were reasonable, the common sense underlying the democratic principle would oblige all States to accept them, and only unreasonable reservations would be rejected. Moreover, the unanimity rule might well co-exist with the presumption in favour of acceptance, after a relatively short time, in cases where the treaty said nothing about reservations.

7. The unanimity formula had the further advantage of being objective, for it would make it possible to dispense with the test of the compatibility of a reservation with the object and purpose of the treaty, which was a vague and subjective criterion, inasmuch as it would leave it to each State individually to judge whether a particular reservation satisfied the test.

8. The draft submitted by the Government of Japan (A/CN.4/175, section I) was based on the ideas he had mentioned. It could easily be made even more flexible. It certainly deserved the Commission's attention if the purpose of the second reading was not merely to make a few minor drafting changes and if it was also intended to improve, where possible, the draft adopted at the first reading. He hoped that his reflections would help the Commission to a small extent to gain a better understanding of the Japanese draft, from which it could undoubtedly derive some benefit.

9. Mr. PAREDES said that he wished to clear up certain points in connexion with reservations. First, it was said in article 1 (Definitions) that a "reservation" was a unilateral statement made by a State. While it was true that, ordinarily, each State made reservations on points which in its judgement called for reservations, it could surely not be said that it was not permissible for a number of States to submit a joint, and therefore more forceful, reservation. The eventuality of joint reservation was quite conceivable, and the idea that a reservation was the act of one single State should perhaps be dropped.

10. Secondly, a State's observations on and objections to a part of a treaty were not always true reservations. A State sometimes made statements in order to indicate the scope it attributed to a particular provision or to express doubt as to its efficacy. Should all such statements be regarded as reservations? Surely, some more specific indication was needed. It was sufficient, for example, for the State to declare whether it was or was not formulating a true reservation. In the absence of such an express declaration, a comment made merely in order to indicate its point of view, and not with the intention of making the article inoperative, might be interpreted by the other States as a true reservation. Conceivably, too, the State which had made the comment in the first place in order merely to express doubt might later come to think that its comment should be maintained as a reservation. In his view, therefore, any observation made by a State should be regarded as a reservation unless the State declared that such was not its intention.

11. Lastly, he thought that, in the case of multilateral treaties, acceptance of a reservation depended on acceptance by a number of States; it would not be enough, for the purpose of the admissibility of the reservation, that one State accepted another State's reservation. For if one State's acceptance sufficed, the force of multilateral treaties, which were concluded to express the will of a large number of States for a particular purpose, would be impaired by the reservation. A multilateral treaty would collapse if two States could *inter se* modify a part of the treaty and apply the modified treaty solely as between themselves.

12. Mr. PESSOU said he realized that reservations were in a way a last resort, for they were liable to create legal anomalies. Yet, in a world in which certain attitudes seemed to be at variance with the most elementary principles of ethics, reservations offered the means of at least neutralizing the consequences which those attitudes might produce. For that matter, GATT and other international institutions made frequent use of the facility which reservations offered to States.

13. In spite of the different opinions which had been expressed, the Commission agreed that reservations should be regarded as an accepted practice. The great merit of articles 18 to 20, as reformulated by the Special Rapporteur, was that they reflected faithfully all the suggestions put forward since 1962. The Special Rapporteur's talent for constantly recasting the text was such that, even when faced with suggestions contrary to his initial wording, he could still produce an alternative solution

which might not satisfy everyone but had some legal value all the same.

14. The reservation undoubtedly introduced into treaties a diversity of rules, which was perhaps incompatible with the unifying function of the treaty regulation. Article 18, as revised by the Special Rapporteur, authorized the parties to formulate certain reservations which, in order to be valid, had to be accepted by the other contracting parties. The text made it clear that a State could not be bound in its treaty relations without its consent. Consequently, no reservations could be pleaded against it, so long as it had not given that consent. As a multilateral treaty was the outcome of a free and symmetrical agreement, none of the parties was at liberty to destroy or compromise, by a unilateral decision, the object and purpose of the treaty. Accordingly, article 18 stressed the concept of the integrity of the treaty.

15. In another paragraph, the Special Rapporteur agreed that that principle might be relaxed in multilateral treaties for certain reasons, such as the universality of the United Nations, in order to facilitate a wider participation in treaties concluded under United Nations auspices.

16. Some speakers had criticized article 18 as a whole as being too descriptive, but the Special Rapporteur was surely justified in using the descriptive method when opinion in the Commission was so unsettled.

17. Without discussing once again the practices of the Organization of American States, he thought that article 18 as proposed by the Special Rapporteur was relevant and necessary, unless another text could be drafted which would reflect even better current practice in regard to reservations.

18. The CHAIRMAN said that, as no other members wished to comment further on article 18, he would call upon the Special Rapporteur to sum up the discussion.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that for the most part members had directed their comments to article 18, though he had not always been clear to which of the two texts of that article, but they had also touched on the general scheme of the provisions on reservations. In order to comply with the Chairman's request, he would try to do something by way of a summing up of the discussion on reservations up to that point, without referring to the drafting points that could be left to the Drafting Committee.

20. As he had already indicated at the 796th meeting when introducing section III concerning reservations, in rearranging the material his aim had been not to alter the substance of the 1962 draft, except on a few points concerning which governments had expressed direct and substantive criticisms. He had been surprised at the adverse reaction to his proposals from some members of the Commission on the ground that the new texts were descriptive in character. That was a charge that could with much greater justification be levelled against the 1962 texts which they favoured.

21. One of his difficulties when modifying the presentation of the provisions on reservations in order to take account of government comments had been the very complexity of the 1962 draft. For that complexity the

Commission had no need to apologize, as it had been an extremely arduous business to work out the general lines of section III after the lengthy discussions both in the Commission and in the Drafting Committee on the difficult topic of reservations. The particularly involved form of article 20, which in itself was a reflection of the difficulty of matching its provisions with those of article 18, had been a cogent reason for attempting a rearrangement of the material.

22. Leaving aside what seemed to him the primarily psychological issue of the method of stating the right to formulate reservations, as to which there was a division of opinion in the Commission, the effects of either of the two versions before the Commission would be very much the same when applied to actual treaties. One of the advantages of his revised text, however, was that it distinguished more clearly between the cases to which the flexible system applied and those to which it did not. He wished to remind members that he himself as Special Rapporteur had proposed the flexible system² and believed that, to meet the needs of contemporary international society, it should be given its place in the draft. But ideally, of course, Mr. Ago had been right in his general thesis that reservations were to be deplored as detracting from the universality of the law. In his view, it was particularly important to underline the distinction because of the new rule the Commission had introduced into its draft concerning tacit consent, to which States would undoubtedly give very careful attention. Indeed, one Government³ had already stated its objection to the application of the rule in cases where the reservation was expressly or impliedly prohibited by the treaty itself.

23. If, as certain members preferred, it was decided that the section on reservations should begin with a rule affirming a general right to make reservations, his new arrangement would have to be set aside and something on the lines of article 18, paragraph 1, of the 1962 text would have to be retained. In that event, the rest of the original article 18 would require careful examination so as to see whether the text could be shortened. In paragraph 1, sub-paragraphs (a) and (b) could be fused, but the latter could certainly not be dropped as it dealt with a separate point, while sub-paragraph (c) would also need careful examination. As he had already mentioned at the previous meeting,⁴ a great deal of the discussion at the fourteenth session had been focussed on the wording of those three sub-paragraphs because of the two strongly opposed currents of opinion, the one in favour of the maximum freedom in formulating reservations, and the other apprehensive lest too liberal an approach should prove detrimental to the principle of the integrity of treaties. The whole problem would have to be examined by the Drafting Committee, and subsequently by the Commission itself, and he was only anxious to stress the importance of not upsetting the balance achieved in 1962 by any hasty decision to drop sub-paragraphs (b) and (c).

² See the Special Rapporteur's first report (A/CN.4/144) in *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 60 *et seq.*, articles 17, 18 and 19 and commentary.

³ The Danish Government; see in A/CN.4/175, section I, that Government's comment on articles 18-20.

⁴ 797th meeting, para. 32.

24. It was also important, in view of the delicacy of the whole subject of reservations, in which so much depended on the mechanics of their acceptance or rejection, particularly where multilateral treaties were concerned, not to underestimate the importance of procedural clauses. It might prove necessary, even at the cost of greater length, to delineate fairly precisely the manner in which the flexible system operated. In his new draft for article 20 he had endeavoured to include, in shortened form, the procedural provisions, but part of that text perhaps went beyond procedure, and the new title which he had given to the article needed changing. If his rearrangement failed to find favour, the Drafting Committee might still find it possible to set out the procedural clauses shortly in a slightly different form: essentially, the matter was one of drafting.

25. There seemed to be general agreement that the special case of a treaty concluded between a small group of States had to be covered. In the context of section III, governments had not criticized the phrase "small group" though they had done so where it had been used in article 9. His own view was that alternative wording should be devised to cover those instances where, for various reasons, the unanimity rule was needed. Further attention might have to be given to the best way of expressing the Commission's views on such points as the fewness of the parties, the nature of the treaty or other circumstances indicative of the parties' intentions, so as to forestall likely criticism.

26. He wished to reserve more final conclusions on the trend of the discussion until consideration of articles 19 and 20 had been completed.

27. The CHAIRMAN asked whether the Commission wished article 18 to be referred to the Drafting Committee forthwith.

28. Mr. BRIGGS said it would be premature to do that until the Commission had completed its consideration of articles 18, 19 and 20 as a whole.

29. Mr. YASSEEN said that the article could hardly yet be referred to the Drafting Committee, because the Commission had not yet decided whether it accepted its own 1962 text or the revised version proposed by the Special Rapporteur.

30. The CHAIRMAN said he agreed with that view; he invited the Commission to take up article 19.

ARTICLE 19 (Acceptance of and objection to reservations)⁵

31. Sir Humphrey WALDOCK, Special Rapporteur, said that having already explained at length the considerations that had led him to reshape articles 19 and 20, he had nothing further to add at that stage and would prefer to hear first what members had to say.

32. Mr. ROSENNE said that before discussing article 19 in detail, he wished to make certain general observations further to those he had put forward at the previous meeting.

33. Mr. Tunkin had rightly described reservations as an institution of international law, and as such they were

⁵ See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.

a self-contained and independent subject that had to be considered in the light of the reasons which had given rise to it before it could be decided how it should be integrated into the law of treaties as a whole. Reservations could not be considered in terms of preconceived notions derived from the domestic law of contract, because there was no analogy even between multipartite contracts and treaties concluded between a small group of States.

34. His own experience confirmed what had been said by other members about the embarrassment, not to say distaste, which reservations caused for those who had to deal with them at the governmental level, a feeling that went beyond the issue whether or not a reservation or an objection to a reservation was necessary and how it should be formulated. Personally, he had found them amongst the most difficult international documents to draft, and they created particular difficulties when it came to applying a treaty containing one accepted by one's own country. It was generally true to say that reservations and objections to them were never lightly made.

35. In the development within international organizations of the institution of reservations to multilateral treaties, from the time of the Austrian Government's reservation to the International Opium Convention of 19 February 1925,⁶ which had led to the report of the Committee of Experts for the Progressive Codification of International Law of the League of Nations,⁷ the issue had been posed in terms of the admissibility of a reservation and its consequences for determining whether or not a treaty was in force and whether, in the event of objection, the reserving State was a party to it. That approach had led to the familiar complications connected with the problem of deciding when a treaty requiring a specified number of ratifications actually came into force. Reservations had also been discussed in those terms at the time of the adoption by the General Assembly of its resolution 478 (V), after the problem had arisen for the Secretary-General of deciding whether the Convention on the Prevention and Punishment of the Crime of Genocide had or had not come into force with the deposit of twenty instruments of ratification: and it was also in those terms that the question had been put to the International Court and to the Commission in 1951, and reconsidered by the General Assembly in its resolution 598 (XI).

36. He believed that that aspect of the issue of admissibility had fundamentally been solved in 1962 by the International Law Commission in the compromise between some two or three main trends of opinion as to what was the correct law in the matter of reservations. An element in that compromise had been the inclusion of the reference to treaties between a small group of States in response to Mr. Jiménez de Aréchaga's insistence that, unless the provisions were very carefully drafted, what had come to be known as the Latin American formula would cease to apply in the area where it had originated.⁸

⁶ League of Nations *Treaty Series*, Vol. LXXXI, p. 317.

⁷ League of Nations, *Official Journal*, 1927, pp. 770, 800, 881.

⁸ *Yearbook of the International Law Commission*, 1962, Vol. I, 652nd meeting, para. 4.

37. He was convinced that the compromise represented the view of the great preponderance of governments and of most members of the Commission, and should be maintained *in toto*. He himself had no wish to disturb it, and at the previous meeting had only wished to suggest that, within the frame of that compromise, the Commission should move on so as to cover all the problems posed by the institution of reservations; it should fix its sights on the issue of participation and the effects of permitted reservations on the application of a treaty and their relevance to article 30—if retained—and to article 55, which would surely be retained. If it could complete its presentation of the law on reservations in that way, some of the difficulties attendant upon having to decide when a treaty came into force, or how many times etc., might be overcome. Those problems, which had been so much to the fore during the previous discussion, were perhaps now of diminishing significance.

38. In restudying the problem of reservations in terms of the application of treaties, he had come across a passage in the French translation of Mr. Tunkin's recent book, which read: "Si aucune des parties n'a émis d'objections contre la réserve élevée, cette dernière apporte une modification: le contenu du traité différera lors de son application entre l'État, auteur de la réserve, et tous les autres États signataires."⁹ He thought that was the point and that if the Special Rapporteur's new article started off on that note, the Drafting Committee might be able to complete the thought and in that way it might be possible to avoid some of the difficulties to which Mr. Briggs had drawn attention.¹⁰

39. The Special Rapporteur in his new draft seemed to be moving in the direction he (Mr. Rosenne) was advocating for purposes of completing the Commission's work, and he fully agreed with him as to the confusion caused by the complicated structure of the original text of article 20, which was focussed more on the question of participation in the treaty than on that of the application of the treaty. Certainly he had made out a convincing case for changing the architecture of the 1962 draft of section III as a whole, and, with one exception, he had succeeded in changing it without touching the substance. Mr. Pal had indicated at the previous meeting the lines which the Commission and the Drafting Committee should follow. The latter would have the double function of examining the Special Rapporteur's new presentation of the different provisions in the light of the explanations he had given in his report and during the discussion of the reasons for the changes, and of fitting together the different elements in whatever form was likely to commend itself to the majority. He himself, although in favour of the Special Rapporteur's rearrangement, would not carry his preference to the length of opposing the retention of the 1962 scheme.

40. With regard to the wording of article 19 as reformulated by the Special Rapporteur, he would make certain comments on drafting which also involved some points of substance. He was not satisfied with the expression "Where a treaty is silent" in paragraph 1.

⁹ *Droit international public — Problèmes théoriques*, Paris 1965, p. 70.

¹⁰ 796th meeting, paras. 34-43.

The first United Nations Conference on the Law of the Sea had decided, at its twentieth plenary meeting, that the Convention on the Territorial Sea and the Contiguous Zone “should not contain any clause dealing with reservations”,¹¹ and later that the depositary clause of the Convention should not contain any instructions to the depositary relating to the transmission of notices on the subject of reservations.¹² The question had immediately arisen whether the Convention on the Territorial Sea could be regarded as “silent” on the subject of reservations. At that same twentieth plenary meeting, divergent interpretations had been given by a number of representatives of the effect of the Conference’s decision; some had maintained that “the absence of a reservations clause meant that any State was entitled to make whatever reservations it wished”; others had taken the view that “any reservation made by a particular State would be valid only *vis-à-vis* States which accepted it”.¹³ Subsequently, reservations had been made by some States and objected to by others, and the Convention had nevertheless entered into force.

41. He suggested the deletion of the reference to “the fewness of its parties” in paragraph 2, since the concept was already covered by the references to “the nature of the treaty” and “the circumstances of its conclusion”. Perhaps, in order to make the position fully clear, it might be advisable to refer to the “manner” of the conclusion of the treaty. Since that question was of particular concern to the Latin American members of the Commission, as part of the 1962 compromise, he would be interested to hear their views on the point.

42. The question also arose whether that part of article 19 should not follow closely the language of article 46, paragraph 2 (*b*), relating to severability, thus introducing the idea that, for the type of treaty in question, no reservation was acceptable automatically if it related to a clause which was “an essential condition of the consent of the parties to the treaty as a whole”. That matter had already been mentioned at the 706th meeting¹⁴ and for that type of treaty seemed to be of relevance.

43. He suggested that paragraph 3, dealing with the case of a treaty which was the constituent instrument of an international organization, which he accepted in principle, should be postponed until the Commission came to consider article 48.¹⁵ It should become either the last paragraph of article 19 or a separate article altogether; in its present position, it disturbed the flow of thought.

44. In fact, there were two types of such constituent instruments: the first was that drawn up for the sole purpose of establishing an organization; the second was that in which the establishment of the organization was an incidental outcome of the negotiations on the treaty, as had been the case with some of the commodity

¹¹ *United Nations Conference on the Law of the Sea, Official Records, Vol. II, p. 71.*

¹² *Ibid.*, p. 72.

¹³ *Ibid.*, pp. 71-72.

¹⁴ *Yearbook of the International Law Commission, 1963, Vol. I, 706th meeting, paras. 25 and 61.*

¹⁵ Article concerning treaties which are constituent instruments of international organizations and provisionally numbered “article 3 *bis*” in the Special Rapporteur’s reformulation.

organizations. The ICAO constitution was one example of a sort of hybrid; the provisions constituting it were buried among the hundred or so articles of the Convention on International Civil Aviation of 7 December 1944¹⁶ dealing with a wide variety of problems of air navigation. In the circumstances, it might be advisable that the Commission should make clear to what types of constituent instruments it wished to refer.

45. An instance of a reservation to a treaty which was a constituent instrument appeared to be referred to in the reply of the United Kingdom Government to question 5 of the Secretary-General’s questionnaire concerning depositary practice;¹⁷ the reply referred to the International Sugar Agreement of 1958 (A/5687, p. 38). With regard to the Secretary-General’s own practice in that respect, paragraph 22 of part II of the Secretary-General’s report should be noted (A/5687, p. 93). On that point, and perhaps more generally on article 3 *bis* (article 48) and other related questions it might be as well to invoke articles 25 and 26 of the Commission’s statute and seek the views of the specialized agencies and other international organizations; it was not enough to ask governments for their comments.

46. With regard to paragraphs 4 and 5, he believed that the basic rule embodied in paragraph 5—the only new rule in the revised text proposed by the Special Rapporteur—should constitute the point of departure; paragraph 4 should be limited to the simple proposition that the objecting State had the option of either regarding the whole treaty as inapplicable in its relations with the reserving State or accepting the treaty subject to the reservation. That proposition had been put forward during the discussions at the fourteenth session¹⁸ and accepted by the Special Rapporteur; it had found adequate expression in paragraph 2 (*b*) of article 20 as adopted in 1962. A text of that kind would obviate the difficulty over entry into force and place the emphasis where it belonged, namely, on the application of the treaty in the bilateral relations of the States concerned. With regard to the compatibility criterion, he had been persuaded by the views of the Australian, Danish and United States Governments, referred to in the Special Rapporteur’s observations (A/CN.4/177/Add.1, commentary on paragraph 4 (*b*) of the new article 19), and would no longer insist, as he had done in 1962, that it should apply to objections in the same way as to reservations themselves.

47. Paragraph 5 of the Special Rapporteur’s text was new but could be justified in the light of material contained in the Secretary-General’s report, especially under the heading “Entry into force” in part I (A/5687, pp. 78-83) and part II (A/5687, pp. 96-97).

48. Mr. CASTRÉN said that the new article 19 proposed by the Special Rapporteur incorporated the provisions both of paragraph 1 (*d*) of article 18 in the 1962 draft and of article 20; the latter were the subject of

¹⁶ *United Nations Treaty Series, Vol. 15, p. 296.*

¹⁷ *Depositary Practice in relation to Reservations*: report of the Secretary-General submitted in accordance with General Assembly resolution 1452 B (XIV) (document A/5687; the questionnaire is reproduced in annex I to that document).

¹⁸ *Yearbook of the International Law Commission, 1962, Vol. I, 653rd and 654th meetings.*

most of the objections voiced by governments concerning the rules relating to reservations. The Special Rapporteur had carefully redrafted those rules, and, in his (Mr. Castrén's) opinion, to good effect. Except on a few points of minor importance, he was prepared to accept the new version of article 19.

49. In paragraph 1, the replacement of the verb "formulate" by the verb "propose", in speaking of reservations, was an improvement.

50. The provisions of paragraph 2 were based on the introductory clause of paragraph 3 in the former article 20, but very judiciously developed and supplemented the clause by some new elements and so made the rules more flexible. The solution proposed by the Special Rapporteur was sound and practical, for it would depend not only on the fewness of the parties, but also on the nature of the treaty and the circumstances of its conclusion whether the effectiveness of a reservation should be conditional on acceptance by all the parties.

51. He had no comments to make on paragraph 3, and his comments on paragraphs 4 and 5, which should be read together, related only to the form. In paragraph 4, the saving clause "unless the State concerned otherwise specifies" should apply to sub-paragraph (b) only, as in the 1962 text, for a State which accepted a reservation could hardly refuse to recognize as a party to the treaty the State which had proposed the reservation.

52. Paragraph 5 seemed unnecessary and could be deleted. The Special Rapporteur had not explained clearly, in his commentary, why he had thought it desirable to insert that new provision in his draft. It seemed to duplicate the preceding paragraph, because what was stated expressly in paragraph 5 was at least implicit in paragraph 4. If the words "as soon as the treaty is in force", which appeared in article 20, paragraph 2 (a), as drafted in 1962, were added at the end of paragraph 4 (a) of the new article 19, the text would be more precise and more concise.

53. Mr. YASSEEN said that the Commission would have to choose between the two modes of presentation, that adopted in 1962 and that newly proposed by the Special Rapporteur. More than a drafting question was involved: the decision might also affect the substance of the Commission's proposals on reservations or the importance attached to them. He thought that the 1962 presentation was more in line with the existing institution; it was more methodical and more logical, for it dealt first with the formulation of reservations, then with the acceptance of reservations and with objections, and lastly with the effects, the application and the withdrawal of reservations. That was the general theory of the reservation as an institution of international law. The Special Rapporteur's presentation was based on one very important consideration, the distinction between the case where the treaty itself answered the question and that where it did not, but it did not build up the theory in such a clear and logical way.

54. One very important rule in article 19 as drafted in 1962 should be retained: that of presumed acceptance if there was no objection within twelve months of

notice of the reservation. But the period of twelve months might seem rather short, in view of the way in which the machinery of government worked.

55. He had no objections to the substantive solutions proposed by the Special Rapporteur in his new version. Paragraph 2 of his new article 19 was an improvement on the earlier text; the inclusion of a reference to the nature of the treaty and the circumstances of its conclusion made it slightly less difficult to apply the criterion.

56. At the previous meeting, Mr. Ago had said what a serious step the Commission would be taking if it decided to encourage the freedom to formulate reservations to general multilateral treaties, and had argued that that freedom might impair existing obligations under rules derived from some other source of law, such as custom. But whether the customary rule existed, and more precisely its scope, and whether it was general or special, were controversial questions which had caused numerous difficulties in the contemporary international order. A treaty, however, did not indicate whether the one or other of its rules codified the law or progressively developed international law. The question whether a treaty rule had a source in customary law was not therefore answered by the fact that it occurred in a treaty. An attempt to solve the problem by curtailing generally the freedom to formulate reservations might result in a bad solution, since the customary nature of those rules might not be recognized. In any case, the conference convened to draw up the treaty would be free expressly to prohibit reservations, either to the treaty as a whole or to some of its provisions; by so doing, it would be shielding certain rules from reservations, either because of their importance—if they progressively developed international law—or because they were in any case positive rules of international law.

57. Mr. TUNKIN said that he found the 1962 text of article 19 broadly acceptable; both from the theoretical and from the practical points of view, it contained a better presentation of the whole problem. It dealt with reservations as an institution, unlike the Special Rapporteur's proposed new text, which only dealt with certain groups of cases.

58. Referring to Mr. Rosenne's remarks on the history of reservations, he pointed out that reservations had become a well-established institution by the end of the nineteenth century. Textbooks mentioned such early cases as the reservations by Sweden to the General Act of the Vienna Congress of 1815 and even the Austrian reservations to the Franco-Danish Treaty of 1748.

59. Taking the 1962 text as a basis, he thought that article 19 could be considerably simplified. Paragraph 2 could be omitted. It was hardly necessary to describe the various forms of express acceptance of a reservation; the form could vary, but since the acceptance was given *expressis verbis*, there was no need for any description.

60. Some governments had expressed certain well-founded objections to paragraph 4. They had pointed out that the Commission had introduced an unnecessary complication by incorporating the idea of an objection to a reservation by a State which was not a party to

the treaty. Since, from the practical point of view, there was hardly any need to cover that case, and since the attempt to do so greatly complicated the whole matter, he suggested that paragraph 4 be dropped altogether; article 19 would then refer only to the parties to the treaty.

61. In paragraph 5, the procedural details should be omitted; its provisions should merely state the simple rule that an objection to a reservation had to be formulated in writing.

62. Briefly, he suggested that paragraph 1 should remain as it stood, that paragraph 2 should be omitted, that paragraph 3—to be renumbered 2—should deal with implied acceptance, that paragraph 4 should be omitted, and that the concluding paragraph should state the requirement that the objection should be in writing.

63. Mr. ELIAS said that, although the new text proposed by the Special Rapporteur for articles 19 and 20 embodied most of Mr. Tunkin's suggestions for the improvement of article 19, there appeared to be some advantage in keeping the order of exposition of the 1962 text. However, that question could be safely left to the Drafting Committee. His own remarks would relate to the 1962 text of article 19.

64. In their comments, some governments had put forward the criticism that article 19 seemed to apply to all reservations, including those which were clearly inadmissible. In fact, where a reservation was not permitted by the treaty, there could be no question of acceptance or objection, because the reservation was incompatible with the object and purpose of the treaty.

65. He noted that the Argentine delegation in the Sixth Committee had pointed out that, under the Pan-American doctrine, where a treaty did not contain any provision relating to reservations, a reservation might be valid "even if not compatible with the object of the treaty" (A/CN.4/175, Argentina, and section III of the 1962 draft). However, the Commission had decided at its fourteenth session in 1962 to accept the compatibility test for the validity of reservations, and he saw no reason to depart from that decision.

66. He agreed that paragraph 2 could safely be dropped. Paragraph 3 raised two main questions: the first was whether it was workable as it stood or whether it would not be better to confine the provisions of article 19 to the parties to the treaty. The second was that of the time-limit, a question which was made slightly clearer by the Special Rapporteur's new text of paragraphs 4 (a) and 4 (b) of article 20. In that new paragraph 4 (a), the time-limit of twelve months was rather short, but some time-limit was undoubtedly necessary for the making of an objection to a reservation. The suggestion by one Government¹⁹ for the simplification of the provisions of paragraph 4 and their transfer to a new sub-paragraph (c) of paragraph 3 of article 20 could be examined by the Drafting Committee. In paragraph 5, the wording should be simplified, and the very real problem of laying down a time-limit would have to be considered by the Drafting Committee.

67. The Special Rapporteur's new text for article 19 was generally acceptable in substance, subject to doubts regarding the expression "fewness of its parties" and the cross-reference to article 3 *bis*.

68. Mr. AGO said it was not very easy to come to a decision on article 19 particularly as the Commission was dealing with two texts of different content, since their provisions were distributed differently in the two versions of the section on reservations. Speakers referred sometimes to the one and sometimes to the other of the two texts, and consequently the discussion was somewhat confused.

69. At the previous meeting, he had expressed a certain preference for the 1962 text. After hearing the Special Rapporteur, he perceived certain advantages in his reformulation which he had not seen at first.

70. If a treaty contained provisions on reservations, there was no great difficulty; the Commission would no doubt find a satisfactory wording to cover that case. The problem became more complicated if the treaty was silent on the subject of reservations. Without suggesting that the Commission should abandon the system which it had adopted, after long discussions, in 1962, he wished to point out that that solution was a makeshift which presented many disadvantages; not least, it would have the effect that all inter-State relations would be governed by different rules. Whereas it had been hoped to establish a certain uniformity, the utmost diversity would prevail. In addition, that system might have unfortunate repercussions on certain generally accepted customary rules, which might be badly shaken. If two States decided not to follow one of those rules, the rule would cease to carry weight among the other States.

71. With regard to cases where a treaty was silent on the subject of reservations, the principle which the Commission wished to establish was that reservations were acceptable unless they were incompatible with the object and purpose of the treaty. Actually, despite its seeming objectivity, the "compatibility" test was very subjective. Each State, in every bilateral relationship, would be free to interpret a reservation as compatible, or as incompatible, with the object and purpose of the treaty; in that way, it would not only become possible to derogate bilaterally from the rules which were in fact essential to the treaty, but situations would arise where one group of States would regard a particular reservation as not inconsistent with the purpose of the treaty, whereas another group would hold the contrary opinion.

72. Accordingly, he urged the Commission to state as clearly as possible that the system it proposed was a system applicable to residuary cases, to cases where the parties had failed in their duty to include provisions concerning reservations in the treaty itself. Those cases should be as few as possible.

73. Several speakers had referred to the first Conference on the Law of the Sea. What had happened at that Conference was that, when the participating States had tried to designate the articles in the Convention on the Territorial Sea and the Contiguous Zone to which reservations would be admissible, some States had argued

¹⁹ That of Australia; see that Government's comments on article 19 in document A/CN.4/175, section I.

that reservations should be admissible to a very few articles only, whereas others had thought that reservations should be permissible to a larger number of articles; no State, however, would have proposed that reservations should be admissible to all the rules included in the Convention in question. As the Conference had been unable to reach agreement, and as no reservations clause had been included in the Convention, some States had promptly declared that they interpreted the absence of such a clause as meaning that reservations were not admissible to any of the rules of the convention, whereas others had declared that reservations could be made to all the rules. In a like case, the system contemplated by the Commission would lead to the paradoxical result that, at an international conference where the majority was in favour of restricting the possibility of making reservations, but where a two-thirds majority was necessary for the adoption of a reservations clause, the minority would be able to secure the admission of all reservations, subject only to the proviso—which might not be very effective—that reservations had to be compatible with the object and purpose of the treaty. To guard against that inevitable difficulty, the Commission should express in very clear terms the hope that every treaty would contain provisions concerning reservations indicating whether reservations were admissible and, if so, to which articles.

74. The Commission would help States themselves by adopting that attitude, since the problems which arose in each State in connexion with the ratification of a treaty were greatly simplified if the treaty itself specified the articles to which reservations could be made. If the treaty was silent on that point, the Ministry of Foreign Affairs would probably dislike the idea of expressing reservations, but it often had to yield to other government departments, such as the Ministry of Finance or the Ministry of Justice, which insisted that the State should make certain—not always necessary—reservations.

75. Mr. Tunkin had suggested the deletion of paragraph 4 of the article 19 adopted in 1962; but in his (Mr. Ago's) opinion that would be a dangerous step. For what would happen during the initial phase of ratification? A reservation might be made even by the first State to ratify, whereupon all the States entitled to become parties to the treaty should also be entitled to object to the reservation. That was a technical rather than a fundamental problem, but it deserved consideration nonetheless.

76. At the previous meeting, Mr. Verdross had raised the difficult and important question of interpretative declarations and had rightly observed that the question was not really connected with the interpretation of treaties. If a State proposed to change the contents of a treaty by an interpretative declaration, that was an act closely resembling a reservation. Nor could an interpretative declaration be fully equated with a reservation, since it did not prevent the article to which it related from entering into force; the article certainly entered into force with respect to the State making the declaration, but with one particular meaning rather than another. The question would probably have to be dealt with in a specific provision in the draft.

77. Mr. BRIGGS said that he would comment on the new text for article 19 proposed by the Special Rapporteur. He had been fully convinced by the Special Rapporteur's statement of his reasons for redrafting the articles on reservations and found the new architecture much superior to that of the 1962 articles.

78. With regard to paragraph 2, despite what Mr. Rosenne had said, he thought it was important to retain the reference to the "fewness" of the parties to the treaty; a reference to the manner of the conclusion of the treaty would not cover the point.

79. He wished to make certain general remarks on reservations, with special reference to the provisions of paragraph 4 of article 19. In the Secretary-General's report on "Depositary practice in relation to reservations" (A/5687), the questionnaire sent to governments spoke of the "sovereign right" to make reservations. In fact, there was no sovereign right to make reservations; if there was any "right" to formulate reservations, it was of limited value until the legal effect of the reservation was established, and that legal effect depended, not on any presumed "sovereign right", but on international law.

80. The position was clear in the traditional rule of international law on the subject, and the League of Nations had merely adhered to the existing rule, which antedated both the League and the Pan-American variant which had not been formulated until 1932. According to the traditional rule, the acceptance of a reservation by all the parties to the treaty was necessary in order to give legal effect to the reservation. That rule had the advantage of being a practical rule which worked, and could be applied without ambiguity. Moreover, it preserved the integrity of the treaty, a phrase which had been questioned in the Commission but which was really a clear and simple concept: it referred to the consensus achieved in the formulation of the treaty's provisions in the light of its objects and purposes. It also prevented a State from unilaterally securing for itself a specially privileged position in relation to the rules established in the treaty.

81. In its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice had found the traditional rule of "undisputed value",²⁰ while the Commission itself had recognized that value when it had maintained the rule in its draft, implicitly with regard to bilateral treaties and explicitly with regard to certain treaties mentioned in the Special Rapporteur's new paragraph 2 of article 19. It was, moreover, incorrect, or at least ambiguous, to label that rule "the unanimity rule", for what an objecting State tried to do was to preserve the consensus reached by the conference; it was not arbitrarily vetoing that consensus. In view of the solid advantages of that rule, he ventured to inquire what was the purpose of the proposal to depart from it in respect of certain treaties.

82. The great increase in the number of parties to some multilateral conventions had led to the belief that, where a majority of the parties was willing to

²⁰ *I. C. J. Reports 1951*, p. 21.

accept a particular reservation as compatible with the treaty, it was no longer desirable that a single State, by its objection, should be able to prevent the reserving State from becoming a party. Personally, he was willing to accept the view that the consensus should prevail in the case of such reservations, just as it prevailed in the formulation of the treaty. However, he found quite unacceptable the argument that, because a State had been outvoted on a particular rule incorporated in the treaty by the conference after careful consideration and perhaps even as part of a compromise, that State had a legal right to be a party to the treaty while repudiating that rule. And it was precisely such a right that would be created and conferred by paragraph 4 (a) of the new article 19.

83. The Commission had reacted against the rule according to which one State could prevent a reserving State from becoming a party to the treaty while maintaining a reservation that the majority of the parties found acceptable; in that reaction, however, the Commission had gone to the opposite extreme of permitting the reserving State to dictate the terms upon which it would become a party even if a majority opposed those terms, provided only that one State could be persuaded to accept the reservation objected to by the majority. Such had not been the original proposal of the Special Rapporteur, a proposal which had been intended to limit the rule in question to general multilateral treaties; yet, despite the warnings of the Special Rapporteur at the fourteenth session,²¹ the Commission had adopted the extreme position embodied in paragraph 2 (a) of article 20 of its 1962 draft and reproduced in the Special Rapporteur's revised paragraph 4 (a) of article 19. In that extreme form, the provision applied not merely to general multilateral treaties but to all multilateral treaties except for constituent instruments of international organizations and treaties limited to a small number of parties. In the Special Rapporteur's new text for article 19, the new criterion of the integrity of the treaty had been introduced into paragraph 2, where it was perhaps somewhat vaguely expressed but was nonetheless indispensable to render the draft acceptable to certain States.

84. The new rule thus introduced had been defended principally on the excuse that it promoted the universality of international law. For his part, he was not at all impressed by the argument that it was desirable to secure the widest possible participation in so-called "general multilateral treaties", if it was to be secured at the price of permitting reserving States to choose the rules of international law by which they would be bound. The right of any State to refuse to become a party to a treaty was undisputed, but there was no element of progressive development in encouraging the fragmentation and the undermining of a treaty provided only that one State other than the reserving State was willing to tolerate that situation by accepting the reservation. The result was a fictitious universality of parties which

disguised a lack of genuine universality in the acceptance of the rules of law established by the treaty.

85. For those reasons, he proposed, as a compromise between the two extreme positions, that paragraph 4 of the Special Rapporteur's new article 19 should be replaced by the following provision :

" 4. In cases other than those referred to in paragraphs 2 and 3,

(a) Acceptance of a reservation by a majority of the parties to the treaty permits the reserving State to become a party to the treaty;

(b) Objection to a reservation by any party precludes the application of the provisions of the treaty as between the objecting State and the reserving State, unless otherwise specified."

86. The idea embodied in that proposal was that, since the rules of law formulated in a multilateral treaty were adopted by some form of majority vote, the admissibility of any particular reservation should be based on a comparable rule.

87. There remained a problem which neither that proposal nor the 1962 draft, nor in fact the Special Rapporteur's new draft, solved satisfactorily, that of the wide variety of multilateral treaties. Although both multilateral treaties which were the constituent instruments of international organizations and multilateral treaties between a small group of States had been excluded from the residual rule, the Special Rapporteur, in his report (A/CN.4/177/Add.1, para. 3 of the observations preceding article 18), drew a distinction between "general multilateral treaties" and "other treaties having a large number of parties", and he himself had, at a previous meeting,²² drawn attention to the wide variety of existing multilateral treaties.

88. With the exceptions mentioned, the Commission had endeavoured to adopt a general residual rule for widely differing categories of multilateral treaties. The adoption of the rule proposed in paragraph 4 (a) of the new article 19 would be fatal to many of those treaty régimes. On reflection, he had come to the conclusion that the surest way to promote the progressive development of international law with regard to those multilateral treaties was to require majority acceptance of reservations for treaties not falling under the provisions of paragraphs 2 and 3 of the Special Rapporteur's new article 19.

89. Mr. AMADO, in reply to Mr. Ago, said that the die was cast and that the Commission could not move backwards. States would not agree to renounce what, rightly or wrongly, they considered a gain which had been confirmed by the Commission in its 1962 draft. The gain was no doubt of debatable value, and one might sigh for the times when every treaty had been a harmonious unit; but the fact remained that many things had been changed by multilateralism.

The meeting rose at 1 p.m.

²¹ *Yearbook of the International Law Commission, 1962, Vol. I, pp. 226 and 230.*

²² 791st meeting, paras. 73 and 74.

799th MEETING

Thursday, 10 June 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Organization of Future Sessions

[Item 5 of the agenda]

and

Dates and Places of Meetings in Winter and Summer 1966

[Item 6 of the agenda]

1. The CHAIRMAN announced that the officers had met the previous day to consider questions concerning the Commission's work up to the end of 1966. The officers had considered first the discussions which had taken place at several private meetings of the Commission; secondly, a letter addressed to the Chairman of the Commission by Mr. Stravropoulos, Legal Counsel of the United Nations, confirming and explaining the statements he had made several days before at a private meeting; and, thirdly, the results of an informal inquiry among the members of the Commission as to their availability for a winter session in January 1966 and for extended summer sessions in 1965 and 1966. The officers' conclusions would be presented by the General Rapporteur.

2. Mr. ELIAS, General Rapporteur, said that, in accordance with the Commission's decision at its fourth private meeting on 4 June 1965, the members of the Commission had been consulted by questionnaire. The results of that consultation had been that neither the suggestion to extend the present session by one week nor that to extend it by two weeks had received any measure of support. The suggestion to hold a winter session from 3 to 29 January 1966 had been approved by all those members who had expressed a view on the question, while the suggestion to extend the 1966 summer session by two weeks had received the support of a majority.

3. In the light of those results, the officers of the Commission proposed that a letter should be addressed to the Legal Counsel, in reply to his letter, reaffirming the Commission's decision taken at its previous session¹ to recommend the holding of a winter session in January 1966. In the light of the progress of the work, the Commission would decide, early in the summer session of 1966, whether any extension of that summer session was necessary or not. The Commission's decision on both those points would be mentioned in its report on

the current session, so as to show that the Commission had reconsidered the whole matter as requested in the letter from the Legal Counsel and had come to the conclusion that a winter session in January 1966 was both necessary and desirable. An indication would at the same time be given of the possibility that it might prove necessary to extend the 1966 summer session.

4. Mr. WATTLES (Secretariat) said that the Secretariat had studied the cost to the United Nations of the proposed winter session in January 1966; the difference in cost between a Geneva session and one held at Monaco² would, of course, be borne by the inviting Government of Monaco. Financial Regulation 13.1 of the United Nations specified that: "No council, commission or other competent body shall take a decision involving expenditure unless it has before it a report from the Secretary-General on the administrative and financial implications of the proposal". In accordance with that regulation, he submitted the following estimate of the expenses of a four-week winter session at Geneva in January 1966:

	<i>Dollars</i>
(a) Travel costs and subsistence allowances of members of the Commission	35,750
(b) Travel costs and subsistence allowances of four staff members from the substantive services at Headquarters	5,000
(c) Temporary assistance to supplement the regular staff of the European Office	16,000
	<u>56,750</u>

The figure of \$16,000 was predicated on the assumption that certain requested increases in the language staff of the European Office would be approved by the General Assembly, and consequently that part of the need for language services could be met from regular staff.

5. If the Commission envisaged a possible two-week extension of its ordinary summer session in 1966, Headquarters should be advised accordingly so that arrangements could be made for the necessary budgetary appropriation.

6. The CHAIRMAN announced that the Commission had received an official communication from the Minister of State of the Principality of Monaco inviting it to hold its winter session in January 1966 in Monaco. The Commission could therefore make public the decision taken at its private meeting on 2 June 1965 to accept the invitation, of which it had previously had only informal knowledge.

7. If the Commission adopted the proposal of its officers, he would send a telegram to the Minister of State of the Principality to inform him of the Commission's decision gratefully to accept the invitation, adding that the final decision lay with the competent organs of the United Nations. That proviso was necessary for, while the Commission was free to decide on the place and date of its winter session in 1966, the proposal to hold the session would still have to be approved by the General Assembly, which would have to appropriate the necessary funds. The Principality would defray all additional expenses occasioned by the fact

¹ *Yearbook of the International Law Commission, 1964, Vol. II, document A/5809, para. 38.*

² The Government of Monaco had invited the Commission to hold its session of January 1966 in Monaco (see para. 6 below.)

that the session would be held in Monaco and not at Geneva, where the Commission met regularly.

8. Mr. TUNKIN proposed that the proposals of the officers of the Commission be adopted, subject to the explanations given by the Chairman.

9. Mr. BRIGGS seconded the proposal.

The proposal was adopted.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(*resumed from the previous meeting*)

[Item 2 of the agenda]

ARTICLE 19 (Acceptance of and objection to reservations) (*continued*)³

10. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 19 and then introduce article 20.

11. Sir Humphrey WALDOCK, Special Rapporteur, said that in the course of the discussion on article 19 some members had stressed that reservations constituted an institution of the law of treaties. Undoubtedly, like ratification, reservations could be so described, but he felt that all the emphasis that was necessary had been given to the institution by allocating to it one whole section consisting of no fewer than five articles.

12. There had also been a number of references to the distinction between a reservation on the one hand and a declaration or statement on the other, a distinction to which he had referred in his report (A/CN.4/177/Add.1, paras. 1 and 2 of the observations preceding article 18). The distinction had not been overlooked by the Commission but had been underlined in the definition of reservations contained in article 1, paragraph 1(f). The section under discussion dealt with reservations as defined in that paragraph.

13. Interpretative declarations, however, remained a problem, and possibly also statements of policy made in connexion with a treaty. The question was what the effect of such declarations and statements should be. Some rules which touched the subject were contained in article 69, particularly its paragraph 3 on the subject of agreement between the parties regarding the interpretation of the treaty and of the subsequent practice in its application. Article 70, which dealt with further means of interpretation, was also relevant.

14. As he understood it, the crucial point was that, if the interpretative declaration constituted a reservation, its effect would be determined by reference to the provisions of articles 18 to 22. In that event, consent would operate, but in the form of rejection or acceptance of the reservation by other interested States. If, however, the declaration did not purport to vary the legal effect of some of the treaty's provisions in its application to the State making it, then it was interpretative and was governed by the rules on interpretation. Probably, the Commission would have to examine more closely at a

later stage the relationship between interpretation and reservations and might have to add a separate provision on the subject of declarations, but for the time being the question should not detain it.

15. Another and very fundamental point had been raised by Mr. Ago when he had made his plea for a presentation of the whole section in such a manner as to show that reservations constituted a residual institution. The opposite approach had been adopted by Mr. Tunkin, Mr. Yasseen and other members, who wanted a statement of the right to make reservations to be made from the outset, as was done in paragraph 1 of article 18 in the 1962 draft. He himself had steered a middle course in rearranging the articles concerning reservations in such a way that the first article, article 18, dealt with the case of treaties which contained clauses permitting or prohibiting reservations; reservations to treaties containing such provisions were thus excluded from the rules set out in the subsequent articles. Then followed his new version of article 19, which dealt with the other cases, those of treaties silent concerning reservations. That difference of approach on the part of members reflected a real difference of opinion. However, the Commission had reached such a large measure of agreement on substance that it should be possible for the Drafting Committee to formulate a broadly acceptable text.

16. Turning to article 19 as adopted in 1962, he said that paragraph 1 did not call for any comment. With regard to paragraph 2, he was prepared to accept the suggestion that some of the procedural details should be eliminated, though he would urge caution in that respect. For example, the rule that a reservation made on signing a treaty was effective only if confirmed at the time of ratification⁴ was not merely procedural and should be clearly stated. Another problem which was not dealt with in the 1962 text was whether an objection to a reservation similarly required to be confirmed on the ratification of the treaty by the objecting State.

17. There was general agreement that paragraph 3 of article 19 should be retained, but it had been suggested that, for the busy legal department of a State, the period of twelve months might be unduly short. Actually, a large number of treaties set a time-limit of six or even three months. Moreover, there was another counterbalancing consideration in that the question whether the multilateral treaty was in operation between the two States concerned would remain in suspense during that given period, and it was surely in the general interest that the period of uncertainty should not be prolonged. He considered accordingly that a time-limit of twelve months was not unreasonable.

18. He agreed that paragraph 4 as drafted in 1962 should be dropped. In his proposed new text, he had in fact eliminated it and had attempted to deal with the time-element in his proposed paragraph 4 for the new article 20.

19. He also agreed that paragraph 5 should be shortened but, there again, would urge caution, so as not to eliminate material that might have a bearing on substance.

³ See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.

⁴ Rule proposed in the Special Rapporteur's reformulation (A/CN.4/177/Add.1, article 20, paragraph 2).

ARTICLE 20 (The effect of reservations)⁵

20. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 20, said that an important point of substance had been raised in the government comments, in connexion with the presumption embodied in paragraph 2 (b). The presumption was that the objecting State did not have the intention to participate in the treaty with the reserving State. Some governments wished the presumption to go the other way, particularly in the case of general multilateral treaties, so that the objecting State would have to indicate clearly that its objection was intended to stop the treaty from entering into force between it and the reserving State; otherwise, the treaty would enter into force between the two States. The Commission would have to give an indication of the way in which it wished the presumption to go.

21. Paragraph 3 raised the question of the meaning of the expression "a small group of States", and the Commission would have to consider whether the language of that provision might be improved.

22. There remained the extremely difficult question which States were to be considered as relevant from the point of view of the acceptance of or objection to a reservation. The question had given rise to considerable discussion in 1962, and the view had been expressed that the provisions should apply only to the actual parties to the treaty; a broader approach was to include also States which had signed the treaty but had not yet ratified it. It was difficult to formulate a fair rule in the matter, but the Commission would certainly have to re-examine its use of the term "party" and also the fact that there existed other States to which it was open to become a party.

23. Mr. VERDROSS said that the interpretative declaration came within the meaning of "reservation" as defined in article 1, paragraph 1 (f). If a State, at the time of signing or ratifying a treaty, declared that it accepted one of its articles only if interpreted in a certain sense, it excluded all other interpretations of that article and its declaration was meant therefore to exclude the legal effect of some provisions of the treaty. It was, admittedly, possible to discuss whether or not such a declaration was a reservation; but the problem it raised was analogous to that raised by reservations. Personally, he would be satisfied if the Commission stated in the commentary, disregarding the theoretical aspect of the question, that the problem of the interpretative declaration should be regarded as analogous to that of reservations.

24. Mr. YASSEEN said he could see a very clear distinction between an interpretative declaration and a reservation. The difference lay in the attitude of the State making an interpretative declaration in respect of a treaty.

25. A State which formulated a reservation recognised that the treaty had, generally speaking, a certain force; but it wished to vary, restrict or extend one or several provisions of the treaty in so far as the reserving State itself was concerned.

26. A State making an interpretative declaration declared that, in its opinion, the treaty or one of its articles should be interpreted in a certain manner; it attached an objective and general value to that interpretation. In other words, it considered itself bound by the treaty and wished, as a matter of conscience, to express its opinion concerning the interpretation of the treaty.

27. If a State recognized a general interpretation and afterwards gave a subjective one, valid only for itself, it would in effect be formulating a reservation.

28. The CHAIRMAN, speaking as a member of the Commission, said that interpretative declarations could take many forms—a letter, an exchange of letters, or a declaration included in the final act of the conference or in the *procès-verbal* of the adoption of the treaty. In the form of the so-called "Martens clause", the interpretative declaration had become classical and had produced important legal effects, in particular during the Second World War.

29. The question raised by Mr. Verdross was an important one; the interpretative declaration was certainly an institution closely resembling that of reservations. The Special Rapporteur had been very wise in choosing not to mention the matter in the actual text of the articles. By mentioning it in the commentary, the Commission would show that the question had not escaped its attention.

30. Mr. CASTRÉN said that the problem raised by Mr. Verdross was not a simple one; it was difficult to draw a distinction between the unilateral interpretative declaration and the reservation. Since there were interpretations which could vary laws, some interpretations could also vary treaties. He supported Mr. Verdross's suggestion that the question should at least be mentioned in the commentary.

31. Mr. AMADO hoped that the Drafting Committee would reconsider the phrase "unilateral statement made by a State", used in article 1, paragraph 1 (f), which in his opinion was tautological.

32. Mr. TUNKIN said that he wished to make certain general observations, which went a little beyond the strict framework of the provisions of article 20.

33. Some members had endeavoured to justify their stand in favour of the unanimity rule in the matter of reservations on the ground that it was a democratic principle. Democracy, in Greek, meant the rule of the State by the people, but even in ancient Greece "the people" excluded not only slaves but a number of other persons who were not completely free. The meaning of democracy was conditioned by the class structure of the society to which it was applied. However, there were some general notions on which all would agree.

34. It had been said by some members who opposed the 1962 text that the Commission should not admit that a minority could overrule a majority and that it would be undemocratic if it could. But it should be noted that the unanimity rule would have precisely the effect that a minority could overrule the majority. In fact, one single objecting State could, under the unanimity rule, prevent one hundred States which were willing to enter into treaty relations with the reserving State from entering

⁵ See 796th meeting, paras. 32 and 33, for the 1962 text and the Special Rapporteur's reformulation of articles 18, 19 and 20.

into such relations. Such a result would certainly be most undemocratic. It was, of course, clear that majority rule, in the sense of deciding all matters in international relations by a majority vote, did not apply in an international society consisting of sovereign States.

35. It had also been suggested that, under the provisions on reservations adopted in 1962, it would be possible for a minority to destroy the uniformity of the treaty régime. That observation ignored the fact that there could be no uniformity in international law; uniformity would presuppose the existence of a super-State organ competent to enact international legislation binding upon all States. States were sovereign, and no such organ existed at the moment. Every effort should be made to arrive at as great a uniformity as possible, but uniformity was not an end in itself; it should be viewed in the light of the realities of the contemporary situation.

36. Reservations constituted exceptions, and the Commission had accepted the rule that they must not be incompatible with the object and purpose of the treaty. A reservation which was compatible with that object and purpose would clearly not break the substantial uniformity of the treaty régime. In the light of those considerations, reservations should be viewed as a useful and valuable institution.

37. The Commission having thus adopted the compatibility test for the validity of a reservation, the problem arose whether the same test should also be applied to the validity of an objection. The Commission had decided at its fourteenth session that the test should apply in the same manner to both, and he urged that that decision be maintained. It would be consistent with the ruling of the International Court of Justice in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. Of course, the test applied only where the treaty itself was silent; if the treaty contained provisions on the subject of the validity of reservations and objections to reservations, those provisions would apply.

38. In general, the wording of article 20 as drafted in 1962 was acceptable. Paragraph 2 (a) raised the same problem as had been discussed in connexion with article 19, whether States to which the treaty was open but which had not yet established their final consent to be bound should have some say in the matter of reservations. It was clearly the modern practice that a reservation was valid only if made or confirmed at the moment when final consent to be bound was given, and that was the presumption reflected in the 1962 draft. The same applied to objections to reservations. The point was partially covered in paragraph 6 of the Special Rapporteur's new text for article 20.

39. While paragraph 2 (b) of the original text was acceptable, he was inclined to favour a provision expressing the presumption rather differently. The provision might be redrafted so as to state that the objecting State would be regarded as having treaty relations with the reserving State unless it had manifested a desire to the contrary. The point needed further thought.

40. The new title for article 20 suggested by the Special Rapporteur ("Procedure regarding reservations") was

misleading because in fact the points of substance covered were more important than those of procedure. In any case, it was never easy to make a firm distinction between the two, since for any rule to become operative some form of procedure or another was necessary.

41. He continued to think that the 1962 scheme was more logical than the new one, and that view was confirmed by the comments of governments. Subject to the necessary alterations by the Drafting Committee, which should of course take into account suggestions made during the discussion and those of the Special Rapporteur, the original text of article 20 should be maintained.

42. Sir Humphrey WALDOCK (Special Rapporteur) said he had already indicated that the title of article 20 was not exact because it contained substantive as well as procedural provisions, as did articles 18 and 19. In rearranging the content of the three articles he had tried to shorten them and to retain all the procedural elements with a bearing on the substance.

43. The CHAIRMAN said that Mr. Tunkin had raised a question which the Commission should ponder, namely whether a reservation expressed at the moment of signature needed formal confirmation at the time of ratification. He asked whether Mr. Tunkin would consider that the reservation was confirmed if it appeared not in the instrument of ratification itself, but next to the signature of the State's representative in the text of the treaty accompanying or reproduced in that instrument.

44. Mr. TUNKIN replied in the affirmative.

45. Mr. RUDA said that in his opinion article 20 of the 1962 draft referred not so much to the effect of reservations as to the circumstances in which a State that had formulated a reservation became a party to the treaty.

46. The article should contain two basic ideas. The first, which was already stated in the definition of "reservation" in article 1, paragraph 1 (f) but which might be restated in article 20, was that the main effect of a reservation was to exclude or vary the legal effect of some provision of the treaty in its application to the reserving State. The second was that the reservation, if valid, made the State a party to the treaty. Those were the ideas which should be included in article 20 in order to bring the text into line with the heading.

47. The right context for paragraph 1 (a) was not article 20 but article 19, which was concerned with the acceptance of reservations.

48. Paragraph 2 (a) dealt with acceptance by a State to which it was open to become a party to a treaty but not with the normal case of acceptance by a State party to the treaty; it could be replaced by paragraph 4 (a) of the new article 19 proposed by the Special Rapporteur, while paragraph 2 (b) could be replaced by paragraph 4 (b) of the new article 19.

49. Paragraph 3 contained the vague and uncertain expression "small group", which gave no idea of the number of States which such a group might comprise.

50. Paragraph 3 (b) should be retained in some form, since it was intended to cover the practice followed by

Latin American States with regard to the making of reservations to multilateral conventions. Without such a provision that practice, which had been adopted by a great many States, would be of doubtful legality. The wording, however, should be changed, for in Latin America there were treaties which had been concluded by States members of a regional organization but not under the auspices of that organization. Examples were the many treaties governing private international law in criminal, civil and other matters concluded by the countries of the Rio de la Plata region, which in 1881 had set up a special system that had nothing to do with the Organization of American States. Paragraph 3 (b) should therefore be retained but modified so as to distinguish between treaties concluded under the auspices of an international organization and other treaties.

51. Mr. CASTRÉN said that the new article 20 proposed by the Special Rapporteur replaced the provisions of paragraphs 2 and 3 of the former article 18 and former article 19 by a simplified version, but it also contained some substantive changes, particularly with regard to the procedure for the tacit acceptance of reservations. In that respect, the Special Rapporteur had been guided mainly by the Australian Government's observations. On the whole, he approved of the substantive and drafting changes but thought that there was a gap in the new system and that the drafting could be further improved.

52. He accepted the idea expressed in paragraph 4 that a State should not be required to raise an objection to a reservation before it was itself a party to the treaty. However, a rule should also be included to cover the very frequent case where the reservation was not proposed or notified until after the other States or some of them had established their consent to be bound by the treaty. In such a case it would seem appropriate to apply the provision of paragraph 3 of the former article 19, under which a reservation would be regarded as having been accepted by a State if it raised no objection during a period of twelve months after receiving formal notice of the reservation. A sub-paragraph (c) to that effect should be added to paragraph 4.

53. Paragraph 5 laid down word for word precisely the same procedural rules for objections to a reservation as those applicable under paragraph 1 to the proposal and notification of reservations. Preferably, therefore, the two paragraphs should be amalgamated or else paragraph 5 should say simply that the provisions of paragraph 1 applied also to objections to a reservation.

54. With regard to the order of the first two paragraphs, he suggested that the order of the earlier text should be followed: first would come the opening sentence of the new paragraph 1, "A reservation must be in writing"; secondly the new paragraph 2, which would become sub-paragraph (b); thirdly the second sentence of paragraph 1, which would become sub-paragraph (c). That would be the chronological order, as the proposal and confirmation of reservations preceded notification.

55. Despite the basically expository nature of the new paragraph 3, it should be retained, for the reasons given by the Special Rapporteur in his commentary. He would

merely draw attention to the vague expression in sub-paragraph (b): "to the other interested States".

56. The new paragraph 6 was a useful addition to the 1962 rules.

57. There was an inaccuracy in the Special Rapporteur's commentary on article 20, where it was stated (A/CN.4/177/Add.1, paragraph 13 of commentary preceding article 20) that the sub-paragraphs in article 18, paragraph 2, of the 1962 text could be dispensed with, whereas in fact only sub-paragraphs (a) (i), (ii) and (iii) were dropped; the provisions of sub-paragraph (b) were retained, with minor changes, in paragraph 2 of the new article 20.

58. Mr. TSURUOKA said that in his statement at the previous meeting,⁶ to which one speaker had referred, he had urged the Commission to show due regard for the principle of democracy, and more specifically for the majority decision. That speaker had claimed that the unanimity rule was contrary to the democratic spirit. He was prepared to accept that argument, provided that the speaker conceded that the acceptance of reservations depended on a collegiate or a majority decision. He (Mr. Tsuruoka) had said that the collegiate solution was closer to the majority rule, and that his reason for preferring the unanimity rule to the collegiate solution was that it was simpler to apply.

59. He was still convinced that the unanimity rule for the acceptance of reservations was more satisfactory than the individualist solution, in that it respected and safeguarded the earlier majority decision. The individualist solution, by contrast, presupposed considerable freedom to repudiate the majority decision.

60. The same speaker had referred to a hypothetical case where a single State prevented the reserving State from entering into treaty relations. In his (Mr. Tsuruoka's) opinion, such a case was purely conjectural and could never actually occur: the fact that 114 States had accepted a reservation showed that it was reasonable, and in such a case the objecting State should reconsider its intransigent attitude and withdraw its objection. Moreover, the reserving State was free to withdraw its reservation, so that the question could perhaps be settled in a democratic spirit.

61. Reference had been made to the difficulty of proposing a reservation. But there was also considerable difficulty for a State to oppose it. A State, which hesitated between acceptance and objection would, on grounds of courtesy, be more readily inclined to accept than to object. Personally, he preferred the system proposed by the Special Rapporteur to that of 1962.

62. Mr. YASSEEN said that he had some doubts about the paragraph 2 proposed by the Special Rapporteur in his reformulation of article 20. Ratification related to the treaty as signed by the State: consequently, if the treaty was signed subject to a reservation, the ratification, even if it did not say so specifically, still related to the treaty as it had been signed by the State.

63. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on articles 18, 19 and 20, after which the Commission might wish to consider what kind

⁶ See 798th meeting, paras. 2-8.

of general scheme it favoured for the section concerning reservations.

64. Sir Humphrey WALDOCK, Special Rapporteur, said that it was hard to draw definitive conclusions from discussions in which some members had expressed a clear preference for one or other of the two texts. He had no pride of authorship to protect, having been largely responsible for the final shape of the 1962 text. He did not find that text objectionable, but he disliked certain features that made for obscurity and complexity, as governments had not been slow to point out. Of course, that could be remedied by other means than rearranging the material, and he was not asking the Commission to reach a decision at the moment. The three articles could be referred to the Drafting Committee for reconsideration in the light of his new proposals and of the observations of members, leaving the question of the final arrangement still open. The Drafting Committee's task would be to work out something that would reconcile as many views as possible.

65. Attention had been drawn to a number of difficulties inherent in the whole subject of reservations, and no very useful purpose would be served by his reviewing them, but he would have liked more guidance from the Commission, first on whether or not it wished to retain in its original form the presumption in paragraph 2 (b) of the 1962 text of article 20, and secondly on the application and scope of the compatibility test. On the latter question he had introduced a change in his new draft in deference to the observation made by some governments that the Commission's draft appeared to restrict the freedom to object to a reservation to cases where the reservation was incompatible with the object and purpose of the treaty; they did not wish to rule out objections that might be prompted by the need to protect some particularly delicate interest of State. To the best of his recollection the conclusion reached on that point at the fourteenth session had been that, although it might be of some theoretical significance, in practice, in the absence of an adjudication clause, States would formulate their objections on grounds of incompatibility. At any event, the point would need further elucidation as the 1962 text was not free of ambiguity.

66. Although it was not easy to judge what was the weight of opinion on certain points, he thought the articles could be referred to the Drafting Committee.

67. Mr. TSURUOKA said that, as he might be absent when the Commission resumed consideration of the articles, he would like to speak on two of the points raised by the Special Rapporteur.

68. If a State objected to a reservation without stating that, its objection notwithstanding, it intended to enter into contractual relations with the reserving State in conformity with the treaty, there should, he thought, be a presumption that it was the objecting State's wish not to establish such relations. Such a presumption was consistent with the prevailing conception of the reservation.

69. With regard to the Special Rapporteur's further question, whether an objection to a reservation had to be based on the criterion of compatibility with the object

and purpose of the treaty, he (Mr. Tsuruoka) considered that no such obligation existed. A State made a reservation in order to defend its interests, fully realizing that another State might object to its reservations. Consequently, if States were authorized to make reservations, other States should equally be authorized to defend their own interests by formulating objections to those reservations.

70. Mr. BRIGGS said he agreed that articles 18, 19 and 20 could be referred to the Drafting Committee but would ask that his own amendment⁷ to paragraph 4 of the Special Rapporteur's new text of article 19 should also be transmitted.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that although he sympathized with the reasons for the amendment, it would reopen the discussion on the basis underlying the 1962 compromise and his own reformulation.

72. Mr. TUNKIN said that, as it was the Commission's usual practice to refer all proposals made in the course of the discussion on any particular article to the Drafting Committee for examination, he would have no objection to Mr. Briggs's amendment being treated in the same way.

73. Mr. ELIAS said he agreed, but thought that perhaps the Special Rapporteur had raised a more fundamental question; possibly some decision should be taken by the Commission itself on Mr. Briggs's amendment because of its radical implications. As Mr. Amado had urged, the Commission should, as far as possible, refrain from going back on the compromise achieved at the fourteenth session.

74. Mr. TUNKIN said that, although it was the Commission's practice to refer all proposals to the Drafting Committee, that did not mean that the Drafting Committee was called upon to steer some kind of middle course between them. It was free to examine, accept or reject any proposal or part of a proposal. At the fourteenth session, Mr. Briggs had proposed⁸ something very similar to his latest amendment which had been discussed at great length, and the issue should not be reopened.

75. Mr. CADIEUX said that a crucial choice had to be made whenever the Commission's instructions to the Drafting Committee were not clear. A distinction had to be drawn between two cases: one which involved simply a matter of drafting, where the Committee was asked to express the tenor of the discussion as a whole; and the other where it was asked to work out a compromise. The two situations might affect each other.

76. It could happen that, as a result of its deliberations, the Drafting Committee would produce a text more or less similar to that of 1962, but taking into account the new elements proposed by the Special Rapporteur, and conclude that most members were more or less in agreement; it would then be fairly confident that it had made some progress, and that a large majority of the Commission's members would accept the solution.

⁷ See 798th meeting, para. 85, for the text of the amendment.

⁸ *Yearbook of the International Law Commission, 1962, Vol. I, 651st meeting, para. 28.*

77. It could also happen, however, that those members who favoured reservations would reopen the question in the Drafting Committee and that it would prove difficult to draft a text as satisfactory as that of 1962. Since the Committee's function was to facilitate the voting in the Commission, it might then conceivably be very desirable that the Committee should propose an alternative. Those less satisfied with the Drafting Committee's revision might renounce the compromise which they had accepted in 1962; but if they had the choice between a proposal which restricted the acceptance of reservations and a formula giving them wider recognition, they would prefer, on balance, to change their minds and revert to the earlier text. That being so, he thought that Mr. Briggs's proposal should be passed on to the Drafting Committee, which would decide, in the light of its debate, whether the proposal should be adopted as it stood or in an amended form. However, it was premature to say that the debate was exhausted and that the matter was no longer before the Commission.

78. The CHAIRMAN said that he had taken the view that the Commission should settle all questions of substance before referring texts to the Drafting Committee. When Mr. Pal had been Chairman, his practice had been to explain in what way proposals differed from each other and to take a preliminary vote before referring the texts to the Committee. The procedure had been changed on Mr. Amado's proposal; under the new procedure, which had been recorded in a report⁹ and which the General Assembly had noted, the Drafting Committee was responsible not only for drafting but also for endeavouring to settle problems of substance. He was not opposed to Mr. Cadieux's opinion, but he was bound to respect the Commission's opinion, since it had been confirmed by the General Assembly.

79. Mr. AMADO said he was disturbed to see that the compromise which the Commission had reached with no little difficulty and a great many mutual concessions was being jeopardized by further discussions of undefined scope. The debate which had just taken place had been of exceptionally high quality, but he wished to reiterate the appeal which he had made to the Commission at the 797th meeting not to try to be perfectionist. It should remember that States were primarily concerned with their own interests, and they could not be blamed for that.

80. Some members of the Commission could make no further concessions than they had already made. He was not prepared to sacrifice a single element of the compromise reached in 1962. His "retreat" at that time had been commented on in his own country, where he had always been regarded as a champion of the unanimity of the parties to a treaty. He hoped the Special Rapporteur would defend at least what amounted to the substance of the draft convention.

81. Even before Mr. Briggs's statement, he had intended to propose that, in view of the clarity of the views expressed, the Commission should refer the three articles in question to the Drafting Committee. The Commission could trust the Drafting Committee which,

by the force of circumstances, had come to play an increasingly important part. That development was to be expected, for a jurist saw in a text not merely the form, the arrangement of the words but, above all, the content.

82. Mr. BRIGGS said that he made no apology for proposing reconsideration of a decision reached at the fourteenth session which he had opposed. After all, the Commission was engaged precisely in the task of reconsidering its draft in the light of the comments by governments. He had not asked the Commission to reopen the discussion, since the views of individual members were well known. There were two ways of handling his amendment. Either it could be put to the vote in the Commission itself, but he had not asked for that; or, in accordance with the Commission's usual practice, it could be referred to the Drafting Committee for examination along with the other texts and suggestions. He would be quite content with the latter course.

83. Mr. AGO said he supported Mr. Amado's view as to how the Commission should proceed. Relations between the Commission and the Drafting Committee had always been very elastic. Sometimes the Commission had decided questions by a vote, so as to offer guidance to the Drafting Committee; in other cases it had postponed voting until after a more searching debate on a more elaborate text. The latter procedure was preferable in the present case. The Committee would do its best, for it realized that the Commission's essential task was to prepare a text which might command the greatest measure of support at a codification conference.

84. Sir Humphrey WALDOCK, Special Rapporteur, said that when it had seemed desirable to secure for the Drafting Committee clearer directives than had been given during the discussion, he had sometimes suggested in his summing up what line the Committee might take, so as to elicit further views from the Commission. In the present instance, without wishing to question the idea of referring to the Drafting Committee all the proposals and texts before the Commission, and although he agreed in general with what had been said about the Committee's functions, he thought that the latitude allowed to it had been somewhat exaggerated. Not infrequently, after a full discussion in the Commission itself, the Drafting Committee at some stage in its work had to take the line that on some points it was not competent to make a radical change of substance because the Commission had shown a clear desire to formulate the article on a particular basis. The issues in regard to reservations could not be regarded as completely open, since otherwise the task of the Special Rapporteur would be impossible. Consequently, unless some indication to the contrary were given by the Commission, he would assume that the views which had gained general support should form the foundation of any new draft he might be asked to prepare for the Drafting Committee. Of course, the final decision would be taken at a later stage when the Commission examined the Drafting Committee's proposal.

85. The CHAIRMAN asked whether the Commission accepted the Special Rapporteur's view. If it did, then

⁹ *Yearbook of the International Law Commission, 1958, Vol. II, p. 108, para. 65.*

articles 18, 19 and 20 could be referred to the Drafting Committee forthwith.

*It was so agreed.*¹⁰

The meeting rose at 1 p.m.

¹⁰ For resumption of discussion on the section concerning reservations, see 813th meeting, paras. 1-109, and 814th meeting, paras. 1-30.

800th MEETING

Friday, 11 June 1965 at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Ca-dieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

ARTICLE 21 (The application of reservations)

Article 21

The application of reservations

1. A reservation established in accordance with the provisions of article 20 operates :

(a) To modify for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Reciprocally to entitle any other State party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*.

1. The CHAIRMAN invited the Special Rapporteur to introduce his proposals for article 21.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that two observations by governments would need to be considered. First, the Japanese Government's criticism of the word "claim" in paragraph 1 (b) seemed justified, and he accordingly proposed (A/CN.4/177/Add.1, paragraph 2 of the commentary on article 21) that the text should be modified to read :

"Reciprocally to modify the provisions of the treaty to the same extent for each party to the treaty in its relations with the reserving State."

The effect of that change would be to state the position of the two States on a footing of complete equality.

3. The United States Government had mentioned the possibility of a State objecting to or refusing to accept a reservation, yet nevertheless still considering itself in treaty relations with the reserving State. That hypothesis was in fact already provided for in the draft, but perhaps there was some ground for dealing with that situation in article 21 as well. His only doubt was whether it was correct to regard that situation in terms of a unilateral right of the objecting State to determine the existence of treaty relations between the two States. He would have thought that in all cases there had to be some kind of consent, and he therefore suggested a somewhat different formulation in paragraph 3 of his observations on article 21 for consideration by the Commission,¹ should it decide to take account of the United States Government's observation.

4. The drafting point dealt with in paragraph 1 of his observation would have to be left pending, as its fate would depend on the decision reached about the re-arrangement of the content of articles 18 to 20.

5. Mr. YASSEEN said that article 21 did not present any problem, as was proved by the comments of governments, though the Commission should settle the two points mentioned by the Special Rapporteur.

6. First, neither the Government of Japan nor that of the United States accepted the words "to claim" : the former proposed that the right should be stressed and the latter that the words "to apply" should be used. In either case, the result would be the same : if a State was entitled to the benefit of a reservation, it could apply it as stipulated, which meant that the treaty would be modified accordingly. Personally, he would prefer the word "apply" as it was less radical than "modify".

7. Secondly, the Government of the United States proposed a new paragraph to cover the situation where a State objected to or refused to accept a reservation, but nevertheless considered itself in treaty relations with the reserving State. That situation should probably be dealt with in the draft articles. The Special Rapporteur had remarked, very ingeniously, that the situation should be regarded as one likewise governed by the mutual consent of the parties, for possibly the reserving State might attach a great deal of importance to the reservation and might not entertain the idea of entering into treaty relations with a State which did not accept the application of the reservation. Consequently, if the Commission wanted the article to cover that situation, it should accept the Special Rapporteur's suggestion and consider the treaty *vinculum*, in the event of an objection to a reservation, as also the result of the mutual agreement between the two States, the reserving State and the objecting State.

8. Mr. ROSENNE said that the trend of the discussion on the preceding three articles in the section on reservations made him inclined to favour Mr. Ruda's suggestion² that the definition in article 1, paragraph 1 (f), if it really comprised the effect of reservations, should be

¹ Additional paragraph suggested by the Special Rapporteur: "Where a State objects to the reservation of another State, but the two States nevertheless consider themselves to be mutually bound by the treaty, the provision to which the reservation relates shall not apply in the relations between those States".

² See 799th meeting, para. 46.

transferred to the section on reservations, preferably article 21.

9. It would be more accurate to substitute the word "application" for the word "provisions" in the new text suggested by the Special Rapporteur as a substitute for paragraph 1 (b).

10. The United States unilateral approach to the situation it had mentioned in its observations concerning paragraph 2 was more in line with the general structure of the Commission's provisions on reservations and preferable to the Special Rapporteur's reciprocal approach, because if a State proposed a reservation, that step automatically brought into play the whole of the law governing the institution of reservations; if an objection was made to the reservation, the objecting State should have some option to decide whether or not it wished to be in treaty relations with the reserving State subject to the reservation. It would unnecessarily complicate matters to require a further agreement between the two States as to whether or not they wished to be in such treaty relations with each other.

11. Mr. RUDA, referring to what he had said at the previous meeting regarding article 20 and its title,³ said that the article which actually dealt with the effect of reservations was article 21; indeed, it began with the words "A reservation . . . operates:" (*Las reservas . . . tendrán por efecto.*) The 1962 commentary to article 21 stated "This article sets up the rules concerning the legal effects of a reservation which has been established under the provisions of articles 18, 19 and 20 . . ."; the title of article 21 therefore did not reflect its content.

12. With regard to the form, he approved the text of paragraph 1 (a), but a change was needed in paragraph 1 (b), at least in the Spanish version, where the word *pretendan* was meaningless.

13. With regard to the substance, he agreed that a paragraph should be added to cover the situation where a State objected to or rejected a reservation but nevertheless considered itself in treaty relations with the reserving State. That idea had appeared, as an innovation, in resolution X adopted at the Fourth Meeting of the Inter-American Council of Jurists in 1959,⁴ which took into account the procedure for reservations followed in the inter-American system. As to whether the situation could be represented as arising from a unilateral or from a bilateral expression of will, he was rather inclined towards the unilateral idea, advocated by the United States Government, for the reasons which Mr. Rosenne had just mentioned.

14. Mr. CASTRÉN said that he was prepared to accept the article as drafted by the Commission in 1962, with the drafting amendment to the introductory sentence proposed by the Special Rapporteur. It might also be possible to reword paragraph 1 (b) along the lines suggested by the Special Rapporteur.

15. He saw no need for the additional paragraph suggested by the Special Rapporteur, since paragraph 1 (b), whether in its old form or in the new form, already covered the case in question.

³ *Ibid.*, para. 45.

⁴ *Yearbook of the International Law Commission, 1960*, Vol. II, p. 133, para. 94.

16. Mr. TUNKIN said he agreed with Mr. Ruda that the title of article 21 was inadequate because in fact it dealt with the legal effects of reservations: the point should be considered by the Drafting Committee, particularly in view of the existing title of article 20.

17. The text of article 21 formulated at the fourteenth session was, in general, acceptable. Paragraph 1 should be simplified as there was no need for two separate subparagraphs; all that was needed was a provision stating the rule that, as a result of a reservation, a treaty applied between the reserving State and other parties accepting the reservation, except for the clauses to which the reservation related.

18. He agreed with the Special Rapporteur that the situation described by the United States Government in its observations was not the result of a unilateral expression of will, but thought that the Special Rapporteur's suggested provision to deal with the situation might lead to unnecessary procedural complications in that it would require the two States to specify whether or not they regarded themselves to be in treaty relations with each other. The United States formulation, being simpler and free from ambiguity, was probably preferable.

19. As it was clear that a reservation only affected treaty relations between the reserving State and those parties which had accepted the reservation or those which, while objecting to it, nevertheless intended to remain in treaty relations with the reserving State, he was not entirely convinced of the need to retain paragraph 2.

20. Mr. VERDROSS said that the idea on which article 21 was based was clear but, in order to avoid any confusion, he thought it would be preferable to retain paragraph 2.

21. Mr. YASSEEN said that the reservation might be of capital importance for the State proposing it, for it might wish the provision to which the reservation related to be applied in a certain manner; the treaty as a whole, and the will of the State to be considered a party to the treaty, might be affected.

22. Could it be presumed that the reserving State would agree to be in treaty relations with a State objecting to the reservation? He did not think so, for such a presumption did not correspond to the general rule in the matter. The reserving State had the right to think that there would be no treaty relations between it and the State which objected to its reservation. It happened very rarely that a State which objected to a reservation accepted, at the same time, certain treaty relations with the reserving State.

23. He considered therefore that the State making the reservation which was not accepted should be allowed to have its say, and that a clause should be added such as "unless the reserving State is opposed thereto".

24. Mr. PAL said that, for the reasons given by Mr. Yasseen, the ultimate formulation of the additional paragraph suggested by the Special Rapporteur in the light of the United States Government's observation would largely depend on how article 20, paragraph 2 (b), concerning the legal effect of objections to reservations,

was drafted. He preferred the Special Rapporteur's text to that of the United States Government as being more logical and because of its emphasis on the two-sided relationship between the two States. The decision to be in treaty relations with another State could not be taken unilaterally.

25. Mr. TUNKIN said that he had not fully understood Mr. Yasseen's argument. In certain circumstances, an objection of principle to a reservation might be made but would amount to no more than a political declaration, because in fact the objecting State was ready to apply the treaty in all respects except for the provision to which the reservation related. He had an open mind in the matter and believed that it was of no great consequence for practical purposes because the mutual consent between the two States to apply the treaty would probably exist.

26. Mr. YASSEEN said that there was also a difference of effect between the objection to the reservation and the acceptance of the reservation. According to the additional paragraph suggested by the Special Rapporteur to cover the situation where a State objected to the reservation of another State but the two States nevertheless considered themselves to be mutually bound by the treaty, "the provision to which the reservation relates shall not apply in the relations between those States." Actually, the reservation might modify a certain provision; it might be intended to preserve the provision in a modified form. The State which objected to a reservation might agree to a treaty relation with the reserving State, except that the provision to which the reservation related would not apply between them. The difference consisted in the fact that, in the event of acceptance, the provision was applied as amended by the reservation, whereas in the event of an objection it was not applied at all. That difference justified the reserving State's right to express its will.

27. Mr. AGO said he did not quite understand Mr. Yasseen's argument. A State made a declaration of acceptance with a reservation: its acceptance with the said reservation being established, it had no further need to express its intention. The other State made an objection, but let it be understood that its objection had a political value only and would not have the legal effect of preventing the treaty from entering into force between the two States, subject to the reservation. The consent was therefore established as from that moment, and it would be strange to provide for any further discussion between the parties in order that the treaty could enter into force.

28. Mr. BRIGGS said that, on the question what was the legal effect of a reservation for the reserving State and those States which accepted it, the rule was correctly stated in paragraph 1 (a) of the 1962 text. A reservation modified the treaty and not merely its application. In some circumstances, it might even have the effect of doing away with a certain clause altogether.

29. No great difficulty arose when a State objecting to a reservation did not regard itself as bound by the treaty in its relations with the reserving State, because

although both were parties to the treaty, it was not applicable *inter se*.

30. The United States Government had suggested an option by which the objecting State might consider the treaty to be applicable in its relations with the reserving State, except for the provisions reserved. On that point he preferred the text of the United States Government, for reasons given by Mr. Rosenne.

31. Sir Humphrey WALDOCK, Special Rapporteur, summing up said that he was able to agree with both currents of opinion about the additional paragraph that might be inserted in order to satisfy the United States Government. As had been indicated, the practical effect of either of the two versions would be much the same and in that particular situation both States would probably be ready to regard the treaty as being in force between them without the reserved provisions. His real objection to the United States text was to the words "considers itself", which gave the impression that the objecting State possessed some kind of unilateral right to take up a certain position because of the reservation. Surely the reserving State, if confronted with an objection couched in unacceptable terms, was entitled to refuse to be in treaty relations with the objecting State, even although the latter was willing. Possibly the case might be a rare one, but there were recent instances of reservations to multilateral treaties having given rise to serious controversy. The United States text went too far in one direction, and in his own the element of mutual agreement had perhaps been too clearly stressed. It could be left to the Drafting Committee to work out a formula.

32. Admittedly the title of article 21 was not very exact, but in 1962 difficulty had been encountered in finding suitable titles for articles 20 and 21, both of which treated aspects of the effect of a reservation. The Drafting Committee would no doubt succeed in remedying that defect.

33. With regard to Mr. Tunkin's suggestion that paragraph 1 might be abbreviated, he said that such a change would need great care. The "flexible" system was so delicate, and its consequences, particularly for multilateral treaties, so important, that the text would probably need to be fairly full and explicit.

34. As to paragraph 2, which Mr. Tunkin thought could be dropped, he shared Mr. Verdross's view that there would be merit in retaining the text in the interests of clarity, but it was, of course, open to improvement by the Drafting Committee.

35. Mr. AMADO said that the Drafting Committee should reconsider paragraph 2, which stated that a reservation operated only in the relations between the other parties to the treaty which had accepted the reservation and the reserving State and that it did not affect in any way the rights or obligations of the other parties to the treaty *inter se*. He did not think that the draft could be quite so explicit or that such a conclusion could be drawn from practice.

36. Mr. CASTRÉN said that, like Mr. Pal, he could see a very close connexion between the additional paragraph proposed by the United States Government and the Special Rapporteur, and paragraph 2 (b) of article 20. He hoped the Drafting Committee would

consider whether it would not be better to deal in article 20 with the question raised by the United States Government.

37. The CHAIRMAN, speaking as a member of the Commission, said it was perhaps a little too categorical to say that a reservation operated only between such and such States and that it did not affect in any way the rights and obligations of the other parties. It would be better to find a more moderate expression, for even in that situation there were certain legal implications.

38. In the case of a multilateral treaty, if some States were bound by a reservation and others participated without any reservation, what was the relationship between the parties? Were they or were they not bound to perform duties, without any discrimination?

39. For example, Argentina and Guatemala invariably made reservations to treaties in which the United Kingdom participated. Those reservations were not of a juridical nature, but were political reservations based on juridical claims. In that case, was there really any equality of the parties, in view of the fact that the reservations excluded mutual application? Certain States ignored the declarations and reservations of the two States in question, but others rejected the reservations: were the latter in treaty relations with Argentina and Guatemala, or only the former?

40. Mr. TSURUOKA asked what would be the effect of an objection to a reservation if the objection was accompanied by a statement by the objecting State to the effect that it was nevertheless willing to enter into a contractual relationship with the reserving State. If the reservation was meant to exclude an entire article, and the objecting State said that it did not accept the reservation but wished to enter into a contractual relationship with the reserving State, then acceptance and objection amounted to the same thing, from the point of view of legal effect. In his opinion, the situation should be clarified in the commentary.

41. Sir Humphrey WALDOCK, Special Rapporteur, said that admittedly paragraph 2 might be regarded as repetitive but it probably should be retained, although it was by no means easy to express the idea. He hoped Mr. Amado's point, which he had had very much in mind, could be met.

42. The CHAIRMAN suggested that article 21 should be referred to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*⁵

ARTICLE 22 (The withdrawal of reservations)

Article 22

The withdrawal of reservations

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

43. The CHAIRMAN invited the Special Rapporteur to introduce his proposed revised version of article 22, which read:

Unless the treaty otherwise provides —

(a) A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal;

(b) Such withdrawal becomes operative when notice of it has been received by the other States concerned from the depositary or, if there is no depositary, from the reserving State;

(c) On the date when the withdrawal becomes operative article 21 ceases to apply, provided that during a period of three months after that date a party may not be considered as having infringed the provision to which the reservation relates by reason only of its having failed to effect any necessary changes in its internal law or administrative practice.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that at the fourteenth session the Commission had thought it important to include the rule that a reservation could be withdrawn at any time and that the consent of the States which had accepted it was not required for its withdrawal. The Commission had also considered it appropriate to provide that the withdrawal should not take effect until notice of it had been received by the other States concerned; that was a departure from the normal rules governing the moment when instruments took effect within the general system of multilateral treaties.

45. Two suggestions arising out of observations by governments could be dealt with by the Drafting Committee without much further discussion in the Commission itself. The first was that article 22 should take the form of a residual rule, and he suggested that the article should be prefaced by the clause "Unless the treaty otherwise provides,". The second arose out of the Israel Government's comment that, owing to the absence of a reference to the possibility of notice of withdrawal being given through the depositary, the 1962 text gave the impression that the notice had to be addressed direct to the other parties individually. He explained that the omission had been due to inadvertence. The distinction between treaties for which there was a depositary and those for which there was none had to be kept in mind throughout the draft.

46. Two other more important comments on the substance had been made. The Government of Israel considered that notice of the withdrawal of a reservation should normally take effect in accordance with the terms of the treaty, or, if no provision was made, in accordance with the rules laid down in the present draft articles. He did not believe that many treaties in fact contained detailed provisions of that sort, and consequently the rule devised by the Commission was likely to be the one applied. The problem of the time when notice of withdrawal made through a depositary would take effect had been discussed in the Commission or in the Drafting Committee at the fourteenth session and, as far as he could remember, the agreement had been that

⁵ For resumption of discussion on the section concerning reservations, see 813th meeting, paras. 1-109, and 814th meeting, paras. 1-30.

it should become operative, upon receipt by the depositary. In its comments on article 29, the Government of Israel made a proposal designed to allow for the normal administrative processes necessary for the depositary to prepare the relevant communications and for them to reach individual States through the normal channels. The point would need examination in connexion with article 29 in order to determine whether the Commission would have to modify the assumptions on which it had been working. The Government of Israel referred to the *Right of Passage case*,⁶ where the problem had been one of critical importance because of its bearing on the issue of jurisdiction. In effect, that Government was proposing that the Commission, instead of following the line taken by the International Court in that case, should not regard notice of the withdrawal of a reservation as automatically taking effect at once but should provide for an interval of time for the other parties to obtain cognizance of the notice.

47. The United Kingdom Government had pointed out that States might need time to adjust their internal laws or administrative practices as a result of the withdrawal of a reservation. In the light of that observation, he suggested in paragraph 5 of his commentary a revised text involving a slight change in the presentation of the article, and providing in paragraph (c) for a period of three months for the requisite legislative or administrative action to be taken, where necessary.

48. In his new paragraph (c), he was proposing a provision according to which the reserving State could not complain of any infringement of the treaty in its altered form for a certain period, if the only reason for such infringement was the failure of the other States concerned to make the necessary changes in their law or practice. That might be regarded as a complicated way of dealing with the matter but it had seemed to him more appropriate than suspending the effect of a withdrawal for a certain period.

49. Mr. VERDROSS said that where a reservation had been proposed by one State and accepted by another State, an agreement existed between those two States. In principle, an agreement could not be modified unilaterally. Consequently, article 22 stated an exception to the general principle and also an exception to article 21. The exception was defensible if it was admitted that the State which accepted a reservation did so in a spirit of conciliation but preferred the treaty in its complete form. It might happen, however, that the State which accepted the reservation was in full agreement with the reserving State. In that case, there was no reason why the reserving State should be free to withdraw the reservation without the consent of the accepting State. He wished to make that observation, but was not submitting any specific proposal, as no government had raised an objection on that point.

50. The CHAIRMAN, speaking as a member of the Commission, said that he had never come across a case where a State had protested against the withdrawal of a reservation by another State. Normally, a treaty was concluded in order to be applied in full; reservations

constituted an exception which was merely tolerated. He agreed with Mr. Verdross in theory but did not think that the point had any practical importance.

51. Mr. AGO said that the question raised by Mr. Verdross made it necessary to distinguish between two cases. If the State which had accepted a reservation to a multilateral treaty had itself accepted that treaty without making the same reservation, then clearly, its consent was not a necessary condition of the reserving State's ability to withdraw the reservation. It might happen, however, that two States parties to a multilateral treaty each formulated the same reservation; in that case, if one of the States wished to withdraw its reservation, the consent of the other was necessary in order that the withdrawal should take effect between them. For otherwise, as between two States which had made the same reservation, the mere fact that one of them withdrew its reservation would oblige the other to withdraw its reservation as well. The Commission would do well to take that case into account.

52. He accepted the idea expressed in paragraph (c) of the Special Rapporteur's revised text, but thought that a less involved wording might be found.

53. The CHAIRMAN, speaking as a member of the Commission, said he recognized that a problem arose in the second of the two cases mentioned by Mr. Ago. Another case which occurred in practice was that where a group of States agreed *inter se* to accept a treaty with the same reservations. He explained that he had not thought of that possibility when making his previous remarks.

54. Mr. TSURUOKA, referring to paragraph (c) of the revised text proposed by the Special Rapporteur, said that although in 1962 he had not been radically opposed to the principle of freedom to withdraw a reservation without preliminary consultation with the other parties, he had thought of the situation to which the United Kingdom Government had drawn attention in its comments. Furthermore, acceptance of a reservation created a *de facto* situation, which could last for some time. In order to change that situation, to change a trade practice, for example, the State which had accepted the reservation should be allowed time to adapt itself to the new situation created by the withdrawal of the reservation. Accordingly, he thought that paragraph (c) should stand in one form or another, or, alternatively, that the necessary explanation should be given in the commentary.

55. As for the problem mentioned by Mr. Verdross, it was clear that, especially in the circumstances mentioned by the Chairman—joint action by a group of States—the withdrawal of a reservation by one of the members of the group would produce its effect in relation to States outside that group, but not in relation to the members of the group. The effect of such a withdrawal on relations between the members of the group deserved clarification.

56. Mr. ELIAS said he supported the Special Rapporteur's new formulation of article 22, but suggested that paragraph (c) should be shortened: the indication that the three-month period was intended to permit

⁶ *Case concerning right of passage over Indian territory (Preliminary objections)*, I.C.J. Reports 1957, p. 125.

the necessary changes in internal law should be transferred to the commentary.

57. Mr. RUDA said that the Special Rapporteur's proposed opening proviso "Unless the treaty otherwise provides" was both useful and necessary.

58. He had no strong objection to the inclusion of the Special Rapporteur's paragraph (b) but thought that the idea embodied in it was already contained in article 21.

59. He was not in favour of the three-month period of grace proposed by the Special Rapporteur in paragraph (c). In strict law, there was no difference between the entry into force for a State of one of the clauses of a treaty as a result of the consent given by that State to be bound and the entry into force of a clause as a result of the withdrawal of a reservation to that clause by another State. There was no reason for allowing three months' grace for the adjustment of internal law in the second case when no such provision existed in the first case. Paragraph (c) should therefore be dropped.

60. Mr. AMADO said that, while the withdrawal of a reservation by a State might satisfy the other States, it was also possible that it might worry them and give rise to complicated problems. In the case of some multilateral treaties of a commercial or economic nature, for instance, the withdrawal of a reservation might, by modifying the rules in force, have very serious practical consequences for some of the countries parties to the treaty.

61. With regard to paragraph (c) of the Special Rapporteur's revised text, he said that he shared, to some extent, Mr. Ruda's opinion on the question of the time-limit. Moreover, it would be going too far to mention internal action to be taken by States. If the Commission wished some such provision to appear in the article, it should draft the provision in less rigid and much more discreet language, stating simply that the parties to the treaty would take the necessary administrative steps in the event of the withdrawal of a reservation.

62. Mr. ROSENNE said that perhaps the treaties to which Mr. Amado had alluded were of a type to which reservations would not be permissible under the Commission's own proposals.

63. Where two States each made identical reservations on the basis of some ancillary agreement between them, the unilateral withdrawal of that reservation by one of them might well be a breach of the ancillary agreement. But the legal situation would otherwise remain unchanged, for the maintenance of the reservation by the other State would keep it in force between itself and the State withdrawing the reservation. Cases could be cited of a number of countries making an identical reservation; if one of them withdrew its reservation, there could be no doubt that the reservation still stood in its relations with the others, which had not withdrawn theirs.

64. He accepted in principle the Special Rapporteur's proposal for paragraph (c). In that connexion, his own proposal (A/CN.4/L.108) for an addition to article 29, or a new article 29 *bis*, to the effect that any notice

communicated by the depositary to the interested States became operative 90 days after the receipt by the depositary of the instrument to which the communication related, could have some bearing on the drafting of paragraph (c). Certainly the adoption of his proposal would permit those provisions to be shortened.

65. In paragraph (b), the passage concerning notice "received by the other States concerned" was not as clear as it appeared, because of the varieties of methods of transmission, a matter to which he would refer when introducing his proposal.⁷

66. Mr. TUNKIN said that the Special Rapporteur's introductory phrase in the revised text of article 22 was useful: where the treaty contained provisions on the subject of the withdrawal of reservations, those provisions should prevail.

67. He suggested that in the new paragraph (b) the concluding words "from the depositary or, if there is no depositary, from the reserving State" should be deleted. The provision would then state simply the substantive rule, and the procedural details could be transferred elsewhere. He added that the Drafting Committee should consider whether all the procedural provisions should not be placed in two separate articles. With regard to the case where a depositary existed, article 29, on the functions of a depositary, would be the appropriate place for a provision giving those procedural details. The case where there was no depositary should perhaps be dealt with in a separate article stating that all communications regarding the treaty, any reservations thereto and any notice of the withdrawal of reservations should be addressed directly by the parties to each other.

68. He was in favour of paragraph (c), which provided for a three-month period for necessary adjustment of internal law, but agreed with Mr. Elias that it was desirable to simplify the text. He did not think that the case was comparable to that where a State gave its consent to be bound. In the latter case, if the treaty stipulated that it was to enter into force on signature, a State which foresaw difficulties in adjusting its municipal law could delay the entry into force of the treaty for the necessary period of time by signing *ad referendum*, or subject to ratification. If the treaty stipulated that it would enter into force on ratification, a State could obtain all the time it required by the simple process of delaying ratification until it had made the necessary adjustments to its municipal law.

69. In the case under consideration, the change in the situation did not depend on the will of the other States concerned, but on the will of the reserving State which decided to withdraw its reservation, as the example given by Mr. Amado showed. The withdrawal could then lead to considerable embarrassment for those States which needed to adjust their internal legislation.

70. Commenting on the point raised by Mr. Verdross, he said that there was no problem where identical reservations were made by several States; if one of them withdrew its reservation and another did not, the latter's

⁷ See 803rd meeting, paras. 30-35.

reservation would stand in its relations with the withdrawing State. The problem was in fact covered by the existing text of article 22.

71. Mr. CASTRÉN said that, subject to a few drafting changes, he accepted the Special Rapporteur's redraft.

72. On the problem referred to by Mr. Verdross, he shared the opinion expressed by Mr. Rosenne and Mr. Tunkin. Where identical reservations had been made by several States acting independently of each other, any one of those States had the right to withdraw its own reservation without consulting the others and without having to obtain their consent; such withdrawal did not affect the validity of the other identical reservations. But if a group of States had agreed to accept a treaty while making identical reservations, the withdrawal of the reservation by one of those States presented a separate problem—perhaps that of the breach of the separate agreement; however, he did not think that that problem should be dealt with in the draft articles.

73. Mr. BRIGGS said that the case mentioned by Mr. Amado illustrated the danger of accepting reservations just as much as the dangers involved in the withdrawal of reservations.

74. He found the Special Rapporteur's paragraph (a) satisfactory: it represented the only possible approach to the problem.

75. With regard to paragraph (b), he said the first point to be considered was the need to make the withdrawal of a reservation immediately operative for the withdrawing State. It should be remembered that the notice of withdrawal would be received at different dates in different parts of the world. The question therefore arose, under the text proposed by the Special Rapporteur, how long the State would have to wait for the withdrawal of its reservation to become operative. He agreed with Mr. Tunkin that the concluding portion of paragraph (b) should be dropped; the idea embodied in it could probably receive expression elsewhere in the draft articles.

76. With regard to paragraph (c), he said he had been fully convinced by the logic of Mr. Ruda's argument. No such period of grace was provided for when a State assumed the obligations of the treaty by giving its consent to be bound. Moreover, the contents of paragraph (c) related not to treaty law but to international responsibility.

77. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that all members were agreed on the need for the introductory proviso which he proposed in his revised text.

78. With regard to the point raised by Mr. Verdross, he said that the making of parallel reservations by a number of States was quite a common feature of multi-lateral treaties. There was tendency for the legal departments of governments to use, for the purposes of a particular reservation, the very terms which had been worked out by the State first making the reservation. Although the result was to produce parallel reservations, those reservations were quite independent of each other and did not involve any special understanding among the countries making them. A situation of that type did

not call for any special provisions on the subject of the withdrawal of reservations, because the withdrawal of its reservation by one State would clearly not affect the others.

79. A different situation would arise if there was a separate agreement, ancillary to the principal agreement, between two or more reserving States to make the same reservation. The withdrawal of its reservation by one of the States concerned would give rise to the problem of incompatible treaties, which was not a matter for article 22.

80. The question dealt with in paragraph (c) was of some importance to States like the United Kingdom, in which no constitutional provision existed for automatically incorporating the provisions of international law, in particular those of a treaty, in domestic law. In such countries, legislation was necessary in order to give effect to treaty obligations, and he agreed with Mr. Tunkin that the case envisaged in paragraph (c) was not comparable to that where a State gave its consent to be bound by a treaty; in the latter case, the State concerned could foresee the situation and act accordingly. The position was quite different where a reserving State had opted out of some clause of the treaty; its subsequent withdrawal of its reservation could make it difficult for some other parties to the treaty to adjust their internal law. Conceivably, a situation of a somewhat similar kind might arise for some States when a treaty in force became binding upon a new party, an event necessitating an addition to internal legislation but in practice that situation did not give rise to difficulties.

81. He agreed that the provisions of paragraph (c) should be simplified, but thought that that simplification should not go to the length of laying down so radical a rule as that the effects of withdrawal should be suspended for a given period of months.

82. Mr. Tunkin's drafting suggestion regarding the procedural elements should be referred to the Drafting Committee; a change on those lines would affect a number of other articles as well.

83. Mr. AMADO said that the difficulty which he saw in paragraph (c) was that the Commission was mainly concerned with the codification of the existing rules of international law; its incursions into the field of the progressive development of international law had been timid. Was there a sufficient body of practice to support such a clause? In his statement, the Special Rapporteur had explained that it would be useful to draft a rule to settle the difficulties arising for States in the event of the withdrawal of a reservation. In his (Mr. Amado's) opinion, the case was real, though not frequent, and consequently the Commission should adopt the rule in question.

84. The CHAIRMAN said that, although not wishing to decide whether paragraph (c) codified or developed the law, he must point out that, according to its Statute, the Commission was expected both to codify and to progressively develop international law.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that the point was being taken into account increasingly by States in their more recent treaty practice. He thought, therefore, that it would be appropriate to

include the provisions of paragraph (c), so as to meet the difficulty which might result from the need to adjust internal law to a new treaty situation, and especially in the case of States whose constitution did not provide for the incorporation of international law in municipal law. If paragraph (c) did not meet with the approval of States, it could be dropped.

86. A further question that could be discussed by the Drafting Committee was the possibility that the effect of the withdrawal of a reservation might be that the treaty entered into force in the relations between two States between which it had not previously been in force.

87. Mr. ROSENNE said that, in the circumstances last mentioned by the Special Rapporteur, the intended effect of the withdrawal of the reservations was precisely to bring the treaty into force between the two States concerned.

88. The CHAIRMAN suggested that article 22 be referred to the Drafting Committee with the suggestions and comments made by members.

*It was so agreed.*⁸

The meeting rose at 1. p.m.

⁸ For resumption of discussion on the section concerning reservations, see 813th meeting, paras. 1-109, and 814th meeting, paras. 1-30.

801st MEETING

Monday, 14 June 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tunkin, Mr. Tsuruoka, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Also present: Mr. Zakariya, Observer for the Asian-African Legal Consultative Committee.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(continued)

[Item 2 of the agenda]

ARTICLE 25 (The registration and publication of treaties)

Article 25

The registration and publication of treaties

1. The registration and publication of treaties entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. Treaties entered into by any party to the present articles, not a Member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

3. The procedure for the registration and publication of treaties shall be governed by the regulations in force for the application of Article 102 of the Charter.

1. The CHAIRMAN invited the Special Rapporteur to introduce his revised version of article 25, which read;

1. Members of the United Nations are under an obligation, with respect to every treaty entered into by them, to register it in conformity with Article 102 of the Charter of the United Nations.

2. Parties to the present articles which are not Members of the United Nations agree to register every treaty entered into by them after the present articles come into force.

3. The procedure for the registration of treaties under the foregoing paragraphs and for their publication shall be governed by the regulations from time to time adopted by the General Assembly of the United Nations for giving effect to Article 102 of the Charter.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, in 1962, the Commission had encountered some difficulties with article 25, because, while not wishing to appear in any way as proposing an amendment of Article 102 of the Charter, it wished to include a provision on registration, a well-established institution of treaty practice. At the same time, it had considered that, in a codifying venture of that nature, the Commission could not confine the provisions it adopted merely to States Members of the United Nations.

3. The Commission had accordingly adopted a text which, in its paragraph 1, provided for the observance by Member States of the existing Charter provisions; paragraph 2 extended the application of the principles embodied in those Charter provisions to any other States that might become parties to the future convention on the law of treaties. Paragraph 3 dealt with the regulations in force for the procedures of registration under Article 102 of the Charter.

4. His proposed new text for article 25 took into account certain Government comments on which he had made his own observations in his report (A/CN.4/177/Add.1).

5. Mr. ROSENNE said that, in general, his thoughts were very close to those of the Special Rapporteur; in particular, the arguments of the Special Rapporteur had allayed his own doubts regarding the possibility of a concealed amendment of the Charter. He agreed that registration was a sufficiently well-established institution of the contemporary law of treaties to justify the retention of article 25, but it would be difficult for him to accept even the amended formulation of the article proposed by the Special Rapporteur. Instead, he proposed that the whole article be replaced by a text reading:

“ The registration of treaties ”

“ The registration of all treaties with the Secretariat of the United Nations shall be performed in accordance with the regulations from time to time adopted by the General Assembly of the United Nations for giving effect to Article 102 of the Charter of the United Nations. ”

6. In the Special Rapporteur's proposed new text, paragraph 1 was redundant, since its provisions were already contained in Article 102 of the Charter. So far as paragraph 2 was concerned, his main objection was to the expression "Parties to the present articles", since the articles had been drawn up throughout in the form of general statements of rules and nowhere was reference made to the parties to the present articles. He objected to paragraph 3 and to the title of the article because they contained a reference to the publication of treaties, which was exclusively a matter for the Secretariat and had nothing to do with the parties to the treaty; the sole obligation of the parties was to register the treaty. The inclusion of the reference to publication might lead to confusion owing to the omission of any corresponding provision regarding promulgation, as indicated by the Government of Luxembourg.¹

7. The text which he himself proposed was intended to cover in a single paragraph all the ideas embodied in paragraphs 1, 2 and 3 of the Special Rapporteur's text; the expression "all treaties" referred to treaties as defined in article 1, which, in the form that the Drafting Committee was likely to propose, did not draw any distinction between treaties concluded by Member States of the United Nations and treaties concluded by non-member States.

8. He asked that the regulations to give effect to Article 102 of the Charter, reproduced as an annex to the Commission's 1962 report (A/5209), should also be included as an annex to the commentary on article 25; that would provide an opportunity to correct the mistakes made when reproducing those regulations in the Commission's report to the General Assembly in 1962.²

9. Sir Humphrey WALDOCK, Special Rapporteur, said that the text proposed by Mr. Rosenne was likely to lead to even greater difficulties. In particular, if it were stated merely that the registration of all treaties must be performed "in accordance with the regulations from time to time adopted by the General Assembly", the effect would be to refer to regulations which made a sharp distinction between registration on the one hand, and filing and recording on the other; under them, registration applied primarily to Member States, and filing and recording to non-members. Mr. Rosenne's proposal might appear to confine the provisions of article 25 to registration and to exclude filing and recording; as a result the article would not be general in its coverage of non-member States and so would not fulfil its main purpose.

10. Consequently, although he sympathized with the suggestion to simplify the language of article 25, he felt that the only possible course was to embody the procedural provisions in a separate paragraph from the substantive provisions, and in the latter, the case of Members of the United Nations should be kept distinct from that of non-member States.

11. Mr. VERDROSS said that, since paragraphs 1 and 3 merely repeated rules which occurred, first, in the United Nations Charter and, secondly, in regulations adopted by the General Assembly, the only problem

raised by the article was that concerning paragraph 2. Did the Commission wish to impose on States not Members of the United Nations the obligation to register treaties? Paragraph 2 of the Special Rapporteur's revised version was definitely preferable to paragraph 2 of the text adopted in 1962, for it clearly indicated that the obligation in question was not imposed on the Secretary-General of the United Nations but on the States not Members of the United Nations which would be parties to the convention being drafted by the Commission—a point left somewhat in doubt in the 1962 text. That obligation could not be imposed on the Secretary-General, but could be imposed on States which agreed to become parties to the convention. For that reason, he would favour the use of a stronger expression that "agree to", such as, for example, "shall" or "are required to". Subject to that observation, he accepted, in principle, the revised version proposed by the Special Rapporteur.

12. Mr. EL-ERIAN said he supported the Special Rapporteur's position and also the general economy of his new formulation, which resembled that of the article adopted in 1962.

13. It was particularly important to include an article on the principal of the registration of treaties. Registration was important in practice; it reflected an achievement of the Covenant of the League of Nations and a departure from the former practice of secret diplomacy and secret treaties which had led to such regrettable results.

14. It was useful to maintain a distinction between States Members of the United Nations and non-member States. The sanction for non-registration was laid down in Article 102 (2) of the Charter: "No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations". Clearly, that sanction would not apply in the same manner to Members of the United Nations and to non-members. Also, the functions of the Secretariat with regard to non-member States would differ, although many non-member States accepted the Secretariat as depositary of their treaties.

15. There were three categories of treaties. The first was that of treaties all the parties to which were Members of the United Nations; Article 102 of the Charter applied to all the parties. The second was that of treaties some of the parties to which were Members of the United Nations and others non-members; the parties which were Members of the United Nations were under an obligation to register the treaty by virtue of Article 102 of the Charter. The third was that of treaties between two or more non-member States. For the purposes of that third category of treaties, it would be useful to generalize the institution of registration. Of course, the system of registration would not be imposed upon them: the States concerned would accept it on signing the draft articles.

16. He asked the Secretariat whether a State which was not a Member of the United Nations could register with the Secretariat of the United Nations a treaty to which it was a party.

17. Mr. BAGUINIAN, Secretary to the Commission, said that a non-member State could register a treaty.

¹ A/CN.4/175, comments by Luxembourg *ad* article 25.

² Rectified version in *Yearbook of the International Law Commission, 1962*, Vol. II, p. 194.

Article 1, paragraph 1, of the regulations on registration and publication of treaties and international agreements adopted by the General Assembly, which had been reproduced as an annex to the Commission's report for 1962,³ provided that :

“ Every treaty or international agreement, whatever its form and descriptive name, entered into by one or more Members of the United Nations after 24 October 1945, the date of the coming into force of the Charter, shall as soon as possible be registered with the Secretariat in accordance with these regulations. ”

18. Paragraph 3 of the same article provided, in part, that “ Such registration may be effected by any party ... ”, including, of course, parties which were not Members of the United Nations.

19. In the Secretariat's answers to questions asked by Mr. Rosenne, the second sentence of paragraph 7 of the reply to question A stated : “ No treaty with a Member has ever been submitted for registration by a non-member ”.⁴ Treaties to which both Members and non-members were parties had, however, been registered by international organizations.

20. If no Member of the United Nations was a party to the treaty, the treaty could not be registered with the Secretariat. However, under article 10 of the regulations, it could be filed and recorded by a non-member if one of the parties was the United Nations or a specialized agency, or if the treaty had been entered into before 24 October 1945.

21. The CHAIRMAN said there was yet another category of States : those which, while not Members of the United Nations, were members of an intergovernmental organization linked to the United Nations by virtue of the Charter. Some of those organizations registered the treaties concluded by their members.

22. Mr. CASTRÉN said that the draft should certainly include a provision concerning the registration of treaties. The revised version of article 25 proposed by the Special Rapporteur was satisfactory on the whole. It would be sufficient if States which were not Members of the United Nations but would be parties to the future convention registered any treaties concluded by them after the entry into force of that convention. He would suggest only one drafting change; the insertion of the words “ with the United Nations Secretariat ” after the words “ to register ” in paragraph 2 of the revised text.

23. The text proposed by Mr. Rosenne had the merit of brevity, but he was not sure that it was desirable to omit the provision which referred particularly to States not Members of the United Nations.

24. Mr. AGO said he was convinced that the article involved no real substantive difficulty. What the Commission wished to do was to transform Article 102 of the Charter into a rule of general law valid for all States. Instead of beginning with a restatement of the rule in the Charter, the article should perhaps open with the broader rule that all States parties to the present articles should register with the United Nations Secretariat treaties entered into by them. That provision might even suffice,

for it would probably not be necessary to add that, so far as non-member States were concerned, the obligation would not commence until after the entry into force of the present articles.

25. The procedure for the registration of treaties should obviously be that adopted by the General Assembly. If the Commission nevertheless wished to include a provision concerning procedure, it might adopt the formula proposed by Mr. Rosenne, which did not differ greatly from the paragraph 3 proposed by the Special Rapporteur.

26. Mr. YASSEEN said that a general convention on the law of treaties should contain an article on the registration of treaties. The obligation to register treaties with a general international organization flowed from the concept of open diplomacy and was evidence of the existence of a unified international community. The obligation already existed in the case of States Members of the United Nations; as Mr. Ago had said, the intention was that it should be extended to other States.

27. For the sake of the clarity and completeness of the draft convention, it was not a bad idea that the article should begin with a paragraph reproducing in essence the rule laid down in Article 102 of the Charter. That would be a precedent which would clearly show that the draft contained existing rules drawn from a conventional source, not merely from a customary source.

28. Paragraph 2 of the revised version proposed by the Special Rapporteur was certainly necessary, and should be strengthened in the manner suggested by Mr. Verdross.

29. Paragraph 3 served a useful purpose in that it made the procedure already followed by Member States applicable to the registration of treaties concluded by non-member States. That rule should be stated in the form of a true obligation, binding also on the United Nations Secretariat. It had been said that the draft convention could not give the Secretariat additional duties; but surely the Commission's work was not outside the United Nations and, as the Special Rapporteur had said, the General Assembly could take the necessary steps before the adoption of the convention to instruct the Secretary-General to register treaties entered into by non-member States.

30. Mr. ELIAS said that he was in favour of retaining article 25 and preferred the Special Rapporteur's new formulation to the 1962 text.

31. Paragraph 1 did not appear to be necessary, since it merely repeated the contents of one of the paragraphs of Article 102 of the Charter.

32. It was paragraph 2 which embodied the essential element of article 25, since its purpose was to make binding upon non-member States certain obligations which already existed for Members of the United Nations. In its comments (A/CN.4/175) the United States Government had objected that the contents of paragraph 2 appeared to go beyond the existing practice, in imposing a new obligation on non-member States and also a new obligation upon the Secretariat. He found the reply given by the Special Rapporteur fully convincing on both those points. The point raised by Mr. Rosenne regarding the opening words of paragraph 2 should be

³ *Ibid.*, *loc. cit.*

⁴ 791st meeting, para. 61.

referred to the Drafting Committee, which might adopt a formula such as "States parties to the present articles . . .".

33. The text proposed by Mr. Rosenne for article 25 did not sufficiently cover the principle which it was the purpose of paragraph 2 to emphasize. Personally, he doubted whether it was possible to compress into a single sentence the contents of all three paragraphs.

34. Paragraph 3 was necessary; if a new obligation was to be imposed on States not Members of the United Nations, the procedure by which the obligation was to be carried out should be specified. However, the language of paragraph 3 should be amended so as to restrict the scope of its provisions to the case covered by paragraph 2.

35. The Drafting Committee should also consider whether the provisions of paragraphs 1 and 2 might not be combined by using some such wording as: "States parties to the present articles, whether or not Members of the United Nations . . .". He agreed with Mr. Castrén that it would be useful to include in paragraph 2 a reference to the Secretariat of the United Nations.

36. Mr. BRIGGS said that all members of the Commission appeared to agree on the desirability of an article on registration, and the only difficulties which had arisen related to drafting. Paragraph 1 did not add anything to the Charter of the United Nations; paragraph 3 was contained in Mr. Rosenne's draft. Paragraph 2 was not contained in that draft but Mr. Ago's suggestion would cover that point. It might therefore be possible to combine all the ideas in article 25 by means of the wording:

"All States parties to the present convention, whether or not Members of the United Nations, are under an obligation to register all treaties with the Secretariat of the United Nations in accordance with the regulations from time to time adopted by the General Assembly . . .".

37. Mr. TUNKIN said that he was in favour of retaining article 25. On the wording, he agreed with Mr. Ago that it would be sufficient to state the substantive rule, leaving out the procedural details. The article would simply state that all treaties signed by parties to the future convention on the law of treaties should be registered, as provided in Article 102 of the Charter. The method of formulating separately one rule for Members of the United Nations and another for non-members was more suited to a code or a manual than to a draft convention. The sole purpose of article 25 was to lay down the obligation to register treaties in general terms. He foresaw difficulties for the draft articles at the future conference of plenipotentiaries if the amount of detail included was excessive.

38. Mr. REUTER said the revised text proposed by the Special Rapporteur was preferable to that adopted by the Commission in 1962.

39. Nevertheless, as the definition of "treaty" given at the beginning of the draft would be quite narrow, the new rule which the Commission was trying to formulate in article 25 could be more limited in scope than Article 102 of the Charter. The application of Article 102 of the Charter depended on the meaning attributed by the General Assembly to the term "treaty or international agreement", and that meaning was much wider than that

which the Commission had decided to give to the term "treaty" for the purposes of the draft articles. For instance, an agreement concerning the headquarters of an international organization came within the scope of Article 102 of the Charter, but not within that of article 25 as it stood. Accordingly, it should be stated that the principle laid down in article 25 would be "without prejudice to Article 102 of the Charter".

40. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion the article was of great importance. The open diplomacy visualized by Lenin and Wilson had not materialized under the League of Nations system, the rule accepted at San Francisco was incomplete, and the problem was further complicated by the fact that in some quarters the Charter of the United Nations was regarded as the constitution of the modern international community, whereas in others it was looked on simply as a conventional rule. The Commission should therefore include in its draft an article making the registration of treaties obligatory for all States which became parties to the convention it was preparing.

41. With regard to the question whether the rule stated in the Charter should be repeated or further developed, he did not agree with Mr. Ago and Mr. Tunkin, for he was always in favour of strengthening existing rules. Some members of the Commission seemed to be afraid that the conference which would eventually have to decide on the draft convention might reject some of the rules proposed by the Commission. Actually, the representatives of States often regretted that the Commission's proposals were not developed further. It was always easier to simplify a text at a conference than to add anything of substance, particularly as it could always be argued that the Commission had not inserted some provision in its draft because it had regarded it as unnecessary.

42. He preferred the revised and much simplified version proposed by the Special Rapporteur, but would support the amendment proposed by Mr. Castrén to paragraph 2; it would be right to make it clear that treaties should be registered with the United Nations, for some of the specialized agencies, the International Civil Aviation Organization, for example, registered treaties concluded by their members dealing with their own specific subjects.

43. It might not be necessary to specify in paragraph 3 the procedure to be followed, for if paragraph 2 was amended on the lines proposed by Mr. Castrén, it would be self-evident that the procedure would be that laid down by the General Assembly.

44. Mr. TSURUOKA said he supported the suggestion put forward by Mr. Ago and taken up by Mr. Tunkin. The Commission should always preferably submit a very simple text; the formula did no violence to Article 102 of the Charter, and so far as the future was concerned, the Commission could rely on the wisdom and progressive spirit of the General Assembly.

45. He could accept either the 1962 text or the Special Rapporteur's redraft, but had a preference for the latter. He was not sure, however, that it would be right to change it so as to impose an obligation on the Secretary-General of the United Nations, because that would mean placing an obligation on someone who was not a party to the convention which the Commission was preparing.

46. Mr. PESSOU said he wished first to associate himself with Mr. Tsuruoka's last observation.
47. Secondly, while grateful to Mr. Rosenne for having proposed a simpler text, he thought that that text left many problems in suspense. His personal opinion was that the Commission should revert to the 1962 text, which he considered more satisfactory even than the Special Rapporteur's redraft. The latter, to which Mr. Verdross had suggested a judicious amendment, would place an obligation on States not Members of the United Nations. It was debatable what was the legal force of such an obligation and what sanction would be applied if the rule were not observed by a non-member State; in any case a State not a Member of the United Nations could not invoke a treaty before an organ of the United Nations.
48. Mr. ROSENNE suggested that, in order to meet the point raised by Mr. Reuter, the language of Article 102 of the Charter should be used; article 25 would then refer to "every treaty and every international agreement" instead of to "all treaties".
49. Mr. TUNKIN said that he had supported Mr. Ago's suggestion simply because he favoured as simple a statement of the rule as possible. The article adopted in 1962, the revised text proposed by the Special Rapporteur, and Mr. Ago's proposal, were all similar in substance; the only difference was in drafting and presentation.
50. He did not share Mr. Reuter's misgivings. By virtue of the definition of treaties, a reference to "all treaties" would cover all international agreements.
51. The CHAIRMAN, speaking as a member of the Commission, said that in the Sixth Committee many States had been critical of the formula adopted at San Francisco on the grounds that it did not settle the question of participation in registration by States which were not Members of the United Nations, and was therefore inadequate. The argument was that, in matters of security, the obligation was binding on all States, whether Members of the United Nations or not, but that in matters of open diplomacy, the obligation was not a universal rule and the sanctions were negligible. There was accordingly a need for a more specific rule. He had always been in favour of a broader formula because he thought that States should not be given an opportunity of impeding the application of the principle of open diplomacy.
52. Mr. YASSEEN said that the intention was that the obligation laid down in Article 102 of the Charter should apply to States not Members of the United Nations which became parties to the future convention. Personally, he did not think that the scope of that obligation could be extended beyond the treaties with which the Commission was concerned. Whatever term was used in the article, it would have to be interpreted in the light of the definition of the word "treaty" given in article 1.
53. Mr. AGO said that, in his opinion, the Commission should lay down rules for the States parties to the convention, and not only rules applicable to States Members of the United Nations, even if the rules reproduced an Article of the Charter word for word. If the Commission wished to guarantee the application of Article 102 to Member States, it should, in order to avoid ambiguity, follow Mr. Reuter's suggestion.
54. He would prefer that course to the proposal made by Mr. Rosenne, as it would seem strange to refer to "treaties" throughout the text, and then in article 25, to "treaties and international agreements".
55. Mr. AMADO said it seemed to him that the Commission had debated the subject long enough, that no one had anything fresh to add, and that there was a danger of complicating matters. The article, with all the suggestions put forward during the discussion, should be referred to the Drafting Committee.
56. The CHAIRMAN said he agreed with Mr. Amado. He invited the Special Rapporteur to sum up the discussion.
57. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that in 1962 article 25 had been a troublesome one to draft; it was with that fact very much in mind that he had not suggested any major changes in his revision. He was all for simplification, but wished to remind members that the real difficulties arose from the need to avoid any appearance of amending or replacing Article 102 of the Charter and from the distinction drawn in the regulations between registration and filing and recording. Mr. Tunkin was evidently anxious to retain the reference to Article 102; but it was not quite clear what kind of text Mr. Ago favoured. Was it a general formula omitting any reference to Article 102, or not?
58. Because of the risk of being accused of having proposed an amendment of the Charter, the Commission had decided at its fourteenth session that, in article 25, it should not do more than restate what was laid down in Article 102 for Members of the United Nations. Possibly that preoccupation had been exaggerated, but the Drafting Committee would certainly again encounter the difficulty of framing the article intelligently without referring to Article 102, and then the delicate problem of the relationship with Article 102 would necessarily arise.
59. Mr. Reuter had pointed to a further difficulty consequent upon the Commission's decision earlier in the session to limit its draft articles to treaties between States, because, however desirable it might be in theory that the rule in article 25 should be a general one, it would not, by reason of that limitation, cover treaties between States and international organizations.
60. The Drafting Committee might not find it easy to exclude from the article the procedural elements that were part and parcel of Article 102 because of the interpretation that might be put upon the word "registration" where non-member States were concerned, owing to the distinction made in the regulations between registration and filing and recording. If the provisions of article 25 ultimately came into force as part of a convention on the law of treaties, the General Assembly itself might find it advisable to amend the language of its regulations on registration to take account of that development.
61. The objection that the reference to "publication" would impose an obligation on the Secretariat did not greatly impress him, because the regulations had emanated from the General Assembly in pursuance of the

provisions of the Charter and, in any event, had to be applied by the Secretariat under the General Assembly's direction.

62. The CHAIRMAN suggested that the Commission should refer the texts, together with Mr. Rosenne's proposal and the records of the discussion, to the Drafting Committee.

*It was so agreed.*⁵

Co-operation with Other Bodies

(A/CN.4/180)

[Item 7 of the agenda]

63. The CHAIRMAN invited the Commission to consider the report by Mr. Ago, the Commission's observer, on the seventh session of the Asian-African Legal Consultative Committee (A/CN.4/180).

64. Mr. AGO said that he did not have much to add to his report. The Asian-African Legal Consultative Committee had held its seventh session at Baghdad from 22 March to 1 April 1965. Among the items on its agenda had been the law of outer space, codification of the principles of peaceful co-existence, enforcement of judgments, diplomatic protection of aliens, relief against double taxation, the United Nations Charter from the point of view of the Asian-African countries, as well as administrative questions. Essentially, however, the Committee had discussed the rights of refugees and collaboration with the Commission in connexion with the law of treaties.

65. During the discussion on the rights of refugees, the United Nations Deputy High Commissioner for Refugees and his legal adviser had been present. The Committee's main concern had been that its draft should not duplicate the Convention of 1951.⁶ The text of the principles which it had adopted was reproduced in annex B of the report.

66. On the subject of co-operation between the Committee and the Commission, he had made certain statements (reproduced in annex C of the report) describing the status of the Commission's work and explaining why it had given priority to certain important topics of international law. He had said that the Commission was counting on the co-operation of the Committee, whose members included most of the new countries keenly interested in the Commission's work of codification. He had added that the Commission hoped very much to receive the Committee's observations on its draft articles as soon as possible, even before the completion of the debate on the draft.

67. The Committee's secretariat had prepared a draft of several articles on the law of treaties. Several members, however, had thought it would be inadvisable to discuss a draft differing from the Commission's draft, and in the end the Committee had decided not to consider that draft but to take the Commission's text as the basis for discussion. The Committee had, however, been unable to

discuss the Commission's draft at that session and had appointed a rapporteur who would report to it, at its next session, concerning the Commission's work on the law of treaties. The rapporteur in question was Mr. Zakariya, who had taken a very active and greatly appreciated part in the Committee's proceedings.

68. The Committee was following the Commission's work with much sympathy, and he was sure that the Commission could count on its active co-operation. It was unfortunate, he thought, that the Committee was only partly representative of the vast regions of Africa and Asia; it had only nine members. Several of its members had spoken in favour of enlarging its membership. An increased membership would present some difficulties; for example, English was the Committee's only working language at the moment, whereas a good many African States were French-speaking and were therefore not represented. The Committee's secretariat was considering the possibility of adopting French as a second working language, a step which might attract more African participation. It was very important that as many countries as possible should become members of the Committee: in that way, the Commission would be sure to know the majority point of view of the countries of both regions.

69. He was very grateful for the warm welcome given to him by the members of the Committee and by the Iraqi authorities, which could certainly be attributed primarily to the friendship and preparatory work of Mr. Yasseen.

70. The CHAIRMAN asked the observer for the Asian-African Legal Consultative Committee whether he wished to make a statement.

71. Mr. ZAKARIYA (Observer for the Asian-African Legal Consultative Committee) said that the important work carried out by the Commission was closely followed by students of international law throughout the world. The Asian-African Legal Consultative Committee had very much appreciated the presence of Mr. Ago at some of its meetings during the seventh session and had heard with interest his statement on the Commission's work and on the state of international law in general. It hoped that the Chairman of the Commission's seventeenth session would attend the eighth session, due to be held in Thailand or Pakistan. Such exchange visits between members of the two bodies would foster closer understanding and collaboration in the common cause of world peace and harmony under the rule of law.

72. Although the Consultative Committee did not yet include among its members all or even a majority of Asian and African countries, it was truly representative of a cross-section of the region. Once certain technical and administrative difficulties had been overcome, such as that of the working languages, it was hoped that the number of participating countries would increase, and he fully endorsed what Mr. Ago had said about the desirability of a wider membership.

73. The Committee's declared objectives were, among others, to examine problems under consideration by the Commission, to arrange for its views to be placed before the Commission, to consider the Commission's reports and to make recommendations to governments of participating countries on points arising out of them.

⁵ For resumption of discussion, see 815th meeting, paras. 1-5.

⁶ Convention relating to the Status of Refugees, of 28 July 1951; United Nations *Treaty Series*, Vol. 189.

74. The topic of the law of treaties, though on the agenda for the seventh session of the Consultative Committee, had been deferred, and he had been appointed rapporteur, with instructions to prepare a report on points arising out of the Commission's draft that required consideration from the Asian-African viewpoint. Though conscious of the difficulties of his task, he was confident that the Commission's deliberations at its seventeenth session, and the comments of government members of the Consultative Committee would be of great assistance.

75. The CHAIRMAN, on behalf of the Commission, thanked the representative of the Asian-African Legal Consultative Committee for his invitation, which the Commission would be happy to consider. He also thanked the Committee for having sent an account of its work and hoped that it would continue that practice, which enabled members of the Commission to keep abreast of legal thinking in the countries of Asia and Africa.

76. He asked Mr. Zakariya to convey the Commission's best wishes to the Committee and to assure it of its desire for sincere co-operation. He hoped the Committee would recommend its member countries to send their comments to the Commission regarding its draft articles so that it could further improve the text.

77. Mr. YASSEEN said that as an Iraqi he wished to thank Mr. Ago for his kind words; Iraqi jurists had particularly welcomed the presence of Mr. Ago, an outstanding expert in international law, as the Commission's observer at the Committee's session.

78. Mr. ELIAS said he had noted from paragraph 15 of Mr. Ago's report that member governments of the Consultative Committee were requested to send their comments on the Commission's draft articles to the rapporteur, Mr. Zakariya, by the end of August 1965; the consequence might be that some would have to prepare two sets of comments, one for the Commission and the other for the Committee, but if they were willing to do so that was no problem. What caused him greater concern was that, if the Consultative Committee's eighth session were not to take place until March or April 1966, there would be very little time for the Commission to take into account any comments on its draft transmitted after that date, because according to the established time-table the work on about two-thirds of the draft was to have been completed before the summer session of 1966.

79. The CHAIRMAN said he was sure that Mr. Zakariya would take note of those observations which were of importance for future co-operation between the Commission and the Committee.

80. Mr. EL-ERIAN said he was glad to note that the Consultative Committee was giving more attention to topics under consideration by the Commission, and hoped that in time it would be in a position to make the valuable contribution that was expected of it. Certainly co-operation between the two bodies must be strengthened and extended.

81. Mr. ROSENNE said Mr. Ago was to be congratulated on his remarkable statement to the Consultative Committee, reproduced in annex C of his report, one of

the best justifications in succinct form for codification that he had read for a long time. He wished the Committee success in its work on the law of treaties. The point made by Mr. Elias regarding the Committee's comments was a very pertinent one.

82. He had one other observation to make, directed generally to the Secretariat, and he hoped it would not be taken amiss by either Mr. Ago or the Chairman. He had noted from annex A in Mr. Ago's report that the United Nations had been represented by no less than five persons at a session of a body which, the Commission had just been informed, was not truly representative of the geographical area described in its name. Yet the Commission had been told by the Secretariat during the past fortnight that 100 copies of its *Yearbook* could not be distributed to leading legal reviews because of the expense involved, and that for the same reason members of the Commission were not entitled to receive volume II of its *Yearbook*. He suggested that the United Nations authorities responsible for such matters should examine more closely the question of United Nations representation at gatherings of that kind, so as to make sure that it was not extravagant.

83. The CHAIRMAN said he understood that the representative of the United Nations mentioned in annex A was the Director of the United Nations Information Centre at Baghdad and that Mr. Omar Sharaf was the acting representative of the High Commissioner for Refugees, also at Baghdad.

84. Sir Humphrey WALDOCK, Special Rapporteur for the law of treaties, associating himself with what had been said about Mr. Ago's statement to the Consultative Committee and with the welcome extended to Mr. Zakariya, said he would be interested to know whether the Consultative Committee had given any thought to the question how it could assist in the Commission's work. Its observer would be aware of the relevance of the time factor if the Commission was to be able to give due consideration to the Committee's views. Obviously it would have been desirable that its views should be presented at an earlier stage in the Commission's work, for at its summer session in 1966 the Commission would be extremely busy completing the last phases of its work on the law of treaties and for lack of time might find it difficult to review any fresh considerations that might be put forward by the Committee. There was clearly a general problem as to the best stage in the Commission's work on a piece of codification at which other bodies could assist most effectively, and he had in mind not only the Consultative Committee but also the Inter-American Juridical Committee and others.

85. The CHAIRMAN, speaking as a member of the Commission, said that he had always been in favour of closer co-operation between the Commission and all regional or non-governmental organizations dealing with the same questions, but there had invariably been objections by the Secretariat, based, where the non-governmental organizations were concerned, on certain legal considerations. The Asian-African Committee and the Inter-American Council of Jurists had applied to the General Assembly for consultative status, and the matter had been debated at length in the Sixth Committee, but he did not know whether the same was true with regard to

the Council of Europe. In any case, the question would arise when the agenda item concerning co-operation with other bodies was discussed again, and the Commission would then consider the Special Rapporteur's proposal for mobilizing all available forces in an endeavour to improve the draft articles still further.

86. He suggested that the Commission should approve the report by its observer.

The report by the Commission's observer (A/CN.4/180) was formally approved.

The meeting rose at 5.55 p.m.

802nd MEETING

Tuesday, 15 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1, A/CN.4/L.107)
(*resumed from the previous meeting*)

[Item 2 of the agenda]

ARTICLES 26 (The correction of errors in the texts of treaties for which there is no depositary) and 27 (The correction of errors in the texts of treaties for which there is a depositary)

Article 26

The correction of errors in the texts of treaties for which there is no depositary

1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested States shall by mutual agreement correct the error either:

(a) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(b) By executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

(c) By executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

2. The provision of paragraph 1 above shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

3. Whenever the text of a treaty has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

Article 27

The correction of errors in the texts of treaties for which there is a depositary

1. (a) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to the attention of any other States which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction.

(b) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the States which are or may become parties to the treaty.

2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the States mentioned in paragraph 1 (b) above.

3. The provisions of paragraph 1 above shall likewise apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

4. If an objection is raised to a proposal to correct a text under the provisions of paragraphs 1 or 3 above, the depositary shall notify the objection to all the States concerned, together with any other replies received in response to the notifications mentioned in paragraphs 1 and 3. However if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the States concerned shall otherwise decide.

6. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

1. The CHAIRMAN invited the Special Rapporteur to introduce his proposals for article 26, which was the first of two complementary articles on the correction of errors in the texts of treaties.

2. Mr. CASTRÉN, speaking on a point of order, proposed that the Commission should deal at the same time with article 27, since the Special Rapporteur suggested the rearrangement in three articles of the

material in articles 26 and 27 and the Japanese Government had suggested (A/CN.4/175) that there should be only one consolidated article.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prefer to proceed as proposed by Mr. Castrén.

4. The CHAIRMAN said that, if there were no objection, he would consider Mr. Castrén's proposal adopted.

Mr. Castrén's proposal was adopted.

5. Sir Humphrey WALDOCK, Special Rapporteur, said that, in order to take into account Government comments, he proposed in his report (A/CN.4/177/Add.1) that the ten paragraphs of articles 26 and 27 as adopted in 1962 should be replaced by a shorter text consisting of three articles. He had arrived at that result by placing in his new article 27 (*bis*) certain procedural provisions which applied to all treaties and which, in the 1962 version, were stated in paragraphs 3 and 4 of article 26 and repeated in paragraphs 5 and 6 of article 27.

6. The consolidated text proposed by the Japanese Government omitted three questions of substance which were covered both by the 1962 text and by his own proposal. The first was that of the non-concordance of two or several authentic texts, in cases where the treaty had more than one language version; the problem was similar to that of the correction of a treaty having a single text. The second was that of certified copies; the inclusion of a provision regarding them was useful, since certified copies were very frequently used by governments to determine the text of the treaty for purposes of internal legislation. The third was that of an objection to a proposed correction. Inclusion of a reference to that third question undoubtedly complicated the exposition of the subject, but that reference was necessary: the articles dealt with the case where no objection was made and would not be appropriate to omit all mention of the contrary case.

7. If those three points were retained, as he believed they should be, it would appear preferable, from the point of view of drafting, to arrange the various provisions in three separate articles as he proposed:

Article 26

1. Unless otherwise agreed between the interested States, where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the error shall be corrected:

(a) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(b) By executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

(c) By executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

2. Paragraph 1 applies also where there are two or more authentic texts of a treaty which are not concordant and where it is agreed to correct the wording of one of the texts.

Article 27

1. (a) Unless otherwise agreed, where an error is discovered in the text of a treaty for which there is a depositary after the text has been authenticated, the depositary shall bring the error to the attention of all the interested States, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction.

(b) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the interested States.

2. The same rules apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

3. If an objection is raised to a proposal to correct a text under paragraph 1 or 2, the depositary shall communicate the objection to all the interested States, together with any other replies received in response to the notifications mentioned in those paragraphs. However, if the treaty was drawn up within an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

4. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to each of the interested States.

Article 27 (bis)

Taking effect and notification of correction to the text of a treaty

1. Whenever the text of a treaty has been corrected in accordance with article 26 or 27, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the interested States otherwise decide.

2. Notice of any such correction to the text of a treaty that has entered into force shall be communicated to the Secretariat of the United Nations.

8. Mr. CASTRÉN said that the Special Rapporteur's proposed redraft was shorter and simpler than the 1962 text and was an improvement in several respects. He thought nevertheless that the subject might perhaps be covered in a single article, drafted on the lines proposed by the Japanese Government. If, as the Special Rapporteur considered, there were gaps in the Japanese text, they could be filled by adding the substance of paragraph 2 of articles 26 and 27 as redrafted by the Special Rapporteur, concerning corrections to two or more authentic texts of a treaty which were not concordant, and, secondly, paragraphs 3 and 4 of article 27 as redrafted by the Special Rapporteur, dealing with objections raised to proposals to correct a text, and the duties of the depositary with regard to the correction of errors in certified copies of treaties.

9. The articles as revised by the Special Rapporteur used the phrase "the interested States" in several passages.

That phrase had been proposed by the Netherlands Government (A/CN.4/175/Add.1, *ad* article 27). It probably had the advantage of making the text lighter, but he still thought that it was a little too vague.

10. Sir Humphrey WALDOCK, Special Rapporteur, said that "interested States" was a reserved phrase. Considerable difficulty had been experienced in finding expressions to describe the States which had to be consulted in the various circumstances contemplated in the draft; the Drafting Committee was giving its attention to the matter and he hoped that it would be able to propose an improvement.

11. Mr. ELIAS said that, since the whole of section V was devoted to the functions of the depositary, the order of the articles in the section should be altered. The section should commence with article 29, which set out the general functions of the depositary, article 28 would then follow and the section would conclude with the provisions on the correction of errors in the text of treaties.

12. It should be possible to simplify the text of articles 26 and 27 even further than the Special Rapporteur proposed, though he would hesitate to say whether the material should be arranged in one article or in two articles; in any case, it should certainly not be spread over three articles.

13. Mr. ROSENNE said that the Special Rapporteur had introduced a valuable simplification. He noted, however, that, under his new proposals, there would be four articles dealing with error, namely, articles 26, 27 and 27 (*bis*) on the correction of errors, and article 34, which contained the substantive provisions on error. He saw some psychological danger in inflating the provisions on the various manifestations of error.

14. With regard to the rearrangement of the material, he recalled the suggestion at a previous meeting by Mr. Tunkin¹ for a general article dealing with the differences of a procedural character between treaties having a depositary and treaties having no depositary. If that suggestion was adopted, it might be possible to simplify considerably the statement of the substantive rules in articles 26 and 27, and any special provisions relating to the duty of the depositary in relation to that type of error could be dealt with elsewhere. The first rule would be that embodied in paragraph 1 of article 26 as proposed by the Special Rapporteur. Then would follow a provision on lack of concordance between two or more authentic language versions; in that connexion, he proposed that the word "texts" be replaced by the word "versions", not only in articles 26 and 27 but also in articles 72 and 73. He also suggested that the provisions on the correction of discordant texts be embodied in a separate article, so as to avoid over-emphasizing the problem of error.

15. He accepted as the statement of a general rule of law the contents of paragraphs 1 of the Special Rapporteur's article 27 (*bis*), but felt that the contents of paragraph 2 should be covered by the provisions of article 25, on the registration of treaties.

16. He next wished to refer to paragraph 4, and only paragraph 4, of article 34. At its fifteenth session, in 1963, the Commission had discussed whether that

paragraph should be retained and where it should be placed and the Special Rapporteur had indicated that its retention "would have to be reconsidered during the discussion on articles 26 and 27".² He (Mr. Rosenne) thought the point should be covered in article 27 (*bis*), paragraph 1.

17. The title of section V seemed inappropriate since it embraced two completely separate subjects.³

18. Mr. RUDA said that, while appreciating the Swedish Government's proposal for deleting articles 26 and 27 on the grounds that they were "more appropriate for inclusion in a code of recommended practices than in a convention" (A/CN.4/175), he supported the Japanese Government's proposal that articles 26 and 27 should be amalgamated.

19. The Special Rapporteur had made a commendable effort to simplify the wording, but he wished to raise a number of points in connexion with his new proposals. The Special Rapporteur's article 26, paragraph 1, commenced with the proviso "Unless otherwise agreed between the interested States"; in the light of that proviso, sub-paragraphs 1 (*a*), 1 (*b*) and 1 (*c*) were unnecessary, since they represented three possible methods which could be adopted by the interested States, by agreement. It would be appropriate to state a residuary rule if there was only one rule applicable where there was no agreement to the contrary, but since a choice of several courses was offered, the sub-paragraphs were redundant. It would be sufficient to say that the interested States chose by agreement the method of correction.

20. Paragraph 2 of the same article dealt with exactly the same subject as the Special Rapporteur's paragraph 2 of article 27, and the Drafting Committee should consider combining the two into a single provision. Contrary to what was suggested by the Japanese Government, he would urge that the provision should be retained. It was a matter of great practical importance to cover the case of non-concordance of two or more authentic texts. He had recently had occasion to deal with an important case of that kind: the non-concordance of the English, French, and Spanish authentic texts of the Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone.

21. The Drafting Committee could endeavour to simplify the language of the Special Rapporteur's article 27, particularly paragraphs 1 (*b*) and 3, which were unduly detailed for the purposes of a draft convention.

22. He commended the Special Rapporteur on his proposed article 27 (*bis*), which was very suitable as the concluding provision for a consolidated article on the correction of errors.

23. Mr. AGO said that the Special Rapporteur had done a great deal to simplify the text, and perhaps the Drafting Committee might try to simplify it still further. As Mr. Rosenne had said, to devote too many provisions to the question of error might exaggerate its importance.

24. There was one other matter to which Mr. Rosenne had quite rightly drawn attention: the word "error"

¹ *Yearbook of International Law Commission, 1963, Vol. I, p. 211, para. 17.*

² The title of section V in the 1962 draft read: "Correction of errors and the functions of depositaries".

¹ 800th meeting, para. 87.

occurred in two passages in the draft articles, with different meanings. In articles 26 and 27 and in article 34, paragraph 4, it meant an error in the wording which did not affect the validity of a treaty; but in the rest of article 34 it meant an error which invalidated the consent of a State and which accordingly affected the validity of the treaty.

25. Not only could articles 26 and 27 be condensed, and perhaps amalgamated, but it should be made clear in that way that they referred to the correction of errors, so as to prevent any confusion with the matter dealt with in article 34.

26. Mr. REUTER said that he, too, had been struck by Mr. Rosenne's remarks. Article 26 was not comprehensible to anyone not familiar with the Commission's earlier proceedings. It was not until article 34, paragraph 4, that the meaning of "error" as used in article 26 was defined and the definition was not very clear. What, precisely, was an error of wording? The question was more complex than appeared at first sight. Slips of the pen or typographical errors caused no difficulty. Where, however, the error was one of translation, the matter was quite different and the error much more serious; and it seemed that paragraph 2 of article 26 as proposed by the Special Rapporteur might cover errors of translation. In his (Mr. Reuter's) opinion, the Commission would be well advised to defer consideration of article 26 and the following articles and to make a careful study of each category of error, for the problems they raised differed widely.

27. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission should keep clearly in mind the distinction between errors in copying or translation, which were covered in articles 26 and 27, and errors which affected the validity of a treaty. It had approached the whole subject from the standpoint that, for an error to come within the scope of the provisions of articles 26 and 27, all the parties had to be agreed that it constituted an error. In the absence of such agreement, the matter became a difference between States which had to be settled by other means; in extreme cases, the error could affect the validity of the treaty. It was therefore important that the Commission's understanding of the scope of articles 26 and 27 should be clearly expressed.

28. Mr. AGO asked Mr. Reuter whether his intention had been to propose that the procedure to be followed for the correction of errors which did not affect the validity of the treaty should be specified after article 34.

29. Mr. REUTER said that, despite what Mr. Jiménez de Aréchaga had said, he still thought that, as they stood, articles 26 and 27 did not make it clear that they referred to all errors, of whatever kind, so long as the States agreed to correct them.

30. It had been pointed out that the title of section V covered two different subjects, the correction of errors and the functions of the depositary. Preferably, the correction of errors should be dealt with in the context of article 34; in other words, in the provisions concerning "error" in general, but as a case particularly easy to settle.

31. If the Commission preferred not to upset the scheme of the draft articles, then it should be made clear right at

the beginning of article 26 that the article was concerned with a particular case of error, that of an error, whatever it might be, which the States agreed to correct.

32. Mr. TUNKIN said that he did not share Mr. Reuter's fears. Practice showed clearly that errors of the type contemplated in articles 26 and 27 were regarded as purely linguistic errors. In such cases, no difference arose over the contents, only over the expression or wording, and the errors were corrected by much simpler methods than those used for errors that affected substance, which were dealt with in article 34.

33. He welcomed the Special Rapporteur's efforts to shorten the articles, but thought that they might be simplified even further. However, he was not certain that that result could best be attained in that case by the proposal he himself had put forward at a previous meeting, for a separate article on procedural rules for treaties having a depositary.⁴ He was inclined to the view that it was better to devote one article rather than three to the correction of errors in the text, so as to avoid attributing an exaggerated importance to the subject.

34. Mr. AMADO said that, while he understood Mr. Rosenne's and Mr. Reuter's concern about the matters dealt with in article 34, he wished to point out that articles 26 and 27 related to the external aspect of the treaty. Coming, as they did, after an article dealing with the registration and publication of treaties, article 26 and those following indicated that treaties should be registered in a correct form and that errors, if any, should be rectified; then, the article on the functions of the depositary dealt with the additional acts which were still necessary to establish the external form of the treaty.

35. He would not be very happy if the almost exclusively formal question of the correction of errors was transferred to a section dealing with the substance and validity of the treaty. It would be better to simplify the provisions than to shift their position in the text. Mr. Ruda's suggestions on that point were completely acceptable; the draft should not give greater prominence to the question than it merited.

36. The CHAIRMAN said that, in his opinion, articles 26, 27 and 27 *bis* dealt with so-called errors of expression and not with errors of substance.

37. Mr. YASSEEN said that there was a very clear difference, of kind and not of degree, between the question dealt with in article 34 and that dealt with in articles 26 and 27. Article 34 concerned errors affecting the formation of the consent, whereas articles 26 and 27 concerned errors affecting the expression of the consent. The Drafting Committee might perhaps make that distinction still clearer in the actual text of the articles. The provisions concerning the correction of slips should not be shifted and should on no account be linked to article 34, for a slip was quite distinct from an error of substance.

38. In his revised version the Special Rapporteur had evidently tried hard to simplify the provisions. The Drafting Committee might perhaps simplify the text even further, for the question was not so important as to deserve elaborate provisions.

⁴ 800th meeting, para. 87.

39. Mr. AGO said that the text should not only be simplified but should be made very clear. Articles 26 and 27 described the procedure for correcting errors which States agreed to treat as errors. It was therefore unnecessary in the draft to specify the nature of those errors. They might be more serious than mere typographical errors; conversely, sometimes States agreed to replace a certain term by another which, in their opinion, better expressed their meaning, even though there was not, strictly speaking, an error. The essential point was that articles 26 and 27 covered errors which States were prepared to correct and which they did not plead as having vitiated their consent. In those articles, therefore, the emphasis should be on the idea of correction rather than on the idea of error.

40. He agreed with Mr. Tunkin that the question should not be given more space than it deserved; a single article would probably be amply sufficient.

41. Mr. TSURUOKA said that, in his opinion, the provisions under consideration were in their right place in the draft, for in practice, the correction of errors of form was part of the treaty-making process.

42. To meet the objections of Mr. Rosenne and Mr. Reuter, the Drafting Committee should bring out more clearly the idea that the provisions in question covered errors of form and not errors of substance. The difference between the two kinds of errors was quite clear; the difference was one of kind and was reflected in the procedure, which was much simpler for errors of form than for errors of substance.

43. The Special Rapporteur was to be commended for his efforts to simplify the text adopted in 1962.

44. Mr. REUTER said it was easy to tell *ex post facto* what kind of error had been involved. If the States agreed that an error was one of drafting, then it was in fact a drafting error and no one would question the matter; if the States did not agree, what some considered a drafting error was regarded by others as an error of substance, and that difference of views might lead to international litigation.

45. He would readily agree to Mr. Ago's suggestion that that section of the draft should contain an article on the correction of errors by agreement among States. Whereas, however, States were free to correct almost anything, the same was not true of the depositary, who could correct an error only if a genuine slip or a purely drafting question was involved. In the case of a translation error, even if, for example, three of the texts were concordant and a fourth differed, who was to say whether the error was a slip or an error of substance? Disputes arose between States over such points. Consequently, if the Commission followed Mr. Ago's suggestion, it would be necessary to specify whether the corrections in question applied to all errors, whatever their nature, or to some errors only, and in the latter case, to what errors. Such an article would merely indicate a procedure and the scope of its application. If any error whatsoever could be corrected in that way, a distinction would have to be made between cases where the initiative for the correction came from States, and those in which it came from the depositary.

46. Moreover, if the Commission wished to keep the present order of the articles, and if there had to be a

cross-reference between article 26 and article 34, it was better that the cross-reference should appear in article 26.

47. Mr. PAL said he was surprised that the question of what kind of errors were covered by articles 26 and 27 should have been raised, as though it were something new. In fact, the question had been very thoroughly discussed at the fourteenth session in 1962 when the Commission had examined article 24, as proposed in the Special Rapporteur's first report (A/CN.4/144/Add.1),⁵ corresponding to the present article 26, and devoted the bulk of its 657th and 661st meetings to it.⁶ It was perfectly clear from that discussion that the Commission had had in mind all kinds of errors, whether clerical or substantial, provided only that they were agreed to be errors. The essential prerequisite was the agreement of the parties on the existence of the error, and that had been repeatedly emphasized by the Special Rapporteur.

48. Mr. AMADO said that Mr. Pal had put the question with the utmost clarity: articles 26 and 27 dealt with errors which States agreed to correct. Article 34, on the other hand, dealt with errors of substance which the States could claim invalidated their consent. The two questions had nothing to do with each other and should be kept quite distinct.

49. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on articles 26 and 27.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had taken the right course at its fourteenth session when it had dealt separately with error in substance and error in expression; any attempt to deal with all errors in the same provisions would lead to confusion. He therefore urged that the rules on errors in wording should be kept in their present context in part I, Conclusion, Entry into Force and Registration of Treaties, and that the provisions on errors which affected the validity of treaties should be left in article 34.

51. A question to be settled was whether the distinction between the two types of error had been made sufficiently clear in the wording of articles 26 and 27 on the one hand and article 34 on the other. As far as the English text was concerned, the use in articles 26 and 27 of the expression "errors in the text" as opposed to the expression "an error respecting the substance" used in article 34 made the distinction clear. The Drafting Committee would however consider whether any improvement was possible in that connexion, and ensure that the French and Spanish texts were equally clear. In any case, none of the Governments appeared to have had any doubts regarding the matters dealt with in articles 26 and 27, which suggested that the 1962 text was reasonably clear in that respect.

52. With regard to the scope of the articles, he fully agreed with Mr. Pal that the determination of what constituted errors of expression must be a matter of agreement. That point was more clearly brought out in his proposed article 27 than in article 26, although paragraph 1 (b) of article 26 gave an indication of the need for agreement.

⁵ *Yearbook of the International Law Commission, 1962*, Vol. II, p. 80.

⁶ *Ibid.*, Vol. I, pp. 182-185 and 212-214.

53. Articles 26 and 27 obviously covered all corrections in expression, regardless of the source of the fault. In all those cases an error would be involved, and he was not prepared to follow Mr. Ago on that point. Even where the parties agreed that the text of the treaty contained some infelicitous expression, which might perhaps be unfortunate because of some political nuance, the case would still be one of error in expression. If, however, the parties admitted that the text was completely correct but merely wished to change it by agreement, the case was really one of amendment and should be governed by the separate provisions on the amendment of treaties.

54. With regard to the drafting of the articles and the suggestion that articles 26, 27 and 27 (*bis*) should be amalgamated into one article, he sympathized with the view expressed by Mr. Rosenne that it was undesirable to lay excessive emphasis on the correction of errors. However, if all the three points omitted from the Japanese Government's proposal were to be included, as he believed they should be, the single article which would result would be unduly long. He noted that Mr. Castrén had urged the retention of those three points and that no member had advocated the deletion of any of them. The Drafting Committee should therefore work on the basis that all three would be included.

55. Regarding Mr. Rosenne's drafting suggestion to make use of Mr. Tunkin's proposal for a general article on the distinction between the case where a treaty had a depositary and the case where it had none, he was glad to note that Mr. Tunkin himself did not think that his proposal could cover the present case. The problems which arose were not connected with a procedural point but affected rather the formulation of the agreement for correction. Where there was no depositary, the parties would settle the question face to face; where there was a depositary, as was almost inevitable in the case of important multilateral treaties, it was necessary to ascertain through the depositary whether all the parties agreed on the existence of the error and on the decision to correct it. Such a matter could not conveniently be dealt with in a general article dealing with procedure in cases where there was or was not a depositary.

56. He would therefore propose that articles 26, 27 and 27 (*bis*) should be referred to the Drafting Committee to be re-examined with a view to shortening them in the most convenient manner possible in the light of the discussion.

57. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to refer articles 26, 27 and 27 (*bis*) to the Drafting Committee as proposed by the Special Rapporteur.

It was so agreed.

58. Mr. TSURUOKA suggested that, to forestall any possibility of misunderstanding, the commentary should explain that the measures provided for in those articles were normally taken during the process of the conclusion of the treaty, between the authentication of the text and signature, ratification or analogous act.

59. Mr. ROSENNE said that the question of the correction of an error could also arise after ratification, and the position of the three articles in the draft must therefore be

carefully considered. He would hesitate to agree with Mr. Tsuruoka.

60. Mr. TSURUOKA said that, in his view, any change made after ratification was an amendment to the treaty and not merely a correction of the text, although such a modification was made by simplified procedure.

61. The CHAIRMAN recalled that in 1962 the Commission had held that it should be possible to correct errors discovered after the text had become final. Mr. Tsuruoka's suggestion would, however, be transmitted to the Drafting Committee.

62. Sir Humphrey WALDOCK, Special Rapporteur, said he thought that Mr. Tsuruoka's suggestion went too far, since it would unduly restrict the application of the articles concerning the correction of errors.

63. He suggested that the Drafting Committee should be asked to consider two further points, additional to those he had mentioned in his summing up. First, the title of section V was not well chosen and should be revised, though that point might have to be left aside pending the final decisions about the rearrangement of the articles.

64. The second point was whether or not the content of article 34, paragraph 4, should be transferred to the articles dealing with corrections of error and removed from the section on invalidity. Possibly, as he had already indicated, it might be found unwise to give the point too much prominence, but he was clear in his own mind that article 34 was not the right context for dealing with the matter.

It was so agreed.⁷

ARTICLE 28 (The depositary of multilateral treaties)

Article 28

The depositary of multilateral treaties

1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the States which adopted it shall have otherwise determined, the depositary shall be:

(a) In the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

(b) In the case of a treaty drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating States shall consult together concerning the nomination of another depositary.

65. The CHAIRMAN invited the Special Rapporteur to comment on article 28.

66. Sir Humphrey WALDOCK, Special Rapporteur, said that article 28 had not given rise to any criticism on the part of governments. The Swedish Government, usually critical on the grounds that the Commission's texts were either procedural or descriptive in character, recognized that article 28 contained a dispositive rule, and the United States Government regarded it as declaratory

⁷ For resumption of discussion, see 815th meeting, paras. 6-14.

of a well-accepted practice and useful. He had no proposal to make regarding the text.

67. Mr. TUNKIN said that most governments had not commented on article 28 because for practical purposes it was useless. There was nothing objectionable in such a residuary rule but it could be dispensed with altogether, because in modern treaty-making practice, provision was always made for a depositary, and as far as the cases dealt with in paragraph 2 were concerned, they would be regulated by subsequent agreement between the parties.

68. Mr. AGO said he was not convinced that the article was either necessary or desirable. It dealt with the case where the treaty failed to designate a depositary, where the parties had not otherwise determined and where it was quite impossible, owing to the treaty's silence, to deduce from the text which depositary had been chosen by the parties. In one case, that where the treaty had been drawn up within an international organization, the depositary, under paragraph 1 (a) of the draft adopted in 1962, would be the competent organ of that international organization. In his opinion, no such rule needed to be laid down: either it would be expressed in the statute of the international organization concerned or it would appear in the rules of the organization, and if not, the Commission could not venture to say that the organ of an organization would be the depositary. If neither the statute of the organization, nor the rules of the organization, nor the treaty itself designated that organ as the depositary, the Commission could not adopt a general rule to that effect.

69. In the case described in paragraph 1 (b), that of a treaty drawn up at a conference convened by the States concerned, the depositary should be the State in whose territory the conference was convened. Actually, the choice of a meeting place was sometimes fortuitous, or the place was chosen for its amenities; why should it follow that, if nobody had designated the host country as depositary, it must be the host country, simply because the conference had been held in its territory?

70. In his opinion, no case had been made out for introducing those residual rules into the Commission's draft, which should not be concerned with such cases.

71. Mr. AMADO pointed out that paragraph 2 covered cases where the depositary declined to take up its functions, and therefore also had a bearing on paragraph 1 (a), under which the depositary was the competent organ of an international organization: did that mean that such an organ could decline to act as depositary? Obviously not, but the wording was not so clear as it should be in a text intended to be approved by States and to govern their contacts and activities.

72. The CHAIRMAN, speaking as a member of the Commission, said that, while he had no intention of defending the text, he could see some logic in it. There had in fact been disputes over who was the depositary, and in such cases some means had to be found of filling the gap in the treaty itself, even though it was arguable that the provision was unnecessary and that the parties would find a solution.

73. Secondly, there were cases—and they were not inventions of the Special Rapporteur's or of his predecessors—where an organ was in fact competent to be a

depositary, but declined to act for political reasons. Political trends in an international organization might change, and at a given moment the organization might hesitate to assume the function of depositary of a treaty concluded at a conference which it had convened when its political orientation had been different, and it might wish subsequently to dissociate itself from the treaty.

74. Mr. AMADO said that States decided on their own course of action, but could hardly give instructions to the competent organ of an international organization.

75. The provision in paragraph 2 was not drafted in legal language: it went without saying that States would "consult together" concerning the nomination of a depositary if that were necessary. It was surely unnecessary to state such a truism in solemn terms.

76. The CHAIRMAN, speaking as a member of the Commission, said that the Baghdad Pact⁸ was a case in point: Iraq had broken away from the other contracting parties and unilaterally relinquished its depositary functions. Was the right view in such a case that another depositary could not be designated or that the remaining parties to the treaty had to nominate one? The text before the Commission was perhaps not necessary because it stated what was self-evident, but there was nothing illogical in it.

77. Mr. ROSENNE said that, although he had no great objection to article 28, the comments made by Mr. Tunkin, Mr. Ago and Mr. Amado prompted him to question whether it needed to be retained. If it was retained, the title should be amended so as not to limit the article to the depositary of multilateral treaties only. The fundamental rule regarding a depositary was stated in the definition contained in article 1, paragraph 1 (g) and article 29, paragraph 1, which should perhaps be combined, and the content of article 28 might be consigned to the commentary.

78. Mr. EL-ERIAN said he was in favour of retaining article 28, despite the fact that it stated a residuary rule, in the interests of presenting in a systematic way the material concerning the depositary. As the Chairman, with his encyclopaedic knowledge of modern practice, had indicated, controversy could arise over the matter of the depositary of a multilateral treaty; provided that article 28 was not too detailed or cumbersome in form, it would render the draft more complete.

79. Mr. REUTER said he would like to be certain about the purpose of the article, read in the light of article 29. After all, the depositary had a twofold function; the function of physical custodian of the instruments and another function derived from the first. But article 28 would then mean that it was recognized, in certain cases, that a depositary could perform his functions without being a depositary of physical instruments, that he had a function which could be dissociated from that of a physical custodian. Or was that not what the Commission wished to say? It could happen that, in consequence of the annexation of a depositary State or of some other events affecting it, the original text of the treaty disappeared, as had happened in the case of the Versailles

⁸ Pact of Mutual Co-operation between Iraq and Turkey, signed at Baghdad on 24 February 1955; United Nations *Treaty Series*, Vol. 233, p. 199.

Treaty. Did the Commission accept the idea that it was possible to entrust the functions of depositary to somebody who was not the custodian of the instrument ?

80. The CHAIRMAN, speaking as a member of the Commission, said that on several occasions fire had broken out in Foreign Ministries and had destroyed the original texts of treaties; the States which had been depositaries had not on that account ceased to be depositaries. The issue was whether the idea of depositary was to be understood in the literal or in the legal sense. Personally, he thought that the depositary continued to be the depositary, even if deprived of the object which he had accepted in deposit.

81. Mr. YASSEEN said that the importance of the role of the depositary was particularly noticeable in the case of multilateral treaties. The Commission had always planned to draw up a residuary rule to fill in gaps in the agreement of the parties and had generally succeeded in its choice, but that was not the case with paragraph 1 (a) and (b) of article 28. Paragraph 1 (a) would vest the functions of depositary in "the competent organ" of the international organization within which the treaty was drawn up; since the competence of that organ depended on the organization's constitution, that was a question which might give rise to considerable doubt.

82. He could not accept paragraph 1 (b): a conference might be convened in the territory of a State because it had a pleasant climate, but that was not a sound reason for preferring that State to any other.

83. The question of the depositary was so important that it was unthinkable that the parties would leave it undecided. He would hesitate between the logical argument advanced by Mr. Bartoš and actual practice, of which there was no lack, but he would be inclined to favour the deletion of the article, since the rules chosen were not the most suitable ones.

84. Mr. CASTRÉN said that at first glance he had thought that the article should stand, but after listening to the debate he had some doubts concerning the necessity and desirability of such a provision. The criticisms of paragraph 1 were relevant, and Mr. Amado was right in saying that the idea expressed in paragraph 2 was self-evident, for it was almost inconceivable that the parties would not consult with each other in the event of the depositary's withdrawal. For that reason, if the Commission decided to retain the article, it should at least revise paragraph 1 (a).

85. Mr. JIMÉNEZ de ARÉCHAGA said he was in favour of retaining the article because the existence of a depositary was essential to the smooth operation of a treaty; and the article would be all the more necessary if the draft took the form of a convention because some of the other provisions gave the depositary important functions. As the Special Rapporteur had indicated, it was not uncommon for treaties to have no clauses designating a depositary, and it was therefore useful to have a residuary rule on the subject, which, as the Special Rapporteur had rightly indicated at the fourteenth session, reflected existing practice. No government had offered any objections, and to jettison the article at that juncture might create doubts about the existence of the rule.

86. The exposition of residuary rules was one of the most useful functions that the Commission could perform in its draft, but he agreed with Mr. Ago and Mr. Amado that certain points in the text would need further polishing by the Drafting Committee. For example, it would need to modify the text so as to bring out more clearly Mr. Ago's point that States could not confer on an organ of an international organization powers which it did not possess by virtue of the organization's constituent instrument, although an attempt had been made to express that idea by the word "competent". Possibly Mr. Amado's preoccupation arose from the fact that the wording of the French text of paragraph 2 appeared less mandatory than the English and Spanish texts.

87. Mr. RUDA said that he did not see any need for the residuary rule stated in paragraph 1.

88. On the other hand, he thought that it was necessary to formulate some rule to cover the cases mentioned in paragraph 2, which had occurred in practice, where a depositary declined, failed or ceased to act in that capacity. He added that the French text of paragraph 2 differed from the Spanish, which was even more categorical than the English in that it did not mention the idea of consultation. Accordingly, he thought that paragraph 1 should be omitted but that the rule in paragraph 2 should stand.

89. Mr. AGO said that the organ referred to in paragraph 1 (a) was "competent" by virtue of a rule established by the organization in question. Consequently, the Commission did not need to adopt any residuary rule on that subject, and should disregard a case which was of no concern to it.

90. Paragraph 2 should cover also the case where the depositary ceased to exist, for instance, through merging with another State, if the depositary was a State, or disappeared, if the depositary was an international organization. Moreover, he agreed with Mr. Amado that the passage "the negotiating States [shall] consult together" (*se consultant*) was a mere statement of fact that was out of place in a convention. Surely, the Commission would not wish to go so far as to lay down a sort of rule which would oblige States to consult with each other and to conclude an agreement for the purpose of designating a depositary, which would be rather strange.

91. Mr. JIMÉNEZ de ARÉCHAGA said that the text would have to be clearer on the point mentioned by Mr. Ago, but the fact that the rules of an international organization prescribed that its secretariat could become the custodian for the deposit of treaties was not enough, and the treaty itself should also make provision in that sense. A residuary rule was needed lest the matter be overlooked by the parties. The constituent instrument of an international organization could only contain some general provision regarding its competence to function as depositary, but the matter had to be regulated further for each individual treaty, and for that reason he considered that paragraph 1, suitable modified, should be retained.

92. Mr. ROSENNE said that the discussion over the phrase "the competent organ of an international organization", with its implicit reference to certain multilateral conventions, had led him to conclude that article 28 should be omitted altogether because bilateral treaties could also be deposited with an international

organization. He was convinced that there was no organ of the United Nations that was competent under the Charter to accept such treaties for deposit, though he knew of at least one case where that had been done as a result of negotiations and of a decision by the Secretary-General of the United Nations. He was referring to the Agreement of 1952 between Israel and the Federal Republic of Germany,⁹ when the political circumstances had been particularly delicate and it had been agreed to ask the Secretary-General to accept the instruments of ratification and to draw up the *procès verbal* concerning entry into force, in fact, to carry out the process followed in the case of multilateral treaties. There could be a real political value in having such a possibility, so that it would be unwise to maintain a rule based on a rigid interpretation of the word "competent".

93. He would have no objection to the text of article 28, as it stood or in revised form, being included in the commentary as a proposal which had been considered by the Commission but which it had decided not to place in its draft articles.

94. The CHAIRMAN, speaking as a member of the Commission, said that in the case of the indemnification agreement concluded between Israel and the Federal Republic of Germany, to which Mr. Rosenne had referred, the designation of the depositary had been made on a two-fold basis, the agreement of the countries concerned and the general competence of the Secretary-General of the United Nations. If States could thus give their agreement *in concreto* they could also give it in a multilateral treaty; that was the only legal inference to be drawn from Mr. Rosenne's argument concerning the case of two States which had no diplomatic relations with each other.

95. Mr. ROSENNE said he agreed with the Chairman but pointed out that the competence had derived not from the Charter of the United Nations but from external sources. The sense attributed to the word "competent" during the discussion had been competence in accordance with the rules of an organization. The particular case he had mentioned had not been an isolated one. Some of the Locarno Treaties¹⁰ and their instruments of ratification had been deposited in the archives of the League of Nations though they had not been concluded under the League's auspices. The competence of the depositary in such cases derived from a double agreement, first between the parties and secondly between the parties and the secretariat of the international organization in question. In the context of article 28, the word "competent" was highly ambiguous.

96. The CHAIRMAN, speaking as a member of the Commission, said that there was a United Nations regulation under which the Office of Legal Affairs also acted as depositary.

97. Mr. YASSEEN said he believed that, for the purpose of the designation of an organ of an international organization as depositary, it was not enough that the organ should be competent according to its own statute;

the treaty itself also had to contain an express provision designating it as depositary. The organ might be competent, but that did not mean that the States concluding the treaty had to entrust it with the functions of depositary.

98. With regard to paragraph 2, he said that while it was not necessary to formulate a residual rule concerning the designation of a depositary, provision had to be made for the case where the depositary failed to perform its functions, as it might no longer exist, or might no longer wish to perform its functions, or ceased to perform them. The case had occurred in practice, and the Commission should formulate a residual rule covering it. He would agree that the rule should lay an obligation on States to consult together concerning the nomination of another depositary, for the role of depositary was indispensable, particularly for multilateral treaties. Moreover, since article 28, paragraph 2, dealt with the functions of the depositary, he saw no objection to including that provision in article 29, which also dealt with those functions.

99. Mr. TSURUOKA said that the problem was whether, for the designation of the depositary, the consent of the interested parties was necessary or whether, if the treaty contained no provisions concerning a depositary, the agreement of the majority was not necessary. In his view, if agreement among the parties was required, article 28 was superfluous. The functions of the depositary were so essential that, even if the treaty was silent on the subject, the States concerned would consult one another *ex post facto* with a view to designating a depositary. The same would be true if for any reason the depositary failed to perform his functions.

100. Mr. EL-ERIAN said he subscribed to Mr. Jiménez de Aréchaga's argument about the desirability of stating a residuary rule in the matter, because one of the important services that the draft could render to the international community was to consolidate certain modern practices which the Commission viewed with approval. During the past ten years, there had been a growing trend towards designating the United Nations as depositary, a trend which should be encouraged. In the absence of a residuary rule of the kind laid down in article 28, States not Members of the United Nations would not be required to recognize the Secretary-General's competence in that domain.

101. The merits of a residuary rule were particularly obvious to anyone with experience of drafting the constituent instrument of an international organization in haste, when there might be little time to prepare the final clauses, as had happened in the case of the Charter of the Organization of African Unity.

102. Mr. AMADO said that paragraph 2 might perhaps be acceptable if amended to read: "the States . . . shall appoint another depositary". The idea of consultation was superfluous; it was hardly conceivable that States would not consult one another and would forget to settle the question of the depositary in the treaty.

The meeting rose at 1 p.m.

⁹ United Nations *Treaty Series*, Vol. 162, p. 206.

¹⁰ League of Nations *Treaty Series*, Vol. LIV, pp. 289-363.

803rd MEETING*Wednesday, 16 June 1965 at 10 a.m.**Chairman : Mr. Milan BARTOŠ*

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

Programme of Work

1. The CHAIRMAN invited the Secretary to make a statement on the Commission's programme of work.

2. Mr. BAGUINIAN, Secretary to the Commission, said that in connexion with a request by the Special Rapporteur on the law of treaties for guidance as to whether he should now prepare a supplement to his fourth report (A/CN.4/177 and Add.1) covering additional articles beyond article 29, or whether he should devote his time to preparing commentaries on articles 1 to 29, the Secretariat had been asked by the Chairman to indicate what might happen with regard to the discussion of the Commission's reports by the General Assembly at its next session, as that information would be helpful in enabling the Commission to reach a decision on the Special Rapporteur's report.

3. At its nineteenth session, the General Assembly had been unable to take any action on a number of reports submitted to it, including that of the Commission for 1964, but presumably it would be able to do so when the session was resumed at the beginning of September. Any reports submitted but not yet discussed would probably then be taken up at the twentieth session scheduled to open on 21 September 1965, which meant that the Sixth Committee would then have before it the Commission's reports for both its sixteenth (1964) and its seventeenth (1965) sessions.¹ It might not, however, be able to devote a great deal of time to them as it would have a heavier agenda than usual, including the report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (A/5746), which was expected to give rise to lengthy discussion, and so would probably concentrate on points requiring immediate decision rather than engage in a detailed examination of the draft articles.

4. It would thus appear unnecessary for the Commission to include in its report on the seventeenth session a full commentary on the articles in part I of its draft on the law of treaties. The Commission might prefer to submit, for information only, the text of the articles adopted at that session, in which case the complete text of the draft articles, together with the complete commentary, would be published in the report on its summer session

in 1966. The comments of governments on the draft as a whole would be included as an annex to that report.

5. The situation in regard to the draft articles on special missions was different because, if the Commission was to achieve its aim of completing them in 1966, the whole text of the articles provisionally adopted at the current session, together with commentaries, would have to be included in the report on the seventeenth session, not in order to meet the needs of the Sixth Committee, which might or might not discuss the draft, but in order to obtain the comments of governments; that could be done under the terms of the Commission's Statute without any action by the General Assembly.

6. Mr. TUNKIN said that the Secretariat's conclusions were reasonable and the course it had suggested should be followed. During the past decade the Commission's usual practice had been to submit to the General Assembly a complete draft, including commentaries, on any given topic. However, the commentaries on the complex subject of the law of treaties called for very careful preparation. In the past they had been drawn up in haste towards the end of the session, but it would be wiser to leave that task until either the January or the summer session of 1966, when the main work on the articles themselves would have been completed. Further changes in the articles adopted at the current session might turn out to be necessary, and that was an additional argument for not submitting commentaries to the General Assembly at the present juncture.

7. Mr. ROSENNE said he agreed with Mr. Tunkin. Any attempt to prepare commentaries at the current session was only likely to cause unnecessary confusion because, as the Special Rapporteur had indicated in his fourth report, much still remained to be done in the way of polishing the drafting, co-ordinating the text and possibly rearranging the material, and that could only be undertaken at a later stage, after the substantive discussion on the draft articles had been more or less completed.

8. Mr. AGO said that in his view the wisest course at the moment would be to adopt as many articles as possible and to prepare the commentary in 1966; the commentary should not be written in haste, as it had been at the time of the first reading, for the final commentary would be submitted to the General Assembly and to the future diplomatic conference. It would have to be uniform in style and approach, and uniformity could only be achieved when the entire draft was before the Commission. For that purpose, the current session, the January session and the 1966 summer session should be regarded as a whole.

9. Mr. BRIGGS said that, although he regretted that no commentaries would accompany the draft articles presented in the Commission's report on its seventeenth session, he had been convinced by Mr. Tunkin's argument. Perhaps, however, it would be possible for the Special Rapporteur to prepare a rather more detailed introduction to the draft articles in order to explain the nature of the changes introduced by the Commission during the second reading.

10. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with the previous speakers. He would

¹ *Official Records of the General Assembly, Nineteenth Session, Supplement No. 9 (A/5809), and Official Records of the General Assembly, Twentieth Session, Supplement No. 9 (A/6009).*

rather have more time to prepare the commentaries during the interval between the end of the seventeenth session and the 1966 summer session. The Commission would be judged by posterity on its final text, and the commentaries would need careful examination.

11. He could prepare for inclusion in the introduction to the draft articles adopted at the seventeenth session an explanation of how the Commission had proceeded and the course it proposed to follow in 1966, in order to satisfy the Sixth Committee that there had been good reason for the Commission's departure from its usual practice of accompanying draft articles with commentaries. The Sixth Committee would understand that, as had occurred in the case of the draft on consular relations, the Commission would be engaged until a very late stage in rearranging the material and remedying defects; no useful purpose would be served by submitting a half-finished piece of work in 1965.

12. He assumed that the Commission would wish to take up item 3 of its agenda (Special Missions) after concluding its examination of article 29 of the draft on the law of treaties and then revert to the Drafting Committee's proposals.

13. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Tunkin. The Commission's report would be regarded as provisional, no commentaries on the articles on the law of treaties would be published in 1965, and the Commission could adopt the method suggested by the Secretariat. Some thought that the Commission would be embarking on a third reading, and making further changes, at the last minute, but his own view was that it was the Commission's duty to produce as its final text a finished and co-ordinated piece of work.

14. Mr. CASTRÉN said he supported Mr. Briggs's suggestion that the Special Rapporteur should be asked to prepare, instead of a commentary, a fuller introduction explaining that the articles adopted were provisional, and that the Commission reserved the right to amend them in 1966.

15. Mr. JIMÉNEZ de ARÉCHAGA said that there was no need for the Commission to wait until the Drafting Committee had completed its work on all the draft articles referred to it before taking up some of them.

16. The CHAIRMAN suggested that the Commission should take note of the Secretariat's suggestion and decide to follow the procedure indicated.

It was so agreed.

17. The CHAIRMAN said that, with regard to the immediate future, it had been agreed between himself and the Special Rapporteur on the law of treaties that the Commission, after considering article 29 of the draft on the law of treaties, should pass on to the topic of special missions, fitting in from time to time, between the meetings devoted to that topic, meetings to consider those articles on the law of treaties which it had held over as well as the texts prepared by the Drafting Committee, so that at least some sections of the draft would be completed by the end of the current

session. He suggested that the Commission should proceed in the manner he had outlined.

It was so agreed.

Law of Treaties

(A/CN.4/175 and Add.1-3, A/CN.4/177 and Add.1,
A/CN.4/L.107 and L.108)

(resumed from the previous meeting)

[Item 2 of the agenda]

ARTICLE 28 (The depositary of multilateral treaties) *(continued)*²

18. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on article 28.

19. Sir Humphrey WALDOCK, Special Rapporteur, said that although article 28 had not given rise to objection from governments, it had not escaped shrewd criticism from members of the Commission. Some had suggested that it was useless, others that it was possibly inaccurate. The principal argument for retaining such a provision was that the depositary was a critical part of the machinery for operating a modern multilateral treaty. Usually the depositary was designated in the treaty itself or decided upon more or less explicitly at the time of signature, but a residual rule could be useful to cover cases where that was not done.

20. As Special Rapporteur he did not attach great weight to some of the objections raised in the discussion, for example, those referring to a "competent organ" of an international organization, as there seemed to him nothing inaccurate in the expression. It must also be remembered that there was a proposal before the Commission for the insertion of an article making a general reservation of the established rules of an international organization. Nor did he think it unwise or inconvenient to take account of the very frequent practice of designating as the depositary the State in whose territory the conference for drawing up the treaty had been convened. Very often particular cities or countries were chosen as the venue for conferences because traditionally treaties on certain subjects were negotiated there, and it was common for the host government to act as the depositary.

21. The wording of paragraph 2 had been criticized and a question had arisen as to whether the English, French and Spanish texts corresponded exactly. The intention had been to make that provision mandatory in order to supply a rule in the event of disagreement between, or the inertia of, the parties. But the Commission had refrained from laying down anything too stringent, and the matter was left to be determined by the States concerned. No attempt had been made to go into more difficult problems, such as what majority would be required to reach a decision in the event of disagreement.

22. There was some truth in the charge that the content of paragraph 2 was self-evident. Nevertheless, changes of depositary occurred in practice, and paragraph 2

² For the text of article 28, see 802nd meeting, following para. 64.

made it clear that the original depositary had no right to transfer the functions to another by means of a bilateral arrangement; such a transfer needed the agreement of all the other States concerned.

23. The article had also been criticized for dealing only with the cases where there was no depositary. The definition contained in article 1, paragraph 1 (g), might, of course, be transferred and re-cast in the form of a positive rule, possibly to replace the existing article 28, but provision would still have to be made for cases where no depositary had been designated or the parties disagreed. Truth to tell, the question of the depositary was not quite so simple as it might appear on the surface. There were such cases to consider as those where a depositary was not in possession of the original text of the treaty, as was the case with the United Nations Charter, though mere custody of the instrument was a secondary matter in comparison with the discharge of depositary functions; again, there were other cases where there were two or more depositaries.

24. As for recent cases where there was more than one depositary, it could be assumed that such cases would be covered by the general definition of the term.

25. He had not yet reached any final conclusion about the fate of the article; perhaps the best course would be to refer it back to the Drafting Committee for re-examination in the light of the discussion.

26. The CHAIRMAN suggested that the Commission should follow the Special Rapporteur's advice and refer article 28 to the Drafting Committee.

It was so agreed.³

ARTICLE 29 (The functions of a depositary)

Article 29

The functions of a depositary

1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all States parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in paragraphs 3 to 8 below.

3. The depositary shall have the duty :

(a) To prepare any further texts in such additional language as may be required either under the terms of the treaty or the rules in force in an international organization;

(b) To prepare certified copies of the original text or texts and transmit such copies to the States mentioned in paragraph 1 above;

(c) To receive in deposit all instruments and ratifications relating to the treaty and to execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument relating to the treaty;

(d) To furnish to the State concerned an acknowledgment in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the

other States mentioned in paragraph 1 of the receipt of such instrument or notification.

4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

5. On a reservation having been formulated, the depositary shall have the duty :

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19.

6. On receiving a request from a State desiring to accede to a treaty under the provisions of article 9, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

7. Where a treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty :

(a) Promptly to inform all the States mentioned in paragraph 1 above when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

(b) To draw up a *procès-verbal* of the entry into force of the treaty, if the provisions of the treaty so require.

8. In the event of any difference arising between a State and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the State concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

27. The CHAIRMAN invited the Special Rapporteur to introduce his revised draft of article 29.

28. Sir Humphrey WALDOCK, Special Rapporteur, said that none of the governments submitting observations had suggested that the article was unnecessary. Some had made suggestions which he had sought to take into account, more particularly those of the Japanese and United States Governments, when trying to reduce the article in length and simplify its wording. His revision read :

1. A depositary shall exercise its functions impartially on behalf of all the parties to the treaty and States to which it is open to become a party.

2. In addition to any functions expressly laid down in the treaty, and unless the treaty otherwise provides, a depositary shall have the duty :

(a) To prepare any further texts in such additional languages as may be required either under the terms of the treaty or the rules in force in an international organization at the time the depositary is designated;

³ For resumption of discussion, see 815th meeting, paras. 15-34.

(b) To prepare certified copies of the original text or texts and transmit such copies to all parties and signatory States and to any other of the States mentioned in paragraph 1 that so requests;

(c) To examine whether a signature, deposit of an instrument or formulation of a reservation is in conformity with the relevant provisions of the particular treaty and of the present articles, and, if need be, to communicate on the point with the State concerned;

(d) To accept any signatures to the treaty, and to receive in deposit any instruments relating to it;

(e) To acknowledge in writing to the State concerned the receipt of any instrument or notification relating to the treaty and to inform the other interested States of the receipt of such instrument or notification;

(f) To carry out the provisions of article 9, paragraph 3, on receiving a request from a State desiring to accede to the treaty in conformity with the provisions of that article;

(g) To carry out the provisions of article 26 in the event of the discovery of an error in a text of the treaty.

3. Where the treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, accession, acceptance or approval, or upon some uncertain event, a depositary shall have the duty to inform the States mentioned in paragraph 1 when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

4. In the event of any difference arising between a State and the depositary as to the performance of the above-mentioned functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the State concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

29. In view of the importance of the depositary in modern treaty-making practice and the lack of literature on the subject, the Commission had thought it useful to draft a provision summarizing the depositary's main functions, since such a provision would assist the operation of modern multilateral treaties and might also be of help to States which acted for the first time as a depositary. When preparing the somewhat detailed text drawn up at the fourteenth session, the Commission had benefited from the material supplied in the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements.⁴ The Commission had before it some additional material in the Secretary-General's report on Depositary Practice in Relation to Reservations (A/5687), but that report dealt with only one facet of the subject.

30. Mr. ROSENNE said he had submitted a proposal (A/CN.4/L.108) for adding to article 29, or as a new article 29 *bis*, a paragraph reading:

“ Unless otherwise provided in the treaty or these articles, any notice communicated by the depositary to the States mentioned in article 29, paragraph 1, becomes operative 90 days after the receipt by the depositary of the instrument to which the communication relates ”.

31. At that stage he did not wish to discuss the wording which, in any event, would be a matter for the Drafting Committee if the Commission accepted the principle. However, he wished to make a few additional remarks to supplement the commentary he had prepared.

32. At the outset he must make it quite clear that his intention was not to overrule or criticize the decision reached by the International Court in the preliminary objection phase of the *Case concerning right of passage over Indian territory*.⁵ The purpose of his proposal was to prevent the accidental repetition of what had happened on that occasion and to fill what he regarded as a gap in the draft articles. His provision would constitute, as it were, a double residuary rule that would only come into play when the treaty itself was silent on the matter and none of the provisions in the draft articles applied. The proposal was strictly *de lege ferenda*, and he stressed that point because he did not wish to disturb what was considered to be the law regarding any existing treaty, whoever was exercising the depositary functions. He had indicated at the 669th meeting,⁶ when reserving his position on paragraph (4) of the commentary to what had then been article 13, that he might later suggest, in the interests of progressive development, a general rule providing for a short time lag between the date of the deposit of an instrument and the date when the instrument became effective vis-à-vis other States, and that was what he was now proposing.

33. Amplifying paragraph 1 (4) of his commentary, he said that on making inquiries about the manner in which a depositary transmitted communications, he had been astonished to learn what a variety of methods was used. Sometimes depositaries, whether international organizations or States, transmitted communications to diplomatic missions accredited to them or (in the case of States) through their own missions accredited in the country of receipt. Sometimes the documents were sent by post. According to the information given to him, as far as the United Nations was concerned, the method was determined by the receiving government, but he did not know whether that was the case when the depositary was a State or any other international organization. Some depositaries, particularly the more technical specialized agencies, did not seem to be aware of the fact that in most, if not all, countries treaty information was centralized at the Ministry of Foreign Affairs, and they sent treaty communications to the technical ministries with which they were normally in contact, with the result that Foreign Ministries responsible for maintaining treaty registers were not always fully informed about treaty relations arising out of technical multilateral conventions. In several of the draft articles, mention was made of the receipt of communications by governments, but with such a variety of methods it was hardly possible to determine objectively when a communication was actually received by a government.

34. He had made an arbitrary choice of a 90-day interval between the date of the receipt of the instrument by the depositary and the date when it would become operative for the other States receiving notice of its

⁵ *I.C.J. Reports 1957*, pp. 145-147.

⁶ *Yearbook of the International Law Commission, 1962*, Vol. I, p. 272, paras. 90 and 91.

⁴ ST/LEG/7.

reception, because that period was mentioned in paragraph 33 of part II of the Secretary-General's report (A/5687) as one traditionally used for certain purposes, and it seemed adequate in the present context.

35. The term "becomes operative" derived from other articles in the draft but might need alteration in the light of the final wording to be adopted in those other articles. Its meaning was that as far as the depositing State was concerned, the instrument was absolutely final the moment it was deposited with the depositary, unless the treaty, or a provision in the draft articles (should they take the form of a convention), allowed for withdrawal of any particular instrument. The term was not intended to give any leeway for withdrawal, but only to make due allowance for the requisite administrative processes, both the transmission of notice by the depositary and its receipt in the proper quarter. By way of illustration he had added a note to his commentary, which should perhaps be amplified further by explaining that the communication in question had been received on Good Friday, when the Ministry of Foreign Affairs in his country had been working; the corresponding departments in many other countries would, however, have been closed not only on that day but over the whole Easter week-end, so that actual receipt would have been delayed by several days.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that it would simplify discussion if the Commission could deal with Mr. Rosenne's proposal separately before taking up the rest of article 29.

37. The CHAIRMAN suggested that the Commission consider first Mr. Rosenne's proposal.

It was so agreed.

38. Mr. CASTRÉN said that, in principle, he approved the addition proposed by Mr. Rosenne, which might form a new paragraph to be inserted between the existing paragraphs 2 and 3 of article 29.

39. Mr. JIMÉNEZ de ARÉCHAGA said that the operation of the additional paragraph proposed by Mr. Rosenne was likely to lead to difficulties. It was apparently intended to provide for constructive notice to States of the existence of certain acts such as ratification, and could have very serious effects. It would seem to involve the surprising result that, whether or not a notice had been sent by the depositary, the 90-day period would apply; in other words, there might be constructive notice without any actual notice being given by the depositary. As a result, a State might find itself in treaty relations with another without any communication having been received by it notifying it of the position. Under the provisions of article 19, paragraph 3, regarding implied acceptance of a reservation to a treaty, a State could find itself in the position of being deemed to have accepted a reservation without having received any advice on the subject. The position was similar with regard to the provisions concerning the withdrawal reservations.

40. If in fact the depositary sent a communication, there appeared to be no reason to wait 90 days; the notice should in fact take effect upon the communication being made. Postponement of the entry into

force of the treaty until the 90-day period had elapsed could result in inconvenience to all States concerned.

41. The proposal embodied the kind of residuary rule which States would wish to avoid. In fact, the whole purpose of laying down a residuary rule was to state what provisions States would wish to see applied where the treaty was silent on a certain point or when the parties had overlooked that point.

42. If the Commission were to adopt the proposal it would appear to be overruling the decision of the International Court of Justice in the *Right of Passage* case.

43. Mr. ROSENNE said that perhaps Mr. Jiménez de Aréchaga had misunderstood his purpose. The Commission could not proceed on the assumption that a depositary would fail to fulfil the obligations it had assumed. Of course, any particular instance of an omission to send out a notice of communication by reason of an administrative oversight would have to be judged on its merits. Thus the issue of constructive notice did not arise.

44. The practice of providing in treaties for a lapse of a specified period after the receipt of the requisite number of ratifications before the treaty came into force was becoming increasingly frequent, and any such provision or relevant rule in the draft articles, if adopted by States, would have priority, but the kind of residual rule he was proposing might find favour with governments to cover cases when the point had been overlooked.

45. The *Case concerning Right of Passage over Indian Territory*⁷ was an important example of the kind of situation his proposal was designed to prevent; there the Indian Government had found itself brought before the International Court before the depositary had communicated the instrument to it or to the Court or indeed to any other government.

46. Sir Humphrey WALDOCK, Special Rapporteur, said that after examining Mr. Rosenne's text, he feared that it did not go far enough to achieve its author's purpose. The wording would not prevent the instrument from having its effect once it had been deposited, unless the treaty itself provided that the instrument would not be binding until the other parties had received notice of it. He understood the purpose of the proposal, which was to suspend the operation of a treaty for a certain interval in respect of any party which had not yet received notice of the instrument in question, but as drafted it left some difficult questions unanswered. For example, what would be the legal position once the depositary received the last instrument of ratification necessary to bring the treaty into force?

47. Mr. ROSENNE said his reply to the Special Rapporteur's question was that, either the treaty itself would provide that it entered into force immediately on the receipt by the depositary of the required number of instruments of ratification or after a specified period thereafter, in which case his proposal would not apply at all, or else, if the treaty were silent, it would come into force, under his proposal, after 90 days. Naturally,

⁷ *I.C.J. Pleadings, Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Vol. I, pp. 220-222.

if the parties desired a different time-lag they would insert the necessary clause in the treaty itself. The United Kingdom Government had made the same point about the need to allow for the necessary administrative processes to be completed in connexion with the withdrawal of reservations (A/CN.4/175, *ad* article 22).

48. Mr. PAL said that he failed to understand the purport of Mr. Rosenne's text. Did it mean that an instrument could become operative *vis-à-vis* the other States concerned, even if the depositary had not sent out the notice at all?

49. Mr. ROSENNE said that Mr. Pal's doubt seemed very similar to that of Mr. Jiménez de Aréchaga. It had to be assumed that the depositary would take the requisite action promptly on receiving an instrument; but experience seemed to show that it took at least twenty days to prepare and send out notices, and time must also be allowed for their receipt in the appropriate quarter.

50. Mr. PAL said that it would be most unsatisfactory for the receiving State to be made answerable if a depositary had been dilatory in sending out the notices.

51. Mr. JIMÉNEZ de ARÉCHAGA said he still maintained that Mr. Rosenne's proposal failed to provide against inaction by a depositary and introduced a time-lag, delaying entry into force, that conflicted with the provisions of article 23, paragraph 2. The utility of such a provision was highly questionable, particularly if, as Mr. Rosenne had argued, the Commission must assume that the depositary would discharge its function. A further argument against its inclusion was the speed of modern communications.

52. Mr. REUTER said that he had at first had some difficulty in grasping the purport of the provision. Now that he understood it, however, he thought that, if the intention was really to develop multilateral treaty law, especially that which might apply in relations concerning individuals, a provision of the kind was essential. A similar practice existed in the European communities, in order that States should know exactly as from what time they were required to apply a treaty. It was simply a residuary rule. It was possible to think of much more convenient arrangements, such as telegraphic notice, or immediate operative effect. At all events, the problem dealt with in Mr. Rosenne's proposal was a very real one.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the question of the date at which a notice took effect for the State receiving it involved a very real problem. Adoption of the provision proposed by Mr. Rosenne would mean that a time-limit, such as that of twelve months laid down in paragraph 3 of article 19 for the period after which consent to a reservation was assumed, would commence to run for the State concerned not from the date of the actual receipt of the formal notice but from a fixed date, namely, 90 days after the receipt by the depositary of the instrument to which the communication related. The effect could be in some cases to cut down the twelve-month period.

54. The provision did not deal with the relation between the effect of the notice and such matters as entry into force. A treaty usually provided for entry into force upon the deposit of a certain number of ratifications;

the question would arise, under the provision, whether the date of entry into force would be affected by the 90-day period for the notices of ratification to become effective. As pointed out by Mr. Rosenne, there was an increasing tendency to include in large multilateral treaties a clause deferring entry into force for a short specified period, to run from the date by which the requisite number of ratifications had been received; periods of that type were often introduced for purposes of facilitating administrative adjustments.

55. He thought that the consequences of the proposed provision should be investigated further, in order to see whether it would be helpful or not in the operation of multilateral treaties. He therefore proposed that Mr. Rosenne's additional paragraph or article should be referred to the Drafting Committee for consideration.

56. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to adopt the Special Rapporteur's proposal.

*It was so agreed.*⁸

57. The CHAIRMAN invited the Commission to consider article 29.

58. Mr. VERDROSS said that the text proposed by the Special Rapporteur was an improvement on that adopted by the Commission at the first reading, more particularly on that of paragraph 1, where the second sentence, "A depositary is therefore under an obligation to act impartially in the performance of these functions", seemed to be a consequence of the first, but was in reality quite separate.

59. It was his impression that paragraphs 2 and 3 contained a full list of functions, but it was always difficult to ensure that a list was truly complete and it could always happen that the depositary assumed some further function; it would therefore be advisable to add, in paragraph 2 of the 1962 text, after the words "a depositary has", the word "primarily" or some similar word.

60. Mr. CASTRÉN said that article 29 was one of the longest adopted by the Commission in 1962. The Special Rapporteur's draft was, happily, shorter and more concise, but could probably be simplified even further.

61. Since the opening passage in paragraph 2 already contained a general reference to other provisions of the draft convention which regulated certain special functions and duties of the depositary, sub-paragraphs (f) and (g) could be deleted, just as paragraph 5 (b) of the 1962 text, concerning certain functions of the depositary in the matter of reservations, had been dropped.

62. Nor was it perhaps necessary to stipulate expressly, in paragraph 2 (e), that the depositary should acknowledge to the State concerned the receipt of any instrument or notification relating to the treaty; that was self-evident.

63. The Commission had provisionally decided⁹ either to delete article 15, paragraph 3, or to transfer it to article 29; he thought that article 29, paragraph 2 (e), in fact already embodied the provision in question.

⁸ For resumption of discussion, see 815th meeting, paras. 63 and 64.

⁹ 787th meeting, paras. 10, 13, 15, 24, 28, 46, 53, 61, 74, 88, 91.

64. Mr. ROSENNE said that the Special Rapporteur's revised draft of article 29 represented an improvement, but as far as paragraph 1 was concerned, he preferred the original formulation; he suggested that the definition of "depository" be deleted from article 1, paragraph 1 (g), since it was more than a mere definition and contained elements of a rule of law.
65. He proposed that in the Special Rapporteur's paragraph 2 the introductory passage should be replaced by the words: "2. Subject to the terms of the treaty and to these articles, the depository shall:". The introduction of the words "and to these articles" would make it possible to drop paragraphs 2 (f) and 2 (g) and perhaps also the whole of paragraph 3.
66. He proposed that in paragraph 2 (a) the word "texts" be replaced by the word "versions". In paragraph 2 (e), and also in paragraph 3 if the Commission decided to retain it, before the words "to inform" the word "promptly" should be introduced, which was used in the corresponding passages of paragraphs 3 (d) and 7 (a) of article 29 as adopted in 1962.
67. With reference to paragraph 8 of the Special Rapporteur's observations on article 29 (A/CN.4/177/Add.1), he said it would be desirable to include in the article a provision laying down a residuary rule to the effect that the depository had the obligation to register the treaty, if only to prevent the point from being overlooked. Since one of the consequences of the draft articles would be to lighten considerably the drafting of the final clauses of multilateral treaties, it was advisable to include in the draft as many such rules as possible. An example of the type of difficulty which it was desirable to solve was provided by the ITU Convention which, he understood, had not been fully registered because of the absence of a clear clause laying a duty of registration upon the depository.
68. Mr. TUNKIN said that the Special Rapporteur had considerably simplified and thereby improved article 29, and his proposed new wording was generally acceptable.
69. He had some difficulty over the reference in paragraph 1 to "States to which it is open to become a party". He had already mentioned in connexion with other articles the difficulties to which that ambiguous phrase could give rise. In the particular instance, those difficulties could be avoided by omitting the statement that the depository exercised its functions "on behalf of" etc.; instead, the paragraph should stress the international character of the functions of the depository, which did not act as a State or on its own behalf. A change of that type would not affect the meaning of the provision.
70. In the opening passage of paragraph 2, a reference should be introduced to the applicable rules of an international organization; sub-paragraph (a) could then be dropped, since both its parts would be covered in the introductory passage, which already referred to "any functions expressly laid down in the treaty".
71. He could accept paragraph 3, but would urge the deletion of the words "in its opinion", which appeared to suggest that the depository might have the power to interpret the relevant provisions of the treaty; the question whether the conditions for the entry into force of the treaty had been fulfilled could not be left to the appreciation of a depository.
72. Lastly, he hoped that the Drafting Committee would consider his own general proposal for simplifying the preceding articles by amalgamating and incorporating into article 29 all the procedural provisions relating to treaties having a depository; a new article would cover the case where there was no depository.
73. Sir Humphrey WALDOCK, Special Rapporteur, said that he himself favoured the deletion of the words "in its opinion" from paragraph 3. Those words had been introduced in the light of the information existing in 1962 on the practice of the Secretary-General as depository; since then, the practice of the Secretary-General had been even more neutral, as the Secretariat paper on the subject showed (A/5687, pages 96-97); the Secretary-General now confined his action to a communication to the effect that what appeared to be the requisite number of ratifications had been received. The deletion of the words "in its opinion" would also be consistent with the resolutions adopted by the General Assembly on the subject of reservations, under which the Secretary-General, as depository, was not entitled to have any opinion officially; he was merely called upon to do the best he could to see that the questions which arose were notified to those concerned to pronounce upon them.
74. He accordingly proposed that the concluding portion of his new paragraph 3 be amended to read: "... a depository shall have the duty to inform the States mentioned in paragraph 1 when the specified number of signatures or instruments has been received."
75. Mr. RUDA said that the Special Rapporteur's revised draft of article 29 represented an improvement on the 1962 formulation, both in structure and in terminology. In clear and concise terms, it dealt with a problem that was made particularly complex by the large number of procedural details involved.
76. So far as paragraph 2 was concerned, he supported Mr. Tunkin's proposal for the inclusion of a reference to the applicable rules of an international organization, and Mr. Rosenne's proposal that the word "texts" in paragraph 2 (a) should be replaced by the word "versions".
77. He did not, however, support the United States suggestion, accepted by the Special Rapporteur, that the reference to the rules in force in an international organization should be qualified by adding in that same paragraph 2 (a), the words "at the time the depository is designated". The purpose of those additional words was to enable a depository to avoid any new burden that might be placed upon it by some change in the relevant rules of the international organizations concerned. Personally, he saw no reason why the depository should be absolved from the duty to observe some new or amended rule which might provide, for example, for an additional language version in consequence of the inclusion by the organization of that language in the list of its official languages.
78. He had no objection to the remainder of article 29 as proposed by the Special Rapporteur, except that the

Spanish version of paragraph 4 needed to be brought into line with the English and French versions, which were clearly in mandatory terms, whereas the Spanish version was in permissive terms.

79. Mr. YASSEEN said he had no difficulty in accepting the article as redrafted by the Special Rapporteur. It accurately described the functions of the depositary, on which the Commission had decided not to elaborate further. The redraft was much shorter and more acceptable than the 1962 text; no doubt its drafting might be reviewed by the Drafting Committee.

80. However, he had the same misgivings as Mr. Tunkin concerning the phrase "and States to which it is open to become a party" in paragraph 1. States to which it was open to become a party to the treaty had, of course, certain rights, but it was an overstatement to say that the depositary acted on behalf of those States. On that point he would perhaps go further than Mr. Tunkin and suggest that the paragraph, which was not essential to the scheme of the article, should be omitted altogether. In particular, it should surely be taken for granted that the depositary would "exercise its functions impartially".

81. With regard to the opening phrase of paragraph 2, he agreed with Mr. Tunkin that the rules in force in the international organization acting as depositary should be mentioned.

82. The phrase added in paragraph 2 (a), in response to a suggestion by the Government of the United States of America, did not seem to be wholly justified. If the constituent instrument of the organization was amended, the depositary might at most find that it was responsible, for instance, for preparing a text in a language which had become an official language of the organization. The additional responsibilities could not be so onerous as to require that the functions of the depositary should be specified as those existing at the time when it assumed them.

83. In paragraph 3, the words "in its opinion" seemed to be indispensable, for the depositary had to decide at a given moment that the conditions for the entry into force of the treaty were fulfilled. That decision was only provisional: the depositary merely notified States that in its opinion the treaty had entered into force. The notification only took effect definitively if there was no opposition by States. Like the preceding provisions of the article, paragraph 3 was governed by the provisions of paragraph 4. If a State disagreed with the depositary, its objection had to be communicated to the other States. An international dispute could then arise, which would be settled by the existing modes of the international order.

84. Mr. REUTER said that he wished to make an observation concerning a question of principle which had been very pertinently mentioned by Mr. Verdross in connexion with the redraft proposed by the Special Rapporteur: was it the Commission's intention to enumerate all the functions of the depositary? It was true that the opening passage of paragraph 2 of the article mentioned, as another source of the depositary's duties and functions, the treaty itself. Mr. Tunkin had proposed that the passage should refer also to the rules

of the international organization acting as depositary. But even then, the provision would not settle the question whether there was a general source of duties and functions for the depositary and what was that source.

85. In that connexion, he inquired what had been the meaning of a provision which had appeared in the 1962 version of article 29 and which was missing from the Special Rapporteur's redraft but which still existed in paragraph 1 (g) of article 1. Did that provision state a rule of law? If it did, then two conclusions had to be drawn.

86. First, some such words as "among others" (*notamment*) should be added at the end of the introductory phrase in paragraph 2 of article 29 because there was a general source of duties and functions for the depositary. That was the interpretation he would prefer. For example, the discussion at the previous meeting had shown that at least one of the depositary's duties was to return, on the termination of the depositary functions, the text which it had received in deposit.

87. Secondly, if the Commission considered that paragraph 1 (g) of article 1 laid down a rule of law, it would have to revise carefully the language used in that clause, the French text of which did not agree with the English text. In English, the Special Rapporteur had accepted the neologism "depositary", which had been imposed by practice, but in order to explain it, he had introduced the terms "entrusted" and "custodian", which had specific meanings in law. In French, the term *dépositaire* implied a contract of deposit or bailment, and the analogy was fairly close, but the word *garde* (custody) had an extremely narrow meaning in law.

88. Mr. AGO said it was obvious that the depositary's functions were laid down, in the first place, by the treaty or, where an international organization acted as depositary, by the regulations of that organization. The rule being drafted by the Commission was the general rule which should prevail, particularly if nothing was said on the subject in the treaty or in the regulations of the international organization. He nevertheless shared Mr. Reuter's concern at the omission of the reference to the essential function of the depositary, that of custodian of the instrument. It would be odd to mention that function in the article on definition rather than in the article on the functions of the depositary. If the Commission did not wish to repeat the idea, the logical place for it would be in article 29.

89. In paragraph 1 of the revised version proposed by the Special Rapporteur, the expression "exercise its functions impartially" was not entirely satisfactory; it should be stated in the article that the depositary acted not on his own account but as depositary of the instrument entrusted to him by the States. Instances had occurred in practice where depositaries had tended to forget that essential duty. In the French text, the phrase *pour le compte de* would be more precise than *au nom de*.

90. With regard to paragraph 2, he shared Mr. Tunkin's view that the opening passage should contain a general saving clause concerning the provisions of the treaty and the regulations of the international organization. If that suggestion was followed, sub-paragraph (a) would become redundant; the functions enumerated

would necessarily be those not expressly mentioned either in the treaty or in the regulations of the international organization.

91. In paragraph 2 (*d*), it might be better to say "to receive any signatures. . .". If that change were made, the order of sub-paragraphs (*c*) and (*d*) could be reversed, since the depositary first received the signature and then determined whether it was valid. The initial phrase of sub-paragraph (*e*), "to acknowledge in writing to the State concerned", really belonged in sub-paragraph (*d*), which would then deal with the correspondence between the depositary and the State which transmitted an instrument to it, and (*e*) would deal with the information to be communicated to other States.

92. In paragraph 3, the phrase "upon some uncertain event" should be replaced by "upon the fulfilment of a suspensive condition".

93. Mr. JIMÉNEZ de ARÉCHAGA said he supported Mr. Ago. Latin American practice provided a recent example of the value of the provisions of paragraph 1. A Latin American Government, which was the depositary of an important Latin American treaty, had received a ratification from a State with different political views; it had then been subjected to pressure to reject the ratification outright. In view of paragraph 1 of article 29 of the Commission's draft articles, however, the opinion had prevailed that the depositary, because of its dual function as depositary and party, had to consult the other States parties to the treaty. In the end, the unanimous decision of the parties to the treaty was that the ratification should not be accepted, but the principle had been upheld that it was not for the depositary to decide in the light of its own national policy.

94. Mr. ELIAS said that the new formulation by the Special Rapporteur was both clearer and simpler than that adopted by the Commission in 1962.

95. He supported Mr. Tunkin's suggestion that the introductory phrase of paragraph 2 should include a reference to the applicable rules of an international organization, with the consequence that paragraph 2 (*a*) could be omitted.

96. For paragraph 3, he could accept the Special Rapporteur's new wording subject to the deletion of the words "in its opinion", which introduced a subjective element and an implication that the depositary might have a discretionary function in the matter.

97. The enumeration of functions set out in the various sub-paragraphs of paragraph 2 could undoubtedly be shortened. It was clearly not exhaustive, since paragraphs 3 and 4 imposed additional obligations on the depositary. He was not in favour of specific references to the various articles which laid down duties for the depositary, as in sub-paragraphs (*f*) and (*g*), but would prefer a general reference.

98. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that most of the observations by members related to questions of drafting which could be left to the Drafting Committee.

99. It had been pointed out that in his revised version of article 29, neither paragraph 1 nor paragraph 2

stated the essential function of the depositary, which was to act as custodian of the text of the treaty; it was, however, mentioned in the definition of "depositary" in article 1, paragraph 1 (*g*), and the Commission's decision on that definition would affect paragraph 1 of article 29. In the course of the discussion of article 28, he had himself suggested that the negative formulation of that article should be replaced by a more positive formulation which would cover the basic function in question.¹⁰

100. His proposed new paragraph 1 took that basic function for granted and stated a rule to which members had attached great importance in 1962. It had been considered useful to set out the depositary duties, for the reason, in particular, that certain States would in modern practice be called upon to act as depositaries for the first time. The real substantive point in paragraph 1 was that the depositary could not act at its own discretion but should act as an international organ; paragraph 4 set out certain consequences which followed from that rule.

101. He agreed with Mr. Tunkin's remarks concerning the difficulties to which the expression "States to which it is open to become a party" could give rise. As he had mentioned during the discussion on a previous article, the Drafting Committee was considering that problem; as far as paragraph 1 of article 29 was concerned, the wording which would be adopted by the Drafting Committee would undoubtedly avoid the expression which Mr. Tunkin had criticized.

102. If the suggestion by Mr. Tunkin for introducing the idea of the international character of the functions of the depositary was adopted, it would not necessarily become possible to drop the reference to the impartiality of the depositary. The notion of impartiality seemed useful in the context, and the Drafting Committee should consider whether it was necessary to retain it.

103. He agreed that the opening passage of paragraph 2 should make it clear that the enumeration in sub-paragraphs (*a*) to (*g*) was not exhaustive and that it covered only some of the functions of a depositary.

104. With regard to Mr. Tunkin's proposal for the inclusion of a reference to the rules of an international organization in that same introductory phrase, he said it might be desirable to adopt it, even though a general article was included in the draft articles for the purpose of reserving the rules of international organizations.

105. The United States Government's proposal, which had led to the insertion of the concluding words of paragraph 2 (*a*), and which some members had criticized, involved a minor point; he now felt that the words should be omitted. A depositary could always refuse to continue to act as such if it considered that certain additional duties imposed by the amended rules of an international organization laid too heavy a burden on it.

106. He suggested that article 29 should be referred to the Drafting Committee, with the comments made during the discussion.

¹⁰ *Vide supra*, para. 23.

107. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to adopt the Special Rapporteur's suggestion.

*It was so agreed.*¹¹

The meeting rose at 1.5 p.m.

¹¹ For resumption of discussion, see 815th meeting, paras. 35-62.

804th MEETING

Thursday, 17 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Special Missions

(A/CN.4/179)

[Item 3 of the agenda]

PRELIMINARY QUESTIONS

1. The CHAIRMAN invited the Commission to consider the second report on special missions (A/CN.4/179), submitted by himself as Special Rapporteur for the topic.
2. Speaking as Special Rapporteur, he asked the Commission first to decide three preliminary questions arising out of paragraphs 1 (a), (c) and (d) of his report.
3. So far as the first question was concerned, he suggested that his corrections to the articles adopted by the Commission at its sixteenth session¹ should not be discussed until after the Commission had received the comments of governments.
4. The second question concerned the drafting of rules relating to so-called "high-level" special missions. Although he had been instructed by the Commission to prepare rules concerning the legal status of such missions, he had had difficulty in gathering material, whether drawn from the practice or from the literature. He had only been able to produce the six rules which appeared in the last section of his second report. If the Commission so wished, he could, after the study of the articles on special missions in general and before the close of the session, submit some conclusions as to how far it was necessary to prepare more detailed rules on the subject of "high-level" special missions.
5. The third question concerned the joint proposal on the legal status of delegations to international conferences and congresses, which the Commission had

¹ *Yearbook of the International Law Commission, 1964, Vol. II, pp. 208-210.*

requested from Mr. El-Erian, Special Rapporteur on relations between States and inter-governmental organizations, and from himself as Special Rapporteur on special missions. He had collected some material on the subject, but had not been able to confer with Mr. El-Erian with a view to preparing a joint proposal. The matter might be deferred until the January session in 1966.

6. He would like to have the Commission's opinion on the first of those three questions.

7. Mr. ROSENNE said that he fully agreed with the Chairman's suggestion regarding the first question. He suggested, however, that, once the Commission had completed its work at the current session on the next group of articles on special missions, the Drafting Committee should consider whether any language adjustments were necessary in articles 1 to 16.

8. The CHAIRMAN said that, if there were no further comments, consideration of the proposed changes in articles 1-16 (A/CN.4/179, paras. 134-148) would be deferred until a later session.

It was so agreed.

9. The CHAIRMAN invited the Commission to express its views on the second question.

10. Mr. BRIGGS said that it would be more appropriate to discuss the Special Rapporteur's draft provisions concerning so-called high-level special missions after the Commission had completed the draft articles on special missions.

11. The CHAIRMAN said that, in the absence of further comments, he would take it as agreed that the subject should be deferred until after the study of articles 17 to 40 had been completed.

It was so agreed.

12. The CHAIRMAN invited the Commission to express its views on the third question.

13. Mr. TUNKIN suggested that the question be left open, as Mr. El-Erian was absent.

It was so agreed.

14. The CHAIRMAN asked whether the Commission wished to have a general debate on articles 17 to 40.

15. Mr. TUNKIN proposed that the Commission should proceed immediately to discuss the articles one by one.

It was so decided.

ARTICLE 17 (General facilities) [17]

Article 17

General facilities

[17]

The receiving State shall offer a special mission all the facilities necessary for the smooth and regular performance of its task, having regard to the nature of the special mission.

16. The CHAIRMAN, speaking as Special Rapporteur, said that article 17 stated a rule which was found in all works dealing with the question; it was not a rule of courtesy but an obligation *ex jure*.

17. Mr. TUNKIN asked why the wording of article 17 differed from that of article 25 of the Vienna Convention on Diplomatic Relations and article 28 of the Vienna Convention on Consular Relations.
18. The CHAIRMAN, speaking as Special Rapporteur, said that the difference was not based on doctrinal considerations. He had merely wished to take account of the particular nature of special missions.
19. Mr. YASSEEN said that the rule should be adopted, regardless of whether the obligation existed in positive law, for it laid down the receiving State's first duty toward a special mission coming into its territory.
20. There was a slight difference between the French and the English texts, in that the latter did not use the comparative form of the adjectives "smooth and regular". The text might be simplified to read "the regular performance of its task", which would be closer to the wording of article 25 of the Vienna Convention on Diplomatic Relations.
21. Mr. PESSOU said that a formula such as "The members of a special mission shall enjoy in the territory of the receiving State all the facilities necessary for the performance of their task" would not change the meaning but would more adequately reflect the fact that the State was a sovereign entity.
22. Mr. AMADO urged that in the French text the word *accomplissement*, used in the corresponding articles of both Vienna Conventions, should be used rather than *exécution*.
23. Mr. ROSENNE said that, while he accepted the general lines of article 17, he felt that the actual text went somewhat beyond what was expressed in the commentary. He therefore suggested that the article should be redrafted to read: "The receiving State shall offer a special mission adequate facilities for the performance of its task, having regard to the nature of the special mission". That formulation involved the omission of the words "smooth and regular" before "performance", which did not add much to the meaning of the provision.
24. The concluding proviso "having regard to the nature of the special mission" was necessary and served to limit the duties of the receiving State.
25. There remained the legal question mentioned in the last sentence of paragraph (2) of the commentary; but that could hardly be solved in the draft articles.
26. Mr. JIMÉNEZ de ARÉCHAGA said that, in his view, the draft articles on special missions did not constitute an isolated piece of work, but formed part of the general codification of diplomatic law and consequently should be integrated into the structure of the Vienna Conventions of 1961 and 1963.
27. The Commission should always bear in mind how the draft articles might affect those two existing Conventions. It should avoid the temptation to try to improve on the wording adopted for the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. Even if there were room for improvement, the Commission should adhere to the language used in those two Conventions and confine its work to specifying any limitations or modifications that were appropriate, bearing in mind the peculiar nature of special missions. Only in that manner would it be possible to avoid gratuitously creating problems of interpretation.
28. He accordingly proposed that the wording of article 17 should follow exactly that of article 25 of the Vienna Convention of 1961 and article 28 of the Vienna Convention of 1963, with the addition of the concluding proviso "having regard to the nature of the special mission" which, as pointed out by Mr. Rosenne, embodied a useful and necessary limitation.
29. Mr. ELIAS said that it had been his intention to suggest that article 17 should be amended to read "The receiving State shall provide facilities adequate for the performance by a special mission of its task", but after listening to Mr. Jiménez de Aréchaga's comments he agreed that it would be desirable to use as nearly as possible the actual words of the two Vienna Conventions.
30. Mr. TUNKIN said that, in essence, article 17 was intended to state the rule that the receiving State should extend to the special mission the same facilities for the performance of its functions as it accorded to a permanent diplomatic mission or to a consular post.
31. He fully supported the arguments put forward by Mr. Jiménez de Aréchaga regarding the need to follow the language used in the corresponding provisions of the two Vienna Conventions. Any departure from that language might have an adverse effect on interpretation.
32. He did not, however, think that the proviso "having regard . . ." should be retained. Obviously, the receiving State would bear in mind the special character of the special mission; but it would do likewise in the case of a permanent mission and of a consular post, and neither article 25 of the Vienna Convention on Diplomatic Relations nor article 28 of the Vienna Convention on Consular Relations provided that the receiving State should, when according full facilities, bear in mind the special character of a permanent mission or of a consular post, as the case might be.
33. Mr. PAL said he saw no convincing reason to depart from the language used in the corresponding provisions of the two Vienna Conventions. The substance of article 17 would be adequately expressed if the wording of article 25 of the Vienna Convention on Diplomatic Relations were used.
34. Mr. RUDA said that he, too, considered that the language of the two Vienna Conventions should be followed, but with the addition of the concluding proviso.
35. Sir Humphrey WALDOCK said that the point raised by Mr. Jiménez de Aréchaga was extremely important. Any departure from the wording used in the existing conventions could give rise to serious difficulties whenever questions of interpretation arose. The point affected all the draft articles, and not merely article 17.
36. The special character of special missions was already sufficiently brought out by the various provisions in articles 1 to 16. In the circumstances, it would seem

unwise to stress it too much in article 17. All that was necessary in the way of limitation was merely to replace, in the text of article 25 of the 1961 Vienna Convention, the word "mission" by "special mission". He therefore suggested that article 17 should be revised to read:

"The receiving State shall grant full facilities for the performance of the functions of the special mission".

37. Mr. CASTRÉN said that the Commission's draft should follow the wording of the corresponding articles of the Vienna Conventions as closely as possible and that in any case the last phrase in the Special Rapporteur's draft article 17 "having regard to the nature of the special mission" should be dropped, since it might be interpreted as a limitation.

38. Mr. BRIGGS said that at first he had thought that the concluding proviso should be retained, as suggested by Mr. Rosenne and Mr. Ruda, particularly in view of the temporary nature of the special mission; but in the light of the discussion he had reached the conclusion that the best course was that suggested by Sir Humphrey Waldock.

39. Mr. TSURUOKA said he had no strong feeling about either retaining or deleting the idea expressed in the last phrase. One of the characteristics of special missions, other than their temporary nature, was the variety of functions which they performed. If the phrase was retained, it would emphasize that peculiar nature of special missions and of the privileges they should enjoy; there was little risk of its being misinterpreted.

40. Mr. ROSENNE said that, as there was no real disagreement on substance, Sir Humphrey Waldock's proposed wording could perhaps meet the case.

41. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission was agreed that an article was needed corresponding to article 25 of the Vienna Convention on Diplomatic Relations and to article 28 of the Vienna Convention on Consular Relations. He had based his draft article 17 on both those articles, but had also tried to show in what respects special missions differed from permanent missions and from consulates. The Drafting Committee could decide to draw that distinction either in the article itself or in the commentary.

42. With regard to the general question of the relationship between the draft articles and the corresponding articles of the two Vienna Conventions, he said that the Commission had decided to prepare a separate convention on special missions. The question was whether the terms of the two earlier Conventions should be followed, or whether in some respects the new draft should differ from them in order to reflect certain distinctions. He thought that as far as possible the wording of the Vienna Conventions should be followed, but possibly his ideas on the distinctions which should be drawn were not shared by the other members of the Commission.

43. Article 25 of the Vienna Convention of 1961 spoke of "the mission" whereas article 28 of the Vienna Convention of 1963 spoke of "the consular post". Special missions differed from both, and the difference might have far-reaching consequences in practice. Special missions always claimed the same facilities as

regular diplomatic missions. Moreover, special missions sometimes needed additional facilities not enjoyed by regular missions. He would accordingly prefer that the article should make the distinction quite clear.

44. Furthermore, in his opinion, article 17 should deal with the special mission as an institution, and should not transform an objective rule into a subjective one applying to the individual members of the mission. The facilities to be accorded to members as such would be set out in other articles.

45. The formula proposed by Mr. Tunkin, which would provide that the receiving State should do everything in its power to enable the special mission to perform its task, might give rise to disputes, especially if a mission was sent to a federal State, whose Government might argue that certain facilities came under the authority not of the central Government but of the governments of the individual States. He (the Chairman) considered that the article should place the obligation squarely on the receiving State and should not leave that State free to judge what was or was not within its power.

46. The phrase "the smooth and regular performance of its task" had been used advisedly, for there was some difference between rendering a task possible and rendering it easy. He would agree to replace the word *exécution* by *accomplissement*.

47. He urged that the idea expressed in the last part of the sentence should be retained, either in the body of the article or at least in the commentary.

48. Speaking as CHAIRMAN, he suggested that article 17 and all the comments concerning it should be referred to the Drafting Committee.

*It was so agreed.*³

ARTICLE 18 (Accommodation of the special mission and its members) [18]

Article 18

[18]

Accommodation of the special mission and its members

1. The receiving State shall facilitate the accommodation of the special mission at, or in the immediate vicinity of, the place where it is to perform its task.

2. If the special mission, owing to the nature of its task, has to change the site of its activities, the receiving State shall enable it to remove to other accommodation at any place where its activities are to be pursued.

3. This rule also applies to the accommodation of the head and the members of the special mission, and of the members of the staff of the special mission.

49. The CHAIRMAN, speaking as Special Rapporteur, said that article 18 of his draft differed from article 21 of the Vienna Convention on Diplomatic Relations and from article 30 of the Vienna Convention on Consular Relations in that it did not make provision for the acquisition of premises, because special missions were temporary. At the same time, article 18 did not exclude the practice of certain States of establishing a house or permanent centre for the accommodation of their successive special missions.

³ For resumption of discussion, see 817th meeting, paras. 1-4.

50. The accommodation problem was often much more difficult in the case of a special mission than in that of a regular diplomatic mission. As yet, there was no rule of law concerning the accommodation of special missions. It should be laid down as a rule *de lege ferenda* that the host State should facilitate the accommodation of the special mission. Problems had arisen in practice, for example in countries where persons of a different colour were not admitted to hotels, and in very small localities where accommodation facilities were very limited.
51. Paragraph 2 dealt with the case where special missions moved from one place to another. Permanent diplomatic missions did not move, save in exceptional cases, such as war or the seasonal transfer of government services.
52. The purpose of paragraph 3 was to extend to the accommodation of the members of the special mission the rule concerning the premises which the mission required for the purpose of its task.
53. Mr. VERDROSS said that article 18 very justly differentiated the obligations of the receiving State towards special missions. The rule applicable to special missions should be both less and more exacting than that applicable to diplomatic and consular missions: less exacting, because the receiving State was not obliged to authorize the acquisition of premises, but more exacting because the receiving State had to make it possible for the special mission to find accommodation and to move from place to place in the performance of its functions.
54. In paragraph (4) of his commentary to article 18, the Special Rapporteur alluded to the obligation to observe the rules of non-discrimination in cases where several special missions from different States met. That idea should, perhaps, be expressed in the article itself.
55. With regard to the drafting, he suggested that in the French text of paragraph 3 the expression *cette règle est également valable* should be replaced by the expression *cette règle s'applique également*.
56. Mr. JIMÉNEZ de ARÉCHAGA said that article 18 provided a good example of the need to adapt the provisions of the two Vienna Conventions so as to take into account the peculiar nature of special missions. He commended the Special Rapporteur for dropping the reference to the acquisition of premises, which would be out of place in the draft on special missions.
57. However, it would not be advisable to impose on the receiving State the duty to facilitate the accommodation of the special mission, as was done in paragraph 1, and of its members, as was done in paragraph 3. All that could be expected of the receiving State was that it should assist in obtaining such accommodation, and the wording of those two paragraphs should be amended accordingly. The position was completely different from that of permanent missions, in respect of which the receiving State could either facilitate the actual acquisition of premises—if necessary, by enacting legislation to that effect—or help the mission to obtain premises by lease or otherwise.
58. The idea of the possible change of site, embodied in paragraph 2, was not in its right place in article 18; it would be better to deal with the question in the provisions on freedom of movement.
59. Mr. CASTRÉN said he accepted article 18 in substance and realized that it could not follow the provisions of the Vienna Conventions.
60. It would no doubt be possible to simplify the article somewhat; for example, paragraph 2 was not absolutely necessary, for the obligation to make provision for certain movements necessitated by the particular nature of a special mission's task was implied in paragraph 1, as well as in article 17. If the Commission should decide to delete paragraph 2, it might amend paragraph 1 by replacing the word "place" by "places".
61. Paragraph 3 stated in substance the same rule as paragraph 2 of the corresponding articles of the Vienna Conventions. The difference in wording was not very substantial; the Vienna Conventions used the expression "assist in obtaining suitable accommodation", which was very close to the expression "facilitate the accommodation of the special mission", used in paragraph 1.
62. Mr. RUDA said that the purpose of article 18 was to lay down the duty of the receiving State to facilitate the accommodation of a special mission. However, it was essential to state expressly that accommodation should be adequate. He therefore proposed the insertion of the word "adequate" before "accommodation" in paragraphs 1 and 3.
63. In the case of a permanent mission, article 21 of the Vienna Convention on Diplomatic Relations offered the receiving State a choice: it could either enable the sending State to acquire the necessary premises, or it could assist the mission "in obtaining accommodation in some other way". Since, in the case of a special mission, the receiving State would not have the possibility of adopting the first of those alternatives, it was desirable to amend paragraphs 1 and 3 in such a manner as to lay down the duty to "assist in facilitating" the accommodation.
64. The Drafting Committee should consider the possibility of amalgamating the provisions of paragraphs 1 and 3 so as to express in one provision the same rule for the accommodation of the special mission and for that of its personnel.
65. Mr. YASSEEN said that, in general, the wording of the articles in the Vienna Conventions should be followed as far as possible. But because diplomatic and consular missions differed materially from special missions, the Commission was drafting a separate convention on special missions. The resemblance between the two kinds of mission was more apparent than real; that was why it had been found necessary to renounce the method, initially chosen, of determining, with respect to each article in the two Vienna Conventions, whether it applied or did not apply to special missions. The Commission should therefore feel at liberty to adopt or to depart from the terms of the Vienna Conventions, according to the circumstances.

66. Article 18 illustrated the difference to be made *vis-à-vis* diplomatic and consular missions. Since special missions functioned for a short time, the question of accommodation might be particularly difficult, and therefore the obligation on the receiving State had to be more precise and should be an obligation to achieve a certain result rather than simply an obligation to use certain means. The formula proposed by the Special Rapporteur satisfied the needs of the situation and reflected the difference to be made between the obligations which rested on the receiving State according as the accommodation was that of a permanent or that of a special mission.

67. The example quoted by Mr. Jiménez de Aréchaga was not really relevant; it related rather to missions to international conferences and to the problems of the headquarters of international organizations.

68. Itinerant special missions occurred in practice, but he did not think they deserved a special paragraph. Paragraph 1, amended as suggested by Mr. Castrén, would perhaps deal adequately with cases of that kind.

69. He supported the drafting amendment to paragraph 3 suggested by Mr. Verdross.

70. Mr. AGO said that, in his opinion, the Special Rapporteur had probably given the article too much prominence by dividing it into three paragraphs; a single paragraph should be sufficient. He accordingly proposed the following text, which was based on the Vienna Conventions, subject to necessary adjustments:

“The receiving State shall assist the special mission in procuring appropriate premises and in obtaining suitable accommodation for its members”.

71. Mr. AMADO³ pointed out that, if it was necessary to deal with the question of accommodation, it should not be forgotten that the State which received a special mission would think of that problem.

72. Mr. TUNKIN said he agreed with the Special Rapporteur that the wording of the Vienna Conventions could not be used in article 18 because of the essentially different character of special missions. While he supported the underlying idea of the text, he was sure that it could be considerably simplified by the Drafting Committee. The kind of text proposed by Mr. Ago would be adequate. There was no need to mention, for example, that the accommodation should be in the immediate vicinity of the place where the mission's task was to be performed, or to provide for the eventuality of its having to change the site of its activity.

73. The CHAIRMAN, speaking as Special Rapporteur, said that the details in article 18 were strictly necessary. Some of the passages might, however, be transferred to the commentary, and the provisions thereby shortened. The wording proposed by Mr. Ago did not cover all the requirements. In some cases, the receiving State would not merely have to “assist” the special mission in finding accommodation, but would have to “ensure” its accommodation. If the Commission should adopt Mr. Ago's proposal, it would have to introduce that idea.

74. He accepted Mr. Verdross's proposal that the words *est également valable pour le* should be replaced

by the words *s'applique également au* in the French text of paragraph 3.

75. In the text proposed by Mr. Ago, the word “suitable” should be replaced by “appropriate”.

76. He suggested that the article should be referred to the Drafting Committee, together with the text proposed by Mr. Ago.

*It was so agreed.*³

ARTICLE 19 (Inviolability of the premises of the special mission) [19]

Article 19

[19]

Inviolability of the premises of the special mission

1. The premises of a special mission shall be inviolable. This rule shall apply even if the special mission is accommodated in a hotel or other public building, provided that the premises used by the special mission are identifiable.

2. The receiving State has a duty to take all appropriate steps for the protection of the premises of the special mission, and in particular to prevent any intrusion into or damage to those premises, any disturbance of the special mission in its premises, and any impairment of its dignity.

3. Agents of the receiving State shall not enter the said premises without the special consent of the head of the special mission or the permission of the head of the regular diplomatic mission of the sending State accredited to the receiving State.

77. The CHAIRMAN, speaking as Special Rapporteur, said that article 19 of his draft corresponded in substance to article 22 of the Vienna Convention on Diplomatic Relations and article 31 of the Vienna Convention on Consular Relations, though in order to take account of the needs of special missions he had been obliged to depart from those provisions to some extent.

78. Mr. VERDROSS said he approved of the article in substance, subject to some drafting changes. In paragraph 1, the words “shall be” should be replaced by the word “are”. As a consequence of that amendment, paragraph 3 would become superfluous. The second sentence of paragraph 1 could be deleted, and the words “even if the special mission is accommodated in a public building” added to the first sentence.

79. Mr. JIMÉNEZ de ARÉCHAGA said that article 19 was an extremely important one. He asked whether the Special Rapporteur had deliberately omitted the provision contained in article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations and in article 31, paragraph 4, of the Vienna Convention on Consular Relations concerning the immunity of premises, property and means of transport from search, requisition, attachment or execution.

80. The CHAIRMAN, speaking as Special Rapporteur, replied that, as one of the changes he had had to make in order to take account of the peculiar nature of special missions, he had dealt with that question in a separate article (article 24).

³ For resumption of discussion, see 817th meeting, paras. 5 and 6.

81. Mr. CASTRÉN said that, like Mr. Verdross, he took the view that the second sentence in paragraph 1 could be transferred to the commentary.
82. Mr. RUDA said he supported Mr. Verdross's proposal that the content of paragraph 3 should be transferred to paragraph 1.
83. The receiving State was under a special duty to protect the premises of a special mission and it would be appropriate in paragraph 2 to use the wording of the Vienna Convention on Diplomatic Relations.
84. Mr. PESSOU proposed that the words "The receiving State has a duty to take", in paragraph 2, be replaced by the words "The receiving State shall take".
85. Mr. PAL said he was fully satisfied with the reasons given by the Special Rapporteur in the commentary for certain departures from the Vienna Conventions. Subject to the necessary drafting improvements, article 19 was acceptable. He did not favour Mr. Verdross's amendment to the first sentence in paragraph 1, which should remain as it stood.
86. Mr. ELIAS suggested that the content of article 24 should be incorporated in article 19 as a new paragraph 2, in order that all the provisions concerning inviolability should, as in the case of article 31 of the Vienna Convention on Consular Relations, be grouped in one article. The existing paragraph 2 of article 19 should be transferred to the commentary. Paragraph 3 in abbreviated form could become the second sentence in paragraph 1. That rearrangement would be more logical and clearer.
87. The mandatory form should be retained in the first sentence if the Commission desired to impose a firm obligation on the receiving State.
88. Mr. BRIGGS said that, in his opinion, the Special Rapporteur's conception of the scope of the article was correct. The article was not easy to draft because of the different senses in which the word "inviolability" had been used, both in the draft under discussion and in the Vienna Conventions. According to the context, it might mean prohibition of entry, an obligation to protect, or immunity from seizure of archives, arrest and detention, search, attachment or execution. The Special Rapporteur had rightly omitted from the article the provisions contained in article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations.
89. He did not particularly favour the proposal for shortening paragraph 3. Paragraph 2 should certainly be retained because it dealt with the important obligation on the receiving State to protect the premises from intrusion by unauthorized persons.
90. The subject of the inviolability of the archives of the special mission was sufficiently important to merit a separate article.
91. Mr. REUTER said that, although he had not much personal experience of special missions, he realized that the draft rules should contain more than just generalities. Accordingly, however much the Drafting Committee might simplify the text, it should sacrifice nothing. In the event of disputes, questions of immunity raised insoluble problems if the relevant provisions were not sufficiently detailed, for then a mere recital of principles was useless.
92. With regard to the phrase "provided that the premises used by the special mission are identifiable", which he regarded as indispensable, he thought that the point should be expressed even more forcefully, for the receiving State should be told what those premises comprised. The Vienna Conventions had not perhaps devoted enough attention to the matter. Some States did not keep lists of premises which were entitled to protection.
93. The CHAIRMAN, speaking as Special Rapporteur, said Mr. Reuter's comments would enable him to fill a gap in the text. It was quite true that, if the receiving State was expected to protect premises, it had to know exactly what premises were involved.
94. The proposals put forward by Mr. Verdross seemed sound, and the Commission should consider them when they had been drafted in appropriate language.
95. Mr. ROSENNE said that, during the discussion on special missions at the previous session,⁴ he had contended that the Commission should depart as little as possible from the provisions of the Vienna Convention on Diplomatic Relations, and where it found that necessary, should justify its action in each case. He had also suggested⁵ that the Commission would, in some cases, find it more useful to draw on the Vienna Convention on Consular Relations than on the other, a view which had been confirmed by the Special Rapporteur in the introduction to his second report.
96. That argument certainly held good for article 19, but its scope should be extended by including the provision contained in the last sentence of article 31, paragraph 2, of the Vienna Convention on Consular Relations. It was essential to allow for protective action to be taken in the case of fire or other disaster, particularly as the premises of a special mission might be located in a series of rooms or on one or more floors of a building.
97. He did not share the preoccupations of Mr. Briggs concerning the use of the word "inviolability", since the context itself always indicated what legal connotation should be ascribed to that word.
98. Regarding the question raised by Mr. Reuter, he wondered whether the English and French texts of the last phrase in paragraph 1 of article 19 exactly corresponded. The former was preferable, the point being that the premises used by special missions should be "identifiable" by the public and the authorities of the receiving State.
99. The proposal by Mr. Elias was essentially one of rearrangement which should be left until article 24 was taken up.
100. The CHAIRMAN, speaking as Special Rapporteur, explained that he had only referred to the identification of the premises, whereas Mr. Reuter had pointed out that the receiving State should be told in advance what those premises were.

⁴ *Yearbook of the International Law Commission, 1964, Vol. I, p. 12, para. 36.*

⁵ *Ibid.*, p. 14, para. 64.

101. Mr. TUNKIN said that the question of inviolability had been discussed at length during the preparation of the Commission's draft on diplomatic relations, and the Commission had rightly concluded, as far as the premises of a diplomatic mission were concerned, that the agents of a receiving State could not enter without the special permission of the head of mission in each case and that the receiving State had a duty to protect the premises from entry by private persons.

102. The question of prior notice raised by Mr. Reuter had also been discussed, but the suggestion that inviolability should be contingent upon prior notice had been rejected because such a rule would unduly complicate matters. It was self-evident that the receiving State could not be regarded as under an obligation to protect the premises of a special mission if its authorities were unaware of the whereabouts of the premises, but it would be unwise to insert a provision on the matter lest the alleged absence of notice be used as a pretext by States for not taking the requisite protective action.

103. He doubted whether Mr. Rosenne was right in thinking that the draft should be closely modelled on the Vienna Convention on Consular Relations, because it was arguable that the analogies between special and diplomatic missions were closer. He was firmly against Mr. Rosenne's proposal for the insertion of a provision corresponding to that in the last sentence of article 31, paragraph 2, of the Convention on Consular Relations. That provision had in fact been inserted by the Vienna Conference and not by the Commission, which had agreed that, in the interests of friendly co-operation between States, any possibility of intrusion into consular or diplomatic premises should be ruled out.

104. He supported Mr. Verdross's proposal that the content of paragraph 3 should form the second sentence of paragraph 1 since the provision as so amended would then state the fundamental rule on inviolability.

105. Mr. VERDROSS said that Mr. Briggs and Mr. Tunkin had referred to the two meanings of the term "inviolability". First, it had a negative meaning—that of prohibition of entry. Secondly, it had a positive meaning—that of the obligation to protect. The first meaning could be covered in paragraph 1 and the second in paragraph 2 of the article; paragraph 3 could then be deleted.

The meeting rose at 1 p.m.

805th MEETING

Thursday, 17 June 1965, at 3.15 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Special Missions

(A/CN.4/179)

(continued)

[Item 3 of the agenda]

ARTICLE 19 (Inviolability of the premises of the special mission) [19] (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 19.

2. Mr. ROSENNE referred to his suggestion, made at the 804th meeting, that the scope of article 19 should be extended by including a provision based on the last sentence of article 31, paragraph 2, of the Vienna Convention on Consular Relations.² Mr. Tunkin had opposed the suggestion on the grounds that the provision in question had been inserted in the Vienna Convention by the United Nations Conference on Consular Relations and not by the Commission itself, which had agreed that in the interests of friendly co-operation between States any possibility of intrusion into premises, whether consular or diplomatic, should be excluded.³

3. The fact that the States represented at the Conference had found it necessary to introduce the provision in article 31 of the Convention spoke for itself. In the case of special missions, which rarely occupied buildings of their own but were usually accommodated in buildings used for other purposes as well, it was as essential as in the case of consular missions that the consent of the head of the mission to entry into the premises could be assumed in case of fire or other disaster requiring prompt protective action.

4. Mr. BRIGGS agreed with Mr. Rosenne.

5. The CHAIRMAN, speaking as Special Rapporteur, said that his difficulties in drafting article 19 could best be understood in the light of the difference between the articles on which it was based: article 22 of the Vienna Convention on Diplomatic Relations and article 31 of the Vienna Convention on Consular Relations, which were not constructed along the same lines. The former said that "the premises of the mission shall be inviolable", whereas the second said that "consular premises shall be inviolable to the extent provided in this article".

6. So far as substance was concerned, the Vienna Convention on Diplomatic Relations laid down the absolute inviolability of the mission's premises, and hence the duty of agents of the receiving State to refrain from entering them. The Vienna Convention on Consular Relations on the other hand (in particular article 41) empowered the authorities of the receiving State to take certain action against consular officers.

7. With regard to the active protection due to special missions, he had followed the provisions of the two Vienna Conventions, which were largely parallel. In addition, he had drawn conclusions from events that had occurred in recent years, which had led to intrusions into premises in connexion with popular movements

¹ See 804th meeting, following para. 76.

² *Ibid.*, para. 96.

³ *Ibid.*, para. 103.

or demonstrations on a smaller scale. On several occasions the question had arisen whether the receiving State was obliged to accord protection and not to accept the theory that such events constituted a case of *force majeure*. The Government of Yugoslavia had ordered the police to lie down on the ground outside the Belgian Embassy when certain events had occurred in the Congo. Crowds might be tempted to attack by the fact that the police did not do their duty.

8. In his opinion, each of the three paragraphs of article 19 had a distinct purpose; one stated the principle of inviolability, another described what the authorities had to do to prevent certain actions, and the third was concerned with active protection. The question was how far the two Vienna Conventions should be followed, and which one should be taken as a model.

9. In reply to Mr. Rosenne's question concerning presumed consent, he said he had not wished to introduce the presumption into the article without an express decision by the Commission, which had twice ruled against it. At the Vienna Conference on Diplomatic Intercourse and Immunities, 1961, the amendment containing such a formula⁴ had been opposed by a small majority, but the formula had been accepted at the Vienna Conference on Consular Relations, 1963,⁵ although at variance with the draft prepared by the International Law Commission. He thought that a question of principle was involved: now that the rule had become a part of positive international law, against the wishes of the Commission, should the Commission follow its own precedents or should it overrule them?

10. With regard to the question who could authorize the agents of the receiving State to enter the premises, he said that under the Vienna Convention on Diplomatic Relations the person competent to give the consent was the head of the diplomatic mission, and under the Vienna Convention on Consular Relations the two organs competent to give the consent were the head of the consular post and the head of the permanent regular diplomatic mission accredited to the country in which the consular post was situated. In the case of special missions, he had thought it better to mention both possibilities, for in practice the heads of special missions were often inexperienced and might refuse to listen to the arguments used to justify entry. Accordingly, he had proposed an alternative though not cumulative combination of the rules set forth in the two Vienna Conventions.

11. He thought that, apart from the question raised by Mr. Rosenne, the differences in the views concerning article 19 related to drafting rather than to substance. Mr. Reuter had asked whether a State had a duty to know its obligations with regard to the object to be protected: he (the speaker) thought that the point should not give rise to controversy so far as the actual rules were concerned, and that it would be enough to improve the text and to draft it in more precise language.

⁴ Amendment submitted by Ireland and Japan; see *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. II, doc. A/CONF.20/C.1/L.163.

⁵ See *United Nations Conference on Consular Relations, Official Records*, Vol. I, fourteenth plenary meeting, especially paras. 46 *et seq.*

12. In reply to Mr. Elias's question whether the article should say that the premises of a special mission "are inviolable" or "shall be inviolable"—in other words whether the provision should be drafted as a general statement or as a rule of law—he thought that the mandatory formula "shall be" should be retained.

13. Mr. PESSOU suggested that the opening passage of paragraph 3 should be amended to read: "Except in cases of *force majeure* or imminent danger (fire or threats), agents of the receiving State may not enter the said premises without the consent of the head of the special mission . . ."

14. The CHAIRMAN, speaking as Special Rapporteur, said that he was not sure that the Commission should accept the idea of *force majeure* as justifying entry, an idea which it had twice rejected in the past and which, as diplomatic history showed, lent itself to abuse.

15. Mr. PESSOU said that there had been several unfortunate cases where the authorities of a country had been unable to prevent a political demonstration against the embassy of a foreign country. At the least, therefore, the article should provide that, except in case of threats or danger, permission for agents of the receiving State to enter the premises was always given by the head of the special mission.

16. The CHAIRMAN, speaking as Special Rapporteur, said that two different cases were involved: Mr. Pessou, who had been right in submitting his proposal, was thinking of the case where the territorial State should prevent a violation of the premises, whereas he (the speaker) was thinking of the case of fire or other disaster.

17. Mr. ROSENNE said he could not accept the contention that the Commission was bound by decisions which it had taken at earlier sessions when, in a different composition, it had been examining a different topic from that now under discussion, any more than the International Court was formally bound by any decision which it had made in a previous case. There should, of course, be some element of continuity and development in the Commission's thinking, but that consideration did not prevent it from departing altogether from an earlier decision if it thought fit, even if it had reached that earlier decision on two previous occasions. It was impossible to overlook the fact that, on the issue he had raised, the Vienna Conference on Consular Relations had not followed the same conclusion as the Commission.

18. However, to avoid prolonging the discussion, he would have no objection if the point which he had raised were referred to the Drafting Committee.

19. Mr. TUNKIN thought that Mr. Rosenne's reference to the decision taken by the Conference on Consular Relations was unconvincing. Many members of the Commission considered that the Commission's draft articles on consular relations⁶ had been spoilt, rather than improved, by that Conference; and the inclusion of the last sentence of article 31, paragraph 2, in the Convention of 1963 was one example of the way in which the sense of the Commission's draft articles had been impaired.

⁶ *Yearbook of the International Law Commission, 1961*, Vol. II, pp. 93 *et seq.*

20. The point raised by Mr. Rosenne was, of course, a very important one and deserved careful consideration by the Commission. But members should not allow their opinion to be swayed by the single fact that the Conference on Consular Relations had reached a conclusion different from their own. They should rather examine the whole history of the problem, and particularly various arguments and facts by which the Commission had been guided in producing the relevant provision in its own draft on consular relations.⁷

21. The CHAIRMAN asked if the Commission wished to refer article 19, together with Mr. Rosenne's proposal, to the Drafting Committee forthwith, or if it wished first to take a decision on Mr. Rosenne's proposal.

22. Mr. YASSEEN said that so important a matter, which involved a whole series of problems, should not be referred to the Drafting Committee. Although the local authorities should, of course, be permitted to help in putting out a fire, it was also conceivable that the fire might have been set by those same authorities in order that they should be able to enter the premises in question.

23. Mr. TUNKIN, supported by Mr. CASTRÉN; thought that the matter should be referred to the Drafting Committee, since the attendance at the Commission's current meeting was far from complete.

24. Mr. YASSEEN again objected to the idea that so important a matter should be referred to the Drafting Committee.

25. Mr. REUTER said that he shared Mr. Yasseen's view. He had noted on several occasions that, when the members of the Commission were not in agreement on a provision, they referred the controversial text to the Drafting Committee, where the real work, which should be done in the plenary Commission, was not done. He thought that the Commission should not discuss such a delicate matter when only half of its members were present; in his opinion, consideration of the matter should be postponed.

26. Mr. JIMÉNEZ de ARÉCHAGA, supported by Mr. BRIGGS, suggested that article 19 be referred to the Drafting Committee and that a decision on Mr. Rosenne's proposal should be postponed until the Drafting Committee had reported back to the Commission with its recommendations concerning the article.

27. Mr. REUTER said that the Drafting Committee had a heavy work-load and should not be asked to settle questions which should be settled by the Commission itself, since those were questions of substance which the Drafting Committee was not authorized to discuss.

28. The CHAIRMAN suggested that the Commission should refer article 19 to the Drafting Committee and that, when it received the Committee's text, it should consider whether it was desirable to add the sentence taken from article 31 of the Vienna Convention on Consular Relations.

*It was so agreed.*⁸

⁷ *Ibid.*, p. 109, article 30.

⁸ For resumption of discussion, see 817th meeting, paras. 7-10.

ARTICLE 20 (Inviolability of archives and documents)
[20]

Article 20

[20]

Inviolability of archives and documents

The archives and documents of a special mission shall be inviolable at any time and wherever they may be. Documents in the possession of the head or members of the special mission or of members of its staff or in the room occupied by them shall likewise be deemed to be documents of the special mission.

29. The CHAIRMAN, speaking as Special Rapporteur, said that article 20 took account of article 24 of the Vienna Convention on Diplomatic Relations and of article 33 of the Vienna Convention on Consular Relations. However, his draft article 20 made no reference to furnishings or other property such as means of transport, which were dealt with in article 24 of his draft.

30. Mr. BRIGGS said he could accept the first sentence of article 20, but thought that the second sentence was redundant. Documents in the possession of the head or members of the special missions which related specifically to the work of the special mission were covered by the words "documents of a special mission" in the first sentence, whereas other documents in the possession of the head or members of a special mission might not relate to the special mission's work at all and were irrelevant to the subject under discussion.

31. The word "inviolable" in the first sentence of article 20, as in article 19, seemed to be ambiguous; he assumed that it meant both that the archives and documents of a special mission should not be seized by the authorities of the receiving State, and that the authorities of that State had a duty to prevent the theft of a special mission's archives and documents. There was another problem, too, which had been evaded both by the Conference on Diplomatic Intercourse and Immunities and by the Conference on Consular Relations. Neither of the Vienna Conventions contained any specific provision relating to the issue which had arisen in the courts of Canada and the United Kingdom—and probably in other countries as well—concerning documents stolen from the archives of a particular diplomatic mission and used as evidence in a court to obtain a conviction. He had in mind particularly the case of *Rex v. A.B. (Kent)*⁹ in which an employee of the United States Embassy in London had stolen certain documents, and the only way in which it had been possible to secure his conviction had been to introduce the stolen documents as evidence in court; and the case of *Rose v. The King*¹⁰ in which a member of the Canadian Parliament had been charged with certain offences and documents stolen from a Soviet mission had been produced in court to obtain his conviction. In both of the cases cited the courts had held that the defendant could not plead the privileged character of the documents when the States from whose diplomatic archives they had been stolen had not done so. Did the provision in article 20 that the archives and documents of the special mission would be inviolable at any time

⁹ [1941] 1 K.B.454.

¹⁰ [1947] 3 D.L.R.618.

and wherever they might be mean that the documents could not be produced in court if they came into the hands of the receiving State after being stolen ?

32. The CHAIRMAN, speaking as Special Rapporteur, said that in the United States, between 1947 and 1949, government agents had seized documents in order to determine whether they really belonged to the special mission. In his opinion, the second sentence was even more necessary than the first where special missions were concerned, for they were very often mobile and had no building in which to keep their documents.

33. Mr. RUDA agreed with Mr. Briggs that the second sentence of article 20 was redundant, since its sense was already covered by the words "and wherever they may be" in the first sentence.

34. Mr. VERDROSS, replying to Mr. Briggs, said that the sentence "the archives . . . shall be inviolable", which was taken from the two Vienna Conventions, meant that the authorities of the receiving State could not touch the archives and documents. It had a negative meaning in that it described what the authorities in question could not do.

35. He proposed that the article should be simplified by incorporating in the first sentence the idea contained in the second, so that it would then read :

"The archives and documents of a special mission, even if in the possession of the head of the special mission, are inviolable".

36. Mr. PESSOU said he understood Mr. Briggs's misgivings, which, fortunately, had been allayed by Mr. Verdross. It would be a mistake to read something into the text that was not there.

37. He considered that the article should be amended to read :

"The archives and documents of a special mission and, in general, all documents belonging to or in the possession of the special mission are inviolable, wherever they may be and whoever may be in possession of them".

That wording was based on a passage in a study by Mr. Torres of the Vienna Convention on Consular Relations.¹¹

38. Mr. JIMÉNEZ de ARÉCHAGA said that article 20 provided an excellent example of the extent to which the Commission should specify in detail the privileges of special missions.

39. At the previous meeting Mr. Reuter had urged that the Commission should consider every possible aspect of the activities of special missions, and should adopt a text covering those activities in the greatest possible detail.¹² That was a sound general policy in other cases, but it might be wiser not to apply it in the particular case of the codification of the rules concerning special missions, because the Commission might be affecting the efficacy of the more important general Conventions of Vienna. The Special Rapporteur had considered

very carefully the question of the inviolability of archives and documents, and had decided to insert an additional sentence which did not appear in the corresponding articles of the Vienna Convention on Diplomatic Relations or of the Vienna Convention on Consular Relations. But, if the Commission were to adopt an excessively precise and detailed text regarding the inviolability of the archives and documents of special missions, that text might indirectly affect the interpretation of the existing law relating to ordinary diplomatic and consular missions. For instance, the inclusion of the proposed second sentence of article 29 in a convention on special missions, and the absence of any corresponding provision in the two Vienna Conventions might give rise to the interpretation that the two existing Conventions did not provide protection for the documents of diplomatic and consular missions to the same extent as that proposed for the documents of special missions in the second sentence of article 20.

40. The CHAIRMAN, speaking as Special Rapporteur, said that the Vienna Convention on Diplomatic Relations provided for the inviolability of the residence of the head of the mission, whereas the position was different in the case of the residence of the head of the special mission.

41. Mr. YASSEEN pointed out that, according to the proposed text, the archives and documents should be inviolable "wherever they may be", the essential condition being that they had to be documents of the special mission. The best solution would be to state who would determine what documents were mission documents. For his part, he saw no reason why it should not be the head of the mission who would have the final say in the matter. In any case, the second sentence of the article was not really essential, since it was only a particular application of the first sentence.

42. The CHAIRMAN, speaking as Special Rapporteur, considered that in practice the second sentence was more useful than the first.

43. Mr. TUNKIN said that in principle he agreed with the wording of the second sentence of article 20. Like Mr. Jiménez de Aréchaga, however, he was seriously concerned about the difference between the wording of article 20, as proposed by the Special Rapporteur, and the wording of the corresponding articles in the Vienna Conventions. The two Conventions — and particularly the Vienna Convention on Diplomatic Relations in its article 30 — provided for the inviolability of documents of members of missions in their private residences, and article 26 of the draft under discussion likewise asserted the inviolability of the residence of members of special missions.

44. He doubted whether it would be wise to retain the second sentence of article 20, but only because its retention might give rise to some misinterpretation of other articles in the present draft or indeed in existing Conventions.

45. Mr. CASTRÉN also considered that the second sentence was unnecessary, as the first was very categorical.

46. Mr. REUTER said that the question of principle to be settled was whether the Commission really had to

¹¹ Santiago Torres Bernardez in *Annuaire français de droit international* (IX), 1963, pp. 78 to 118.

¹² See 804th meeting, para. 91.

follow the Vienna Conventions mechanically. If so, a convention on special missions could be reduced to a protocol of two or three articles. However, the formulae adopted in 1961 and 1963 did not solve all the problems.

47. He cited a hypothetical case in which there could be double inviolability: certain archives were violated by a State to the prejudice of another State. For example, one embassy stole documents from another, whereupon the stolen papers became documents of the first-mentioned embassy and were therefore covered by two conflicting immunities.

48. In another hypothetical case, the members of a special mission mislaid a briefcase containing papers, which had to be opened for the purpose of determining what it contained: who was competent to identify the contents as that mission's archives or documents?

49. He did not object to leaving those problems unsolved if it was intended that the Vienna Conventions should be sacrosanct and if the law was not to advance further now that they had been signed. Personally, he favoured the reasonable compromise solution chosen by the Special Rapporteur in his second sentence, which disposed of some of the difficulties.

50. Mr. ROSENNE noted that in the first sentence of article 20 the Special Rapporteur had adopted the phrase "at any time" which appeared in article 24 of the Vienna Convention on Diplomatic Relations. He personally preferred the phrase "at all times", which appeared in the Vienna Convention on Consular Relations (article 33), and thought that the substitution of that phrase for the words "at any time" might resolve some of the difficulties which had arisen in regard to the second sentence of article 20.

51. There was, moreover, a distinct difference between the English and French texts of the second sentence. The general consensus seemed to be in favour of deleting the second sentence; but he thought that the matter should be given some further consideration, particularly if an English wording could be found which reflected more faithfully the sense of the original French text.

52. Sir Humphrey WALDOCK wished to associate himself with the views expressed by Mr. Jiménez de Aréchaga and Mr. Tunkin. Any provision relating to the inviolability of archives and documents would undoubtedly cover matters which might give rise to innumerable problems in practice; and, although there might be certain advantages in trying to solve some of those problems in advance, it was surely wiser to be guided by the corresponding provisions of the Vienna Conventions, which were based on a full knowledge of the problems that had arisen in international practice. If the Commission began to embroider on the Vienna Conventions on points which were not specifically related to special missions alone, it would be going beyond its instructions. There might indeed be a strong case for a supplementary protocol to the Vienna Conventions; but such a protocol would have to be suggested by States. What the Commission had been instructed to do was to review the provisions of the Vienna Conventions, and to decide which of them should be

extended and which restricted in the case of special missions. It had no mandate to deal with subjects not specifically connected with special missions. It had a limited function to perform and should observe the limitations imposed on it.

53. Mr. ELIAS said he did not think that the disagreement which existed over article 20 could be settled merely by drafting changes to incorporate the sense of the second sentence in the first sentence. The issue was rather one of principle — did the Commission wish to extend the protection to be granted to documents in the possession of the head or members of the special mission even to itinerant members of the mission, as the Special Rapporteur stated in paragraph (4) of his commentary? In his (the speaker's) view, protection of that kind should be extended to documents in the possession of the head of the mission, but he doubted whether the same inviolability should be provided for documents in the possession of members of the special mission or of members of its staff. The Special Rapporteur had stated that his proposal was based on the provisions of article 33 of the Vienna Convention on Consular Relations; but the idea of extending protection to documents in the possession of members of a mission or members of its staff did not appear in that article.

54. Secondly, at the previous meeting he had suggested that draft article 24 (Inviolability of the property of the special mission) should be included in article 19, as a new paragraph.¹³ In summing up the discussion on article 19, the Special Rapporteur had not specifically replied to that suggestion, but it appeared that part of the answer, at least, was contained in the last sentence of paragraph (5) of the commentary on article 20. In order not to prolong the discussion, he would reserve his position until the Commission came to consider draft article 24.

55. The CHAIRMAN, speaking as Special Rapporteur, wondered where the Commission's duty lay: its function could not be merely to repeat what had been accepted at Vienna, since under its terms of reference the Commission was to carry out a thorough analysis of the case of special missions. In the course of his research he had found more than thirty cases where documents seized at the residence of the head of a special mission had not been deemed to be documents belonging to the special mission. Frontier officials frequently wished to search diplomats or agents whose names did not appear in the lists of diplomatic couriers. Foreign Ministries received complaints about such incidents daily.

56. It was therefore necessary to adopt a provision raising the presumption that documents found at the residence of the head of the special mission belonged to the mission, in the light of the difference between regular missions and special missions.

57. He suggested that the article should be referred to the Drafting Committee together with the arguments advanced during the discussion.

*It was so agreed.*¹⁴

¹³ See 804th meeting, para. 86.

¹⁴ For resumption of discussion, see 817th meeting, paras. 11 and 12.

ARTICLE 21 (Freedom of movement) [21]

Article 21 [21]
Freedom of movement

1. The head and members of a special mission and the members of its staff shall have the right to freedom of movement in the receiving State for the purpose of proceeding to the place where the special mission performs its task, returning thence to their own country, and travelling in the area where the special mission exercises its functions.

2. If the special mission performs its task elsewhere than at the place where the permanent diplomatic mission of the sending State has its seat, the head and members of the special mission and the members of its staff shall have the right to movement in the territory of the receiving State for the purpose of proceeding to the seat of the permanent diplomatic mission or consulate of the sending State and returning to the place where the special mission performs its task.

3. If the special mission performs its task by means of teams or at stations situated at different places, the head and members of the special mission and the members of its staff shall have the right to unhindered movement between the seat of the special mission and such stations or the seats of such teams.

4. When travelling in zones which are prohibited or specially regulated for reasons of national security, the head and members of the special mission and the members of its staff shall have the right to freedom of movement, if the special mission is to perform its task in precisely those zones. In such a case, the head and members of the special mission and the members of its staff shall be deemed to have been granted the right to freedom of movement in such zones, but they shall be required to comply with the special rules applicable to movement in such zones, unless this question has been settled otherwise either by mutual agreement between the States concerned or else by reason of the very nature of the special mission's task.

58. The CHAIRMAN, speaking as Special Rapporteur, said that although the text of the draft article was based on the ideas contained in article 26 of the Vienna Convention on Diplomatic Relations and in article 34 of the Vienna Convention on Consular Relations, the notions underlying the draft article were different. General freedom of movement was granted to permanent diplomatic missions because, as had been explained at Vienna, diplomats were authorized to observe events in the country. On the other hand, freedom of movement was granted to special missions in practice only to the extent necessary for the performance of their tasks. In the United States, for example, the freedom of movement of special missions was, as in many other countries, subject to certain restrictions. Movement in certain areas was subject to special permission which, so far as he knew, had never been refused by the authorities. In fact, freedom of movement was restricted to a greater or lesser extent according to the country concerned. The Commission should make a choice between the two notions.

59. If the special mission comprised several teams operating in different parts of the receiving State's territory, the special mission had to be able to keep in touch with them at all times. With regard to movement in so-called "prohibited" zones, or zones which were

specially regulated, there were in practice differences between the rules applied to special missions and those provided by the Vienna Conventions. But it might happen that a special mission had to perform a task in a prohibited zone. In that case, it was considered that the agreement relating to the special mission implied the right to freedom of movement in that zone.

60. In brief, the head and members of the special mission should be able to proceed freely to the place where they would perform their task, to proceed freely to the seat of the permanent diplomatic mission or the consulate of the sending State, to move freely between the seat of the special mission and the seats of the different teams of which it was composed, to return freely to their own country and even to enter prohibited zones without hindrance. It might accordingly be said that special missions had the right to freedom of movement in the places where their tasks were to be performed.

61. Mr. CASTRÉN said that paragraph 1 was the most important clause in the article, for it supplemented the provisions laid down in the Vienna Conventions. He did not clearly see the distinction between paragraphs 2 and 3. He thought that paragraph 4 might be omitted and a simplified version of that paragraph added to paragraph 1 in the following terms:

"If the special mission performs its task in zones which are prohibited or specially regulated for reasons of national security, the head and members of the special mission and the members of its staff shall be required to comply with the special rules applicable to movement in such zones, unless this question has been settled otherwise either by mutual agreement between the States concerned or else by reason of the very nature of the special mission's task."

62. The CHAIRMAN, speaking as Special Rapporteur, said that Mr. Castrén's text did not take into account the essential rule set forth in paragraph 4 — the right to freedom of movement in zones which were prohibited or specially regulated. It provided only that special missions would have to comply with the regulations in force. A passage might be added in Mr. Castrén's text stating "... have the right to freedom of movement, subject to compliance with ... etc.". More than a drafting question, an essential principle was involved.

63. Mr. CASTRÉN said that his proposal for combining paragraphs 1 and 4 of the text seemed to him to meet the Special Rapporteur's objection.

64. Mr. ELIAS agreed with the thought behind draft article 21, but considered that its four paragraphs could be reduced to two at the most. It did not seem necessary, for example, to provide, as did paragraph 2, for the case where the special mission performed its task elsewhere than at the place where the permanent diplomatic mission of the sending State had its seat; in his opinion, it would be sufficient to guarantee, as in paragraph 1, the special mission's freedom of movement for the purpose of proceeding to the place where it performed its task, subject, of course, to the conditions laid down in paragraph 4. Paragraph 3 could also be dispensed with, as it concerned a mere matter of detail. Lastly, although he had no specific text to propose, he thought

that paragraph 4 should be streamlined and drafted in clearer terms.

65. The CHAIRMAN, speaking as Special Rapporteur, said that if freedom of movement was accepted as a principle, everything contained in paragraph 2 and 3 could be summed up in one sentence. He did not have the impression, however, that States always granted that freedom to special missions.

66. Mr. ROSENNE said that, in condensing article 21, the Commission should not lose sight of the principle stated in paragraph (3) of the Special Rapporteur's commentary. He fully agreed with the Special Rapporteur that special missions should have the right to freedom of movement in the territory of the receiving State only to the extent required to ensure the smooth performance of their tasks.

67. Mr. TSURUOKA supported the idea, expressed by Mr. Rosenne, of a limited freedom of movement. The freedom should be admitted and recognized to the extent considered necessary for the performance of the task of the special mission. That was the criterion which should be observed in drafting paragraph 1. With respect to paragraph 4, he said that the paragraph was based on the assumption that the right to freedom of movement had already been recognized, but in practice that right would remain ineffective in the absence of prior agreement on the subject. The idea of a general guarantee of freedom of movement was in many respects an attractive one, but was it really necessary? It would perhaps be better to leave it to the States concerned to settle that question by mutual agreements. Special missions would not have too great difficulty in performing their task, but the principle stated in paragraph 4 should not be overemphasized.

68. The CHAIRMAN, speaking as Special Rapporteur, said that the right to freedom of movement should remain the cardinal principle, for in a country part of which was under military law, special missions had the right to freedom of movement but they had to obtain permission from the responsible military headquarters in order to enter so-called prohibited zones.

69. Mr. VERDROSS said that if a government authorized a special mission to perform a task in a prohibited zone, it should supply it with the means of free access to that zone. But an express provision to that effect was not needed, for in recognizing a purpose, one recognised also the means necessary for achieving that purpose.

70. Mr. TUNKIN said that he was broadly in agreement with article 21; with respect to paragraph 4, however, he agreed with Mr. Tsuruoka that it was hardly possible to deduce from the general task of the special mission that it would be automatically permitted to enter certain specific zones. Such an inference would be going too far. He hoped that the Drafting Committee would stress the specific arrangement which might be needed in the light of the general functions of the special mission in order to facilitate its work.

71. The CHAIRMAN, speaking as Special Rapporteur, said that he had proceeded from the premise that two interested States concluded an agreement providing

that the special mission should perform its task in certain places situated in prohibited zones. In his opinion, therefore, it was necessary to place even more emphasis on the right to freedom of movement in those zones.

72. Sir Humphrey WALDOCK agreed with Mr. Tunkin and Mr. Tsuruoka that paragraph 4 raised a very delicate question; perhaps that paragraph overemphasized the right of freedom of movement, which was already stated in paragraph 1. He thought it hardly likely that States would accept paragraph 4 as it stood. In order to retain the Special Rapporteur's idea, and at the same time to make the paragraph acceptable to States, he suggested that the reference to the right to freedom of movement in the first sentence of paragraph 4 should be omitted. The sentence might then be revised on the following lines, using some of the wording of article 26 of the Vienna Convention on Diplomatic Relations:

“When travelling in zones which are prohibited or specially regulated for reasons of national security, the head and members of the special mission and the members of its staff shall be subject to the laws and regulations concerning such zones, except as may be otherwise agreed between the States concerned or indicated by the nature of the special mission's task.”

73. With respect to the other paragraphs of the article, he thought that the Special Rapporteur had steered a judicious course between the various difficulties involved.

74. The CHAIRMAN, speaking as Special Rapporteur, said that the essential principle to be established was the right of the special mission to enter so-called prohibited zones if such entry was necessary for the performance of its task. The prior agreement concluded between the governments concerned should not be subsequently subject to rules restricting its application.

75. Mr. BRIGGS said that he had assumed that paragraph 4 referred to situations, for example, where international teams were inspecting disarmament sites; those teams would naturally be in prohibited zones because they were authorized to be there. That point, he felt, was adequately covered by the draft suggested by Sir Humphrey Waldock. The first three paragraphs should, as Mr. Elias had suggested, be condensed and simplified.

76. The CHAIRMAN, speaking as Special Rapporteur, said he agreed with Mr. Elias that the reference to contact with consular and diplomatic missions and with the different teams of the special mission should be added to paragraph 1. The controversial question was that concerning paragraph 4, although it was agreed that special missions had to comply with special rules when travelling in prohibited zones. The Drafting Committee would have to draft paragraph 4 with particular care. He suggested that article 21 should be referred to the Drafting Committee.

*It was so agreed.*¹⁵

¹⁵ For resumption of discussion, see 817th meeting, paras. 13 and 14.

ARTICLE 22 (Freedom of communication) [22]

Article 22

[22]

Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including its couriers. However, the special mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the special mission shall be inviolable. Official correspondence means all correspondence relating to the special mission and its functions.

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. Special missions shall have, first and foremost, the right to permanent contact with the permanent diplomatic mission of their State accredited to the country in which they are performing their task and with the consuls of their own State within whose jurisdictional territory they are exercising their functions.

7. Special missions shall not have the right to send messages in code or cipher unless they have been accorded this right by an international agreement or by an authorization of the receiving State.

8. Only members of the special mission or of its staff may act as couriers of the special mission.

77. The CHAIRMAN, speaking as Special Rapporteur, said that draft article 22 differed slightly from article 35 of the Vienna Convention on Consular Relations and from article 27 of the Vienna Convention on Diplomatic Relations. A technical question was involved. The articles in the Vienna Conventions to which he had referred had established the principle that diplomatic and consular missions had the right to make contact with nationals of their country in the receiving State. Some special missions had sought recognition of the same right for themselves, but in his opinion such a right would exceed their competence. It was true that occasionally educational or ecclesiastical special missions travelled to certain countries to make contact with students or members of particular religious communities; but such contact was not, in normal practice, a task for special missions, and that consideration could therefore be disregarded.

78. Article 22 of his draft was based on article 27 of the Vienna Convention on Diplomatic Relations, subject to certain terminological changes.

79. So far as the use of couriers was concerned he said that, after consulting his country's frontier authorities, he

had thought it advisable not to make provision for the possibility of the special mission's employing couriers *ad hoc* or of its employing as a courier a person who was a national of or resident in the receiving State. Only members of the special mission or of its staff could act as couriers of the special mission. Admittedly, the special mission could route its mail through the sending State's embassy or consulates, but it should be noted that in some cases (e.g. communications between Italy and Yugoslavia) special missions sometimes used captains of ships or of commercial aircraft as couriers *ad hoc*. It might therefore be possible to insert a provision to that effect in article 22.

80. Mr. RUDA said that the basic idea in article 22 was that of freedom of communication between the special mission and the authorities of the sending State; accordingly, he approved of paragraphs 1 to 5, which correctly reflected article 27 of the Vienna Convention on Diplomatic Relations. He was fully in agreement with the principle stated in paragraph 6 that special missions should have the right to permanent contact with the permanent diplomatic mission of their State accredited to the country in which they were performing their task. With respect to paragraph 7, he said that the transmission of messages in code or cipher was a common practice of special missions, and in fact the task of a special mission would often be made more difficult if the practice was prohibited. With regard to paragraph 8, he thought that the use, when considered necessary, of diplomatic couriers who were not members of the special mission should also be permitted.

81. The CHAIRMAN, speaking as Special Rapporteur, said that, in general, special missions were not authorized to send messages in code or cipher. There were provisions in the Convention of the Universal Postal Union on that point.

82. With reference to Mr. Ruda's other remark, concerning the employment of *ad hoc* couriers by special missions, he said that his country's frontier authorities had warned him of the danger of the use of such couriers by special missions. He agreed to the inclusion in paragraph 8 of a reference to the use of the services of members of embassies and consulates and of captains of ships and of commercial aircraft.

83. Mr. AGO said that, since private persons used codes in their communications, it would be wrong to refuse to special missions the right to use codes and ciphers.

84. The CHAIRMAN, speaking as Special Rapporteur, pointed out that private persons could use codes on condition that the code was deposited with and approved by the appropriate authorities.

85. Mr. AGO proposed that the following phrase should be added at the end of the second sentence in paragraph 1: "and code and cipher".

86. He agreed that reference should be made in paragraph 8 to the possibility of using captains of ships and of commercial aircraft as *ad hoc* couriers of the special mission, because in certain circumstances they constituted the most convenient means of communication. He had no criticism to make with regard to the other paragraphs, except paragraph 6, which, in his opinion, should follow paragraph 1, dealing specifically

with freedom of communication. However, the usefulness of paragraph 6 was questionable, for it might give the impression that there were difficulties in the way of communicating freely with the diplomatic and consular authorities of the sending State.

87. The CHAIRMAN, speaking as Special Rapporteur, agreed to delete paragraph 6.

88. Mr. TSURUOKA said that what mattered above all was that the special mission should enjoy the conditions necessary for its success. For that purpose, and in order to avoid misunderstandings, it was desirable to establish effective co-ordination at the seat of the permanent diplomatic mission in the country where the special mission performed its task. In that connexion, he found the Special Rapporteur's idea a good one, but it should be laid down that special missions were permitted to send messages in code or cipher to the embassies or consulates in question. Communications with the Government of the sending State could be routed through its diplomatic or consular agents, though the States concerned would naturally be free to conclude an agreement granting special facilities to special missions.

89. The CHAIRMAN, speaking as Special Rapporteur, said that that argument had often been used by permanent diplomatic missions in order to keep control over special missions. He agreed that it was necessary to facilitate liaison through embassies, but communications of that kind were not always possible, particularly in regions difficult of access, unless it was possible to communicate by wireless transmitter, river or ocean routes or helicopter.

90. Mr. TSURUOKA said that his suggestion had been that the States concerned should be completely free to agree on special measures when communications between the special mission and the permanent diplomatic mission and consuls of the sending State were particularly difficult.

The meeting rose at 5.55 p.m.

806th MEETING

Friday, 18 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen

Special Missions

(A/CN.4/179)

(continued:)

[Item 3 of the agenda]

ARTICLE 22 (Freedom of communication) [22] (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 22.

2. Mr. YASSEEN said that, although article 22 followed the corresponding article of the Vienna Convention on Diplomatic Relations, it included a number of innovations, which the Commission should examine carefully.

3. Under paragraph 7, for example, special missions did not have the right to send messages in code or cipher unless they had been accorded that right by an international agreement or by an authorization of the receiving State. That provision was not consistent with the requirements of special missions or with the realities of international life. Everyone knew the reasons why permanent missions used codes and ciphers in communicating with the sending State; those reasons were equally valid for special missions and justified a provision granting to such missions the unrestricted right to communicate with the sending State by those means. If that practice was not already established in positive law, it should be recognized in the interest of the progressive development of international law.

4. Paragraph 6 contained another new notion, that of free communication by the special mission with the permanent mission of its State. In his opinion, that freedom of communication should be clearly guaranteed, because the special mission always used the services of the permanent mission as its link with the sending State. Moreover, the reason why some doubted the desirability of authorizing special missions to use codes and ciphers was perhaps that in reality special missions did so in any case through the permanent missions; however, there might be cases which called for a specific rule allowing special missions to communicate direct with the sending State in code or cipher.

5. On the question whether a special mission should in fact have the right to employ the captain of a commercial aircraft or of a ship as a courier, as diplomatic and consular missions were permitted to do by the Vienna Conventions, he had no strong views. There was nothing to be lost by stating that right, which should be governed by all the guarantees provided in the Vienna Conventions; nor would there be any great risk if it were not mentioned at all. The provision stipulating that the courier had to be a member of the special mission or of its staff was perhaps required by the temporary character of special missions.

6. Mr. ROSENNE said that article 22 should be brought more closely into line with the Vienna Conventions. Paragraph 1 should be drafted in more or less the same terms as the first paragraphs of the corresponding articles in those Conventions; in the second

¹ See 805th meeting, following para. 76.

sentence, the word "its" in the expression "its couriers", should be deleted. Freedom of communication must be safeguarded, and the Commission should not enter into internal questions affecting the hierarchy between special and permanent missions. Paragraph 7 should also be deleted. Another reason for not restricting absolute freedom of communication by code or cipher direct with the capital of the sending State was that there could be instances of a special mission being sent to a State where there was no permanent mission.

7. He had some difficulty in accepting paragraph 8, which should be modified so as to contain the same kind of provision about couriers and *ad hoc* couriers as appeared in the Vienna Conventions; but that was a matter that could be left to the Drafting Committee.

8. A reference to the possibility of captains of civil aircraft or merchant ships being entrusted with the bag of a special mission, on the lines of similar provisions in the Vienna Conventions, would be acceptable.

9. Mr. CASTRÉN said that he could accept article 22 with the amendments proposed by Mr. Ruda and Mr. Ago. Special missions should have a general right to use diplomatic couriers and to send messages in code or cipher. A provision should be inserted in the article corresponding to article 27, paragraph 7, of the Vienna Convention on Diplomatic Relations, which provided that a diplomatic bag could also be entrusted to the captain of a commercial aircraft or even, under the Convention on Consular Relations, to the captain of a ship.

10. The idea in paragraph 6 seemed to be already contained in paragraph 1, and hence he agreed with Mr. Ago that paragraph 6 might be omitted.

11. He doubted whether the second sentence in paragraph 2 was really necessary, since a definition of official correspondence was already given in the two Vienna Conventions.

12. Mr. VERDROSS thought that it should be possible to amalgamate paragraphs 1, 6, 7 and 8.

13. The idea in paragraph 6 that the special mission could communicate with the sending State's permanent mission and consulates in the receiving State was already stated in paragraph 1; paragraph 6 was therefore superfluous.

14. Paragraph 8 said that only members of the special mission or of its staff could act as couriers of the special mission; but the second sentence of paragraph 1 already provided that the special mission could employ its couriers. Paragraph 8 might therefore be omitted if the words "including its couriers" in paragraph 1 were replaced by the words "including the couriers belonging to the special mission".

15. The idea expressed in paragraph 7, that special missions should not have the right to send messages in code or cipher, could be covered by adding at the end of the third sentence in paragraph 1 the clause "and may send messages in code or cipher only if it has been accorded this right by an international agreement or by an authorization of the receiving State."

16. The CHAIRMAN, speaking as Special Rapporteur, said that personally he thought that special missions should have the right to use code and cipher; but receiving States did not have sufficient confidence in special missions, which included not only missions of a diplomatic character, in the proper sense of the term, but also small missions with very limited tasks. Perhaps it would be better to delete paragraph 7 and to include a provision giving special missions the right to use code and cipher. If strong opposition developed to that proposal later, there would always be time to reconsider it.

17. It was against his own personal feelings that he had included paragraph 8, concerning couriers. The fact was that most special missions operated in frontier areas; and, if they used as *ad hoc* couriers persons recruited in the area who did not belong to the mission and were not members of the diplomatic or consular staff, serious problems might arise. The Swiss Federal Political Department had issued a circular stating that, in such cases, the courier should not be regarded as having any diplomatic status. A provision permitting *ad hoc* couriers had been accepted without difficulty in the Vienna Convention on Diplomatic Relations, but had met with some opposition at the 1963 Conference on Consular Relations.² He saw no objection to introducing in article 22 of his draft a provision similar to that contained in article 35, paragraph 6, of the Vienna Convention on Consular Relations.

18. He could accept Mr. Rosenne's proposal that the words "its couriers" should be replaced by the word "couriers", though he wished to point out that his draft did not mention diplomatic or consular couriers and hence did not exclude the possibility of diplomatic or consular officers acting as couriers for the special mission.

19. He was still undecided whether it was desirable to insert a provision stating that the bag could be entrusted to the captain of an aircraft or of a ship. If the Commission decided in the affirmative, it would be better to use the wording of article 35, paragraph 7, of the Vienna Convention on Consular Relations, rather than that of the corresponding article in the Vienna Convention on Diplomatic Relations, and to use the word "ship" rather than the word "vessel", which suggested naval vessels; the provision should be drafted to cover inland waterway craft in the Danubian countries as well as lake craft in Africa.

20. He had noted that while the draft provided for freedom of movement between the different sections of the special mission, it made no provision for freedom of communication between them; the words "and between the various sections of the special mission" might therefore be added at the end of the first sentence of paragraph 1.

21. He had not included any reference to freedom of communication between the special mission and nationals of the sending State. Some special missions were sent with the specific purpose of communicating with

² See *United Nations Conference on Consular Relations, Official Records*, Vol. I, 327, paras. 34-39.

nationals of the country from which they came. For example, missions were sent by the United States Government to investigate United States nationals living abroad who were receiving social security pensions, and to inquire into double taxation problems. The United States Government had also sent missions abroad to inquire into citizenship problems and to investigate the loyalty of United States citizens. A third example was that of the missions sent by eastern European countries to get in touch with their nationals among displaced persons. Such cases were always governed by special arrangements or a general instrument, but it might be as well to mention them in the draft.

22. Mr. ROSENNE said that article 22 should not be overloaded with detail, particularly in view of the wide variety of special missions. All that was really needed was to link it more closely with article 2. The use of the phrase "for all official purposes" in paragraph 1 should suffice to ensure that freedom of communication would be accorded for the performance of the task which, under article 2, would be agreed upon between the sending and the receiving State. And for the same reason no express provision was necessary to cover the eventuality of the special mission's having to communicate with nationals of the sending State in the receiving State, if that was required for the performance of its task.

23. If for technical reasons it was found desirable to restrict in some way the freedom of communication of special missions dealing with frontier problems, that could be provided for within the framework of the agreement required under article 2.

24. The CHAIRMAN, speaking as Special Rapporteur, said that article 22 contained nothing on that subject. At the Conference which had drafted the Vienna Convention on Diplomatic Relations, it had been generally agreed that freedom of communication should apply "for all official purposes" only, to forestall abuse such as the carriage of narcotic drugs or the evasion of exchange control regulations. He did not think that special missions should enjoy greater liberties in their communications. A special mission should have freedom of communication for official purposes, and those purposes would be determined by the agreement defining the task of the special mission.

25. Mr. TSURUOKA said that he found it difficult to choose between giving the special mission almost complete freedom, and safeguarding the security and defence interests of the receiving State. No doubt, a fair balance should be struck between the two.

26. The Special Rapporteur's proposal, apart from one or two points of drafting, was sound. The last sentence of paragraph 1, for instance, provided a just and equitable solution to the problem of wireless transmitters. If special missions were given too much freedom, the receiving State might, during the negotiations preceding the sending of a special mission, announce that it would not recognize the mission as having the status of special mission as defined in the articles being drafted by the Commission, with the result that the mission would be denied the privileges attaching to that status. The Special Rapporteur had quite rightly mentioned the practice of the United Nations with regard to the

facilities granted to technical special missions of international organizations under the general Convention on Privileges and Immunities, and the Commission should base its draft on that practice.

27. As the majority of the Commission favoured almost complete freedom for special missions, some effort should be made to preserve the balance between the interests of the mission and those of the receiving State.

28. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the last sentence of paragraph 1 was taken from the International Telecommunication Convention.

29. Mr. TSURUOKA said that he agreed with the Special Rapporteur on the subject of article 22, especially as article 40, paragraph 2, of the draft provided that nothing in the articles adopted by the Commission precluded States from concluding international agreements confirming, supplementing, extending or amplifying the provisions thereof. The Special Rapporteur's purpose was accordingly that the Commission should lay down minimum rules, leaving the States concerned free to grant broader facilities to special missions.

30. Mr. AGO said that the Special Rapporteur had tried admirably to make provision for all eventualities, even for freedom of communication between the different sections of the special mission. The first sentence of paragraph 1 fully covered that last point, for it contained the phrase "for all official purposes"; there was no need to add further unexpected detail. If the last sentence included the judicious amendment proposed by Mr. Verdross, article 22 would be perfect and could be referred to the Drafting Committee.

31. The CHAIRMAN, speaking as Special Rapporteur, said that the Vienna Conventions specified with whom diplomatic and consular missions could communicate freely. In the case of permanent diplomatic missions, the question of communication with different sections did not arise since they were not allowed to have any sections outside the place of their official seat without the consent of the receiving State.

32. Mr. CASTRÉN, reverting to the question of couriers *ad hoc* and messages in code or cipher, said that one reason for the difficulty was that there were so many different kinds of special missions and that it was impossible to treat them all alike. The Drafting Committee should give some thought to an intermediate solution, proceeding from the premise of a general right on the part of special missions to use couriers *ad hoc* and to send messages in code or cipher, but at the same time giving the receiving State the right to withdraw or to limit that right in special cases and for reasons of overriding importance.

33. Mr. TUNKIN said that, as far as freedom of communication by code or cipher was concerned, article 22 should follow closely the Vienna Conventions, and the provision concerning couriers should be modelled on the Vienna Convention on Diplomatic Relations.

34. While understanding the reason that had prompted Mr. Castren's suggestion for including a provision enabling the receiving State to restrict the privileges of

a special mission, he believed that such a provision would be dangerous. The definition, already approved by the Commission, of a special mission as one that represented the government of the sending State, was in itself an adequate limitation, and it would be only reasonable to regard it as being entitled, *mutatis mutandis*, to the same privileges as were accorded to permanent diplomatic missions. The possibility of unilateral limitations on the freedom of communication of a special mission by the receiving State would certainly be undesirable, as any such matter should be regulated by negotiation between the two States.

35. Mr. YASSEEN, reverting to paragraph 6, said that by their nature special missions had to be in contact with the permanent diplomatic mission. That necessity should be brought out somewhere in article 22, and he thought that the formula proposed by the Special Rapporteur, with certain drafting amendments, would suffice.

36. The CHAIRMAN, speaking as Special Rapporteur, said that he had not mentioned that special missions had to attach to the bag certain papers issued to the couriers by the diplomatic or consular missions and, in some cases, bearing the visa of the protocol department of the receiving State. It would be necessary to inquire whether and in what circumstances the special mission could have those papers issued to it; perhaps the Commission should leave the matter in suspense for the moment.

37. Speaking as CHAIRMAN, he noted that the members of the Commission seemed to be generally agreed that the special mission should be allowed as much freedom of communication as possible. In view of that general feeling, he suggested that the Commission should refer article 22 to the Drafting Committee, without mentioning the question of communication between special missions and the nationals of the sending State.

*It was so agreed.*³

ARTICLE 23 (Exemption of the mission from taxation)
[23]

Article 23 [23]

Exemption of the mission from taxation

1. The sending State, the special mission, the head and members of the special mission and the members of its staff shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the special mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the special mission.

3. The special mission may not, as a general rule, levy any fees, dues or charges in the territory of the receiving State, except as provided by special international agreement.

38. The CHAIRMAN, speaking as Special Rapporteur, said that paragraphs 1 and 2 of article 23 of his draft reproduced, with certain adjustments, the provisions of article 23 of the Vienna Convention on Diplomatic Relations.

39. Paragraph 3 was based on the language of, but stated in negative terms, the rule contained in article 28 of that Convention; as a general rule, in the absence of a special international agreement, special missions had no authority to levy fees, dues or charges in the territory of the receiving State.

40. Mr. ROSENNE said that paragraphs 1 and 2 were acceptable, but he suggested that paragraph 3 should be redrafted in the following terms so as to bring out its meaning more clearly and to link it more closely with articles 1 and 2:

“If for the performance of its task the special mission is entitled to levy fees and charges, such fees and charges shall be exempt from all dues and taxes.”

41. The CHAIRMAN, speaking as Special Rapporteur, said that although it was clear, the formula suggested by Mr. Rosenne was incomplete, for it did not specify that the special mission required the receiving State's permission in order to levy charges. The matter was important from the standpoint of the sovereignty of the receiving State. If, in the agreement defining the special mission's task, there was no specific reference to the subject, would the mission be able to levy charges? The situation would, of course, be quite different if the two States had concluded an agreement on that point.

42. Mr. ROSENNE said that there was no real difference of opinion between himself and the Special Rapporteur. The task of a special mission was always determined by mutual consent between the receiving and the sending State. His suggestion had merely been prompted by a desire to improve the drafting.

43. Mr. PESSOU said that, if the article dealt principally with exemption from taxation, it would be better to place it near articles 27, 28 and 29.

44. Mr. TUNKIN pointed out that, under the terms of article 39 of the Vienna Convention on Consular Relations, a consular post could levy fees and charges without the specific consent of the receiving State, but of course the nature of those fees and charges was generally known; the same would not be true in the case of a special mission which, in the normal course of events, did not levy fees or charges. In his opinion, Mr. Rosenne's text went too far and might have the result that a special mission would levy fees from nationals of the sending State in the receiving State on the ground that they were indispensable for the performance of its task; that would be tantamount to levying taxes in foreign territory, in violation of the sovereign rights of the receiving State.

45. Mr. RUDA said that paragraphs 1 and 2 were acceptable, but he doubted whether paragraph 3 was required at all because, should it be necessary, exceptionally, for a special mission to levy fees, dues or charges, provision could be made for that case, under article 2, by agreement between the two States.

³ For resumption of discussion, see 817th meeting, paras. 15 and 16.

46. Mr. PAL said that paragraph 3 was out of place unless it was intended to provide in it that if, by way of exception, a special mission, by agreement with the receiving State, levied fees, dues or charges, they would or would not be exempt from taxation by the receiving State.

47. The CHAIRMAN, speaking as Special Rapporteur, said that Mr. Pal's point related to a separate matter. Instead of deciding in advance that there would be exemption from taxation, it would be better to add: "In such cases, the question of exemption from taxation will be settled by the agreement".

48. Mr. TUNKIN said he agreed with Mr. Ruda that paragraph 3 should be dropped, for the reasons he had given.

49. The CHAIRMAN, speaking as Special Rapporteur, said he had come across many cases where difficulties and disputes had arisen over large sums of money collected as charges by special missions which had been sent to his country to settle questions relating to emigration, medical assistance, recruitment of labour and the like.

50. Mr. YASSEEN said that the principle that a special mission could not levy fees, dues or charges in the receiving State was a consequence of the general principle in international law that an agent of a State could not exercise executive power in the territory of another State. As paragraph 3 of article 23 would operate in very rare cases only, he was inclined to support Mr. Ruda's proposal for omitting it. Two States would, of course, be at liberty to agree, in case of need, that a special mission sent by one of them to the territory of the other could levy certain charges there; the question of the exemption from taxation of the sums thus levied would be settled in that agreement.

51. The CHAIRMAN, speaking as Special Rapporteur, said he agreed that the principle stated in paragraph 3 should be transferred to the commentary. The important point was that that principle should be mentioned, lest an analogy be drawn in that respect between special missions and consular missions as regards consular fees.

52. Mr. ROSENNE said he agreed with Mr. Pal. He was not sure whether paragraph 3 should be dropped and its content consigned to the commentary, or not. The matter could be left to the Drafting Committee.

53. Mr. YASSEEN said it would be useful to mention the principle in the commentary, though there could be no analogy in the matter of taxation.

54. The CHAIRMAN suggested that the Commission should refer article 23 to the Drafting Committee with instructions to take into account the comments made in the discussion and in particular the two proposals relating to paragraph 3, the one that the paragraph be amended along the lines indicated by Mr. Rosenne and Mr. Pal, and the other that it be deleted and its substance transferred to the commentary.

*It was so agreed.*⁴

ARTICLE 24 (Inviolability of the property of the special mission) [19, para 3]

Article 24 [19, para 3]

Inviolability of the property of the special mission

All property used in the operation of the special mission, for such time as the special mission is using it, and all means of transport used by the special mission, shall be immune from attachment, confiscation, expropriation, requisition, execution and inspection by the organs of the receiving State. This provision shall likewise apply to property belonging to the head and members of the special mission and to property belonging to the members of its staff.

55. The CHAIRMAN, speaking as Special Rapporteur, said that article 24 did not follow the provisions of article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations or article 31, paragraph 4, of the Vienna Convention on Consular Relations, because so far as the property necessary for the performance of their task was concerned, special missions were in an entirely different position from that of permanent diplomatic or consular missions. Permanent missions used property which was itemized in the inventory of a fixed post—embassy, legation or consulate—whereas in practice special missions used property which belonged to other owners so that they were always liable to be deprived of its use. A case had occurred, for example, where the hotel in which a special mission was accommodated had been attached by a creditor. Consequently, it was not sufficient to copy the provisions of the Vienna Conventions; he was not sure, however, that the solution he had adopted was the best.

56. Mr. ELIAS said that, during the discussion of article 19, he had suggested that the contents of article 24 should be transferred to article 19;⁵ he wished to repeat that suggestion. The presentation which he thus suggested would be similar to that of article 31 of the Vienna Convention on Consular Relations, paragraph 4 of which dealt with the question of the inviolability of property. It was appropriate that the provision on that subject should form part of the article concerning the inviolability of the premises.

57. As far as the language of the provision was concerned, he saw no reason for adopting the broader approach suggested by the Special Rapporteur, whose draft spoke of immunity "from attachment, confiscation, expropriation, requisition, execution and inspection". It should be sufficient to provide for immunity from requisition, as in the Vienna Convention on Consular Relations. Special missions should not enjoy any greater protection in that respect than did consulates.

58. Mr. CASTRÉN said that on the whole he could accept article 24, by which the Special Rapporteur had sought to ensure greater protection for special missions than was afforded by the corresponding provisions of the two Vienna Conventions.

59. He suggested that the passage, "for such time as the special mission is using it" should be deleted, since it might be interpreted in such a way as to hinder the proper functioning of the mission.

⁴ For resumption of discussion, see 817th meeting, paras. 17-32.

⁵ See 804th meeting, para. 86.

60. He added that it might perhaps be desirable, as Mr. Elias had suggested, to transfer the substance of the article to the end of article 19.

61. Mr. VERDROSS said he supported Mr. Castrén's suggestion that the passage "for such time as the special mission is using it" should be deleted, for it added nothing useful to the preceding phrase: "All property used in the operation of the special mission".

62. The Special Rapporteur had been right to make a distinction between property used in the operation of the special mission and property belonging to the head and members of the mission.

63. Mr. TUNKIN said that the provisions of article 24 should follow as closely as possible the wording of the corresponding provision of the Vienna Convention on Diplomatic Relations.

64. He had his doubts regarding the second sentence of the article, for which no precedent was to be found in the corresponding articles of the two Vienna Conventions; its inclusion could give rise to difficulties of interpretation.

65. The suggestion that the contents of article 24 should be incorporated in article 19 should be referred to the Drafting Committee.

66. The CHAIRMAN, speaking as Special Rapporteur, said that article 27, paragraph 2, of his draft laid down a rule regarding immunity from the receiving State's civil and administrative jurisdiction that was much narrower than that embodied in the Vienna Conventions; he had taken the view that the head and members of the special mission should enjoy such immunity only in respect of acts performed in the exercise of their functions in the special mission. For that reason, he had thought it advisable to add to article 24 a provision concerning the property belonging to those persons. If the Commission decided to amend article 27, it would of course have to revise that provision of article 24.

67. Unlike Mr. Tunkin, he thought it would be wrong to extend to the head and members of special missions the complete immunity from civil and administrative jurisdiction which was granted to diplomatic agents.

68. Replying to Mr. Castrén, he said that the passage "for such time as the special mission is using it" was intended to mark the temporary character of the protection granted, but the idea was probably contained in the words "used in the operation of the special mission".

69. If the substance of the article was transferred to article 19, the title of article 19 would have to be amended by adding the words "and property" after the word "premises". The Drafting Committee would be able to deal with that point.

70. What mattered was that the "property used in the operation of the special mission" should be protected; from the point of view of the special mission, such property was the equivalent of the "furnishings and property" of the consular post, referred to in article 31 of the Vienna Convention on Consular Relations.

71. Mr. REUTER said that, as he understood it, the Special Rapporteur's intention in article 24 was to

provide certain safeguards in the case of property owned by persons unconnected with the special mission. If that was the intention, then he interpreted the expression "be immune" as meaning that the property should enjoy, not complete immunity, but a stay of execution of any measures taken against it. For example, if expropriation proceedings were instituted, they would follow their normal course, but the physical execution of any measure which would deprive the mission of property necessary to the exercise of its functions would be suspended. If his interpretation was correct, the Drafting Committee should try to find a more precise and narrower formulation.

72. The CHAIRMAN, speaking as Special Rapporteur, said he agreed with Mr. Reuter's interpretation, but pointed out that the property used by the mission might also belong to the sending State.

73. Mr. ELIAS said that all members appeared to approve the principle embodied in article 24, and the article could accordingly be referred to the Drafting Committee.

74. Mr. TSURUOKA said he was sure the Commission was agreed on the essential point, that the special mission must not be prevented from performing its functions by judicial or administrative measures taken in the receiving State.

75. The CHAIRMAN suggested that article 24, with the comments of members, should be referred to the Drafting Committee.

*It was so agreed.*⁶

ARTICLE 25 (Personal inviolability [24])

Article 25

[24]

Personal inviolability

The head and members of the special mission and the members of its staff shall enjoy personal inviolability. They shall not be liable to arrest or detention in any form. The receiving State shall treat them with respect and shall take appropriate steps to prevent any attack on their person, freedom or dignity.

76. The CHAIRMAN, speaking as Special Rapporteur, said that article 25 of his draft reproduced in slightly different form article 29 of the Vienna Convention on Diplomatic Relations. So far as the substance was concerned, he did not suppose that anyone would deny that the principle of the personal inviolability of members of special missions should be laid down.

77. Mr. TUNKIN asked whether article 25 was intended to accord inviolability to a greater number of persons than the corresponding provisions of the Vienna Convention.

78. The CHAIRMAN, speaking as Special Rapporteur, said that he had considered it essential to extend to all

⁶ For resumption of discussion, see 817th meeting, paras. 33-58.

members of the staff of special missions the personal inviolability which, under article 29 of the Vienna Convention on Diplomatic Relations, was accorded only to diplomatic agents.

79. Similarly, in article 27 of his draft, he proposed that immunity from criminal jurisdiction should be granted to all members of the staff of the special mission for special missions included technical experts who were indispensable; the position of a special mission was quite different from that of a permanent mission.

80. Mr. CASTRÉN asked whether the expression "the members of its staff" also covered service staff. If so, the article went much further than the Vienna Convention on Diplomatic Relations, article 37, paragraph 3 of which granted only a limited degree of immunity to service staff.

81. The CHAIRMAN, speaking as Special Rapporteur, said that when the Commission had been preparing the draft convention on diplomatic relations, he had argued that full immunity should be granted to all members of the staff of diplomatic missions; that had also been the Commission's view. But the Vienna Conference had decided to grant immunity to service staff only in respect of acts performed in the course of their duties.

82. Mr. ROSENNE said that after listening to the Special Rapporteur's explanations, he inclined to the view that it would be better to embody in the draft articles provisions similar to those of articles 29 and 37 of the Vienna Convention on Diplomatic Relations. The question was one of principle and related to the categorization of staff, as approved by the Vienna Conference of 1961.

83. Mr. AMADO said that the Commission was preparing a draft for States; at both the Vienna Conferences, States had made it clear that they were not prepared to go as far as the Commission had proposed. Admittedly, special missions, which were becoming increasingly numerous and varied, carried out very complex tasks, and special functions called for special safeguards. Nevertheless, he felt impelled to advise the Commission to follow the Vienna Conventions as closely as possible and to propose only rules that would be acceptable to States.

84. The CHAIRMAN, speaking as Special Rapporteur, said that he had thought it advisable to broaden the rule laid down in the Vienna Conventions because, in his view, it was the Commission's duty to indicate the path which States should follow. It was for the Commission to decide whether to keep to the line which it had followed in preparing those Conventions or whether to be guided by what had occurred at the Vienna Conferences.

The meeting rose at 1.5 p.m.

807th MEETING

Monday, 21 June 1965, at 3 p.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Casttrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Special Missions

(A/CN.4/179)

(continued)

[Item 3 of the agenda]

ARTICLE 25 (Personal inviolability) [24] (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 25.

2. Mr. PAL said that he wished to raise a general drafting point. It should be unnecessary to repeat throughout the articles the phrase "the head and members of the special mission and the members of its staff"; the possible composition of the special mission was given in article 6 with a note that definitions would be given later, presumably on the lines indicated in article 1 of the Vienna Convention on Diplomatic Relations. In most cases, the phrase "members of the special mission", which was likely to be comprehensive enough, should suffice.

3. As far as article 25 itself was concerned, he said that if the Commission considered that the rule concerning personal inviolability should be restricted to only certain members of the mission, the provision should say so expressly.

4. The CHAIRMAN, speaking as Special Rapporteur, said that in article 6 as adopted at the previous session the Commission had meant to distinguish the head and members of the special mission from the diplomatic staff, administrative and technical staff and service staff of the mission. The expression "members of the mission" did not cover the mission's staff. The members of the mission were negotiators, plenipotentiary representatives of States, whereas the staff of the mission consisted of assistants.

5. No member of the Commission seemed to dispute the idea that the members and the diplomatic staff of the special mission should enjoy personal inviolability, but very few were prepared to go further than that.

6. Mr. CASTRÉN said he thought that most members had accepted the principle of personal inviolability for technical and administrative staff as well, though not for the service staff, to whom the Vienna Convention on Diplomatic Relations granted only lesser privileges.

¹ See 806th meeting, following para. 75.

7. The CHAIRMAN, speaking as Special Rapporteur, said that a good case could be made out for granting personal inviolability to the technical and administrative staff of a special mission. For instance, it might happen that an expert, a technical agent serving on a special mission, had a more important part to play than those members of the mission who had the status of diplomatic agents. Most speakers, however, apparently considered that personal inviolability should be limited to the diplomatic staff.

8. Mr. TUNKIN said that the discussion had clearly indicated that most members were in favour of following closely the Vienna Convention on Diplomatic Relations in regard to privileges and immunities. Any departure from its detailed provisions, notably those set out in article 37, might lead to misinterpretation. In general, the scope of the immunities granted under the Convention was applicable to special missions. Likewise the same three categories as for members of a diplomatic mission — diplomatic, administrative and service staff — should be maintained.

9. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission had a choice between two approaches: either it could take from the Vienna Convention on Diplomatic Relations all the passages which applied to special missions, or else it could study thoroughly the needs of special missions and draft rules based on those needs, without slavishly reproducing the provisions of the Vienna Convention.

10. He had chosen the second course because he thought it more in keeping with the recommendation by the Vienna Conference of 1961. Because a roving mission and a permanent mission worked under entirely different conditions, he had, in article 25 and again in article 27 of his draft, placed the members of the special mission and its staff, including the service staff, on the same footing. In his opinion, a special mission deprived of the services of a craftsman or mechanic, for instance, might be unable to perform its task.

11. The Commission should first consider and settle the substantive question, as there would be no point in borrowing from the Vienna Convention on Diplomatic Relations set phrases which did not reflect the circumstances of special missions.

12. Besides, some of the rules stated in the Vienna Convention were very controversial from the point of view of theory; and in practice, many States gave diplomatic status to agents who did not in fact perform any representative functions.

13. Mr. TUNKIN said that he had evidently failed to make himself clear. There was no real difference of opinion between himself and the Special Rapporteur. All he had wished to point out was that the scope of the privileges and immunities granted to diplomatic missions should be the same for special missions. The question to what particular categories of staff certain privileges would be granted was a different one. Once the issue of principle had been settled, the Commission could consider what was in effect a problem of presentation, namely, whether or not the best course would be to set out the rules for special missions by cross-reference

whenever possible, to the corresponding provisions of the Vienna Convention on Diplomatic Relations.

14. Mr. AGO said he was sure that there was no real difference of opinion in the Commission. In cases where the Commission found that the rules concerning special missions should differ from those concerning diplomatic missions, the difference, even if very small, should be clearly indicated. There was therefore a problem of substance to be discussed in connexion with each article. He agreed with the Chairman that the points on which the rules concerning special missions should depart from those concerning diplomatic missions were more numerous than appeared at first glance.

15. But in cases where the Commission thought that the rules applicable to special missions should be the same as those for diplomatic missions, it could either make a cross-reference to the Vienna Convention on Diplomatic Relations, as Mr. Tunkin had proposed, or else reproduce textually the relevant provision of that Convention. It was true that the Vienna Convention was sometimes criticized from the point of view of theory, but it was no less true that it had been adopted and was in process of ratification. Accordingly, that was hardly the time to try to revise it or to depart from its text. His own view was that in all cases where the Commission thought that the rule should be identical with a provision in the Vienna Convention on Diplomatic Relations, it should reproduce the terms of that Convention exactly; if it made the slightest change, the commentators comparing the texts would think that the differences of form reflected differences of substance.

16. Mr. CASTRÉN said that, in the case of draft article 25, the majority of the Commission wished to follow the system established by the Vienna Convention on Diplomatic Relations. That Convention, however, recognized the personal inviolability not only of diplomatic staff, in article 29, but also of administrative and technical staff, in article 37, paragraph 2. It was the extension of that inviolability to service staff which seemed excessive.

17. The CHAIRMAN, speaking as Special Rapporteur, said that at the 1961 Vienna Conference, article 37, paragraph 2, had been adopted only after a hard struggle.² It was not until the preceding articles had been adopted that the privileges and immunities referred to in articles 29 to 35 had, by virtue of that paragraph, been extended to members of the administrative and technical staff.

18. Mr. ROSENNE said he was quite unable to see what justification there could be for so many departures from the provisions of the Vienna Convention on Diplomatic Relations in respect of privileges and immunities. He had assumed that article 6, paragraph 2, adopted at the previous session had been adopted on the supposition that it would constitute a preface to the provisions on privileges and immunities, which could be so drafted as to refer back to that Convention, and for that very reason mention had been made of advisers

² See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. I, 32nd and 33rd meetings of the Committee of the Whole and 9th-12th plenary meetings (relevant provision discussed as article 36, para. 2).

and experts in paragraph (5) of the commentary to article 6. The Commission's task was to examine how far the special character of special missions warranted deviating from the system for diplomatic missions adopted by a two-thirds majority of States as recently as 1961.

19. He was quite unimpressed by the argument that some provisions of the Vienna Convention on Diplomatic Relations had been criticized in the literature: no international instrument was free from defects, and the Convention in question probably represented the most that would be accepted by a majority of States at the moment.

20. The Commission's real contribution to the subject of special missions probably lay in the first sixteen articles prepared at the previous session, in which it had set out the distinguishing features of such missions. That being so, and given the terms in which articles 1 and 2 had been drafted, his view was that at best the rules on privileges and immunities should be largely residual and should only apply in the absence of specific agreement between the States concerned; and that the residual rules should follow as closely as possible rules which had been already accepted. In that connexion, he attached considerable importance to article 40, which he could not accept in the form in which it was drafted.

21. Mr. PESSOU said that, in his view, the course suggested by Mr. Ago was the right one: the Commission should take from the Vienna Convention on Diplomatic Relations whatever rules were applicable to special missions and draft independent rules where they were necessary by reason of the peculiar position of special missions.

22. Article 25 was acceptable in substance so far as the head of the special mission was concerned.

23. Mr. YASSEEN said that the question of the scope of the privileges and immunities constituted the essence of the draft, since they departed most conspicuously from the ordinary law. Admittedly, it was possible to determine those privileges and immunities in the light of the function of the person concerned, whatever his rank; but in his opinion the nature of the special mission's task could hardly be the sole criterion. Special missions were very diverse; they might be either technical or political. But in any event, special missions could surely not be granted a status more advantageous than that provided by the Vienna Convention on Diplomatic Relations.

24. Article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations, which extended to administrative and technical staff the privileges accorded to diplomatic agents, had not been adopted without difficulty, and some reservations had been entered to that provision. What had been difficult to secure for permanent diplomatic missions would be even more difficult to secure for special missions of a technical character.

25. He appreciated the Special Rapporteur's concern; owing to the unity of the special mission and the temporary nature of its task, a technician serving on a special mission might be more important than the head of the mission. But the problem was not insoluble; if the sending State thought it necessary, it could temporarily give to

the technician concerned a certain rank for the purpose of his service on the mission.

26. With regard to the form of the rules on special missions, he said the Vienna Convention on Diplomatic Relations provided a starting point. So far as possible, and where there was no difference of substance, the Commission should use the same language in order to avoid difficulties of interpretation. The text of the provisions taken from the Vienna Convention should, however, be reproduced; mere cross-references would not suffice, for the Commission's draft should form an independent whole and should not be dependent on what happened to another convention which might some day be amended.

27. The CHAIRMAN, speaking as Special Rapporteur, proposed, in the light of the comments of members, that the Commission should change its method of discussing the draft articles. It should quickly review each article and decide in what way it differed in substance from the corresponding provisions of the Vienna Convention on Diplomatic Relations. He would then redraft the articles accordingly and submit his redraft to the Drafting Committee.

28. Mr. ROSENNE said that he found the Special Rapporteur's proposal entirely acceptable.

29. Mr. AGO said that the extra work the Chairman was undertaking would undoubtedly speed the Commission's proceedings.

30. Mr. TUNKIN, supporting the Special Rapporteur's proposal, said that it would accelerate discussion of the succeeding articles.

The Chairman's proposal was adopted.

31. The CHAIRMAN, speaking as Special Rapporteur, said that so far as article 25 was concerned the Commission should, in the light of the terms of article 29 of the Vienna Convention on Diplomatic Relations, decide whether personal inviolability should be confined to the head and diplomatic staff of the special mission. In his opinion, it should cover also at least the administrative and technical staff of the special mission. If the Commission wished to take the Vienna Convention on Diplomatic Relations as a model, it should refer to the diplomatic staff in draft articles 25 and extend inviolability to the administrative and technical staff in a later article modelled on article 37 of the said Vienna Convention.

32. Mr. AGO said that, if the Commission took the view that, so far as personal inviolability was concerned, the rules concerning special missions should be identical with those laid down in the Vienna Convention on Diplomatic Relations, it should follow exactly the presentation in that Convention.

33. The CHAIRMAN, speaking as Special Rapporteur, said that he would have preferred a more logical presentation, but that was just a matter of drafting. He suggested that he should prepare a redraft of article 25, modelled *mutatis mutandis* on article 29 of the Vienna Convention on Diplomatic Relations.

It was so agreed.³

³ For resumption of discussion, see 817th meeting, paras. 59-62.

ARTICLE 26 (Inviolability of residence) [25]

Article 26 [25]
Inviolability of residence

The residences of the head and members of the special mission and of the members of its staff shall enjoy inviolability and the protection of the receiving State, whether they reside in a separate building, in certain parts of another building, or even in a hotel.

34. The CHAIRMAN, speaking as Special Rapporteur, explained that article 26 of his draft reproduced the idea expressed in article 30, paragraph 1, of the Vienna Convention on Diplomatic Relations, with the difference that, since special missions had not as a rule their own separate premises, his draft provided that the members of the special mission and of its staff might reside in certain parts of another building or even in a hotel.

35. The provisions corresponding to article 30, paragraph 2, of the Vienna Convention on Diplomatic Relations, which referred to property, appeared in article 24 of his draft, but could be transferred to article 26.

36. Mr. VERDROSS said he approved the reasons given by the Special Rapporteur in paragraph (2) of his commentary for extending the guarantee of inviolability to the residences of all members of the staff of a special mission; he suggested that, since special missions had no fixed premises, articles 19 and 26 might be amalgamated in order to avoid repetition.

37. Furthermore, under article 29 of the Vienna Convention on Diplomatic Relations, inviolability comprised two separate obligations: the duty not to arrest or detain the person concerned and the duty to protect him. In other words, protection was part of inviolability, and consequently the expression "inviolability and the protection" was not quite correct.

38. The CHAIRMAN, speaking as Special Rapporteur, pointed out that article 30, paragraph 1 of the Convention referred to "the same inviolability and protection".

39. Mr. VERDROSS, while not disputing the fact, said that article 30 of the Convention was not drafted according to the rules of logic, for it did not correspond to the definition of "inviolability" given in other articles of the same Convention.

40. Mr. AMADO said that article 30 of the Vienna Convention on Diplomatic Relations was concerned with the private residence; the Special Rapporteur's draft article should therefore speak of "the premises in which the special mission was accommodated".

41. The CHAIRMAN, speaking as Special Rapporteur, said that in article 19 the Commission had accepted the fiction that the special mission actually had "premises". Article 26 of his draft, like article 30 of the Vienna Convention on Diplomatic Relations, related to the private residence, and preferably the provisions concerning the private residence and those concerning the premises of the special mission should be kept distinct from each other.

42. Mr. TUNKIN said that if the Commission decided to follow the structure of the Vienna Convention on

Diplomatic Relations in regard to personal inviolability it should do likewise in regard to inviolability of residence, which should extend only to the residence of the head and of the administrative and technical staff of the special mission.

43. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission had agreed that the draft provisions under discussion would deal only with the head and members of the special mission and its diplomatic staff, not with the administrative and technical staff, nor, of course, with the service staff.

44. Mr. YASSEEN said that, in his opinion, there would be nothing wrong in using the Vienna Convention on Diplomatic Relations as a model and stipulating that the residences of the head and members of a special mission should enjoy the same inviolability as the premises of the mission. The fact that some of its members lived in a hotel was not peculiar to the special mission. Many diplomats, even resident ones, lived in hotels.

45. The CHAIRMAN, speaking as Special Rapporteur, said that in many countries the courts drew a distinction between public premises, such as hotels, and private residences. Many difficulties followed from the distinction; for example, officials responsible for inspecting the premises claimed the right to enter hotel rooms occupied by members of special missions, because hotel staff were free to enter them at all times, and hence it seemed that such premises were not strictly inviolable. In the United States, a distinction was made for the purpose between a hotel "room" and a hotel "suite".

46. Mr. AGO said that articles 18 and 19 of the draft spoke of the special mission's premises, and article 19 provided for the case where the special mission might be accommodated in a hotel, adding that the premises should be identifiable. Those provisions already fully covered the point which caused concern to the Special Rapporteur.

47. Mr. AMADO said, in reply to the Special Rapporteur and for the benefit of the Drafting Committee, that the word "residence" connoted permanent quarters, whereas the distinctive characteristic of a special mission was its temporary character.

48. Mr. YASSEEN said that the provision should be so drafted as to recognize that, despite differences in law, the residence of members of a special mission should be equally inviolable whether they lived in a hotel or in a private house.

49. The CHAIRMAN said that, if the Commission agreed, he would prepare a redraft of article 26 for the Drafting Committee, taking into account the provisions of the Vienna Convention on Diplomatic Relations and the comments made during the meeting.

*It was so agreed.*⁴

ARTICLE 27 (Immunity from jurisdiction) [26]

Article 27 [26]
Immunity from jurisdiction

1. The head and members of the special mission and the members of its staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

⁴ For resumption of discussion, see 817th meeting, para. 63.

2. They shall also enjoy immunity from its civil and administrative jurisdiction in respect of acts performed in the exercise of their functions in the special mission.
50. The CHAIRMAN, speaking as Special Rapporteur, said that article 27 should be compared with article 31 of the Vienna Convention on Diplomatic Relations. Paragraph 1 was drafted in the same terms, but according to entirely different ideas.
51. With regard to paragraph 2, it would be for the Commission to decide whether the provision should grant to the members of the special mission complete immunity from civil and administrative jurisdiction or only "functional immunity" in respect of acts performed in the exercise of their functions. Personally, he did not think that the members of the special mission should enjoy complete immunity from civil and administrative jurisdiction.
52. Mr. VERDROSS said that he entirely agreed with the Special Rapporteur. According to the Convention on the Privileges and Immunities of the United Nations, the representatives of States enjoyed immunity from criminal jurisdiction only; why, then, should the special mission enjoy immunity from civil jurisdiction?
53. Cases in which a special mission might claim immunity from administrative jurisdiction could hardly arise, for the function of the administrative court was to protect the individual against the administration, and the individual could only be plaintiff and never the defendant in proceedings before such a court. Since, however, the terminology was taken from the Vienna Convention, he would not object to its use in the draft.
54. Mr. TUNKIN said that paragraph 2 of article 27 as proposed by the Special Rapporteur was more restrictive than article 31 of the Vienna Convention on Diplomatic Relations. It ran counter to the general trend of the draft articles, which was to broaden the scope of the immunities enjoyed by the members and staff of the special mission. Personally, he saw no reason to depart from the rules laid down in the Vienna Convention; neither the commentary to article 27 nor the comments of members led him to change that view.
55. The CHAIRMAN, speaking as Special Rapporteur, explained that he had been guided by the Convention on the Privileges and Immunities of the United Nations, where there was no provision concerning immunity from civil and administrative jurisdiction.
56. Mr. AGO thought it would not be right to adopt so restrictive a criterion with respect to special missions: they varied greatly in composition and sometimes included persons of very high rank who should not be treated differently from the head of a diplomatic mission.
57. Immunity from civil jurisdiction should apply to members of the special mission, for despite the mission's temporary character, it needed such immunity in the exercise of its functions.
58. The reason why immunity from administrative jurisdiction was mentioned in the Vienna Convention on Diplomatic Relations was that, owing to the diversity of the laws, cases might occur in which that immunity was necessary. He considered therefore that the article should provide for the immunity of special missions from civil and administrative jurisdiction.
59. Mr. ROSENNE said that he had no strong views regarding the rule to be stated in article 27, so long as it was stressed that it was a residual rule, which would apply only if there was no agreement to the contrary on the part of the two States concerned. States were free to choose the immunities to be accorded, and it was only where the agreement on the special mission was silent that the residual rule would apply.
60. Drawing attention to the footnote to article 1 as adopted at the Commission's sixteenth session,⁵ he said that a definitions article, which should as far as possible follow the language of the Vienna Convention on Diplomatic Relations, should be included in the draft.
61. Mr. PAL said that he had drawn attention to the question of definitions earlier in the meeting.
62. Mr. VERDROSS said that even immunity from civil jurisdiction could not be justified by the functional theory. The theory of immunity was based on custom, dating from a time when independent courts had not yet come into existence. The modern tendency was to curtail privileges, not to enlarge them, as was shown by a comparison between the practice followed at the time of the League of Nations and that of the United Nations.
63. He noted that at the end of his second report, the Special Rapporteur proposed provisions concerning so-called "high-level" special missions. He fully agreed that such missions should be granted wider privileges and thought that the Commission should retain that important distinction between different kinds of special missions.
64. Mr. TUNKIN said that the Commission had decided to proceed on the basis that special missions would be treated in principle in the same way as permanent missions. It was now suggested that special missions should be treated like delegations to United Nations conferences. If the Commission adopted that criterion, it would have to apply it throughout the draft articles, not just in article 27. Personally, he saw no valid reason for treating special missions differently from permanent missions.
65. The CHAIRMAN, speaking as Special Rapporteur, said that in his opinion special missions should not be given the same immunities as diplomatic staff; their functions were not permanent and there was no reason why it should not be possible to bring a civil action against them. A member of a special mission who was domiciled in his own country could always challenge the jurisdiction of the courts of the country where he was residing temporarily. The position was quite different for a diplomat who resided permanently in the receiving State and who had to uphold his status in the diplomatic corps. In any case, it was for the Commission to decide whether or not it wished to treat special missions on a par with resident missions.

⁵ *Yearbook of the International Law Commission, 1964, Vol. II, p. 210.*

66. Mr. AGO said that each argument cut both ways : it was possible to question the need for granting immunity from civil jurisdiction where the stay lasted for a few days only, but it could also be argued that during such a brief stay it would rarely become necessary to institute judicial proceedings against the person concerned, whereas the situation was different in the case of a diplomat who lived in the receiving State for a longer period.

67. He did not think that a distinction should be drawn between ordinary special missions and so-called "high level" special missions : in making such a distinction the Commission would be treading on dangerous ground, since it might lead to different States being treated in different ways.

68. Mr. ELIAS suggested, as a compromise solution, that the principle embodied in paragraph 1 of article 27 should be retained and that paragraph 2 should provide that, unless otherwise agreed by the two States concerned, the head and members of the special mission would enjoy immunity from civil and administrative jurisdiction.

69. The CHAIRMAN, speaking as Special Rapporteur, said he was convinced that it was absolutely necessary to provide for immunity from criminal jurisdiction; immunity from civil and administrative jurisdiction was less indispensable, except where acts performed in the course of official duties were concerned. It might be possible to formulate a residual rule.

70. Mr. AGO said that, by special agreement, the receiving State and the sending State might even dispense with immunity from civil and administrative jurisdiction in the case of the members of a special mission.

71. Mr. Elias's proposition was self-evident, but it would be dangerous to draft a rule on those lines : it might be construed to mean that it was impossible to derogate from it by special agreement in the case of a permanent mission.

72. The CHAIRMAN, speaking as Special Rapporteur, said he did not think that States could, by mutual agreement, waive rules which entailed a form of discrimination; he referred to article 47 of the Vienna Convention on Diplomatic Relations in that connexion.

73. Mr. ROSENNE said that, in the light of the discussion, he thought it would be better if paragraph 2 was drafted in language close to that of the corresponding provision of the Vienna Convention on Diplomatic Relations, but making it clear that it was possible for States to derogate from the rules in that provision. The difficulty arose from the text proposed by the Special Rapporteur for paragraph 2 of article 40, which laid down the right of States to conclude agreements "confirming or supplementing or extending or amplifying" the provisions of the draft articles, but did not mention the right to derogate from the rules laid down in the draft articles. That right should be clearly stated.

74. Mr. TUNKIN said that he did not favour the inclusion of a provision under which States would be able to derogate from the rules laid down in the draft articles. That right always existed; States could, by

mutual agreement, derogate even from the rules laid down in the Vienna Convention of 1961. It would, however, be unwise to state that fact in article 27, because it could give the mistaken impression that States could not derogate from rules set out in other articles, which contained no such proviso.

75. The CHAIRMAN, speaking as Special Rapporteur, said that the idea that States could not derogate from those rules was contained in the Vienna Convention on Consular Relations : States could develop the rules and widen their scope, but they could not curtail them. That was an established rule of international law which had been accepted by more than seventy States.

76. Mr. TUNKIN pointed out that he had been referring to the Vienna Convention on Diplomatic Relations, not to the Vienna Convention on Consular Relations.

77. Mr. ROSENNE said that the difficulty arose largely from the excessive variety of special missions; it was difficult to have the same rule for a mission which lasted three days as for another which lasted ten years. The wisest course would be to follow the rules of the 1961 Convention and to make it clear that States could derogate from the provisions of articles 17 to 39.

78. Mr. TUNKIN said that there undoubtedly were provisions of international law which marked a progressive development and from which States should not withdraw. However, with regard to Mr. Rosenne's proposal, he did not believe that the draft articles should contain any provision to the effect that States could, or could not, derogate from the rules they stated. There were certainly some rules from which it was undesirable that States should derogate. In practice, special missions were often sent in great haste, and States would rely on the provisions of the future convention.

79. The CHAIRMAN, speaking as Special Rapporteur, suggested that he should redraft paragraph 1 to provide for immunity from criminal jurisdiction, and that in paragraph 2 and the subsequent paragraphs he should follow *mutatis mutandis* the text of article 31 of the Vienna Convention on Diplomatic Relations, with the addition of a sentence to the effect that those provisions would be applicable except as otherwise agreed. In the commentary, he would mention the opinion held by some members of the Commission that immunity from civil and administrative jurisdiction should be confined to acts performed by members of the special mission in the course of their official duties and he would add that there was a difference of views in the Commission, some members favouring complete immunity as a safeguard against interference by the receiving State, while others considered that there should be immunity from civil and administrative jurisdiction only in respect of acts performed in the course of duty, with a view to safeguarding as far as possible the sovereignty of the territorial State.

*It was so agreed.*⁶

80. Mr. AGO said he agreed that both of the two opinions voiced in the Commission should be set out

⁶ For resumption of discussion, see 817th meeting, paras. 64-83.

in the commentary. It might then however, be stated that the Commission had preferred to follow the example of the Vienna Convention on Diplomatic Relations and use the broader formulation, although it would, of course, be open to States to adopt the other arrangement by bilateral agreement.

The meeting rose at 6.5 p.m.

808th MEETING

Tuesday, 22 June 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

Special Missions

(A/CN.4/179)

(continued)

[Item 3 of the agenda]

ARTICLE 28 (Exemption from social security legislation) [28]

Article 28 [28]

Exemption from social security legislation

1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the receiving State for the purpose of carrying out the tasks of the special mission, from the application of the social security provisions of that State.

2. The provisions of paragraph 1 of this article shall not apply to nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission.

3. Locally recruited temporary staff of the special mission, irrespective of nationality, shall be subject to the provisions of social security legislation.

1. The CHAIRMAN, speaking as Special Rapporteur, said that article 28 of his draft was based on article 33 of the Vienna Convention on Diplomatic Relations but had been abridged because of the temporary nature of special missions. What remained was the provision in paragraph 1, under which the members of the special mission and its staff were exempt, while in the receiving State, from the social security provisions of that State.

2. Paragraph 2 provided that the provisions of paragraph 1 should not apply to nationals or permanent residents of the receiving State, from among whom many persons employed by special missions, and not only service staff, were recruited. Since the task of a special

mission was very often dangerous and might result in death or disability, the application of social security provisions was more important in that case than in the case of permanent missions.

3. The question of temporary staff, referred to in paragraph 3, was different from that arising in connexion with permanent missions, since the special mission generally engaged such staff for a few days only. He had drafted paragraph 3 with that consideration in mind and in conformity with the general trends of international labour legislation.

4. Mr. ROSENNE said that the divergence from the Vienna Conventions was justifiable and he could accept the Special Rapporteur's formula for article 28.

5. Mr. TUNKIN said he agreed that some deviation from the Vienna Conventions was inevitable. The Drafting Committee would need to consider whether paragraph 3 was necessary at all. Locally recruited temporary staff would be covered by the provision in paragraph 2 that nationals or permanent residents of the receiving State were not exempt from social security legislation.

6. Mr. ELIAS said that either paragraphs 2 and 3 could be amalgamated or the former could be redrafted so as to cover locally recruited temporary staff, possibly by substituting the words "persons ordinarily resident in" for the words "permanent residents of".

7. The CHAIRMAN, speaking as Special Rapporteur, said there was some doubt as to the meaning of the term "ordinarily resident". International law distinguished between temporary residents and permanent residents, and France and the United Kingdom, for example, made a distinction between permanent residents and privileged residents.

8. Mr. ELIAS pointed out that the phrase "ordinarily resident in" often appeared in legislative enactments of many common law countries and the context would indicate what it meant. Alternatively, the phrase "or persons permanently or temporarily resident in the receiving State" could be used in paragraph 2, and paragraph 3 would then be unnecessary.

9. The CHAIRMAN, speaking as Special Rapporteur, said that the reference to permanent residence had been introduced into the Vienna Convention on Diplomatic Relations at the request of the Commonwealth countries.

10. Mr. ROSENNE said that both the Vienna Conventions contained the phrase "nationals of or permanently resident in the receiving State"; its meaning was well-known, and there was no reason for using another form of words to express the same idea.

11. The CHAIRMAN, speaking as Special Rapporteur, said that the question which expression was the more usual had been considered at both Vienna Conferences. The expression "permanent residents" or a similar one had been used in the Convention relating to the Status of Stateless Persons¹ and in the Convention relating to the Status of Refugees.²

¹ United Nations *Treaty Series*, Vol. 360, p. 130.

² *Ibid.*, Vol. 189, p. 137.

12. He suggested that article 28, together with the comments made during the meeting, be referred to the Drafting Committee.

*It was so agreed.*³

ARTICLE 29 (Exemption from personal services and contributions) [30]

Article 29 [30]

Exemption from personal services and contributions

1. The head and members of the special mission and the members of its staff shall be exempt from personal services and contributions of any kind, from any compulsory participation in public works and from all military obligations relating to requisitioning, military contributions or the billeting of troops on premises which are in their possession or which they use.

2. The receiving State may not require the personal services or contributions mentioned in the preceding paragraph even of its own nationals while they are taking part in the activities of the special mission.

13. The CHAIRMAN, speaking as Special Rapporteur, said that paragraph 1 of article 29 of his draft followed fairly closely article 35 of the Vienna Convention on Diplomatic Relations.

14. He had added a paragraph 2, as he had thought it necessary to make it clear that the receiving State could not require any personal services, even if that provision to some extent curtailed its sovereignty. In some countries, citizens could be employed by special missions of foreign States with the authorization of the receiving State, but the mission's work would suffer if they were liable at any moment to have to leave their employment. In other countries, nationals were debarred from entering a foreign mission's employ or else were so strictly bound by personal service obligations that they could not take part in the mission's activities. The situation sometimes reached a point where the mission could no longer perform its task. In the light of those considerations he had inserted a rule which did not occur in article 35 of the Vienna Convention on Diplomatic Relations.

15. The question whether the members and staff of special missions had an obligation to furnish personal services dictated by humanitarian considerations was discussed in paragraph (3) of his commentary.

16. Mr. YASSEEN said that article 29 was really necessary; members of special missions should be exempt from all personal services and from participation in public works. In order to avoid difficulties of interpretation, however, the provision exempting them from such services should be modelled very precisely on article 35 of the Vienna Convention on Diplomatic Relations.

17. He agreed that the persons eligible for the exemption should include all the members of the mission and even the administrative and technical staff, but he could not agree that the exemption should be extended to nationals of the receiving State, especially if it involved exemption from military service. It was true that the exemption would be for a brief period only, but it was a

material derogation from principle and it was better not to admit it.

18. Humanitarian obligations were not enforceable. There was, of course, a moral sanction, but that was not a matter within the competence of the Commission.

19. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission was agreed that members of the special mission should enjoy immunity from criminal jurisdiction. He had mentioned humanitarian obligations in the commentary only, and had had no intention of introducing the idea into the body of the article.

20. Mr. TUNKIN said he agreed with the principle set out in the article, but considered that the wording should follow more closely that of article 35 of the Vienna Convention on Diplomatic Relations.

21. He could accept the Special Rapporteur's proposal that the exemption should extend even to service staff, but only on condition that the persons concerned were not nationals of the receiving State; the same condition must apply to the members of the technical and administrative staff of the special mission.

22. The CHAIRMAN, speaking as Special Rapporteur, said that the difference lay in paragraph 2, which he proposed tentatively in order to deal with the case where the regulations of the receiving State were so stringent as to hamper the work of the special mission, which could not employ anyone without receiving the State's consent.

23. Mr. VERDROSS said that he hesitated to endorse paragraph 2, which was not only superfluous but a derogation from the general principle. If the receiving State requested its nationals to participate in the activities of a special mission, it was in its own interest to exempt them from personal services; there was no need to protect the individual when his interests coincided with those of the State.

24. The CHAIRMAN, speaking as Special Rapporteur, said that he had come across many instances where the receiving State, even after accepting the special mission, had done everything in its power to prevent the mission from functioning.

25. Sir Humphrey WALDOCK said that practice showed that there would be no chance of States accepting the extension of the exemption to nationals of the receiving State, however desirable that might seem in theory. Otherwise the Special Rapporteur's draft was on the right lines.

26. Mr. ROSENNE said that he was not altogether convinced that paragraph 2 should be dropped; it might be desirable to obtain the views of governments before reaching the conclusion that they would necessarily in that case reject the extension of the exemption to nationals of the receiving State.

27. Article 29 should be read in conjunction with the provisions of article 14, which gave some measure of control to the receiving State. Despite what was said in the last sentence of paragraph 2 (b) of the commentary, special missions could last quite a long time and the size of their staff might be not inconsiderable. If paragraph 2 was retained, it should refer not only to nationals of but also to permanent residents in the receiving State. If

³ For resumption of discussion, see 817th meeting, para. 85.

paragraph 2 was not retained, the point should be mentioned in the commentary so as to find out what attitude would be taken by governments.

28. Mr. REUTER said that the approach to paragraph 2 would depend also on the Commission's general approach to article 40. The question of article 40 had already been raised, but remained obscure. Was the Commission drafting rules from which there could be no derogation—in which case they would be few in number—or was it drafting residual rules? If the proposal contained in article 40 was maintained, no such rule as that contained in paragraph 2 could be laid down. But if the Commission wanted to adopt the more flexible formula, closer to that contained in the Vienna Convention on Diplomatic Relations than to that used in the Vienna Convention on Consular Relations, the question might remain open for discussion.

29. The CHAIRMAN said it was evident that most members wished to retain paragraph 1 and to enlarge the category of persons entitled to the benefit of the exemptions specified in it, so that an article similar to article 35 of the Vienna Convention on Diplomatic Relations would result.

30. Most members thought that paragraph 2 should be omitted but did not object to the idea being mentioned in the commentary, in order to indicate that the receiving State should not hinder the work of the special mission by imposing excessive obligations on those members of the mission who were its own citizens or permanent residents.

31. The question of humanitarian obligations would be mentioned in the commentary.

32. He suggested that the article should be referred to the Drafting Committee, with directions along those lines.

*It was so agreed.*⁴

POSSIBLE INCLUSION OF AN ARTICLE ON THE LINES OF ARTICLE 34 OF THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS

33. The CHAIRMAN, speaking as Special Rapporteur, said that article 34 of the Vienna Convention on Diplomatic Relations dealt with certain exemptions from taxation; there was no corresponding provision in his draft on special missions. He was undecided whether exceptions should be made in favour of members of special missions or whether a provision like article 23 of his draft would be better. There was a material difference between article 23, to paragraph 3 of which the Commission had made reservations, and article 34 of the Vienna Convention on Diplomatic Relations, which related only to the diplomatic agent. As special missions stayed only temporarily in the territory of the receiving State, the same considerations did not apply. He would be glad to hear the views of the Commission.

34. Mr. TUNKIN said that a special mission, one dealing with frontier problems, for example, might stay in a country for as long as a year, and the question could then arise whether its members were liable to taxation in the receiving State. It might be wiser to insert a provision

covering the point on the basis of article 34 of the Vienna Convention on Diplomatic Relations.

35. The CHAIRMAN, speaking as Special Rapporteur, said that sometimes special missions, although temporary, became almost permanent. He suggested that he should draft a provision based on article 34 of the Vienna Convention on Diplomatic Relations for inclusion in the draft articles.

*It was so agreed.*⁵

ARTICLE 30 (Exemption from customs duties and inspection) [31]

Article 30 [31]

Exemption from customs duties and inspection

The receiving State shall grant exemption from the payment of all customs duties, all taxes and other duties—with the exception of loading, unloading and handling charges and charges for other special services—connected with the import and export and permit the free import and export of the following articles :

(a) Articles for the official use of the special mission;

(b) Articles for the personal use of the head and members of the special mission and of the members of its staff which constitute their personal baggage, as well as articles serving the needs of family members accompanying the head, the members and the staff of the special mission, unless restrictions have been specified or notified in advance on the entry of such persons into the territory of the receiving State.

36. The CHAIRMAN, speaking as Special Rapporteur, said that he had based his draft for article 30 on article 36 of the Vienna Convention on Diplomatic Relations but had not followed it in its entirety, because members of special missions did not settle and hence did not need exemption from customs duties as did members of the permanent diplomatic mission.

37. He had not drafted a provision corresponding to paragraph 2 of article 36 of the Convention, though he was ready to do so. A further question to be decided was whether the family of members of the special mission enjoyed the same customs privileges as the members themselves did.

38. Mr. ROSENNE said that article 30 was acceptable except that sub-paragraph (b) should not apply to nationals of or permanent residents in the receiving State. The point was not a theoretical one, as permanent residents in the receiving State could form part of a special mission by agreement between the two States concerned, and such persons should certainly not be given any excuse to claim exemption from customs duties solely because they had been accepted as members of a special mission.

39. Mr. TUNKIN said that article 30 was acceptable but should follow as closely as possible the wording of the Vienna Convention on Diplomatic Relations, since the scope of the privileges to be accorded should be much the same as for diplomatic missions. He was prepared to accept the Special Rapporteur's proposal that customs exemptions should be extended even to the service staff of

⁴ For resumption of discussion, see 817th meeting, para. 90.

⁵ Draft provision later discussed as article 28 *bis*; see 817th meeting, para. 86-89.

a special mission—even though no such privilege existed for the service staff of a diplomatic mission under the terms of article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations—provided that they were not nationals of or permanent residents in the receiving State.

40. It was, of course, imperative to insert in the text after the words “ the receiving State shall ” the words “ in accordance with such laws and regulations as it may adopt ”, which appeared in article 36 of the Vienna Convention on Diplomatic Relations.

41. The CHAIRMAN, speaking as Special Rapporteur, said that the question of furniture and installation did not arise in the case of the special mission. He thought it should be provided that the head and members of the special mission were exempt from inspection of their personal baggage “ unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 ” (paragraph 2 of article 36 of the Vienna Convention on Diplomatic Relations).

42. Mr. PESSOU said that the Commission should perhaps be a little more severe, in order not to add to the difficulties being experienced in many African countries, for instance, where increasing quantities of cigarettes and alcohol were being imported duty-free. A proviso should be added to the article on the lines of that in the Vienna Convention on Diplomatic Relations, or else a qualifying phrase like “ according to the facilities available at the place of residence ”.

43. The CHAIRMAN, speaking as Special Rapporteur, said that the question raised by Mr. Pessou was dealt with in paragraphs (8) and (9) of his commentary. He knew of cases where disputes had lasted for months and others where the Foreign Ministry of the receiving State had had to warn the Embassy of a sending State, but other countries were more tolerant. The common practice was to import such goods for the use of the special mission through the permanent diplomatic mission. The question was important but he had not considered it advisable to draft a precise rule on the point.

44. Mr. ROSENNE said that Mr. Pessou had raised a serious point which would in part be met by Mr. Tunkin's proposed amendment.

45. The CHAIRMAN, speaking as Special Rapporteur, said that possibly the provision should be qualified by a reference to the laws and regulations of the receiving State; but in some cases such a qualification might have the effect of destroying the custom. Even if it were stipulated that only articles other than articles for the official use of the mission, or other than personal baggage, were subject to the laws and regulations of the receiving State, that State would be given a great deal of discretionary power and one would have to trust it to use that power with moderation. Would it agree that alcohol and cigarettes were essential for the performance of the mission's tasks?

46. Mr. PESSOU said that the difficulties to which he had referred were particularly acute where relations between two States were strained; restrictions could then serve as a means of pressure. The Commission should, he

thought, model the provision as closely as possible on the Vienna Convention on Diplomatic Relations.

47. The CHAIRMAN, speaking as Special Rapporteur, suggested that the Commission should authorize him to prepare a generally acceptable redraft of article 30.

*It was so agreed.*⁶

ARTICLE 31 (Status of family members) [35]

Article 31

[35]

Status of family members

1. The receiving State may restrict the entry of members of the families of the head, members and members of the staff of the special mission. If such restriction has not been agreed upon between the States concerned, it must be notified in due time to the sending State. The restriction may be general (applying to the entire mission) or individual (some members are exempt from restriction), or it may relate only to certain periods of the special mission's visit or to access to certain parts of the country.

2. If such restriction has not been agreed upon or notified, it shall be deemed to be non-existent.

3. If the special mission performs its task in military or prohibited zones, family members must be in possession of a special permit from the receiving State authorizing them to enter such zones.

4. If the entry of members of the families of the head, members or members of the staff of the special mission is not subject to restrictions, and in areas where restrictions on entry do not apply, family members accompanying the head, members or members of the staff of the special mission shall enjoy privileges and immunities as specified below :

(a) The members of the families of the head and members of the special mission and of those members of its staff who belong to the category of diplomatic staff (article 6, paragraph 2, of these articles) shall enjoy the privileges and immunities which are guaranteed by these articles to the persons whom they are accompanying;

(b) Members of the families of the administrative and technical staff shall be entitled to the privileges and immunities which are guaranteed by these articles to the persons whom they are accompanying.

5. Family members shall enjoy the above-mentioned privileges and immunities only if the provisions of these articles do not limit their right of enjoyment and if they are not nationals of or permanently resident in the receiving State.

48. The CHAIRMAN, speaking as Special Rapporteur, said that in drafting article 31 he had proceeded on the premise that in practice, so far as family members were concerned, the case of special missions was very different from that of permanent missions. Without conflicting with paragraph 1 of article 37 of the Vienna Convention on Diplomatic Relations, article 31 of the draft accordingly reflected the specific character of special missions. In the case of special missions, the receiving State was often anxious to restrict the entry of family members; that was why paragraphs 1, 2 and 3 of the article dealt with possible restrictions. But he had to admit that he had only drafted the article after a good deal of hesitation.

⁶ For resumption of discussion, see 817th meeting, paras. 91 and 92.

49. Mr. JIMÉNEZ de ARÉCHAGA suggested that article 31 should be confined to the provisions on the privileges of family members; the provisions on restrictions on the entry of such persons, a totally extraneous matter, should be dropped.

50. The article had been drafted on the assumption that special missions were always of short duration, which was not necessarily true in all cases.

51. Mr. VERDROSS said that he had no criticisms of paragraphs 1, 2 and 3, but thought that paragraph 4 went too far. In that respect, the position of special missions was analogous to that of delegations to the United Nations—which distinguished between members of permanent missions, whose privileges were extended to their families, and representatives to conferences, whose privileges were strictly personal. Before it could settle the problem, the Commission would first have to know whether the Special Rapporteur still proposed to draw up special rules for “high-level” special missions. Under general international law, a Head of State enjoyed complete immunity, together with the members of his family. That privilege had sometimes been extended, particularly by the United Kingdom during the last war, to Heads of government and ministers.

52. He would accept the proposed rule as applicable to a Head of State, a Head of government or a minister when on an official mission, but could not accept it for other special missions.

53. The CHAIRMAN, speaking as Special Rapporteur, said that he might first have stated a general rule granting all privileges and immunities to family members and then added another rule providing that the receiving State could attach certain restrictions to the admission of family members to its territory. Attitudes varied greatly in that respect; for example, the local idea of the family unit varied, even in countries where equality of the sexes was recognized in law.

54. Mr. REUTER suggested that, in the French text of paragraph (3) of the commentary, the word “*habituellement*” be substituted for “*régulièrement*”.

55. The CHAIRMAN, speaking as Special Rapporteur, said that a slight difference of meaning was involved which had been discussed at the Vienna Conferences.

56. Mr. ROSENNE said that the opening proviso of paragraph 4 fully covered the matters dealt with in paragraphs 1, 2 and 3; he therefore suggested that the article be limited to the contents of paragraphs 4 and 5.

57. Mr. TUNKIN, supporting that suggestion, said that paragraphs 1, 2 and 3 went into unnecessary detail. In paragraph 4, an effort should be made to find a more dignified expression than “restriction of entry”. He found acceptable the concluding portion in paragraph 5, which related to nationals of the receiving State and persons permanently resident in its territory, but failed to see the purpose of the first portion.

58. Mr. ELIAS suggested that the final decision on the retention or deletion of paragraphs 1, 2 and 3 be left to the Drafting Committee.

59. Sir Humphrey WALDOCK, supporting that suggestion, said that if paragraphs 1, 2 and 3 were

ultimately dropped, the language of paragraph 4 would have to be adjusted.

60. The CHAIRMAN, speaking as Special Rapporteur, said he could accept Mr. Rosenne’s suggestion that paragraphs 1, 2 and 3 should be deleted and their substance incorporated in the commentary. In that case, the opening passage of paragraph 4 became unnecessary.

61. Since that seemed to be the Commission’s wish, he suggested that he should prepare a redraft of article 31 along those lines.

*It was so agreed.*⁷

ARTICLE 32 (Status of service staff and personal servants) [33 and 34]

Article 32 [33 and 34]

Status of service staff and personal servants

1. Members of the service staff of the special mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and exemption from the social security provisions of the receiving State.

2. Personal servants of the head, members and members of the staff of the special mission may be received in that capacity in the territory of the receiving State, provided that they are not subject to any restrictions in this connexion as a result of decisions, prior notifications or measures by the receiving State.

3. If personal servants are admitted to the territory of the receiving State and are not nationals of that State or permanently domiciled in its territory, they shall be exempt from payment of dues and taxes on the emoluments they receive by reason of their employment.

4. The receiving State shall have the right to decide whether, and to what extent, personal servants shall enjoy privileges and immunities. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

62. The CHAIRMAN, speaking as Special Rapporteur, said that his aim in article 32 had been to set out in an orderly manner the rules relating to service staff. The provisions of paragraph 1 were the same as those of article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations, with the addition of a provision concerning exemption from social security legislation, a point already decided by the Commission. The rule stated in paragraph 2 was broader than that in article 37, paragraph 4, of the Vienna Convention on Diplomatic Relations. In the French text he had avoided the use of the term *domestiques*, which had been criticized at the second Vienna Conference as inconsistent with the terminology used by the International Labour Organisation and as reminiscent of an obsolete institution.

63. Mr. AMADO said that he was glad to see that the term *domestique* had been dropped as obsolete. He proposed that in the French text the words *service personnel* should be replaced by the words *service privé*.

⁷ For resumption of discussion, see 819th meeting, para. 93.

64. Mr. ROSENNE said that the use of the word "status" in the title of articles 31 and 32 was inappropriate; those articles really dealt with the privileges and immunities of the persons concerned rather than with their status.

65. He suggested that the Drafting Committee should consider dividing article 32 into two separate articles; the first would embody the provisions of paragraph 1 on service staff and the second the remaining provisions, which dealt with personal staff.

66. He failed to see the meaning of the proviso in paragraph 2, which should be amalgamated with paragraph 3.

67. The CHAIRMAN, speaking as Special Rapporteur, said that in his view the provision was in fact concerned with the "status" of the persons in question; but that was a point that could be settled by the Drafting Committee.

68. Mr. Rosenne's suggestion that the substance of article 32 should be divided into two separate articles was in line with his own decision to deal separately with family members and service staff; the Vienna Convention on Diplomatic Relations, however, dealt with both categories in article 37.

69. Mr. TUNKIN said that he was in general agreement with the contents of article 32. Certain provisions concerning the service staff were, however, included in articles that had already been approved; the question of concordance should therefore be carefully examined.

70. Paragraph 2 could be dropped; its contents were covered by the opening words of paragraph 3.

71. He supported Mr. Rosenne's suggestion that article 32 should be divided into two separate articles, one dealing with service staff, which belonged to the mission, and the other with persons in the personal service of members of the mission.

72. The wording of paragraphs 3 and 4 should be brought closer into line with that of paragraph 4 of article 37 of the Vienna Convention on Diplomatic Relations; there was no difference in substance between the two sets of provisions.

73. The CHAIRMAN, speaking as Special Rapporteur, said that he agreed with Mr. Tunkin. The Drafting Committee should, nevertheless, consider whether certain parts of paragraph 2 should not be retained in the new article on personal staff. The crux of the matter was whether members of a special mission had the right to bring personal staff with them. Some States refused to grant visas to such persons, while others interpreted the term very narrowly.

74. He suggested that he should redraft article 32 in the light of the discussion.

*It was so agreed.*⁸

ARTICLE 33 (Privileges and immunities of nationals of the receiving State and of persons permanently resident in the territory of the receiving State) [36]

Article 33

[36]

Privileges and immunities of nationals of the receiving State and of persons permanently resident in the territory of the receiving State

1. Nationals of the receiving State and persons permanently resident in its territory who are admitted by the receiving State as the head, as members or as members of the staff of the special mission shall enjoy in the receiving State only immunities from jurisdiction and inviolability, in respect of official acts performed in the exercise of the functions of the special mission.

2. Certain other privileges and immunities may also be granted to such persons by mutual agreement or by a decision of the receiving State.

3. The receiving State shall itself determine the nature and extent of the privileges and immunities granted to any personal servants of the head, the members and the members of the staff of the special mission who are its own nationals or are permanently resident in its territory.

4. Jurisdiction over the persons mentioned in this article must in all cases be exercised by the receiving State in such a manner as not to interfere unduly with the performance of the functions of the special mission.

75. The CHAIRMAN, speaking as Special Rapporteur, said that article 33 of his draft was based on article 38 of the Vienna Convention on Diplomatic Relations with certain changes of form and substance necessitated by the particular requirements of special missions.

76. Mr. REUTER said that article 33, paragraph 2, raised a question which the Commission had discussed on several earlier occasions but had not yet decided; it would arise in still more acute form in article 39 and especially in article 40. If paragraph 2 was retained, a like provision would be necessary in many other articles. Alternatively, the paragraph might be omitted, and article 40, paragraph 2, amended to say that additional privileges could be granted either by international agreement or by decision of the receiving State.

77. The CHAIRMAN, speaking as Special Rapporteur, pointed out that at its previous session the Commission had wished to insert in a number of articles a reference to the possibility of mutual agreement. Moreover, draft article 40 was based on article 73 of the Vienna Convention on Consular Relations.

78. Mr. TUNKIN said that, although he had no strong views on the matter, he doubted the need to include in the draft articles on special missions an article on the question of nationals of the receiving State and persons permanently resident therein.

79. The CHAIRMAN, speaking as Special Rapporteur, said that he could not agree with Mr. Tunkin. Since the risk of a special mission's being unable to carry out its duties was greater, it needed additional guarantees; consequently, the persons referred to in article 33 should at least enjoy immunity in respect of acts performed in the course of their official duties.

80. Mr. ROSENNE said that apart from paragraph 2, on which a question had been raised by Mr. Reuter, the

⁸ For resumption of discussion, see 817th meeting, paras. 94-96.

rest of the article appeared to be already covered by other provisions of the draft. For example, paragraph 3 laid down a rule for nationals of the receiving State and persons permanently resident in its territory which was already laid down for all personal servants by paragraph 4 of article 32.

81. Mr. AMADO said that the Drafting Committee should consider carefully whether the word "unduly" should be retained in paragraph 4.

82. The CHAIRMAN, speaking as Special Rapporteur, said that the word was used in article 38 of the Vienna Convention on Diplomatic Relations and in article 71 of the Vienna Convention on Consular Relations. The participants in the Vienna Conferences had thought that some interference would have to be tolerated, and that too many difficulties might be raised if States were required not to interfere at all in the performance of the functions of the mission.

83. Mr. AMADO said that he always deferred to the decision of States and would therefore withdraw his suggestion.

84. Mr. TUNKIN said that article 33 of the draft went much further than article 38 of the Vienna Convention on Diplomatic Relations, which covered only diplomatic agents; article 33 applied not only to the head of the mission but also to members of the special mission and even to members of the staff, and he doubted whether States would be prepared to go so far as that.

85. Sir Humphrey WALDOCK said he was convinced that the only way to ensure acceptance of the draft articles by governments was to restrict the privileges and immunities of persons who were nationals of the receiving State, or permanently resident therein, as had been done in the Vienna Convention on Diplomatic Relations.

86. The CHAIRMAN, speaking as Special Rapporteur, said that his general approach, as reflected in several of the draft articles, had been that the entire staff of the special mission should enjoy the same protection as the head and members of that mission. The question to be decided was whether to recommend that States adopt that rule, or whether to confine such protection to the diplomatic staff. If the Commission chose the latter course, he would add the word "diplomatic" before the word "staff" in paragraph 1.

87. He agreed to the deletion of paragraph 2, as Mr. Reuter had suggested. Paragraph 3 should be retained, for in substance it reproduced the first sentence of paragraph 2 of article 38 of the Vienna Convention on Diplomatic Relations. The question of privileges granted by a decision of the receiving State would come up again in connexion with article 39 (Non-discrimination) of his draft.

88. As his intention had been that the entire staff of special missions should be in the same position, he had not reproduced paragraph 2 of article 37 of the Vienna Convention on Diplomatic Relations, which extended to administrative and technical staff certain privileges which the earlier articles of the Convention accorded to diplomatic staff only. If the Commission decided not to follow his idea and wished to reproduce exactly the provisions of the Vienna Convention on Diplomatic Relations, an

article covering administrative and technical staff would have to be added, possibly immediately before the article referring to the status of family members.

89. He suggested that he should redraft article 33 along the lines he had just indicated.

*It was so agreed.*⁹

The meeting rose at 1.10 p.m.

⁹ For resumption of discussion, see 817th meeting, para. 93, and 819th meeting, paras. 94-96.

809th MEETING

Wednesday, 23 June 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Special Missions

(A/CN.4/179)

(continued)

[Item 3 of the agenda]

ARTICLES 34 (Duration of privileges and immunities) [37] and 35 (Death of the head or of a member of the special mission or of a member of its staff) [38]

Article 34

[37]

Duration of privileges and immunities

1. The head and members of the special mission, and the members of its staff and members of their families, shall enjoy facilities, privileges and immunities in the territory of the receiving State from the moment when they enter the territory of the receiving State for the purpose of performing the tasks of the special mission or, if they are already in its territory, from the moment when their appointment as members of the special mission is notified to the Ministry of Foreign Affairs.

2. The enjoyment of facilities, privileges and immunities shall cease at the moment when they leave the territory of the receiving State, upon the cessation of their functions with the special mission or upon the cessation of the activities of the special mission (article 12 of these rules).

Article 35

[38]

Death of the head or of a member of the special mission or of a member of its staff

1. In the event of the death of the head or of a member of the special mission or of a member of its staff who is not a national of or permanently resident in the receiving State, the receiving State shall be obliged to permit the removal of his remains to the sending State or decent burial in its own territory, at the option of the family

or of the representative of the sending State. It shall also facilitate the collection of the movable effects of the deceased, and shall deliver them to the representative of the family or of the sending State, permitting them to be exported without hindrance.

2. This provision shall apply also in the event of the death of a member of the family of the head of the special mission, of one of its members, or of a member of its staff, who has been allowed to accompany the person in question to the territory of the receiving State.

1. The CHAIRMAN invited the Commission to consider articles 34 and 35 together.

2. Speaking as Special Rapporteur, he said that articles 34 and 35 of his draft were based respectively, on paragraphs 1 and 2, and on paragraphs 3 and 4 of article 39 of the Vienna Convention on Diplomatic Relations; he had wished to deal with the case of death in a separate article.

3. Mr. PAL suggested that the Drafting Committee should be instructed to keep draft articles 34 and 35 in terms as close as possible to the language of article 39 of the Vienna Convention on Diplomatic Relations.

4. The CHAIRMAN suggested that the Commission should refer articles 34 and 35 to the Drafting Committee, with instructions to keep as closely as possible to the wording of article 39 of the Vienna Convention on Diplomatic Relations.

*It was so agreed.*¹

ARTICLE 36 (Enjoyment of facilities, privileges and immunities while in transit through the territory of a third State) [39]

Article 36 [39]

Employment of facilities, privileges and immunities while in transit through the territory of a third State

1. If the head or a member of the special mission or a member of its staff passes through or is in transit in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to the place where he is to perform the functions assigned to the special mission or when returning from such place to his own country, the third State shall accord him such inviolability and immunities as may be required for his unhindered transit through its territory. The same shall apply in the case of family members who accompany the head or a member of the special mission, or a member of its staff.

2. During such transit, such persons shall enjoy the right to inviolability of official correspondence and of other communications in transit.

3. The third State shall be bound to comply with these obligations only if it has been informed in advance, either in the visa application or by notification, of the purpose of the special mission, and has raised no objection to such transit.

4. Subject to the provisions of the preceding paragraph, the State shall also accord the necessary guarantees and immunities to the courier of the special mission and to the bag of the special mission in which correspondence and other official communications in transit are carried,

in either direction, for the purpose of maintaining contact between the special mission and the Government of the sending State.

5. All the provisions set forth above shall also apply to the persons mentioned in paragraph 1 of this article, to the courier of the special mission and to the bag of the special mission if their presence in the territory of the third State is due to *force majeure*.

5. The CHAIRMAN, speaking as Special Rapporteur, said that article 36 of his draft was based on article 40 of the Vienna Convention on Diplomatic Relations. He had, however, added a new provision, which appeared in paragraph 3. The status of a diplomat or consular officer was evident from his passport, but the same was not true in the case of members of a special mission. Consequently the transit State could only be bound to comply with its obligations if it had received advance notice of the journey of such persons.

6. Mr. ROSENNE said that the new provision contained in paragraph 3 was necessary for special missions, and he fully supported it in substance; he would, however, suggest the deletion of the words "either in the visa application or by notification", since there might be other means by which the third State could be informed of the special mission. For example, by virtue of a series of agreements for the abolition of visas on diplomatic passports he could travel freely without a visa in many countries, but he would not enjoy or claim any privileges or immunities unless the State through which he was travelling had been officially informed in some way that his journey was for the purposes of a special mission.

7. Mr. ELIAS suggested that the point, which was not of fundamental importance, should be left to the Drafting Committee.

8. The CHAIRMAN, speaking as Special Rapporteur, said that some two thirds of all States still required visas and that the application for a visa generally stated the purpose of the visit. The essential point was that the transit State should have advance notice. He was therefore willing to regard the phrase quoted by Mr. Rosenne as not absolutely essential.

9. Speaking as Chairman he proposed that the Commission should, as Mr. Elias had suggested, refer article 36 to the Drafting Committee, with directions to follow as closely as possible the wording of article 40 of the Vienna Convention on Diplomatic Relations.

*It was so agreed.*²

ARTICLE 37 (Professional activity) [42]

Article 37 [42]

Professional activity

The head and members of the special mission and the members of its staff shall not, during the term of the special mission, practise for personal profit any professional or commercial activity in the receiving State, and they may not do so for the profit of the sending State unless the receiving State has given its prior consent.

¹ For resumption of discussion, see 819th meeting, paras. 97-107.

² For resumption of discussion, see 819th meeting, paras. 108-113.

10. The CHAIRMAN, speaking as Special Rapporteur, said that article 37 of his draft was intended to strengthen the rule in article 42 of the Vienna Convention on Diplomatic Relations, because many States complained that occasionally members of special missions carried on, on behalf of the sending State, activities not consonant with the mission's terms of reference. That was why he had added the passage "and they may not do so for the profit of the sending State unless the receiving State has given its prior consent".

11. Mr. AMADO said that in the French version, he preferred the expression *en vue d'un gain personnel* which was used in article 42 of the Vienna Convention, to the expression *à leur propre profit*.

12. Mr. VERDROSS said he did not think that the additional passage was necessary, since the idea was in any case implied in the first part of the sentence. It would be enough to mention it in the commentary.

13. Mr. TUNKIN said that, as drafted, article 37 would cover members of the staff of the special mission who were nationals of the receiving State or permanently resident in its territory. It was quite unnecessary to require such persons to abandon all their ordinary professional activities if they were employed by a special mission; their employment by a special mission might last only a very short time.

14. Article 37 of the draft differed from article 42 of the Vienna Convention on Diplomatic Relations in that the latter confined the prohibition of all professional or commercial activity to diplomatic agents, whereas article 37 extended it to all the staff of the special mission, including members of the service staff. Although he was not necessarily against that extension, he would like to know on what grounds it was based.

15. He was opposed to the rigid rule embodied in the final proviso, prohibiting members of the special mission from engaging in any professional activity on behalf of the sending State without the prior consent of the receiving State. That rule was unnecessary and would hamper the smooth functioning of international relations; a member of a special mission, acting in the name of the sending State, could deal with the appropriate authorities of the receiving State on a matter outside the special mission's specific terms of reference, provided that the authorities concerned were empowered to discuss the matter. He saw no need to require a prior specific agreement between the sending State and the Ministry of Foreign Affairs of the receiving State for that purpose.

16. The CHAIRMAN, speaking as Special Rapporteur, said he could accept Mr. Tunkin's first suggestion that the rule in article 37 should not apply to nationals of or persons permanently resident in the receiving State.

17. Mr. Tunkin's second suggestion raised a more complicated question. The article on professional activity had been severely criticized at both the Vienna Conferences. Paragraph 1 of article 57 of the Vienna Convention on Consular Relations was modelled on article 42 of the Vienna Convention on Diplomatic Relations, while paragraph 2 of the said article 57 laid down that the privileges and immunities provided in the Convention should not be accorded to consular employees or to members of the service staff who carried on

any private gainful occupation in the receiving State. The reason was that, in practice, it was usually employees of that category who engaged in gainful private activities, sometimes of a reprehensible nature. Because the special mission was of short duration and because it was difficult to establish special rules for employees in that category attached to special missions, he had preferred to propose a rule applicable to the whole staff of the special mission, and Mr. Tunkin seemed prepared to accept that.

18. With regard to the final provision, he said the Commission would have to make up its mind whether it wished to curb the growing practice of special missions to engage, on behalf of the sending State, in activities which formed no part of their task, a practice which might raise objections from the receiving State. For instance, members of a special mission might buy goods which were very scarce in their own State. Or again, there was the case of the archaeological discoveries in Egypt. Shortly after the war, a member of a Yugoslav special mission had been declared *persona non grata* by the United States because he had bought, on behalf of his State, radar equipment which, although on sale freely, the receiving State had not wished to be exported at the time. He would not, however, press for the retention of that provision.

19. Mr. REUTER thought that the final provision was necessary. The representatives of certain States, notably those of the socialist States, could not act on their own behalf; they always acted on behalf of their States. He was quite prepared to admit that it should be open to members of special missions to approach the authorities of the receiving State to discuss, for instance, an economic question which did not come within the mission's terms of reference. But he gathered that the final provision in the article was meant to refer to contacts with private concerns in the receiving State. In countries with a private enterprise economy, the State did not carry on commercial activities. In France, for instance, the State neither bought nor sold unless specifically so authorized by law. A foreign State could hardly be allowed to do what the national State itself was not entitled to do. The system might be criticized, but it was logical. The problem was very serious and touched on the structure of society. Article 37 should forbid members of special missions to carry on commercial operations, buy shares, form companies—in short, to do any business locally without express permission.

20. Mr. ELIAS said he supported the principles laid down in both parts of article 37. It should be remembered that, in many cases, the members of a special mission were technical experts; and even the junior members of such a mission would, unlike the diplomats of a permanent mission, possess knowledge which could be exploited. The concluding proviso was therefore a useful and necessary addition to the text of the Vienna Convention on Diplomatic Relations.

21. Mr. TUNKIN pointed out that it was already laid down in article 2 that the "task of a special mission shall be specified by mutual consent of the sending State and of the receiving State". It would be going too far to forbid members of a special mission to do anything else on behalf of the sending State without an express supplementary agreement. In practice, it was an everyday experience for the members of a special mission to

engage in negotiations on some new matters. In the event of abuse, the receiving State would always be able to declare the member of the special mission *persona non grata* and thus easily put an end to his objectionable activities.

22. Any attempt to deal with the question of transactions with private firms would mean entering into a new and completely uninvestigated field. If such a transaction was not illegal under the laws of the receiving State, there was no reason to forbid an expert belonging to a special mission to discuss it with the firm in question. He saw no grounds for requiring the specific consent of the receiving State if such consent was not required by the laws of the country.

23. The CHAIRMAN, speaking as Special Rapporteur, said that the question of conversations between members of the special mission and authorities of the receiving State had been discussed in connexion with article 2, adopted at the previous session, the commentary to which indicated that the task of the special mission could be enlarged by mutual agreement. Article 37 referred to negotiations or operations carried on in the receiving State with individuals or bodies corporate not representing that State.

24. Mr. YASSEEN said that, in his opinion, article 37 fell into two distinct parts. The first part, up to the words "in the receiving State", concerned the personal activities, for profit, of the members of the special mission. The proposed provision was necessary, because the members of a special mission should confine themselves to their official task. Nevertheless, Mr. Tunkin's remark concerning nationals of the receiving State should be borne in mind, for it would be going too far to compel a national of the receiving State who was employed for a few days by a special mission of a foreign State to abandon his professional activities.

25. The second part of the article was connected, first, with article 2, concerning the definition of a special mission's task and, secondly with article 38,³ concerning the obligation to respect the laws and regulations of the receiving State.

26. If a member of a special mission, in other words a person acting in a representative capacity carried on, in that capacity, activities unrelated to the special mission's task as defined by agreement between the two States, there were two possible cases to be considered. In one case, the activities in question would concern official relations between the two States; that case presented no difficulty, for the agreement defining the special mission's task could be amended by mutual agreement. The second agreement amending the first did not necessarily have to be express; it could be implied.

27. In the other case, the member of the mission, as such, entered into relations with individuals or private companies; that activity, for the profit of the sending State, should be supervised by the receiving State. There was no need, however, for any very strict rule on the subject, or to prohibit all activities of that kind; they should however, require the receiving State's permission.

If the receiving State refused its permission, there was nothing more to be done.

28. In short, if a member of a special mission acted, not in his personal capacity, but as a representative of his State, his acts should be either in conformity with the task assigned to the special mission, or in conformity with another task agreed to by the two States, or agreed to by the receiving State, or in conformity with the law of the receiving State. The last condition followed from article 38, paragraph 2.

29. Mr. VERDROSS said he thought that article 38 settled the problem along the lines indicated by Mr. Yasseen.

30. Mr. ELIAS said that he was in favour of article 37. Clearly, if a special mission which, for example, had entered the territory of the receiving State to help with an electrical installation, proceeded to engage in transactions for the supply of nuclear energy, the matter would come to the knowledge of the receiving State and a specific agreement would have to be concluded. The door should not be left open too wide for activities outside the terms of reference of the special mission, since otherwise members of the special mission might, under the pretext that there was no prohibition in the matter, engage in activities which were apparently innocuous but which could later become detrimental to the interests of the receiving State. A special mission had by definition a special character and should not exceed its terms of reference.

31. Mr. PAL said he was not in favour of any extension of the prohibition contained in article 42 of the Vienna Convention on Diplomatic Relations. If the laws of the receiving State prohibited certain transactions, the matter would be covered by the provisions of article 38 of the Special Rapporteur's draft. The question might also arise what bearing such transactions might have on the privileges and immunities of the members of the special mission; that point could be dealt with in the same way as in paragraph 2 of article 57 of the Vienna Convention on Consular Relations.

32. Mr. ROSENNE said that a strong case had been made out for a provision giving the receiving State some measure of protection in certain exceptional circumstances. One important safeguard was already provided by the article requiring compliance with local laws and regulations (article 38); an additional safeguard would be provided by the concluding passage of article 37 for which he preferred more flexible language, as suggested by Mr. Yasseen. To require the permission or consent of the receiving State would be sufficient.

33. Mr. YASSEEN said that the more he studied the question the more he could see that the two parts of the article dealt with entirely different matters. The first part concerned the professional activities of members of the special mission as individuals, and the second part dealt with the activities of the same persons, either as members of the special mission or at least as representatives of their State.

34. In his opinion, the second part of the article should be transferred elsewhere; perhaps a clause drafted on the following lines should be added to article 2 :

³ See below, following paragraph 51.

“The members of the special mission may not practise, for the profit of the sending State, any activity exceeding the functions of the special mission, without the consent of the receiving State.”

35. Mr. REUTER expressed support for Mr. Yasseen's suggestion. Like Mr. Tunkin, he was convinced that international trade was beneficial and should be encouraged rather than obstructed.

36. He also agreed with Mr. Tunkin and Mr. Rosenne that very flexible language should be used. If a provision stipulating that the receiving State's permission was required was considered too strong, the Commission might say simply that, in relations between the members of the special mission and private undertakings in the receiving State, the members of the special mission should not engage in any business transaction unless the receiving State had been informed and had given its consent.

37. Sir Humphrey WALDOCK said he too agreed with Mr. Yasseen. Article 37, which dealt with the simple question of the prohibition of individual professional and commercial activities, was not the right context for a rule which related to the activities of members of a special mission acting on behalf of the sending State. A rule on that question would be more appropriately placed in the article dealing with the functions of the special mission.

38. Article 38 already contained useful and very strong safeguards in its paragraph 1, requiring all persons belonging to special missions to respect the laws and regulations of the receiving State, and in its paragraph 4, which prohibited the use of the premises of the special mission for purposes other than the exercise of its functions and the performance of its task. Those provisions did not perhaps cover all the matters which could arise, but they went a very long way towards providing security against abuse of their position by members of the special mission.

39. He did not disagree with Mr. Reuter's view that, since the receiving State accepted the special mission for a special purpose, it was entitled to insist that the mission should observe the limits of its functions. However, transactions between States must also be facilitated. He accordingly suggested that the Drafting Committee should be asked to try to find a less rigid formula than that used in the concluding provision of draft article 37; the provision, which would be placed in another article, would admit some possibility of the special mission going outside its terms of reference with the assent of the receiving State.

40. Mr. TUNKIN said he, too, agreed that the concluding provision of article 37 was not in its right place. Since the articles already adopted by the Commission provided that the functions of a special mission were to be specified by agreement between the receiving State and the sending State, it followed that any extension of those functions would also have to be agreed between those two States. So far as the activities of the mission were concerned, the matter was therefore already covered by previous articles. An additional safeguard was provided by paragraph 1 of article 38, which required the special mission to respect the laws and regulations of the receiving State.

41. The two safeguards in question, mutual consent with regard to functions and observance of the municipal law of the receiving State, were embodied both in the Vienna Convention on Diplomatic Relations and in the Vienna Convention on Consular Relations. It had not, however, been found necessary to state, in either of those Conventions, that a diplomatic agent or consular officer could not perform, on behalf of the sending State, without the prior consent of the receiving State, any act which was not related to the functions of the mission to which he belonged.

42. The CHAIRMAN proposed that article 37 should be referred to the Drafting Committee with instructions to retain only the first part of the article, up to and including the words “in the receiving State”, to redraft it along the lines of article 42 of the Vienna Convention on Diplomatic Relations and to explain in the commentary that in the Commission's opinion the question of the commercial or professional activities of members of the special mission for the profit of the sending State was adequately regulated by article 38. The Commission could not then be criticized for having overlooked a very topical problem which had attracted public notice in recent incidents. If such activities did not conflict with the laws and regulations of the receiving State, there could be no abuse.

43. Mr. AGO said he could accept the Chairman's proposal, since all matters connected with the activities carried on by members of the special mission in their official capacity were regulated by other articles.

44. With regard to the first part of article 37, which dealt with the activities of members of the mission in their individual capacity, he thought, that, in the case of special missions, it was hardly necessary to lay down rules as stringent as those applicable to permanent missions. It was right that diplomats and consular officers should not be allowed to carry on any other professional activity; but a special mission might be composed of persons from very different walks of life, business men, for example, who might even be established in the receiving State. If such a person was forbidden to carry on any activity for his own account so long as the mission lasted, governments might have difficulty in securing the services of competent persons. He had no strong opinion on the subject but merely wished to mention the point.

45. The CHAIRMAN, speaking as Special Rapporteur, said that, on Mr. Tunkin's proposal, the Commission had decided that the article should not apply to nationals or to permanent residents of the receiving State.

46. He pointed out that a delegation coming to negotiate a commercial treaty might, for example, include business men who would therefore be in a privileged position, owing to the opportunities of access and the privileges and immunities which they would enjoy, and who could prepare quota lists in such a way as to favour their own export and import interest and increase their sales. Cases of that kind had been reported and criticized in a number of parliaments.

47. Mr. AMADO said that in starting that lengthy but instructive discussion, he had approached the subject from the psychological standpoint: man could not divide

his mind into watertight compartments. Modern life was very complex and the members of a special mission had difficulty in confining themselves to the subject assigned to their mission, to the exclusion of all others.

48. The receiving State should, of course, be given every protection against malpractices, but article 38 seemed to provide an adequate safeguard for that purpose. Naturally, members of special missions must not take advantage of their position for business purposes, but he doubted whether the Commission could do more than lay down a few general rules to guard against possible abuses.

49. Mr. ROSENNE suggested that article 37 should follow the language of article 42 of the Vienna Convention on Diplomatic Relations with the addition of the words: "without the assent of the receiving State".

50. Sir Humphrey WALDOCK said it would be a grave mistake to include in article 37 anything more than the statement of the general rule contained in article 42 of the Vienna Convention on Diplomatic Relations. The statement of that rule would not exclude the possibility of agreement between the two States concerned.

51. The CHAIRMAN suggested that article 37 should be referred to the Drafting Committee, with the record of the discussion.

*It was so agreed.*⁴

ARTICLE 38 (Obligation to respect the laws and regulations of the receiving State) [40 and 41]

Article 38 [40 and 41]

Obligation to respect the laws and regulations of the receiving State

1. Without prejudice to their privileges and immunities, it is the duty of all persons belonging to special missions and enjoying these privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of the receiving State.

2. The special missions of the sending State shall be requested to conduct all the official business entrusted to them by the sending State with the organ, delegation or representative of the receiving State which has been designated in the mutual agreement on the acceptance of the special mission or to which they have been referred by the Ministry of Foreign Affairs of the receiving State.

3. Special missions may not, as a general rule, communicate with organs of the receiving State other than those specified in the preceding paragraph, but it is the duty of the receiving State to designate the liaison organ or officer through whom the special mission may, if necessary, make contact with other organs of the receiving State.

4. The premises used by the special mission must not be used for purposes other than those which are necessary for the exercise of the functions and for the performance of the task of the special mission.

52. The CHAIRMAN, speaking as Special Rapporteur, said that if article 38 of his draft was compared with article 41 of the Vienna Convention on Diplomatic

Relations, it would be seen that the major difference occurred in paragraph 2; whereas permanent diplomatic missions had contact with the central authorities only, a kind of decentralization occurred in the case of special missions, which very often entered into relations not with the Ministry of Foreign Affairs but with another organ of the receiving State.

53. Paragraph 3 concerned communications between special missions and other organs of the receiving State. For the purpose of such contacts, which were peculiar to special missions, liaison officers were designated.

54. So far as the use of the premises was concerned he said he had been in two minds whether to reproduce the relevant clause in article 41 of the Vienna Convention on Diplomatic Relations or to propose some other general rule. If the premises belonged to the special mission, they could be used by no-one else; if they belonged to the permanent mission the rules in the two Vienna Conventions would apply.

55. Mr. ROSENNE said that, as article 38 dealt with two entirely separate matters, the obligation to respect the laws and regulations of the receiving State and the channels of communication with the authorities of that State, it should be divided into two articles, one consisting of paragraphs 1 and 4 and the other of paragraphs 2 and 3. Although that arrangement would mean a departure from the pattern of the Vienna Convention on Diplomatic Relations, it was both logical and consistent with the way in which the two matters were dealt with in the Vienna Convention on Consular Relations.

56. The CHAIRMAN, speaking as Special Rapporteur, said that he entirely agreed with Mr. Rosenne, but that he had followed the structure of the Vienna Convention on Diplomatic Relations. If the Commission wished to separate the provisions concerning the obligation to respect the laws and regulations of the receiving State from those concerning contacts with the authorities of that State in another, he would have no objection.

57. Mr. VERDROSS said that paragraphs 1 and 4 in fact corresponded to the relevant paragraphs of the Vienna Convention on Diplomatic Relations. Paragraphs 2 and 3 might be combined, since the latter expressed in a negative form what the former stated in a positive one.

58. He thought that it was wrong to speak of "the official business entrusted to them . . ." (paragraph 2), for the instructions received by a special mission from its own Government came under internal law and were of no concern to international law; international law was concerned only with what was agreed upon between the receiving State and the sending State.

59. The CHAIRMAN, speaking as Special Rapporteur, said that paragraphs 2 and 3 could certainly be merged.

60. With regard to the other question, he said that according to the commentary on article 2 the mission's task could be changed in the course of its existence. If the prior agreement related only to official business, then any act outside such official business, in the sense that the mission had exceeded its powers, could be treated as *ultra vires* and void. Accordingly, in order to avoid any contradiction, it would be better to delete the words "entrusted to them by the sending State".

⁴ For resumption of discussion, see 819th meeting, para. 117.

61. Mr. TUNKIN said he was not in favour of dividing article 38 into two articles and would prefer it to follow the structure of article 41 in the Vienna Convention on Diplomatic Relations, though he could support Mr. Verdross's proposal for amalgamating paragraphs 2 and 3. Paragraph 4 should be redrafted to follow more closely the language of article 41, paragraph 3, since in substance the obligation laid down was the same.

62. Mr. AGO said he endorsed Mr. Verdross's proposal for amalgamating paragraphs 2 and 3 and so simplifying and shortening the text.

63. He thought that paragraph 2 should begin with the words "All the official business of the special missions of the sending State shall be conducted . . .", for the phrase "shall be requested to conduct" was ambiguous, in that it might be taken to mean that special missions were encouraged to do their best but that, if they did not quite succeed, they would not be infringing any obligation.

64. The fundamental rule stated by the Special Rapporteur was correct. The mutual agreement would designate the liaison organ; but if the agreement did not mention the matter, who would decide? The article should say that the liaison organ would be the Ministry of Foreign Affairs or some other organ designated by the Ministry.

65. As to paragraph 4, he was inclined to think, like Mr. Tunkin, that the Commission could not lay down more stringent rules for the premises of the special mission than applied to the premises of embassies. The special mission might conduct activities on its premises—such as film showings—which were not, perhaps, "necessary" for but were not "incompatible" with the performance of its functions. It would be best, therefore, to reproduce the wording used in the Vienna Convention on Diplomatic Relations concerning the premises of permanent missions.

66. The CHAIRMAN, speaking as Special Rapporteur, agreed that the words "compatible with" would be better than the words "necessary for". He suggested that article 38, together with the comments made in debate, should be referred to the Drafting Committee.

*It was so agreed.*⁵

ARTICLE 39 (Non-discrimination)

Article 39

Non-discrimination

1. In the application of the provisions of the present articles, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) Where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its special mission in the sending State;

(b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present articles.

67. The CHAIRMAN, speaking as Special Rapporteur, explained that article 39 reproduced, with the necessary changes, article 47 of the Vienna Convention on Diplomatic Relations, and article 72 of the Vienna Convention on Consular Relations. The question was whether such a provision should appear in the draft articles. In his own opinion, the rule was recognized in international law and should be retained.

68. Mr. ROSENNE said that paragraph 2 was acceptable but he was unable to understand the meaning of paragraph 1. Did the obligation arise when there were several special missions engaged on the same task, or was the obligation on the receiving State to treat all special missions in its territory at any given moment on the same footing, whatever their task? The latter proposition seemed to go too far.

69. The CHAIRMAN, speaking as Special Rapporteur, said that in his article 17 he had proposed that facilities should be offered in accordance with the task and nature of the special mission; that should answer Mr. Rosenne's question. No kind of discrimination could be made between special missions of like nature having like tasks.

70. Mr. YASSEEN said that he found it hard to understand the purport of the article. Did it deal with non-discrimination as between special missions which came from different States at the same time? Or did it mean non-discrimination as between special missions coming to a State one after another? Everything depended on the circumstances and, especially in the case of political missions, on the relations between the receiving State and the sending State. The most that could be required was that a receiving State should guarantee a minimum standard of treatment.

71. In the case of special missions taking part in the same negotiation in the same country, obviously discrimination would not be admissible.

72. The CHAIRMAN, speaking as Special Rapporteur, explained that the rule to be laid down was that the provisions concerning special missions would not be applied in a discriminatory way and that the receiving State would be under an obligation to enter into contact with all special missions on the same footing. The rule was obviously an amalgam of legal rules and protocol courtesy.

73. Mr. AGO said that the Special Rapporteur had shown admirable scrupulousness in mentioning the problem in order to follow the Vienna Conventions. But perhaps such an article was hardly necessary in the draft on special missions.

74. So far as permanent missions were concerned, the rule of equality of treatment was a logical rule reflecting principles which had become customary. In the case of special missions, however, the treatment would depend to a great extent on the agreement between the two States about the sending of the mission. There should be no attempt to tie the hands of States. Special missions at very different levels were not necessarily always treated in the same way. In order to defend the principle of equality of treatment, the Special Rapporteur had felt constrained to say in paragraph 2 (a) that the restrictive application of any of the provisions of the articles by the receiving State, because it was also applied to its mission in the sending

⁵ For resumption of discussion, see 819th meeting, paras. 114-116.

State, was not discriminatory. But surely there was no reason to assume that the sending of the special mission to the receiving State was paralleled by the simultaneous sending of a special mission to the sending State. Special missions were very frequently sent in one direction only. The reciprocity would thus come into play between two special missions of a different level.

75. What the Commission had to do was to ensure that two or three special missions arriving in the receiving State with the same task should not receive different treatment; but that proposition was so self-evident that a provision to that effect would be out of place in a convention on special missions.

76. The CHAIRMAN, speaking as Special Rapporteur, explained that he had reproduced the article from the Vienna Conventions not automatically, but out of scruple. He could cite several cases in which special missions from different sending States had asked to visit factories; but not all had received permission to do so, because not all the sending States granted such permission to the receiving States.

77. In his opinion, it would be logical to include the article in the draft, but in view of the many possible counter-arguments he would not press for its retention, even though personally convinced that it stated a general rule of international law.

78. Mr. ELIAS said he thought it would be wiser to omit article 39; the matters it sought to cover should be regulated by other international agreements.

79. Mr. TUNKIN said he, too, was in favour of deleting the article, for the reasons already given by other speakers.

80. Mr. REUTER said he agreed with Mr. Tunkin. In any event, a thorough discussion of article 39 should be preceded by a discussion of article 40.

81. The CHAIRMAN suggested, in view of the wish of the majority of the Commission, that article 39 be deleted.

It was so agreed.

ARTICLE 40 (Relationship between the present articles and other international agreements)

Article 40

Relationship between the present articles and other international agreements

1. The provisions of the present articles shall not affect other international agreements in force as between States parties to those agreements.

2. Nothing in the present articles shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

82. The CHAIRMAN, speaking as Special Rapporteur, said that article 40 of his draft was based on article 73 of the Vienna Convention on Consular Relations, which had constituted an innovation.

83. Mr. REUTER said he doubted very much whether the article should form part of the draft on special missions. In connexion with many articles, the question had arisen whether the provisions being drafted were or

were not residual rules, and he had the impression that the Commission was inclined to think that they were. If the Commission should accept article 40, it would certainly have to re-examine all the articles and decide which should be redrafted in less categorical terms. States would be pleased with the draft convention, but would wish to adapt it to special situations and since, for that reason, they would like the draft to be elastic, article 40, if adopted, might seriously jeopardize the convention as a whole without any very great benefit.

84. It was understandable that, from the point of view of theory, there should be a certain liking for article 40, although he personally did not share the feeling of the majority, and doubted whether it stated a rule of *jus cogens*. Without wishing to begin a discussion on the substance, he did not consider that the rule contained in the article should be erected into a leading principle.

85. The CHAIRMAN, speaking as Special Rapporteur, said that the Netherlands delegation had put forward the same arguments at the Vienna Conference on Consular Relations and had asked the Conference to reconsider all the articles, on the ground that a question of principle was at stake, but the Conference had declined.

86. Mr. AGO said that, like Mr. Reuter, he doubted whether the article should appear in the draft. He could understand, without however being convinced that it was a sound provision, how such a provision had come to be included in the Convention on Consular Relations, the Conference having evidently wished to guarantee to consulates stable conditions, a sort of minimum ceiling which agreements could raise but not lower. In the case of the draft on special missions, however, the provision was surely unnecessary; after all, in many cases, a special mission might, by agreement between the two States, enjoy privileges and immunities less extensive than those provided for in the convention. It would be undesirable to lay down hard and fast rules in that respect, and because special missions were of a temporary nature, an article like article 40 should not be adopted.

87. Mr. TUNKIN said that paragraph 2 might be interpreted to mean that an agreement between States reached independently of the rules laid down in the draft would be regarded as void, which was tantamount to saying that those rules constituted *jus cogens*. States could not contract out of or derogate from rules of *jus cogens*, even by mutual agreement, and to transform the rules in the present draft into rules of *jus cogens* could only hamper the development of closer international relations and would run counter to present-day realities. The article, like article 73 of the Vienna Convention on Consular Relations, would be unworkable. Nothing could prevent States, by agreement, from supplementing or modifying the rules in the present draft.

88. The CHAIRMAN, speaking as Special Rapporteur, said that at the Vienna Conference on Consular Relations, the overwhelming majority had voted for the provision in question,⁶ on the ground that the rules of

⁶ The provision which subsequently became article 73 of the Vienna Convention on Consular Relations was adopted (as draft article 71) by the First Committee of the Conference by 54 votes to none, with 9 abstentions, and unanimously by the plenary Conference. See *United Nations Conference on Consular Relations, Official Records, Vol. I, p. 240 and p. 80.*

consular law were institutional and should constitute *jus cogens*. But either argument was tenable. The new States had argued that the consular rules should be institutional and should not be at the mercy of governments which wished to impose on others certain changes through reciprocal agreements. On the other hand, countries like Switzerland and the Netherlands had stated that the provision would make it impossible for them to ratify the Convention.

89. Mr. YASSEEN said that article 40 should be dropped, not because there was no *jus cogens* in the draft convention, but because the question should preferably be governed by the general principles of the law of treaties concerning conflicting treaty provisions. The Commission should not take sides in the draft convention, which was of a special kind and covered a field in which bilateral agreements were the rule.

90. Mr. PESSOU said that paragraph 2 of the article covered cases which actually occurred in practice. He had read in "*Le Monde*" a paragraph on a bilateral agreement concluded between the United Kingdom and the USSR concerning the Vienna Convention on Diplomatic Relations. He had sent the article to the Special Rapporteur (Mr. Bartoš), who had replied that it was normal practice for a bilateral agreement to be made for the purpose of confirming the rules established by the Vienna Conference. Should, therefore, article 40 be adopted?

91. Mr. ROSENNE said that he agreed with nearly everything that had been said in favour of dropping article 40. He had difficulty in understanding the corresponding provision in the Vienna Convention on Consular Relations, and it had no place in the present draft. In the light of the comments of governments, the Commission might consider including a clause to the effect that some of the provisions of the draft, particularly those from article 17 onwards, would apply in the absence of any agreement to the contrary between the States concerned.

92. Sir Humphrey WALDOCK said that article 40 should certainly not be retained in a draft concerned with a matter in which bilateral agreements played such a prominent part, even though some of its provisions were of fundamental importance such as the inviolability of members of a special mission and its archives. It would suffice to include a clause of the kind suggested by Mr. Rosenne.

93. The CHAIRMAN, speaking as Special Rapporteur, said that if the majority of the Commission so wished he would be prepared to redraft article 40 in terms stating that the provisions of the articles would apply except as otherwise agreed by the parties, even though he preferred the solution of article 73 of the Vienna Convention on Consular Relations.

94. The final provisions should, he suggested, be drafted by the Secretariat as was customary.

It was so agreed.

The meeting rose at 1 p.m.

810th MEETING

Thursday, 24 June 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(resumed from the 803rd meeting)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to resume its consideration of item 2 of the agenda and to take up the draft articles proposed by the Drafting Committee.
2. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the definitions contained in paragraphs (b) to (g) and the provision in paragraph 2 of article 1¹ be left aside until the Drafting Committee had considered them.
3. It might also be preferable for the Drafting Committee to examine at a later stage his proposal for the insertion among the general provisions in section I of an article safeguarding the rules of international organizations, taking into account the arguments he had put forward in the section entitled "Article 3 (*bis*)" in his fourth report (A/CN.4/177).²
4. At some time the Commission would need to decide whether or not to include an article on the conclusion of treaties by one State on behalf of another, or by an international organization on behalf of a Member State; the matter had been discussed at the sixteenth session³ and was examined in his fourth report immediately after article 4 (Authority to negotiate . . . a treaty).
5. Consideration of articles 8 and 9, which had given rise to much discussion⁴ and were difficult to formulate in a manner which might obtain the support of a substantial majority, should be deferred until the Drafting Committee had put forward fresh proposals and when more members of the Commission were present. He had not yet transmitted any texts to the Drafting Committee, because he had not yet succeeded in devising a compromise that would bridge the gulf between the two opposing schools of thought. As yet, he had not been able to do more than prepare alternative texts for the two articles.

¹ For earlier discussion of article 1, see 777th and 778th meetings.

² For earlier discussion of the Special Rapporteur's proposal, see 780th meeting, paras. 17-26.

³ *Yearbook of the International Law Commission, 1964*, Vol. I, 732nd and 733rd meetings.

⁴ See 791st meeting, paras. 61 *et seq.*, and 792nd-796th meetings.

6. It should not be necessary for the Commission to consider at the present session the proposal by the Luxembourg Government for the inclusion of a new article on entry into force of treaties within the territory of the parties. He had commented on that proposal in his fourth report (A/CN.4/177/Add.1) after the section dealing with article 23, and it should be taken up in conjunction with article 55, since it was closely linked with the *pacta sunt servanda* rule.

7. Mr. TUNKIN said he supported the Special Rapporteur's suggestions concerning article 3 (*bis*) and articles 8 and 9. Controversial issues, such as those involved in the latter two articles, should be left aside until more members of the Commission were present. At the moment the Commission was only at about half strength and so could not take any decisions on those articles.

8. Mr. ROSENNE said he agreed with the Special Rapporteur that the question of including an article on the conclusion of treaties by one State on behalf of another or by an international organization on behalf of a Member State should be deferred, since the decision would partly depend on the outcome of the discussions on article 4.

9. The CHAIRMAN said the Special Rapporteur's suggestions evidently commended themselves to members and should be followed.

It was so agreed.

NEW FIRST ARTICLE (The scope of the present articles)⁵

10. The CHAIRMAN invited the Commission to consider the text of a new first article proposed by the Drafting Committee, which read :

The present articles relate to treaties concluded between States.

*The new first article was adopted without comment.*⁶

ARTICLE 1 (Use of terms)⁵

11. The CHAIRMAN invited the Commission to consider the revised text of article 1, paragraph 1 (*a*) proposed by the Drafting Committee, which read :

"(a) 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

*Article 1, paragraph 1 (a) was adopted without comment.*⁷

ARTICLE 2 (Treaties and other international agreements not within the scope of the present articles)⁵

12. The CHAIRMAN invited the Commission to consider the revised text of article 2 proposed by the Drafting Committee, which read :

⁵ For earlier discussion, see 777th meeting, in particular paras. 71-73 and 78.

⁶ For formal vote on the new first article, see 811th meeting, para. 104.

⁷ For formal vote on article 1, paragraph 1 (*a*), see 811th meeting, para. 104. For resumption of discussion on article 1, see 820th meeting, paras. 15-26.

"The fact that the present articles do not relate

(a) To treaties concluded between subjects of international law other than States or between such subjects of international law and States, or

(b) To international agreements not in written form shall not affect the legal force of such treaties or agreements, nor the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles."

13. Mr. ROSENNE said that the Drafting Committee was to be congratulated on solving the difficult problems posed by the first three articles. Article 2 should, however, be transposed to follow the new first article.

14. With regard to the drafting of the article, he considered that sub-paragraph (*a*) should be modified so as to refer to States before the other subjects of international law, as that arrangement would be more consistent with the Commission's decision to limit the scope of the articles to treaties between States. The sub-paragraph would then read : "to treaties concluded between States and subjects of international law other than States or between such other subjects of international law".

15. Stylistically, it would be more correct in sub-paragraph (*b*) to substitute the word "does" for the word "shall" after the words "in written form". The comma should be deleted after the word "agreements" and the word "or" substituted for the word "nor", so as to avoid a double negative. Perhaps an alternative to the overworked word "subject" could be found, though he could not think of one himself.

16. The CHAIRMAN said that Mr. Rosenne had raised two different questions; one related to the arrangement of the three articles, the other to the wording of article 2. So far as the first question was concerned, he (the Chairman) considered that article 2 should follow immediately the new article 1, to which it was the logical sequel. However, that was a matter to be settled by the Drafting Committee.

17. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Rosenne's suggestion for changing the place of article 2, said that the order of the first three articles had been discussed at great length in the Drafting Committee, which had finally concluded that the proposed order, though not entirely satisfactory, was the best possible as well as the most logical. To include article 2 as part of the new article 1 would be inelegant and logically unacceptable. It was an independent article dealing with two separate matters, the second of which was international agreements not in written form; and since such agreements would be mentioned for the first time in article 1, the definitions article—which would be article 2—Mr. Rosenne's suggestion would mean formulating the safeguarding reservation concerning oral agreements before they had been excluded from the scope of the draft articles.

18. Mr. ROSENNE said that one of the reasons which had prompted his suggestion was that the first three articles were closely inter-connected but if, as he feared, article 1 was to contain a long list of definitions, the present continuity would be broken. However, the point

could be left over for consideration when the Commission came to decide the final order of the articles.

19. Sir Humphrey WALDOCK, Special Rapporteur, said he acknowledged that article 2 was connected with the new first article, but still believed that Mr. Rosenne's preoccupation was exaggerated. The title of the article clearly indicated its subject matter.

20. Mr. RUDA said he agreed with Mr. Rosenne that the new first article and article 2 both dealt with the same subject and were similar in scope and so should perhaps be amalgamated.

21. Mr. ELIAS said that any question of the order of articles should be held over until the 1966 summer session.

22. Mr. TUNKIN said he agreed that the Drafting Committee would have to review the general structure of the whole draft later, but in the meantime suggestions about the order of the articles could usefully be made and would be taken into account.

23. The CHAIRMAN said that it was for the Drafting Committee to settle the final presentation of the three articles.

24. Sir Humphrey WALDOCK, Special Rapporteur, said that he had always assumed that the Commission would be free to change the order of the articles until the very last moment.

25. Mr. ELIAS said he was opposed to Mr. Rosenne's first drafting suggestion concerning sub-paragraph (b). The others were acceptable.

26. Sir Humphrey WALDOCK, Special Rapporteur, said he doubted whether Mr. Rosenne's drafting suggestion for sub-paragraph (a) was an improvement.

27. Mr. ROSENNE asked that his drafting suggestions should be referred to the Drafting Committee.

It was so agreed.

Article 2 was referred back to the Drafting Committee.⁸

ARTICLE 3 (Capacity of States to conclude treaties)⁹

28. The CHAIRMAN invited the Commission to consider the new text of article 3 proposed by the Drafting Committee, which read :

" 1. Capacity to conclude treaties is possessed by every State.

2. The capacity of member States of a federal union to conclude treaties depends on the federal constitution. "

29. Mr. VERDROSS said he had two remarks to make on paragraph 2 of article 3. First, a distinction was normally drawn between a federal State and a federation of States, whereas the text referred to a federal union; did that term denote both a federal State and a federation of States? More than a terminological question, a question of substance was involved. Secondly, the capacity of a member State to conclude treaties did

not depend on the federal constitution, but on international law, under which the capacity to conclude treaties was dependent on the effective power to do so.

30. Mr. JIMÉNEZ de ARÉCHAGA said that the rule stated in paragraph 2 of article 3 was dangerous from a political point of view and unsound from a scientific point of view; it meant a complete abdication by international law of one of its main functions, that of determining its own subjects and of recognizing the *ius tractatum* of States.

31. The question whether a member State of a federal union possessed, or did not possess, the capacity to enter into treaties did not depend exclusively on the provisions of the constitution of the federal union; such institutions of international law as recognition had an important influence in the matter.

32. He had already pointed out, during the discussion of article 8,¹⁰ the grave consequences that would result from the combination of the provisions of article 3, paragraph 2, with those of article 8, on accession to general multilateral treaties. A federal State could by amending its constitutional law so as to grant to all its member States the right to enter into treaties, enable those member States to become parties to a treaty; the federal State would thus, without altering its substantial obligations, gain a very large number of votes in the treaty system, thereby acquiring a preponderant voice in the operation of that system. For example, a federal State which was a member of a Customs union could gain control over the operation of the union by amending its constitution so as to allow its member States to become separate members of the union.

33. Mr. TUNKIN said that paragraph 1 stated a general rule. There was no need to define the word " State ", which indeed had never been defined in any international instrument. States themselves had to decide whether or not a particular entity was a State, since no international organ existed that could adjudicate in the matter. On that premise, paragraph 2 could safely be retained, though he agreed with Mr. Verdross that it would be preferable, in the interests of precision and in order to avoid complications, to use the term " federal State " rather than " federal union ".

34. Paragraph 2 was a logical consequence of paragraph 1, because a member State of a federal State—and whether or not it was a State would depend on the written federal constitution—under international law possessed the right to enter into treaties.

35. Mr. ROSENNE said that he had no difficulty in accepting the idea underlying paragraph 1, but it stated the obvious. As Mr. Scelle used to say, although the whole of international law was concerned with States, no one had ever succeeded in defining the concept of " State ".

36. On a drafting point, he suggested that the English version of paragraph 1 should be redrafted on the lines of the French; the words " Every State ", not " capacity ", should be the subject of the sentence.

⁸ For resumption of discussion, see 816th meeting, para. 2.

⁹ For earlier discussion, see 779th meeting, paras. 1-88, and 780th meeting, paras. 1-16.

¹⁰ 794th meeting, para. 17.

37. On paragraph 2, his views accorded closely with those of Mr. Jiménez de Aréchaga. The failure to resolve the legal issue as to whether or not a unit of a federal State contracted in its own name or in the name of the federal State as a whole, made him seriously doubt whether paragraph 2 was either accurate or useful.

38. Mr. TSURUOKA said that, although not convinced of the usefulness of article 3, he would not oppose the retention of paragraph 1, whatever the wording. On the other hand, he thought that paragraph 2 should be omitted altogether, for, as Mr. Tunkin had shown, it added very little and might even be misleading.

39. Mr. AMADO said that what was in issue was not the capacity of States members of a federal union, but that of States regarded as such for the purposes of international law. Paragraph 2 should therefore be deleted.

40. The CHAIRMAN, speaking as a member of the Commission, said that in his opinion paragraph 2 should stand, but, as Mr. Tunkin had suggested, should follow rather the 1962 text, for two reasons. First, the participation of the members of a federal union in international life was a fact, and secondly, a provision stipulating that the capacity depended on the federal constitution would lay down the criterion for determining that capacity.

41. Mr. PAL said he was in favour of deleting paragraph 2 because if, after federation, member States retained their status as States their capacity to conclude treaties was covered by paragraph 1. But if a political union resulted in the formation of another State, with the consequence of depriving the member States of the status of "State", then their case would be outside the scope of the present set of articles altogether, for those articles related only to treaties between States. Unless, therefore, paragraph 2 was introduced to serve the ulterior purpose of defining the treaty-making capacity of such member States, whether still States or not, the paragraph was not at all pertinent. The present convention nowhere purported to indicate the requirements of statehood. It would therefore be still more surprising if suddenly the status of such member States was thus taken up.

42. Mr. REUTER said he shared Mr. Jiménez de Aréchaga's and Mr. Pal's opinion concerning paragraph 2. So delicate a question could hardly be settled by constitutional law; besides, why should the federal State receive such prominence? The expression "federal union" seemed better. In his view, the right course was simply to delete paragraph 2.

43. Mr. YASSEEN said that, while paragraph 2 was liable to raise many difficulties, those difficulties should not be evaded. The federal phenomenon was a fact and could play an important part. The draft should therefore contain a paragraph providing for the case of States members of a federation. Moreover, to speak of the "federal State" would mean in effect limiting the scope of the text, for in that event only one aspect of the federal phenomenon would be covered. Federation did not always take the form of a federal State; it could also take other forms. Consequently, the expression "federal union", although not entirely satisfactory,

was none the less better, because more general, than the expression "federal State".

44. Mr. PESSOU said that the modern trend was towards association, as was illustrated by the example of the African countries. His own country had at one time been a member of the French-African Community, whose President, General de Gaulle, had then been responsible for settling certain questions of common interest. The deletion of paragraph 2 would not do away with reality; on the contrary, the Commission should endeavour to devise a formula corresponding to reality. On that point, he shared Mr. Yasseen's opinion.

45. Mr. JIMÉNEZ de ARÉCHAGA said that the suggestion to return to the 1962 text would not solve the problem, since that formulation was open to the same criticism as the text newly proposed. It was not accurate to say that the capacity of a member State of a Federal Union to enter into treaties depended only on the federal constitution; the community of States, and the other individual States, had to accept the entity as a member of the international community. That point was particularly important in modern times, when relations between States were conducted not just on a bilateral basis but also on a multilateral basis. It would be extremely dangerous to say that it was a matter to be determined exclusively by the federal constitution whether a member State of the federal union could become a party to an international treaty; to be able to do so, it had to be recognized as an independent State, capable of maintaining relations with other States and of fulfilling its international obligations.

46. Reference had been made to the case of States which joined a union inaccurately termed "federal" but nevertheless retained their separate treaty-making capacity to the full extent. That case was not relevant to the discussion because a State which retained its full treaty-making capacity would be covered by the provisions of paragraph 1, not by those of paragraph 2.

47. Nor did he believe that any strong argument could be derived from the very limited treaty-making capacity of Swiss cantons and German *Länder* in local matters. Those examples were of minor importance and had an historical explanation. Moreover, it would be a misreading of the Swiss practice to say that the cantons had an independent treaty-making capacity; there was every indication that the consent of the federal authorities was required for treaties made by cantons.

48. Mr. VERDROSS said that if a member State of a federal union was a State within the meaning of international law, its treaty-making capacity was governed by paragraph 1, and paragraph 2 was therefore redundant.

49. If paragraph 2 meant anything, the expression "member States" could only be taken to have the meaning it had in internal law, not the meaning it had in international law. That being so, the paragraph spoke of the decentralization of the treaty-making capacity. It was only in that respect that the treaty-making capacity of member States depended on the federal constitution, but in such a case the subject really concluding treaties was the federal State acting through a decentralized organ. He could not accept paragraph 2

unless it was interpreted in the sense which he had just indicated.

50. Mr. RUDA said that the treaty-making capacity of a member State of a federal union depended on whether it fulfilled the requirements for being regarded as a State under international law. It was for international law to determine whether the entity constituted a State or not and, if it did, what was its treaty-making capacity. That capacity would not depend on the terms of the federal constitution; it was determined by international law, which took the constitution into account. He considered that paragraph 2 should be deleted.

51. Mr. AGO said he did not consider that the distinction between "a State under international law" and some other category of States was capable of solving the problem. The international personality of a subject was evidenced in the first place by the fact that it possessed treaty-making capacity, and consequently the question of capacity could not be settled by reference to international personality.

52. Federation was a historical phenomenon, instances of which occurred in modern times and would continue to do so; it was not therefore sufficient to look at existing cases for the purpose of laying down a rule.

53. In some cases federations were the result of a desire for association. Several States, each of which was a subject of international law and possessed full capacity to conclude treaties, might decide to form an association; they gave the federal State an international personality and a capacity to conclude treaties distinct from that which they had previously possessed. In extreme cases, the member States lost their treaty-making capacity entirely and consequently ceased to exist as subjects of international law. Cases arose, however, where member States retained part of their treaty-making capacity. For example, in the German Empire, which had been largely a centralized State, Bavaria had to some extent retained its own treaty-making capacity; in exercising that capacity it had in no way acted as an organ of the German Empire. In other cases, federations were the result of a tendency towards dissociation or decentralization. When decentralization transcended purely internal matters and affected foreign policy, the States members of the federation possessed a limited capacity to conclude treaties.

54. In either case, it was obviously necessary to refer to the federal constitution in order to ascertain how the treaty-making capacity was apportioned. He could understand the concern expressed by Mr. Jiménez de Aréchaga and Mr. Ruda: they were thinking of cases where, in consequence of a change of constitution, a member State of a federation had the right to participate in an international conference and to become a party to a treaty. It was precisely for that reason that he had always thought it necessary to draw a clear distinction between the capacity to conclude a treaty and the so-called right, which every State should possess, to participate in a multilateral treaty; capacity was a matter affecting only the State concerned, whereas participation in a treaty was one affecting all the parties.

55. He did not think there was the slightest risk in including in article 3 a paragraph on the question of

federal unions. There was no great difference of substance between paragraph 2 as adopted in 1962, and paragraph 2 of the new text submitted by the Drafting Committee. Since, however, a member State's treaty-making capacity was nearly always limited, it would be advisable to use some such language as "The capacity of member States of a Federal union to conclude treaties and the limits of that capacity depend on the federal constitution".

56. If the Commission was reluctant to adopt such a rule and decided to delete paragraph 2, he would then prefer to see the whole article dropped, because paragraph 1 by itself was ambiguous and would in certain circumstances be inaccurate.

57. Mr. TUNKIN said that the problem was a real one, in view of the existence of federal unions with member States having the capacity to conclude treaties. Paragraph 1 by itself would not therefore be sufficient, since it would not cover a certain field of treaty-making. The development of various types of unions of States, on the basis of the self-determination of peoples, was a modern phenomenon. The formation of such a union usually involved some limitation on the freedom of action of its members but did not deprive them of their essential characteristics as States; hence the practical importance of the problem under discussion. A State which entered into negotiations with a member State of a federal union would wish to know what was the capacity of that member State and what limitations were imposed upon it under constitutional law.

58. He could accept the introduction of the additional words proposed by Mr. Ago, which would bring into the provision a special reference to the limits set by constitutional law on the treaty-making capacity of the members States of a union.

59. Mr. AMADO said that the State referred to in paragraph 1 was the State which was the subject of international law. A State's treaty-making capacity was determined by its status as a subject of international law. It was self-evident that the States members of a federation possessed or acquired that capacity if they were, or became, subjects of international law. Paragraph 2 was therefore only an extension of paragraph 1.

60. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. Ago's proposal would not solve the problem. Paragraph 2 would still have the effect, when taken in conjunction with the provisions of article 8, of making an important change in international law by enabling a member State of a federal union to become a full member of the international community: independence would no longer be a requirement for participation in general multilateral treaties and in the conferences which adopted such treaties.

61. It had been pointed out by Mr. Ago that a State was always free not to enter into treaty relations with an entity which it did not wish to recognize as a full member of the international community; but that remedy would only apply to bilateral treaties, whereas the problem under discussion was connected with that of participation in multilateral treaties.

62. Mr. TSURUOKA said he still thought that article 3 should be deleted altogether, though he would

not oppose paragraph 1 if the Commission wished to retain it. If it was retained, paragraph 2 might be drafted to read: "In cases where the capacity of a member State of a federal union to conclude treaties is recognized by international law, the scope of this capacity shall be defined by the federal constitution".

63. Mr. AGO asked Mr. Amado how he would determine whether a member State of a federal union was or was not a subject of international law. In his (Mr. Ago's) opinion, the only way was to inquire whether the State had the treaty-making capacity, and that question had to be answered by reference to the federal constitution.

64. There was nothing new about the rule proposed in paragraph 2. If, for example, Brazil adopted another constitution recognizing each member State's treaty-making capacity, then clearly each of the member States would have that capacity. The rule providing for *renvoi* to internal law in such matters already existed in international law.

65. He could support Mr. Tsuruoka's suggested redraft, but like him thought that it would be better to delete the whole article.

66. Mr. JIMÉNEZ de ARÉCHAGA said that, if the Constitution of Brazil were so amended as to enable the member States to conclude treaties, the other States of the international community would not be obliged to respect the literal terms of the new Brazilian Constitution; they would have the power and the duty to determine whether, under international law, the letter of the Constitution corresponded to reality and would consider whether the member State were truly independent States.

67. Mr. AMADO said that it was utopian to claim that, because a federal constitution recognized the treaty-making capacity of member States, those member States were States within the meaning of international law.

68. The CHAIRMAN, speaking as a member of the Commission, said that the question was in no way utopian, nor was it new. It concerned a matter of actual fact. The treaty-making capacity of member States of a federation had been recognized; that had happened in the case of Bavaria under the German Constitution established at Versailles in 1871, in order to enable Bavaria to make a Concordat with the Vatican. At the moment, the Province of Quebec, relying on its own interpretation of the Canadian Constitution, was proposing to conclude a cultural agreement with France. Such a claim by a member State was sometimes disputed by the central government. If, despite the fact that the claim was disputed, the treaty-making capacity of the State member of a federation was recognized by another contracting State, the latter might be accused of interference in the internal affairs of a State.

69. Mr. AMADO said that the best way to reconcile the different views which had been expressed would be to delete the whole article, for the Commission would gain little credit by simply stating the obvious.

70. Mr. PESSOU urged the Commission to take account of current trends, particularly in Africa, and to lay down a flexible rule concerning the treaty-making capacity of member States of a federal union. For that reason, he supported the formula proposed by Mr. Ago.

71. Mr. ROSENNE said that the question under discussion would become more than an academic issue, if, for example, a doubtful treaty was presented to the Secretary-General for registration. So far as he was aware, no such request had been made or was ever likely to be made with respect to the so-called cultural "agreement" between the Canadian Province of Quebec and France, which neither party regarded as an international treaty. In fact, the Secretary-General's practice as registrar of treaties, following on the previous practice of the Secretary-General of the League of Nations, had shown a commendable capacity for adaptation to changing situations.

72. In the light of the discussion, he had arrived at the conclusion that paragraph 1 possibly said a little more than the merely obvious; as pointed out by Mr. Pal, it would serve to cover some aspects of the problem of the federal State, and he would accordingly favour its retention.

73. As far as paragraph 2 was concerned, he had been impressed by Mr. Ago's remark that the real problem to be solved concerned not so much capacity itself as the extent of such capacity. The problem of drafting such a provision was a difficult one, and he therefore proposed that the whole of article 3 should be referred to the Drafting Committee for reconsideration in the light of the discussion.

74. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that, in his fourth report, he had suggested the deletion of article 3.¹¹ The question of capacity was much more complex than the provisions of that article might suggest. He considered therefore that the problem should be either dealt with thoroughly or not at all. However, he was prepared to accept the important, if self-evident, provision embodied in paragraph 1.

75. With regard to paragraph 2, he said there was some uncertainty as to who was the party to the treaty in the case of a treaty concluded by a member State of a federal union. He suspected that in Switzerland there might be more than one view on that point, according to whether the jurist concerned took a federalist approach or an approach favourable to "States' rights". There was undoubtedly a danger that paragraph 2 might be interpreted as an acknowledgement by the Commission that, under international law, member States of a federal union had in principle the capacity to conclude treaties. Paragraph 2 would not give rise to much objection if, as suggested by Mr. Ago, it was amended to emphasize the limits of the treaty-making capacity of the member State of a federal union which was a State within the meaning of paragraph 1.

76. Reference had been made to the danger of a federal State encouraging its component elements to exercise their capacity to enter into general multilateral treaties, thereby multiplying the number of parties and the number of votes. He believed that any attempt of that kind would inevitably meet with opposition.

77. If the Commission decided to retain paragraph 2, it would be desirable to keep to the expression "federal

¹¹ A/CN.4/177, para. 3 of the Special Rapporteur's observations *ad* article 3.

union". There would also be a great advantage in introducing, as suggested by Mr. Ago, a reference to the limits of capacity; such a reference would help to make it clear that the Commission was not working on the assumption that the capacity of the entities in question to conclude treaties existed in all cases.

78. Mr. AGO said he agreed with the Special Rapporteur that the text proposed might create the impression that the Commission was inclined to recognize the existence of the treaty-making capacity in the case of member States of a federal union. To avoid that impression paragraph 2 might perhaps be drafted to read: "The existence of the capacity of member States of a federal union to conclude treaties and the limits of this capacity depend on the federal constitution". But he suggested that the matter should receive further thought in order that the most satisfactory formula could be worked out.

The meeting rose at 1 p.m.

811th MEETING

Friday, 25 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen

Composition of the Drafting Committee

1. The CHAIRMAN suggested that, in order to relieve Sir Humphrey Waldoock, whose time would be entirely absorbed during the rest of the session by work on the topic of the law of treaties, Mr. Rosenne should be appointed to serve on the Drafting Committee to assist in preparing the draft on special missions. If there was no objection, he would consider that the Commission agreed to that suggestion.

It was so agreed.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(resumed from the previous meeting)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 3 (Capacity of States to conclude treaties)
*(continued)*¹

2. The CHAIRMAN invited the Commission to continue its consideration of article 3 as proposed by the Drafting Committee.

3. Mr. PAL said that the article should be confined to paragraph 1; paragraph 2 should be deleted. The draft articles dealt with treaties between States, and article 3 dealt with the treaty-making capacity of States as such; the Commission had nowhere attempted to define "State" or to lay down, in general terms, the requisites for an entity to be regarded as a State.

4. If a number of States entered into a federation but still retained their statehood, paragraph 1 would apply. If, on the other hand, the federated entities did not amount to States, they would be beyond the scope of the draft convention, unless paragraph 2 was intended to provide that, notwithstanding federation, the federated entities would retain statehood if the federal constitution so allowed. He was opposed to paragraph 2, because the Commission was not dealing with the question of what constituted a State. The provisions of paragraph 1 dealt with all the matters with which the Commission was concerned in that context.

5. Mr. VERDROSS proposed as a compromise that paragraph 2 should be deleted and the following sentence added to paragraph 1: "This capacity may be limited by an international convention or by the constitution of a federal State". That formula took into account the problem of federalism to which several speakers, notably Mr. Yasseen, had referred. It made it clear, furthermore, that international capacity flowed not from domestic law as such but only from international law. Moreover, it indicated that the capacity recognized by international law might also be limited by international law, either by an international convention or by the fact that a State became part of a federal State, a case likewise governed by international law.

6. It was a formula which applied just as much to historic federalism—the Swiss cantons, or Bavaria from the establishment of the Empire until the fall of the German monarchy—as to modern federalism—the League of Arab States or the European Economic Community, where the capacity to conclude commercial treaties would one day be vested not in the member States but in the Community. It also covered the case of member States of a federation whose international capacity had been recognized by the Covenant of the League of Nations or by the Charter of the United Nations.

7. On the other hand, it excluded member States of a federation whose capacity was based solely on internal law, and which were in fact organs of the federal State, in cases where the treaty-making capacity had simply been decentralized, a situation with which the Commission should not concern itself.

8. If the Commission adopted that formula, it might indicate in the commentary that the problem dealt with in paragraph 2 of the Drafting Committee's text was a problem of internal law, and that any State could decentralise the treaty-making capacity, but that in that case the subject which concluded the treaties was the federal State, for a new subject of international law could not be brought into existence by means of internal law.

9. Sir Humphrey WALDOCK, Special Rapporteur, said he feared that Mr. Verdross's proposed text would

¹ For text see 810th meeting, para. 28.

give rise to considerable difficulties. The reference to the possible limitation of a State's treaty-making capacity by the clauses of an international convention raised the complex issue of the compatibility of treaties. There might be cases, such as a treaty setting up an economic union, where the matter would go beyond compatibility of treaties because the States entering into the union surrendered some of their powers to a central authority. The Commission had already discussed at length the problem of possible limitations on treaty-making capacity arising from the terms of a treaty,² and had taken the view that cases of that kind did not give rise to international incapacity but only to international responsibility.

10. Nor was he altogether satisfied with the second part of Mr. Verdross's text, which referred to limitations arising from the constitution of a federal State. He saw no reason to confine such a provision to the constitutions of federal States; there might be constitutions other than federal constitutions which purported to limit the treaty-making capacity. Another difficulty was that the text suggested a presumption that a component State of a federation had an international capacity to conclude treaties.

11. Although he had no great enthusiasm for the Drafting Committee's proposed text for paragraph 2, he would be prepared to accept it with the addition proposed by Mr. Ago at the previous meeting.³

12. Mr. TUNKIN suggested that, after the exhaustive discussion which had taken place, the Drafting Committee should be asked to reconsider article 3, together with the various proposals which had been put forward.

13. Mr. JIMÉNEZ de ARÉCHAGA pointed out that there had been a strong current of opinion in the Commission in favour of the deletion of paragraph 2; if article 3 was simply referred back to the Drafting Committee, the implication would be that paragraph 2 was to be retained in some form or another. The Commission should first therefore take a decision on the proposal to delete paragraph 2; if that proposal was rejected, the various texts proposed for paragraph 2 could then be referred to the Drafting Committee.

14. Mr. PESSOU said he noted with regret that all the efforts which had been made to reach a compromise had not proved acceptable to all the members of the Commission. Some who had originally supported the article seemed to have changed their position. Even if the article was deleted, the problem would remain, and States would settle it; in fact they were already settling it without waiting for the Commission. If the matter came to a vote, he would vote for the deletion of the article.

15. Mr. CASTRÉN said he thought that the Commission could safely adopt the first part of the additional sentence proposed by Mr. Verdross, consisting of the phrase: "The capacity may be limited by an international convention". The objections to the second part of the sentence might be met by replacing it by the words

"or by the constituent act of a union of States". That wording would have the advantage of covering cases other than federation.

16. Mr. BRIGGS said that, like the Special Rapporteur, he thought that the text proposed by Mr. Verdross would raise more problems than it solved. Since the capacity of a State to conclude treaties was derived from international law, it was questionable whether a State could contract out of capacity and still remain a State. All that could be done by treaty would perhaps be to impose some limitation on the exercise of the capacity to conclude treaties.

17. With regard to the constituent members of a federal State, he could not agree that the capacity to conclude treaties derived from the federal constitution; if such capacity were possessed by any such entity it would be derived from international law. He accordingly supported the proposal that paragraph 2, as it stood, should be deleted for it was inaccurate, inadequate and unnecessary. Article 3, should be retained, but should consist only of the provisions of paragraph 1.

18. Mr. TUNKIN said that, in view of the proposal to delete paragraph 2, he was compelled to add to his previous comments on the article.

19. As far as paragraph 1 was concerned, the Commission deserved credit for its statement of what amounted to a new principle of international law which had not existed 50 years earlier. An examination of textbooks written some 50 years previously might show that at that time there had been no support for the proposition that all States had the capacity to conclude treaties. That proposition, which was in keeping with the principle of the equality of States, constituted a new development of international law and a denial of all forms of protectorate or of colonial dependency. Paragraph 1 therefore represented a valuable contribution by the Commission to the codification of international law.

20. With regard to paragraph 2, he appreciated the intention behind Mr. Verdross's proposal but, like the Special Rapporteur, he could not accept it. It raised a number of theoretical issues which were best avoided. The first was whether an international treaty limited the capacity of a State to enter into a treaty or only the exercise of such capacity. The question also arose whether capacity was derived from international law or whether international law derived from the sovereignty of States. All those were controversial theoretical issues, and the Commission should not become involved in them.

21. The dangers which Mr. Jiménez de Aréchaga feared were purely imaginary; they had no existence in real international life. The fact that certain member States of federal unions entered into treaties constituted a real phenomenon, which involved problems that would be present, regardless of whether the Commission dealt with them or not. It would therefore be a dereliction on the part of the Commission not to deal with an important situation in international law which arose from the fact that States were free to enter into any kind of union.

² See *inter alia* 639th and 640th meetings in *Yearbook of the International Law Commission, 1962, Vol. I.*

³ 810th meeting, para. 78.

22. Of course, there were States which were styled "federal" but were really unitary States; the so-called "member States" were really provinces. But there were also genuine federations, the member States of which constituted real States and had capacity to enter into treaties. It was important to state the rule that such capacity depended on the provisions of the federal constitution; the statement of that rule was important both to the federal State and to the member States, but it was equally important that other States wishing to enter into treaty relationships with a member State of the federal union should be aware of the situation. Where the federal constitution did not permit a member State to conclude treaties, the treaty would not be valid; that point should be brought out.

23. He could accept the addition proposed by Mr. Ago;⁴ it would make it clear that the federal constitution covered not only the question of the existence of capacity, but also that of the limits of that capacity.

24. Mr. LACHS said that paragraph 1 stated a very important principle; it might be declaratory of the existing law, but, since it reflected a rule of modern international law which departed from the conceptions prevalent some decades previously, it was desirable to state the rule.

25. As far as paragraph 2 was concerned, he said it would be extremely helpful if the Drafting Committee would make another effort to formulate a text in the light of the various suggestions put forward during the discussion.

26. Mr. ROSENNE appealed to Mr. Jiménez de Aréchaga to withdraw his opposition to the referral of article 3 to the Drafting Committee. It would be extremely difficult for the Commission to vote on the retention or deletion of paragraph 2 until it had before it a final text prepared by the Drafting Committee.

27. Mr. YASSEEN said that paragraph 1 reflected recent developments in international law and the progress achieved. No member of the Commission seemed to oppose it.

28. Even if paragraph 2 was deleted, the problem it dealt with would not cease to exist. There were member States of a federal union which concluded treaties. The Commission should inquire into the origins of the phenomenon and work out a rule concerning it. The Commission's draft would be incomplete, and its technical value would be much diminished, if it contained no reference to the treaty-making capacity of member States of a federal union.

29. The rule proposed was a very wise one; it made the capacity dependent on the federal constitution. It had been objected that international capacity could not flow from internal law. But surely the real source of the capacity was not in internal but in international law, in the proposed rule itself, which in turn made the capacity to conclude treaties dependent on the federal constitution. It was an instance—but not the only one — of *renvoi* to internal law.

30. He regretted that he could not accept Mr. Verdross's proposal, because it raised afresh a problem which the

Commission had settled in taking the view that a State could not be deprived by an international convention of the capacity to conclude treaties.

31. Mr. AGO said he considered, like Mr. Rosenne, that it would be a mistake to settle the question by a vote before the Drafting Committee had made a fresh effort to find a formula which satisfied at least the majority.

32. The principal difficulty appeared to be the question of the source of the treaty-making capacity in the case of member States of a federation, even if one accepted Mr. Yasseen's view that the source of that capacity was to be found in international law which relied, for that purpose, on internal law. In lieu of the provision that the capacity to conclude treaties "depends on the federal constitution" he proposed that paragraph 2 be redrafted to read: "States members of a federal union may have a capacity to conclude treaties within the limits indicated by the federal constitution". Such a provision would make it clear that capacity to conclude treaties depended on the proposed rule of international law and the federal constitution merely indicated the limits of that capacity.

33. Mr. VERDROSS said he could accept Mr. Ago's proposal, which was very close to his own and to Mr. Castren's proposal.

34. Mr. JIMÉNEZ de ARÉCHAGA said that, although it had been said that his fears were imaginary, it had been recognized by several members that the difficulties to which he had referred at the previous meeting could arise.

35. Paragraph 2 embodied a very novel thesis. It had always been recognized that international law determined who were its subjects. It was now being suggested that a federal State, merely by adopting some constitutional provision, was free to impose on the international community an unlimited number of subjects. There were indeed some real federations of States, but there were also some paper federations, and international law could not accept at their face value the terms of a federal constitution.

36. It had been suggested that there was a *renvoi* by international law to constitutional law, in so far as the treaty-making capacity of the component States of a federal union was concerned. There might well be such a *renvoi*, but it was not and could not be absolute. International law could not abdicate its authority in the matter and would always retain some control over such situations; international law would retain the function of determining whether the member State really enjoyed independence and whether the federation did not constitute a purely paper federation.

37. The introduction of a reference to the limits which might be set by the federal constitution to the treaty-making capacity would make the situation worse, by stressing even more the power of the constitution to create new subjects of international law.

38. In response to Mr. Rosenne's appeal, he would withdraw his objection to the idea that the article should be referred to the Drafting Committee, but only

⁴ *Ibid.*, *loc. cit.*

on the understanding that the position of members on the proposals to delete paragraph 2 was in no way prejudiced thereby.

39. Mr. ELIAS considered that article 3 should be referred back to the Drafting Committee; when the article had been redrafted, the Commission should quickly take a vote on the redrafted text.

40. Mr. REUTER said that the Commission was hardly likely to reach agreement if it continued to discuss not reality but terms which everyone interpreted in a different way. As the text stood, article 3 contained an anti-colonialist paragraph and a pro-federalist paragraph. He did not object to the article being worded in that way, but it would still be necessary to explain what was meant by colonialism and by federalism, by making it clear at least that federalism was characterized by reciprocity. If there was no such explanatory passage, he would vote against the article.

41. Mr. TSURUOKA said that he approved the proposal to refer the article back to the Drafting Committee, and hoped the Committee would find a formula for deciding by what criterion international law recognized the treaty-making capacity of some political entities and denied that of others. In his opinion that was the crux of the problem. If it was impossible to find such a formula, the Commission might agree to formulate simply a descriptive rule indicating that some member States of a federation had the capacity to conclude treaties. Without being adamant on the point, he would prefer that there should be no reference to the federal constitution; very few of the draft articles mentioned internal law.

42. The CHAIRMAN, speaking as a member of the Commission, said he thought that the article should be referred back to the Drafting Committee, with full freedom to consider all the suggestions and observations which had been made.

43. He could accept Mr. Ago's proposal; the wording was moderate and might satisfy everyone. He could not, however, accept Mr. Verdross's proposal, for the possibility of limiting the attributes of the sovereignty of States by agreement had been ruled out by the General Assembly.

44. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that he naturally accepted the proposition embodied in paragraph 1, although the paragraph did not say very much. The real question was what constituted a State for the purposes of the rule that all States had the capacity to enter into treaties. In 1962, the Commission had declared in paragraph (2) of its commentary to article 3: "The term 'State' is used here with the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Relations; i.e. it means a State for the purposes of international law". Subject to that explanation, paragraph 1 was acceptable to him; it would express the thought that all States had the capacity to make treaties and, presumably, that a State could not lose that capacity by a subsequent agreement.

45. The provisions of paragraph 2 involved some very serious dangers. There were federal States in which the problem of the possible treaty-making capacity of component units had given rise to controversy. Any pronouncement by the Commission on that question could involve the risk of such a component unit invoking a right under article 3, with risks to the continuance of the federation. Both with respect to that question and to the one mentioned by Mr. Jiménez de Aréchaga, he thought that the Commission was faced with deep-seated political problems which were bound to arise, regardless of any decision the Commission might take on paragraph 2.

46. He was not in favour of retaining paragraph 2 as it stood, mainly because it did not deal with most of the really interesting questions which arose with regard to treaties concluded by member States of a federal union. One of those questions was whether the member State acted as an organ of the federal State and with its authority, or whether it exercised an independent treaty-making capacity under international law.

47. He was, however, prepared to agree that the paragraph should be re-examined by the Drafting Committee, together with Mr. Ago's proposal, which would serve to stress that not only the limits but also the actual existence of treaty-making capacity depended on the provisions of the federal constitution.

48. Mr. PESSOU said he endorsed Mr. Reuter's remarks. It was necessary to define exactly what was meant by federalism, and it would be useless for the Drafting Committee to draft still another text based on an ambiguity.

49. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Pessou's concern would be largely allayed by the use of the general term "federal union" and the addition proposed by Mr. Ago. Regardless of whether a federation was loose or tight, the rule would be stated that both the existence and the limits of the treaty-making capacity of the member State of a federation depended on the provisions of the federal constitution.

50. The CHAIRMAN said he noted that for some members of the Commission the term "federation" indicated the political constitution of a State, while for other members, like Mr. Reuter and Mr. Pessou, federalism suggested a community of States, such as the European Economic Community or the former French-African Community. But it was better not to deal with that question. The Drafting Committee would endeavour to find a compromise formula, and when the redraft came before it, the Commission could decide whether it accepted it or not.

51. He accordingly proposed that the Commission should refer article 3 back to the Drafting Committee, requesting it to take into account all the points made during the discussion.

*It was so agreed.*⁵

⁵ For resumption of discussion, see 816th meeting, paras. 3-9.

ARTICLE 4 (Full powers to represent the State in the negotiation and conclusion of treaties)⁶

52. The CHAIRMAN invited the Commission to consider the new text of article 4 proposed by the Drafting Committee, which read :

“ 1. Except as provided in paragraph 2, an agent of a State is considered as representing his State for the purpose of the negotiation and adoption of the text of a treaty or for the purpose of expressing the consent of his State to be bound by a treaty only if :

(a) He produces the appropriate instrument of full powers; or

(b) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

“ 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State :

(a) Heads of State, Heads of Government and Foreign Ministers, for the purpose of concluding treaties;

(b) Heads of diplomatic missions, for the purpose of the negotiation and adoption of the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by a State to an organ of an international organization or to an international conference, for the purpose of the negotiation and adoption of the text of a treaty by such organ or conference.”

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the order in which the contents of article 4 appeared in the redraft represented a reversal of the one adopted in 1962. Instead of stating in paragraph 1 the rule relating to Heads of State, Heads of Government and Foreign Ministers, the article now began with a statement of the general rule on the requirement of full powers.

54. The substance of the article had been left unchanged, except for the new formulation in paragraph 2 (c), which embodied a different rule more limited than that appearing in paragraph 2 (b) of the 1962 formulation.

55. His attention had been drawn by Mr. Rosenne to a possible difficulty in the use of the term “ an agent of a State ” in the opening sentence of paragraph 1; he would be prepared to agree that the expression should be replaced by “ a person ”.

56. Mr. ROSENNE said that, since the term “ agent ” had other technical meanings in international law, it was preferable to speak of “ a person ” or “ an individual ”; article 4 was the only one of the draft articles which connected the treaty with the actions of the human beings concerned.

57. Article 4 was acceptable, except for paragraph 2 (c), which he strongly opposed. The provisions of that sub-paragraph were extraneous to the law of treaties and closely related to the topic of relations between States and inter-governmental organizations. They were

also incompatible with the rules of most of the international organizations with which he was familiar; for example, the words “ Representatives accredited by a State to an organ of an international organization ”, if applied to the General Assembly of the United Nations, would give rise to ambiguity since under Article 9 of the Charter each Member could appoint up to five representatives in the General Assembly. Furthermore, they did not accord with his experience of the practice of the Secretariat with regard to conventions concluded either in an organ of the United Nations or in a conference convened under the auspices of the United Nations.

58. For those reasons, he would have to oppose paragraph 2 (c).

59. Mr. CASTRÉN said that the new text was a great improvement. He accepted it in substance, including paragraph 2 (c), which Mr. Rosenne opposed. He wished to comment only on the drafting.

60. Paragraph 1 (b) referred only to the “ circumstances ”, which was rather a vague term. The corresponding provision in the version submitted by the Special Rapporteur earlier in the session⁷ had mentioned also the nature and the terms of the treaty, and perhaps the new text should also mention them.

61. In paragraph 2 (a), the word “ concluding ” might give the impression that the passage related only to the signature or final adoption of a treaty. In order to reflect the distinction between paragraph 2 (a) and paragraph 2 (b), where the powers referred to were more restricted, paragraph 2 (a) should read : “ . . . for all acts relating to the conclusion of treaties ”.

62. He inquired why the Drafting Committee had added the mention of “ an organ ” of an international organization in paragraph 2 (c); there had been no such mention in the previous text.

63. He noted that the Drafting Committee had dropped the original paragraph 5 of the text proposed by the Special Rapporteur, under which a letter or telegram might be provisionally accepted subject to the production in due course of an instrument of full powers. Some members had proposed that that provision be deleted. Perhaps the intention was to deal with that point in the commentary. While he would not oppose that course, he thought that the matter was important enough to deserve a provision in the article itself.

64. Mr. LACHS said that the new text of article 4 was a great improvement, but it was clumsy to start the article with a proviso, instead of just stating the general rule. He shared Mr. Rosenne's doubts about the phrase “ an agent of a State ”, but did not favour as an alternative the word “ person ”. The point had been discussed earlier and possibly it would be best to revert to the Special Rapporteur's original term, “ a representative ”.

65. He agreed with what had been said by Mr. Castrén concerning paragraph 2 (a). The discussion had confirmed his opinion that, if no precise definition was included of what was meant by the “ conclusion ” of a treaty, the powers of Heads of State, Heads of government and

⁶ For earlier discussion, see 780th meeting, paras. 27-85 and 781st meeting, paras. 1-41.

⁷ 780th meeting, para. 27.

Foreign Ministers should be regarded as wider than those of heads of diplomatic missions.

66. Provision should be made for the (admittedly rare) case of delay in the transmission of the instrument of full powers.

67. Mr. Rosenne's objection to paragraph 2 (c) was only partly justified and could be met by deleting the words "an organ of". The sub-paragraph was important and should be retained, for a person accredited to an international organization as a representative of his State was on an equal footing with the head of a permanent mission.

68. For the sake of precision, the final words of the sub-paragraph should be amended to read: "... text of a treaty at such a conference".

69. Mr. RUDA said he approved of article 4 as a whole, with the exception of paragraph 2 (c).

70. As far as paragraph 1 was concerned, he thought, like Mr. Lachs, that it was not very logical to start with an exception in a clause intended to lay down a rule. He also thought it might be dangerous to introduce the notion of a person or individual; if the term "agent" was not satisfactory, it was still preferable to any other term. The words "is considered as" and the word "only" should be deleted so that the paragraph would then open thus: "An agent of a State represents his State for the purpose of the negotiation and adoption of the text of a treaty".

71. In paragraph 2 the expression "In virtue of their functions and" should be deleted; that passage not only stated the obvious but also constituted a piece of reasoning for which the more appropriate context was the commentary. He shared the views of Mr. Castrén and Mr. Lachs concerning paragraph 2 (a) and (b).

72. With regard to paragraph 2 (c), he said that the use of the term "organ" posed a problem. It would be preferable to delete it, since, for the purpose of the negotiation and adoption of treaties by an organization or an international conference, it was not necessary to draw a distinction between the heads of diplomatic missions and permanent representatives accredited to organizations. Heads of mission as well as accredited representatives should have competence to negotiate and adopt such treaties. The deletion of the word "organ" would put sub-paragraph (c) on an equal footing with sub-paragraph (b) and so would dispose of Mr. Rosenne's objections.

73. Mr. ELIAS said that there was not much force in Mr. Lachs's criticism of the drafting of paragraph 1. Article 38 of the Vienna Convention on Diplomatic Relations, 1961, Article 80 of the Charter and Article 64 of the Statute of the International Court, to mention only a few examples, all opened with a proviso in similar form.

74. The CHAIRMAN said there were two distinct types of question: questions of substance and drafting questions. The questions of substance had been considered by the Drafting Committee without specific instructions from the Commission. Every member of the Commission had, of course, the right to submit proposals, but since most of the articles would be referred

back to the Drafting Committee, it should be sufficient to make suggestions.

75. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the scope of paragraph 2 (c) was limited, as it dealt only with accreditation for the purposes of negotiating and adopting the text; it did not even extend to authority to sign. The Drafting Committee had been informed that such a rule conformed to the general practice in international organizations and at international conferences.

76. He was firmly against the idea of dropping the reference to an organ of an international organization, since to do so would radically alter the provision and would be at variance with practice. He understood that representatives were accredited to a specific organ or organs of an international organization—in the case of the United Nations, for example, to the General Assembly, the Security Council or the Economic and Social Council—and were not necessarily empowered thereby to act in any other.

77. Mr. TSURUOKA said he approved of article 4 as a whole as redrafted. In his opinion, the "except" clause at the beginning of paragraph 1 was not awkward. The rule laid down in that paragraph seemed to him more important than, and should therefore precede, that set out in paragraph 2.

78. As for paragraph 2 (c), he was satisfied with it in the light of the explanation given by the Special Rapporteur.

79. The CHAIRMAN, referring to paragraph 2 (c), said that all permanent representatives to the United Nations would have difficulty in relying on that provision, for they were accredited to the Secretary-General. With the exception of the Security Council, they represented their State in all the organs of the United Nations, unless otherwise prescribed, as was the case with the Economic and Social Council and the Trusteeship Council. Accordingly, while agreeing on the substance, he feared that, owing to the use of the word "organ", permanent representatives might be unable to rely on the provision in question.

80. Mr. ROSENNE said that he had not been convinced by the Special Rapporteur's defence of paragraph 2 (c). The matter called for detailed study because the techniques of accreditation varied greatly from organ to organ, organization to organization and conference to conference. In large measure they depended on the relevant rules of procedure or the constituent instruments of organizations. The subject did not really belong to the law of treaties at all, but rather to the topic of relations between States and inter-governmental organizations, or possibly to that of special missions, should the question of conferences be included within the scope of that topic. He realized that he was in a minority and, as his dissent had been recorded, he would be content if the Commission reached a decision forthwith on article 4 as a whole.

81. He would not insist on a separate vote on paragraph 2 (c). If it was retained the reference to an organ of an international organization should certainly be kept.

82. The CHAIRMAN suggested that article 4 should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*⁸

ARTICLE 5 (Negotiation and drawing up of a treaty)⁹
[Deleted by the Drafting Committee]

83. The CHAIRMAN invited the Commission to take a decision on the Drafting Committee's proposal that article 5 be deleted.

84. Mr. ROSENNE said he was opposed to the Drafting Committee's proposal because the negotiation and drawing up of a treaty were essential features of the whole process. In view of what had been said by the Special Rapporteur at the 781st meeting, when summing up the discussion on article 5, about the difficulties of either retaining or deleting the article, it would be preferable to postpone a decision until the Commission came to review the draft as a whole and had before it the articles on interpretation.

85. Mr. LACHS said that one way out of the difficulty would be to incorporate the content of article 5 in the commentary to article 6 (concerning the adoption of the text of a treaty).

86. Sir Humphrey WALDOCK, Special Rapporteur, said that that possibility had not been considered by the Drafting Committee. Article 5 had given a great deal of trouble, and the Drafting Committee had not succeeded in formulating a legal rule and getting away from a text that was purely descriptive. Mr. Ago, who had strongly advocated the inclusion of an article on negotiation, had finally admitted defeat.

87. Mr. TUNKIN said that it was self-evident that negotiation was an important phase of the treaty-making process, but as a legal rule could not be worked out, the Drafting Committee had rightly decided not to include a purely descriptive provision. No purpose would be served by deferring a decision on the matter.

88. Mr. LACHS formally proposed that the points dealt with in the original text of article 5 be covered in the commentary to article 6.

89. Sir Humphrey WALDOCK, Special Rapporteur, said that the proposal was acceptable to him and would not exclude the possibility of any member submitting a text for an article on negotiation at some later stage.

90. Mr. ROSENNE said that he would have no objection to that course.

Mr. Lachs's proposal was adopted by 17 votes to none.

ARTICLE 6 (Adoption of the text)¹⁰

91. The CHAIRMAN invited the Commission to consider the new text of article 6 proposed by the Drafting Committee, which read :

“ 1. The adoption of the text of a treaty takes place by the unanimous agreement of the States partici-

pating in its drawing up except as provided in paragraphs 2 and 3.

“ 2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States participating in the conference unless :

(a) By the same majority they shall decide to apply a different rule; or

(b) The established rules of an international organization apply to the proceedings of the conference and prescribe a different voting procedure.

3. The adoption of the text of a treaty by an organ of an international organization takes place in accordance with the voting procedure prescribed by the established rules of the organization in question.”

92. Sir Humphrey WALDOCK, Special Rapporteur, said that no changes of substance had been introduced, but the Drafting Committee, in accordance with suggestions made in the Commission, had decided to alter the order of the provisions in the article, which in the revised version first stated the unanimity rule and then the exceptions set out in paragraphs 2 and 3.

93. Mr. ROSENNE asked whether the Drafting Committee had considered transposing article 6 to follow article 7.

94. The CHAIRMAN suggested that questions about the order of the articles should be left over until the text of all the draft articles was reviewed. He then put article 6 to the vote.

Paragraph 1 was adopted by 17 votes to none.

Paragraph 2 was adopted by 16 votes to 1.

Paragraph 3 was adopted by 17 votes to none.

Article 6, as a whole, was adopted by 16 votes to 1.

ARTICLE 7 (Authentication of the text)¹¹

95. The CHAIRMAN invited the Commission to consider the new text of article 7 proposed by the Drafting Committee, which read :

“ The text of a treaty is established as authentic and definitive by such procedure as may be provided for in the text or agreed upon by the States concerned and failing any such procedure by :

(a) The signature, signature *ad referendum* or initialing by the representatives of the States concerned of the text of the treaty or of the Final Act of a conference incorporating the text; or

(b) Such procedure as the established rules of an international organization may prescribe for the authentication of the text of a treaty adopted by one of its organs.”

96. Sir Humphrey WALDOCK, Special Rapporteur, explained that the new text was shorter but comprised the substantive rules covered in the previous article 7.

97. Mr. AMADO said he objected to the use of the term *arrêté* (“ established ”) in place of *adopté* (“ adopted ”). He could agree to the use of the term “ authentication ” in order to cover all forms of procedure

⁸ For resumption of discussion, see 816th meeting, paras. 10-13.

⁹ For earlier discussion, see 781st meeting, paras. 59-96.

¹⁰ For earlier discussion, see 782nd meeting, paras. 1-63.

¹¹ For earlier discussion, see 782nd meeting, paras. 71-95 and 783rd meeting, paras. 1-81.

—signature, signature *ad referendum* and initialling— but he could not agree to an innovation which was at variance with the terminology in use in legal texts.

98. Mr. ROSENNE said that, as the draft articles were being confined to treaties between States, the word “in” should be substituted for the word “by” after the words “treaty adopted” in sub-paragraph (b).

99. The CHAIRMAN, speaking as a member of the Commission, said that he accepted the notion of authentication, for he believed that a distinction should be drawn between the establishment and the adoption of the text of a treaty. But he was opposed to the idea of the signature of a final act, for often a final act was not signed: the president of the conference certified that the text had been adopted. He did not, however, feel so strongly in the matter that he would vote against the article; on the other hand, the drafting was not good enough for him to vote for it. He would abstain.

100. He agreed with Mr. Rosenne that it would be better to say “adopted in one of its organs” than “by one of its organs” in sub-paragraph (b).

101. The text should be referred back to the Drafting Committee.

102. Sir Humphrey WALDOCK, Special Rapporteur, said he hoped that the Chairman would not feel compelled to abstain in the vote on article 7 which, he would see, was formulated as a residual rule.

103. The CHAIRMAN, speaking as a member of the Commission, said that the residual rule applied where there was no express decision by the parties, and it might well happen that there was none. In that case, it would be necessary to follow the rule. Though he did not much like the introductory paragraph to article 7, he would not vote against it.

Article 7 was adopted by 16 votes to none, with 1 abstention.

104. The CHAIRMAN invited the Commission to take a formal vote on the new first article and article 1, paragraph 1, which had been adopted without a vote at the previous meeting.¹²

The new first article was adopted by 17 votes to none.

Article 1, paragraph 1 (a) was adopted by 17 votes to none.

The meeting rose at 1 p.m.

¹² 810th meeting, paras. 10 and 11.

812th MEETING

Monday, 28 June 1965, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 11 (Consent to be bound expressed by signature), incorporating Article 10 (Initialling and signature *ad referendum* as forms of signature)¹

1. The CHAIRMAN invited the Commission to consider the new text of article 11, incorporating in its paragraph 2 the substance of article 10, which had been prepared by the Drafting Committee and which read:

“1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

(a) The treaty provides that signature shall have that effect;

(b) It appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that signature should have that effect;

(c) The intention of the State in question to give that effect to its signature appears from the full powers of its representative or from statements made by him during the negotiations.

“2. (a) The initialling of a text is considered as a signature of the treaty when it appears from the circumstances that the contracting States so agreed;

(b) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, is considered as the equivalent of a full signature of the treaty”.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had incorporated in paragraph 1 the rules relating to those cases where, either expressly or by implication in the light of the circumstances, the States had shown their intention that signature should express consent to be bound.

3. Paragraph 2 dealt with two subsidiary questions. The first, covered by sub-paragraph (a), expressed in general terms the rule in cases where the initialling of the text amounted to signature; the Drafting Committee had dropped the distinction between initialling by the Head of State, Head of Government or Foreign Minister, on the one hand, and initialling by other representatives on the other.

4. In paragraph 2 (b), relating to signature *ad referendum*, the text adopted by the Drafting Committee did not state any rule respecting the date at which confirmation would be taken as operative. Government comments, especially those by the Government of the United States, had shown that a certain practice had emerged of using signature *ad referendum* as equivalent to signature subject to ratification. The Drafting Committee had adopted a text which was intended not to encourage that practice, although it actually contained the implication

¹ For earlier discussion, see 782nd meeting, at which it was agreed (paras. 74-95) that articles 7, 10 and 11 would be discussed together, and 783rd meeting, paras. 1-81.

that signature would operate from its date, if subsequently confirmed.

5. Mr. YASSEEN said that the last phrase in paragraph 1 (c) was somewhat dubious and should be deleted; how could mere statements be regarded as on a par with the provisions of a treaty?

6. The Special Rapporteur had said that paragraph 2 (b) did not settle the question whether confirmation of a signature *ad referendum* was retrospective or not. In his (Mr. Yasseen's) opinion, the inference to be drawn from the wording, especially the English text, was definitely that such confirmation had retrospective effect to the date on which the signature *ad referendum* was appended.

7. Mr. REUTER said that paragraph 1 (b) stated a more general rule than paragraph 1 (c) and therefore the order of the two provisions should be reversed. That change would perhaps dispose of Mr. Yasseen's objection; even if the words "or from statements made by him during the negotiations" were deleted, it would still remain doubtful whether such statements formed part of the "circumstances" of the conclusion of the treaty.

8. Mr. TUNKIN said he supported Mr. Yasseen's suggestion for the deletion from paragraph 1 (c) of the words "or from statements made by him during the negotiations". A statement by a representative would either be an expression of his full powers, or it would represent one of the "circumstances of the conclusion of the treaty". He also supported Mr. Reuter's suggestion for transposing paragraphs 1 (c) and 1 (b).

9. With regard to Mr. Yasseen's remarks on paragraph 2 (b), he said that the provision was intended to state that signature *ad referendum*, if confirmed, would be taken as final; there was no intention to introduce a subjective element.

10. The CHAIRMAN, speaking as a member of the Commission, said that he would be forced to vote against the article, for he still held that ratification was normally necessary; any enlargement of the opportunities of dispensing with the requirement of ratification tended to lessen the role of national representative assemblies.

11. Mr. LACHS said that it was necessary to retain article 11 now that the Commission had abandoned the distinction between formal treaties and treaties in simplified form, which constituted the majority.

12. He supported Mr. Yasseen's suggestion that the concluding portion of paragraph 1 (c) should be deleted. The expression "statements made by him" was unduly broad; a representative might make a casual statement during the negotiations or might even make a number of contradictory statements.

13. Mr. AGO said that, while appreciating Mr. Yasseen's concern, he thought paragraph 1 (c) should stand as drafted. The provision covered two cases affecting a particular State: the case where the representative had full powers specifying that signature would express the State's definitive consent to be bound, and the case where the representative himself regarded himself as authorized to make a statement to that effect. In the latter case, how could the representatives of the other States question the statement? That was not, however, a point of prime importance.

14. With regard to Mr. Reuter's proposal that the order of paragraphs 1 (b) and 1 (c) should be reversed, he said that paragraphs 1 (a) and 1 (b) were inter-connected: both dealt with cases where the fact that the signature sufficed to express the State's definitive consent was recognized by agreement among all the parties. That agreement was explicit in the case covered by paragraph 1 (a), implicit in that covered by paragraph 1 (b). Paragraph 1 (c) dealt with a different case, that where one of the parties could express its final consent by signature whereas another could append its signature subject to ratification. Paragraph 1 (b) was not therefore a residual rule in relation to paragraph 1 (c).

15. Mr. AMADO asked whether the confirmation referred to in paragraph 2 (b) was an act equivalent to ratification. If a representative of Brazil, for instance, appended his signature *ad referendum*, that meant that the matter had to be submitted to the National Congress for approval.

16. With regard to the "statements" mentioned in paragraph 1 (c) he said that, as he had mentioned before, when States negotiated, they tried to obtain as much as they could, and too much importance should not, therefore, be attached to statements and *travaux préparatoires* in general.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that the confirmation in question was the confirmation of the signature itself; "ratification" was the ratification of the treaty, not of the signature. The signature was confirmed as a signature; it might, or might not, amount to consent to be bound.

18. Mr. AMADO said that the Special Rapporteur's explanations had not entirely allayed his misgivings.

19. Mr. REUTER said he admitted that Mr. Ago's interpretation was correct with regard to paragraph 1 (b), since in that provision the word "States" was in the plural. But it was by no means certain that the provision was right; if, for example, the representatives of States were provided with powers specifying that after signature the treaty would have to be ratified, could they agree that signature would express definitive consent? If that were the case, the capacity of the representatives could be changed by mutual agreement—a very bold idea. It would therefore be better to draft paragraph 1 (b) with the word "State" in the singular. If that was done, his earlier remark would still apply.

20. Sir Humphrey WALDOCK, Special Rapporteur, said that he entirely agreed with Mr. Ago regarding paragraphs 1 (b) and 1 (c). Paragraph 1 (b) dealt with a case, quite common in treaty practice, where there was a clear agreement, usually made by correspondence, before the negotiations began, that representatives would be empowered to give their signature that effect. Of course, a representative would not be able to alter the basis of his authority; if he did so, the case would be covered by article 32 (Lack of authority to bind the State).

21. Paragraph 1 (c) dealt with the case where a State unilaterally pronounced that it was bound by signature; such a pronouncement could not be prevented, even if other States were in the same position. The point was one on which Governments had insisted strongly.

22. Mr. ROSENNE said that, in the light of the discussion, he doubted whether paragraph 1 (c) was really necessary. He therefore suggested that sub-paragraphs (b) and (c) of paragraph 1 be amalgamated to read :

“ it appears from the full powers or the circumstances of the conclusion of the treaty that it was agreed that signature should have that effect ”.

If, however, the Commission decided to retain the three sub-paragraphs of paragraph 1, he would support the remarks of Mr. Ago regarding the logic of the present formulation.

23. In both sub-paragraphs of paragraph 2, he did not favour the use of the expression “ is considered as ”, which was the language of a legal fiction. He suggested that in sub-paragraph (a) it should be replaced by the words “ is the equivalent of ”, and in sub-paragraph (b) should simply be deleted. Also in sub-paragraph (b), the word “ if ” should be replaced by “ when ”.

24. Mr. RUDA said that the provisions of paragraph 1 corresponded to the title “ Consent to be bound expressed by signature ”. Those of paragraph 2, however, dealt with a different matter : initialling and signature *ad referendum* might or might not express the consent of a State to be bound. It would therefore seem more appropriate to make paragraph 2 a separate article.

25. Mr. AGO said he agreed that a hasty reading of the article might give the impression that it suffered from the defects to which Mr. Ruda had drawn attention. But the intention of its two paragraphs fully reflected the title of the article in that they were concerned with cases where the definitive consent of a State to be bound was expressed by signature or by an equivalent act. The article would probably have to be redrafted in such a way that the connexion between the two paragraphs became clearer.

26. Mr. RUDA said that he fully agreed with Mr. Ago and found the provision quite acceptable in the light of his explanation regarding its intention. However, it would be necessary to amend the wording to make the contents of the provision conform more closely to the title of the article.

27. Mr. TSURUOKA said it was quite possible to get the impression from reading the article that paragraph 2 dealt with a matter unrelated to that in paragraph 1; he would, however, accept the explanations given by Mr. Ago. He also supported what Mr. Rosenne had said.

28. In sub-paragraph 2 (b) the word “ full ” before “ signature ” might be omitted, or else the expression might be amended to “ unconditional signature ”. That sub-paragraph did not mean that confirmation of a signature *ad referendum* was equivalent to ratification; such confirmation meant that the State gave its definitive consent, but that consent was expressed by signature, not by an act analogous to ratification.

29. Mr. CASTRÉN said that he was prepared to accept the redraft of article 11 with the amendments suggested, especially those by Mr. Rosenne.

30. He noticed that, in the English title, there was nothing corresponding to the words *de l'Etat* which appeared in the French title.

31. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that a number of

suggestions had been made during the discussion, which should be considered by the Drafting Committee. He did not think that the words “ is considered as ” in paragraph 2 were inappropriate or that they indicated a fiction. In sub-paragraph (a) they served to indicate that the initialling of a text amounted to a signature when such was the intention of the parties; in sub-paragraph (b) they served to stress the fact that signature *ad referendum* was tantamount to a full signature if it was confirmed, and certainly did not introduce an element of fiction.

32. With regard to the same sub-paragraph, he was opposed to Mr. Rosenne's suggestion for replacing the word “ if ” by “ when ”, since that change would introduce a change of substance. The traditional rule in the matter was that signature *ad referendum* was an actual signature upon a condition. In adopting the wording suggested, the Drafting Committee had intended not to exclude the possibility of an agreement between the parties on a special date on which the signature was to become operative.

33. He suggested that article 11 should be referred back to the Drafting Committee for reconsideration in the light of the discussion.

34. The CHAIRMAN said that, if there was no objection, he would consider the Commission agreed to refer article 11, incorporating article 10, to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*²

ARTICLE 12 (Consent to be bound expressed by ratification, acceptance or approval)³

35. The CHAIRMAN invited the Commission to consider the new text of article 12 proposed by the Drafting Committee, which read :

“ 1. The consent of a State to be bound by a treaty is expressed by ratification when :

(a) the treaty or an established rule of an international organization provides that ratification is required;

(b) it appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that ratification should be required;

(c) the representative of the State in question has signed the treaty subject to ratification, or it appears from his full powers or from statements made by him during the negotiations that he intended to sign the treaty subject to ratification.

“ 2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification ”.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that article 12 consolidated a number of previously separate provisions, on the subject of ratification, acceptance and approval. Accession had been left aside for the time being.

² For resumption of discussion, see 816th meeting, paras. 14-17.

³ For earlier discussion, see 783rd meeting, paras. 82-98, 784th and 785th meetings, 786th meeting, paras. 5-101, and 787th meeting, paras. 99-110.

37. To some extent, the draft represented a compromise. Ratification was dealt with separately in paragraph 1, so as to stress its importance and thereby give some satisfaction to those members who considered that a residual rule should have been included, stating the requirement of ratification.

38. The language of paragraph 1 (a) needed some adjustment, in the light of the statement in paragraph 2 that the consent of a State to be bound by a treaty could be expressed by acceptance or approval "under conditions similar to those that apply to ratification". It would clearly not be correct to say that the treaty or an established rule of an international organization would necessarily provide that acceptance or approval "is required". He suggested that, instead of "provides that ratification is required", the end of paragraph 1 (a) should read "provides for such consent to be expressed by means of ratification". It was quite common for a treaty to give States the choice between acceptance, approval and other means of expressing their consent to be bound.

39. Mr. VERDROSS pointed out that if, as was the case in article 12, ratification, acceptance and approval were to be treated as having the same legal force, the article could be simplified by adding the words "acceptance or approval" at the end of the introductory passage in paragraph 1, replacing the word "ratification" by the words "such an act" in sub-paragraphs (a) and (b), and adding the words "acceptance or approval" after the word "ratification" in sub-paragraph (c). In that way, paragraph 2 could be deleted. Otherwise, three paragraphs containing the same particulars would be required for each of the three acts: ratification, acceptance and approval.

40. Sir Humphrey WALDOCK, Special Rapporteur, said that in principle he entirely agreed with Mr. Verdross, but the language of article 12 represented a compromise; there had been a strong current of opinion in the Commission in favour of a rule stating the requirement of ratification. In particular, Mr. Jiménez de Aréchaga had accepted the formulation of article 12 only because of the special place given to ratification.

41. Mr. VERDROSS asked whether different definitions of the three acts in question would be included in the article on definitions. If the Commission wished to make its terms clear, it should specify that the term "ratification" meant exclusively the act performed by the supreme authority of the State—which might be the Head of State or the Government—whereas the term "acceptance" designated the act of a subordinate authority. If the Commission did not establish that distinction, it would be using different words to designate one and the same thing.

42. The CHAIRMAN, speaking as a member of the Commission, said that he would abstain in the vote on article 12, because in that article ratification was presented not as a general rule but as an exception. He shared the view that, in the article, acceptance and approval had the same legal force as ratification.

43. Mr. ROSENNE said that he accepted article 12 as proposed by the Drafting Committee. A certain lack of symmetry in the matter was not undesirable. One party

might consider itself required by its constitutional law to ratify a treaty, whereas another might be satisfied with approval.

44. Mr. LACHS said he supported the redraft suggested by Mr. Verdross, which would facilitate the adaptation of the treaty to the constitutional provisions of States. He also supported the drafting improvement proposed by the Special Rapporteur for paragraph 1 (a).

45. Mr. YASSEEN said that he would abstain in the vote on article 12 because it contained no provision indicating that ratification was the general rule.

46. Mr. AGO said he did not understand why not even the supporters of ratification were able to endorse article 12; after all, it corresponded to practice.

47. He saw the logic of Mr. Verdross's suggestion, but preferred the present wording precisely because the traditional rule was ratification, whereas acceptance and approval were still rather ill-defined practices. The text would become very unwieldy if the three acts, "ratification, acceptance and approval", had to be mentioned each time; and if repetition was to be avoided, the formula "such an act" would not always be very clear. Moreover, so far as sub-paragraph (c) was concerned, it would sometimes be inaccurate to speak of a State signing a treaty subject to acceptance or approval, for some of those acts were not necessarily preceded by a signature.

48. Mr. YASSEEN said that Mr. Ago's observation compelled him to explain his view. The text proposed by the Drafting Committee had been over-simplified; it offered no means of solving the problem in cases where it was not clear from the treaty, explicitly or implicitly, that ratification was necessary or signature sufficient. He would agree that, in the cases mentioned in the article, signature would be sufficient to express the consent of the State to be definitively bound, but he believed it was essential to lay down, as an additional rule, that a treaty should be ratified.

49. The CHAIRMAN, speaking as a member of the Commission, explained in reply to Mr. Ago that he subscribed to the principle that a treaty should be ratified. In article 12, however, that principle was reversed, since it provided that a treaty should be ratified only if ratification was required.

50. Mr. REUTER said that it might be better if article 12 was drafted on exactly the same plan as article 11, using the same language. If the words "shall have that effect" were substituted for "is required" in paragraph 1 (a), the resulting wording would be more neutral in the dispute between the supporters and the opponents of the principle that a treaty must be ratified. In actual fact, the question could not be settled one way or the other in international law, but States were under a legal obligation to make their position clear.

51. The end of paragraph 1 (b) should read "... the States concerned have recognized that ratification is required", in deference to constitutional provisions.

52. The CHAIRMAN, speaking as a member of the Commission, said that an important issue of substance was involved. In his view, the rule was that the nation,

through its duly qualified representatives, decided on the validity of the treaty by means of ratification.

53. Mr. TUNKIN said that Mr. Verdross's suggestion did not touch the substance; it only affected the presentation. If adopted, it would logically require three separate sets of provisions on ratification, acceptance, and approval respectively. Considerable repetition would thereby result.

54. Mr. Reuter's suggestion could be considered by the Drafting Committee.

55. Mr. TSURUOKA said he agreed with Mr. Tunkin. He would willingly accept article 12, as he regarded it as a well-conceived attempt to reconcile the opposing views to the fullest possible extent.

56. So far as the drafting was concerned, he said that since ratification was a more solemn and the more common procedure, it would be more correct to mention it first and to deal with the analogous acts afterwards.

57. In the French text of paragraph 2, the words *sont requises* should be substituted for the word *valent*.

58. Mr. BRIGGS said that he fully accepted the compromise embodied in articles 11 and 12. The purpose of that compromise was to avoid the doctrinal dispute which had arisen during the discussion of those articles, and which related to the question whether a residual rule should be laid down to the effect that the ratification of treaties was necessary.

59. The Drafting Committee had merely listed in article 11 those cases in which consent to be bound was expressed by signature and, in article 12, those cases in which consent was expressed by ratification, acceptance or approval. The two articles contained parallel provisions. In paragraph 1 (c) of article 12, however, provision was made for the case where one State might regard ratification as necessary, whereas the full powers of the representative of another State indicated that, for the purpose, signature was sufficient.

60. The resulting wording of article 12 was perhaps not perfect but it represented a satisfactory working compromise. The Drafting Committee should consider the various suggestions for the improvement of the wording.

61. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that if paragraph 1 (a) of article 12 was amended as he had suggested, the provisions of articles 11 and 12 would be almost symmetrical. Complete symmetry was not possible because of the inherent difference between signature and ratification. Ratification always expressed the consent of the State to be bound; signature, on the other hand, was equivocal and might or might not express consent to be bound.

62. He was not in favour of using the word "recognized" instead of "agreed", which was a term he always tried to avoid using otherwise than in its technical meaning.

63. He agreed with Mr. Briggs regarding the difference of opinion in the Commission on the laying down of a residual rule. The purpose of the Drafting Committee had been to state no rule in the matter, one way or the other. The text consequently disappointed the expectations of those who wished the principle to be laid down that ratification was required. In 1962, the Commission had

tried to solve the problem by laying down two different presumptions, one for treaties in simplified form and another for other treaties; the new formulation was an attempt to avoid the whole issue. Undoubtedly, on the basis of treaty practice, it would be difficult to justify laying down a firm rule to the effect that ratification was always required.

64. The CHAIRMAN suggested that article 12 should be referred back to the Drafting Committee for redrafting in the light of the discussion, and that the Commission should pass on to consider article 15.⁴

*It was so agreed.*⁵

ARTICLE 15 (Exchange or deposit of instruments of ratification, accession, acceptance or approval)⁶

65. The CHAIRMAN invited the Commission to consider the new text of article 15 proposed by the Drafting Committee, which read :

" Unless the treaty otherwise provides, instruments of ratification, accession, acceptance or approval become operative :

(a) By the exchange of the instruments between the contracting States;

(b) By deposit of the instruments with the depositary; or

(c) If so agreed, by notification to the contracting States or to the depositary. "

66. Sir Humphrey WALDOCK, Special Rapporteur, said that the new article 15 incorporated the material formerly contained in article 15, paragraph 2, of the text adopted at the fourteenth session. The Drafting Committee had endeavoured to set out in shortened form the rules governing the procedures by which, and the time at which, an instrument of ratification, accession, acceptance or approval became operative as an instrument. The treaty might not necessarily enter into force, for a specified number of ratifications might be required.

67. Sub-paragraphs (a) and (b) referred to the traditional procedures, but sub-paragraph (c) was new and had been inserted as a result of the emphasis which some members had placed on the modern trend towards a less formal procedure by means of notification through the diplomatic channel. Recourse to that method had, however, been made subject to agreement between the States concerned.

68. Mr. CASTRÉN said that the new wording was an improvement and the text as a whole acceptable, but the new sub-paragraph (c) seemed unnecessary. It was true that the Commission had discussed the problem, but the parties to the treaty were always free to agree on another rule. If the Commission wished to retain that idea, it would be better to express it in the introductory sentence or to include it in the commentary.

⁴ Article 13 (Accession) and article 14 (Acceptance or approval) were discussed at the 786th meeting, paras. 61 *et seq.* It was eventually agreed that a decision on article 13 would be postponed pending decisions on articles 8 and 9 (dealing with participation in a treaty); and article 14 was deleted, its substance being incorporated in article 12.

⁵ For resumption of discussion, see 816th meeting, paras. 18-27.

⁶ For earlier discussion, see 787th meeting, paras. 4-98.

69. Mr. AGO said he fully approved of the new version of article 15.

70. In sub-paragraphs (a) and (b) the words "the instruments" should perhaps be replaced by "those instruments", while in sub-paragraph (c) the purpose of the notification should be specifically stated.

71. The CHAIRMAN, speaking as a member of the Commission, said he supported Mr. Ago's last remark. In practice, the notification could be effected in two ways: either by indicating that ratification had taken place, or by sending a copy of the instrument of ratification.

72. For the rest, he approved of both the substance and the form of the article.

73. Mr. REUTER, to meet the point made by the Chairman and Mr. Ago, proposed that the wording "... by notification of their content or of the formality completed" should be used in sub-paragraph (c).

74. Sir Humphrey WALDOCK, Special Rapporteur, explained that it had been decided to refer simply to notification, without going into further detail, because the methods varied. Perhaps the point could be left to the Drafting Committee.

75. Mr. ROSENNE said that, as far as the English version was concerned, the meaning was perfectly clear and the text acceptable; it would only complicate matters to go into detail. Perhaps the drafting point raised by Mr. Ago, which affected the French text, could be left to the Drafting Committee.

76. Mr. LACHS said that there was some force in Mr. Castrén's criticism of sub-paragraph (c). It should be couched in more general terms, leaving States freedom in the choice of procedure.

77. The CHAIRMAN suggested that the Drafting Committee should be requested to review sub-paragraph (c) in the light of the discussion.

*It was so agreed.*⁷

ARTICLE 16 (Consent relating to a part of a treaty or to alternative clauses)⁸

78. The CHAIRMAN invited the Commission to consider the new article 16 proposed by the Drafting Committee, which read:

"1. The consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits the contracting States to choose between alternative clauses is effective only if it is made plain to which of the alternatives the consent relates."

79. Sir Humphrey WALDOCK, Special Rapporteur, said that the new article 16 incorporated the substance of the 1962 text of article 15, paragraph 1 (b) and (c), but the rule was stated somewhat differently. The earlier text might have been interpreted to mean that the instrument would be void altogether unless it applied to the treaty as

a whole, whereas in its new form the provision was more flexible.

80. Paragraph 2 dealt with the case where a treaty permitted a choice between alternative clauses, and stipulated that the consent to be bound would only be effective if it was made plain to which of the alternatives it related. Again, the rule had been stated in less rigid terms than in the original text.

81. Mr. ROSENNE said that the drafting of paragraph 1 seemed inconsistent with the whole section on reservations and he was unable to see how, in its present form, it could fit in with the scheme of the articles on reservations. Its wording would require very careful review by the Drafting Committee.

82. Mr. YASSEEN said that, in his opinion, paragraph 2 was superfluous, because the case with which it dealt was governed by the general principles regarding the expression of will.

83. Mr. AGO said he regretted that paragraph 2 referred to a choice between alternative "clauses". The corresponding provision adopted in 1962, article 15, paragraph 1 (c), referred to "texts", which he found preferable. The provision was meant to cover cases where there were two different versions of a treaty. If only a few clauses were involved, it would be excessive to state that the ratification would not be effective because it was not made plain to which of the alternatives it related.

84. Mr. LACHS said he agreed with Mr. Ago that the existing wording of article 16 could place the whole treaty in jeopardy. A clear distinction should be drawn between the treaty as a whole and those of its parts for which alternative clauses existed, as was the case in certain international labour conventions.

85. Mr. TUNKIN said he agreed with what had been said by Mr. Rosenne about paragraph 1. Its drafting called for careful re-examination.

86. Paragraph 2 was unnecessary and too rigid. A State might, by an oversight, fail to indicate which of the alternatives it preferred when depositing its instrument of ratification, but it would be a simple matter for the depositary to find out. Paragraph 2 failed to answer the question of the date when, in such cases, the instrument would be effective.

87. The CHAIRMAN, speaking as a member of the Commission, said that he shared Mr. Ago's view: the reference in paragraph 2 should be to alternative texts. To speak merely of alternative clauses overlooked the fact that the differences in the obligations and rights derived not just from those clauses, but from the treaty as a whole. The rule stated in the paragraph was essential in practice.

88. In reply to Mr. Tunkin, he said that the text was clear: an initial ratification which did not specify the alternative to which it related was without effect.

89. Mr. TUNKIN said that he wished to make it clear that he had no specific objection to paragraph 2, but believed it could be omitted.

90. Mr. TSURUOKA said that he shared Mr. Rosenne's misgivings regarding paragraph 1. He could accept the provision if the phrase "the other contracting States" meant "all the other contracting States".

⁷ For resumption of discussion, see 816th meeting, paras. 28 and 29.

⁸ For earlier discussion of a provision on this matter, see 787th meeting, paras. 6-98.

91. Mr. BRIGGS said that there could be treaties offering a choice between two different sets of provisions; it was not always a question of differing texts.

92. He agreed with Mr. Rosenne that, in the text as drafted, there was some conflict between paragraph 1 and the provisions concerning reservations.

93. He preferred the original versions of paragraph 1 (b) and 1 (c) of article 15, as adopted in 1962, which were less rigorous and did not impose the rather strong sanction laid down in paragraph 2 of the new article 16.

94. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the Drafting Committee had tried to reflect the views expressed in the Commission; he would be reluctant to revert to the earlier text which had been criticized for failing to formulate a positive rule. There was certainly some overlapping between the subject of partial acceptance of a treaty and reservations, and possibly a cross-reference at the beginning of article 16 to the section on reservations should be made in some such form as "Without prejudice to articles 18 to 22", as indeed he had proposed in his fourth report.⁹ With a modification of that sort, paragraph 1 should be retained.

95. Paragraph 2 dealt with the not uncommon case where an instrument was defective owing to the State's failure to indicate to which alternative its consent related. The other parties could claim that such an instrument was not effective, but if the omission was regarded simply as the result of an oversight, presumably the treaty would be considered to be in force from the date of the deposit of the instrument. He would not have thought there was any harm in retaining paragraph 2, but the Drafting Committee might be able to improve the text in the light of the comments made.

96. The CHAIRMAN suggested that article 16 should be referred back to the Drafting Committee with the comments made during the discussion.

*It was so agreed.*¹⁰

ARTICLE 17 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force)¹¹

97. The CHAIRMAN invited the Commission to consider the new text of article 17 proposed by the Drafting Committee, which read :

"A State is obliged in good faith to refrain from acts calculated to frustrate the object of a treaty when :

(a) It has agreed to enter into negotiations for the conclusion of the treaty, while the negotiations are in progress;

(b) It has signed the treaty subject to ratification, acceptance or approval, until it shall have become clear that it does not intend to become a party to the treaty;

(c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

⁹ A/CN.4/177, para. 3 of the Special Rapporteur's observations *ad* article 15.

¹⁰ For resumption of discussion, see 816th meeting, paras. 30-35.

¹¹ For earlier discussion, see 788th meeting and 789th meeting, paras. 1-58.

98. Sir Humphrey WALDOCK, Special Rapporteur, said that in the new text of article 17 the obligation of good faith was set out in three different stages. Members would recall that a number of governments had been opposed to the idea that the obligation should extend to the phase of negotiation, and the Drafting Committee had been instructed to produce a rather more cautious provision on that point than that approved at the fourteenth session.

99. Mr. VERDROSS said that, while he agreed with the ideas underlying article 17, he had some doubt concerning sub-paragraph (b). The passage "until it shall have become clear that it [the State] does not intend to become a party . . ." was too weak; indeed, it was meaningless, for if a State had committed acts calculated to frustrate the object of the treaty, it had *ipso facto* disclosed the absence of any intention to become a party to the treaty. The passage should be amended to read: ". . . so long as it has not notified the other States that it does not intend . . .". Such notice was surely the least that could be expected.

100. Mr. LACHS said that article 17 would be acceptable provided that sub-paragraph (b) was modified so as to remove the vague qualification contained therein. The words "until it shall have become clear" should be replaced by some such wording as "until the State concerned has made it clear" because, under the provision as it stood, the matter was left to the judgement of individual parties which could draw differing and sometimes conflicting conclusions about the intention of the State in question. Some might be willing to wait for a considerable time for ratification, acceptance or approval, while others might be less patient.

101. Mr. AGO, supporting Mr. Verdross's remarks, said that the Special Rapporteur had made provision for such notice in his earlier draft.¹²

102. With regard to the opening passage of the article, he said that admittedly the rule stated was an application of the principle of good faith, but there was no need to mention good faith expressly. The essential point was that the State was bound to refrain from acts calculated to frustrate the object of a treaty; it would be better to leave it to the commentators to ascertain the source of the obligation. If, nevertheless, the Commission wished good faith to be mentioned expressly, then, in the French version, the words *en toute bonne foi* should be replaced by the words *de bonne foi*.

103. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Verdross's comment was perfectly sound. It could happen that a State acted in a manner contrary to the object of the treaty while, at the same time, its representatives continued to announce its impending ratification. The least that could be asked for was that the State should make its intentions clear.

104. He agreed with Mr. Ago that the words "in good faith" should be omitted. Some jurists contended that the obligation of good faith was a moral, not a legal obligation. To put an end to such arguments, it could be explained in the commentary that the obligation laid

¹² A/CN.4/177, para. 5 of the Special Rapporteur's observations *ad* article 17.

down in article 17 had its origin in the principle of good faith, but had since become a legal obligation.

105. Mr. CASTRÉN said that the Drafting Committee had produced a good text.

106. Sub-paragraph (a) reflected the view that the obligation already existed at the negotiating stage. He agreed with Mr. Ago and the Chairman that, in the opening passage, the words "in good faith" should be omitted.

107. For sub-paragraph (b), it would be desirable to use clearer and more precise wording, introducing the word "notify" or "declare".

108. The substance of sub-paragraph (c) he could accept, but the phrase "provided that such entry into force is not unduly delayed" was too vague; there was no need to restore the ten-year period mentioned in the earlier draft, but something more precise should be found. He would not, however, vote against the sub-paragraph as it stood, even if the passage were left unchanged.

109. Mr. ROSENNE said that he, too, was in favour of dropping the reference to good faith.

110. Sub-paragraph (b) required some modification because it was not correct to take signature as a point of departure; as had just been pointed out during the discussion on ratification, some treaties were ratified without any signature at all. The obligation operated from the time of the adoption of the text. The provision should be drafted in such a way as not to impose an actual duty on the State to notify whether or not it intended to become a party.

111. Mr. REUTER said that he could agree to the deletion of the words "in good faith" in the opening passage. If the Commission did not wish to commit itself as to the origin of the obligation, an alternative formulation might be "a State is obliged to refrain in good faith . . .". The ultimate source of the rule was that it was wrong to deceive the partner.

112. He hoped the Commission would not be too formalistic in drafting sub-paragraph (b), where he would prefer the word "express" to the word "notify". After all, a public speech by the Head of State or, for example, the adoption of a resolution by the United States Senate concerning the Havana Charter, could be regarded as sufficient expression of the intention of the State. If the Commission accepted that suggestion, he would accept the suggestions of other speakers.

113. Mr. YASSEEN said it was correct that the duty to act in good faith was the basis of the rule, but if the words "in good faith" were allowed to stand, they might sow seeds of doubt as to whether the obligation in question was a *de jure* obligation. He would therefore prefer that those words should be dropped, as they had in fact been dropped from the title.

114. Mr. BRIGGS said that if the reference to good faith was dropped, what kind of obligation would remain, particularly at the stage of negotiation when no treaty existed at all?

115. Mr. RUDA said that the Drafting Committee should be very careful in its choice of language for sub-paragraph (b), because the intention of a State might not necessarily be either notified or manifested expressly.

116. Mr. AGO proposed that the Commission should refer article 17 back to the Drafting Committee.

117. Mr. TSURUOKA said he supported the proposal, but hoped that the Drafting Committee would study Mr. Briggs's comment very carefully. At the negotiating stage one could conceivably speak of the "object" of the treaty, but from the legal point of view the formula was debatable.

118. The CHAIRMAN suggested that, if there was no further comment, article 17 should be referred back to the Drafting Committee with the comments and suggestions put forward during the discussions.

*It was so agreed.*¹⁸

119. The CHAIRMAN said that, in reply to certain criticisms which had been voiced informally, he wished to explain that, as initially most of the articles had been referred to the Drafting Committee without precise instructions regarding substance, he could hardly prevent members of the Commission from re-opening questions of substance, at least as far as new provisions were concerned.

The meeting rose at 6 p.m.

¹⁸ For resumption of discussion, see 816th meeting, paras. 36-40.

813th MEETING

Tuesday, 29 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 18 (Formulation of reservations)¹

1. The CHAIRMAN invited the Commission to consider the new text of article 18 proposed by the Drafting Committee, which read:

¹ For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

"A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless :

(a) The making of the reservation is prohibited by the treaty or by the established rules of an international organization;

(b) The treaty authorizes the making of specified reservations which do not include the reservation in question; or

(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty."

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, on the subject of reservations, the Commission had had before it two sets of provisions, the articles adopted in 1962 and his own rearrangement of the first three articles, as proposed in his fourth report (A/CN.4/177/Add.1). After the discussion in the Commission, the matter had been referred to the Drafting Committee, which had decided of adhere to the 1962 arrangement to the extent of retaining the first provision of article 18 on the formulation of reservations. In the case of articles 19 and 20, however, the Drafting Committee had adopted many of the provisions suggested by him in his fourth report, thereby greatly simplifying the presentation of the articles, while retaining all the real substance of the 1962 formulation.

3. Article 18 as redrafted embodied the substance of paragraph 1 of the 1962 text of article 18 but contained only three sub-paragraphs because the new paragraph (a) covered the substance of sub-paragraphs (a) and (b) of the former paragraph 1.

4. Mr. RUDA asked that the opening words "A State may" should be rendered in Spanish by *Todo Estado puede*; that formulation would be more categorical and so would conform more with the spirit of the rule which article 18 was intended to embody.

5. Mr. ROSENNE suggested that the opening phrase would be lightened if it read: "A State may, when signing or otherwise expressing its consent to be bound by a treaty, formulate reservations . . .".

6. He suggested that in paragraph (a) the words "the making of" should be deleted as unnecessary; the English text would thus be brought closer to the French.

7. In paragraph (b), the wording "authorizes the making of specified reservations" seemed unduly narrow and should be replaced by "authorizes reservations to specific provisions".

8. In paragraph (c), the opening words "[in cases where] the treaty contains no provisions regarding reservations" should be replaced by: "in other cases".

9. Mr. BRIGGS said that some States had misunderstood the distinction drawn by the Commission in 1962 between the formulation and the making of a reservation. Personally, he preferred the expression "propose a reservation" for the opening sentence of article 18.

10. Moreover, he thought that the compatibility test should not be limited to cases where the treaty contained no provisions regarding reservations; it should apply to

all cases. He accordingly suggested that the opening sentence should be amended to read: "A State may, when signing, ratifying, acceding to, accepting or approving a treaty, propose any reservation compatible with the object and purpose of the treaty unless: ". That sentence would be followed by the two exceptions set out in paragraphs (a) and (b).

11. Mr. YASSEEN said that, in his opinion, paragraph (b) could not be reconciled with the principle, which had been adopted by the Commission, of the freedom to make reservations to multilateral treaties. The fact that a treaty authorized reservations to some of its clauses did not mean that reservations to other clauses were inadmissible. He could accept the paragraph if the word "exclusively" was introduced after the word "authorizes".

12. Mr. CASTRÉN said that the Drafting Committee's redraft of the articles on reservations was based on the articles adopted by the Commission in 1962. But apart from simplifying and rearranging the articles in several respects, the Committee had introduced several ideas taken from the proposals submitted by the Special Rapporteur at the current session. As always, the Drafting Committee's text was very clear and concise, and he was prepared to accept it as a whole, although he had previously supported the system proposed by the Special Rapporteur.

13. He proposed that in paragraph (b) the word "only" should be inserted after the word "authorizes"; that amendment would have the same effect as Mr. Yasseen's.

14. Mr. AGO said that the Drafting Committee's redraft of article 18 was a compromise, probably the only one on which agreement was possible. He therefore urged members of the Commission not to try to bias the text to one side or another.

15. He disagreed with Mr. Yasseen's opinion that the system adopted by the Commission was that of freedom to make reservations. If the treaty contained provisions concerning reservations, the matter was settled by the treaty; but if the treaty itself expressly authorized reservations to specific articles, then it followed that reservations to other articles were not authorized.

16. Mr. Briggs's suggested amendment would complicate matters considerably. The compatibility test, which was undoubtedly difficult to apply, should be used only where the treaty was silent on the subject of reservations. Where the parties had been careful to specify in the treaty the clauses to which it was permitted to make reservations, or those to which no reservations could be made, the compatibility test was unnecessary. The parties would undoubtedly not be so careless as to include among the clauses to which reservations were permitted, or to leave out of the list of articles to which reservations were prohibited, clauses that were essential to the object and purpose of the treaty.

17. Mr. PAL, referring to Mr. Rosenne's suggested drafting change in paragraph (a), said that it was essential to retain the word "the" before the word "reservation".

18. Mr. TUNKIN appealed to members not to try to change the substance of article 18, which represented a reasonable compromise. The text proposed by the Drafting Committee reflected existing practice and was based on the relevant General Assembly resolutions. Under the very flexible system embodied in article 18, the way was left open for a supplementary agreement resulting from the making of a reservation by one State and its acceptance by another.

19. Mr. AMADO supported Mr. Tunkin's remarks. The Drafting Committee consisted of members of the Commission representing different legal systems, and if that Committee could not reach agreement on some point, there was little purpose in pursuing the matter further. On the other hand, if the Committee submitted a text which was the outcome of a number of concessions, then it was not necessary to discuss it again; he did not believe in perfectionism.

20. But whenever there was talk of compromise, he always asked himself whether the compromise was on the legal aspect or on the practical aspect. In his view, it was pointless to propose what might be excellent in theory, if it was not acceptable to governments. Provisions like that at the end of article 18 were intended to be applied by States. Even should States accept the provision, how would they apply it?

21. To him, the meaning of the expression "specified reservations" in paragraph (b) was obscure; but if the other members of the Commission accepted it, he would do likewise.

22. Mr. YASSEEN said that he was very sensitive to Mr. Ago's appeal, but the view he had expressed was based on the actual wording of the opening sentence of the article, which manifestly laid down a principle, followed by a number of exceptions.

23. With regard to paragraph (b) he said that Mr. Ago himself had argued that where the treaty authorized reservations to certain clauses, the implication was that reservations to other clauses were not permitted. But if that was the case, why not say so in the treaty? The problem was a practical one. In order to encourage States to accept a treaty which contained a very controversial clause, the treaty might specify that reservations could be made to that clause. But if the treaty contained no such provision regarding its other clauses, it did not follow that reservations to those other clauses were prohibited. In his view, the principle of freedom to make reservations remained valid, unless the treaty clearly prohibited them.

24. The CHAIRMAN, speaking as a member of the Commission, expressed support for Mr. Castrén's proposal.

25. Mr. TSURUOKA said that, if paragraph (b) was amended in the manner proposed by Mr. Yasseen and Mr. Castrén, he would be obliged to vote against it. Where a treaty prohibited reservations to certain specific clauses, it was most unusual to specify that the prohibition related exclusively to those clauses. The sole effect of the addition of the word "only" or "exclusively" in paragraph (b) would be to extend the freedom to make reservations, and he was opposed to that because he was opposed to disorder.

26. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that he fully agreed with Mr. Ago and Mr. Tunkin. As redrafted, article 18 represented a delicate balance between the freedom to make reservations and the restrictions which might arise from actual treaty provisions.

27. The Drafting Committee had been fully aware of the considerations put forward by Mr. Yasseen. The question had also been discussed on a number of occasions by the Commission, which had arrived at the conclusion that, where a treaty authorized reservations to certain specific provisions, the natural implication was that those were the only provisions to which reservations were allowed. Any departure from that assumption would open the door wide to the making of reservations. It would also disturb the position with regard to a treaty which prohibited certain specific reservations; in that case, the implication was that all other reservations were admitted. If, however, the concept suggested by Mr. Yasseen were introduced, the point raised by Mr. Briggs would then arise, namely whether the compatibility test in paragraph (c) should not also apply to such provisions.

28. The suggestion by Mr. Rosenne concerning the opening sentence of article 18, although it might appear to be an improvement in language, was not acceptable. It should be remembered that signature did not always express consent to be bound. A reservation could be formulated by a State when signing, without thereby giving its consent to be bound; in a case of that kind, article 20^a provided that the reservation must be confirmed at the time when the State gave its consent to be bound. Accordingly, it would be inaccurate to suggest in the opening sentence of article 18 that a reservation could only be formulated at the time when a State signed a treaty with intent to be bound.

29. He suggested that article 18 be referred back to the Drafting Committee with the various suggestions put forward during the discussion.

It was so agreed.³

ARTICLE 19 (Acceptance of and objection to reservations)⁴

30. The CHAIRMAN invited the Commission to consider the new text of article 19 proposed by the Drafting Committee, which read:

" 1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the nature of a treaty, the limited number of the contracting States or the circumstances of its conclusion that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound, a reservation requires acceptance by all the States parties to the treaty.

^a *vide infra*, para. 72.

³ For resumption of discussion, see 816th meeting, paras. 41 and 42.

⁴ For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

3. When a treaty is a constituent instrument of an international organization, the admissibility of a reservation shall be determined by decision of the competent organ of the organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article :

(a) Acceptance by another contracting State of the reservation makes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

6. An act expressing the State's consent to be bound which is subject to a reservation is effective as soon as at least one other contracting State which has expressed its own consent to be bound by the treaty has accepted the reservation."

31. Sir Humphrey WALDOCK, Special Rapporteur, said that the new text of article 19 represented a rearrangement of the material in the former articles 19 and 20. It contained the substance of the old article 19 and, from the old article 20, the provisions regarding the inferences to be drawn from the absence of objection, in other words, the question of tacit consent. All the procedural elements had been transferred to the new article 22.⁵

32. Mr. LACHS suggested that the Commission should consider the article paragraph by paragraph.

It was so agreed.

Paragraph 1

33. Mr. VERDROSS said that the words "does not require any subsequent acceptance" should be replaced by the words "is valid even if it has not been accepted"; there could be no obligation on States to accept a reservation.

34. Mr. LACHS said he agreed with Mr. Verdross that the question was not one of acceptance but of the validity of a reservation notwithstanding an objection. The wording of paragraph 1 should be changed to make that meaning clear.

35. Mr. ROSENNE said that, if read in conjunction with the provisions of article 21, the formulation in paragraph 1 was quite adequate. It was his understanding that the title of section III was to be amended to read: "Reservations to multilateral treaties".

Paragraph 2

36. Mr. LACHS proposed the deletion of the two phrases, "the nature of a treaty" and "or the circumstances of its conclusion". The Commission had already adopted in article 18 the compatibility test, and the "nature" of a treaty was determined precisely by its object and purpose. It was sufficient to retain the one criterion, that of the compatibility with the object and purpose of the treaty, which had been adopted by the International Court of Justice. It would be a source of confusion if further criteria were introduced.

37. Mr. RUDA said that paragraph 2 embodied the rules set out in the former paragraph 3 of article 20 of the 1962 formulation. That text, however, had contained in its sub-paragraph (b) an exception relating to States which were "members of an international organization which applies a different rule to treaties concluded under its auspices". In view of the importance of the matter from the point of view of safeguarding the practice of the Organization of American States, he asked the Special Rapporteur whether any provision for that exception would be made in the revised draft articles.

38. Mr. VERDROSS said that the idea underlying paragraph 2 was acceptable, but his comment on paragraph 1 was again applicable. The words "is not valid unless it is accepted" should be substituted for the words "requires acceptance".

39. Mr. TUNKIN said that the purpose of paragraph 2 was to express the rule relating to reservations to treaties with a limited number of contracting States. He therefore suggested that the provision should be redrafted to read: "When, in a treaty with a limited number of contracting States, it appears from the nature of the treaty or the circumstances of its conclusion that . . .".

40. Sir Humphrey WALDOCK, Special Rapporteur, pointed out, in reply to Mr. Lachs, that paragraph 2 would operate mainly in cases where a reservation had been formulated under paragraph (c) of article 18.

41. The reference to "the nature of a treaty" was intended to cover treaties in which the obligations of the various contracting parties were closely interrelated, for in such cases the treaty clearly had to be binding as a whole or else would not be binding at all.

42. With regard to the expression "limited number of contracting States", he recalled the difficulties which had arisen with that and similar expressions; the Drafting Committee would have to make a further attempt to find a suitable expression.

43. Mr. LACHS said he agreed to some extent with the Special Rapporteur, but he was concerned at the contradiction between articles 18 and 19. Under paragraph (c) of article 18 a State was debarred from making a reservation which was incompatible with the object and purpose of the treaty. Article 19 specified that, for a reservation to be valid, all the parties to the treaty must accept it, thus appearing to open the door which had been closed by article 18. The provisions of paragraph 2 of article 19 should lay stress on the character of the treaty linked with the number of parties.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that there was undoubtedly a logical difficulty, in

⁵ See 814th meeting, para. 22.

that there was an inherent contradiction between the rule in article 18, prohibiting the formulation of a reservation which was incompatible with the object and purpose of the treaty, and the provision in article 19 for the acceptance of a reservation. That contradiction, however, was the basis of the flexible system. It should be remembered that there was no compulsory adjudication of disputes and that there was a strong element of subjectivity in the matter. In the circumstances, the criterion applied was that of acceptance.

45. Mr. LACHS suggested that the point should be referred to the Drafting Committee.

46. Mr. REUTER suggested that the words "the limited number" might perhaps be replaced by the words "the limitation on the number", since the reference was to treaties intended to be applied by a specified number of States and not to open treaties.

47. The CHAIRMAN, speaking as a member of the Commission, said that the meaning of the expression "limited number" should be explained, because it could denote either a small number or a specified group of States.

48. Sir Humphrey WALDOCK, Special Rapporteur, said that in the past two years he had made several attempts to find wording that would express the idea of a treaty to which a comparatively small number of States were parties; he feared that the problem was not one which language alone could solve.

49. Mr. BRIGGS said that, in view of the looseness of the rule stated in paragraph 4, paragraph 2 served to indicate certain types of treaties to which a reserving State could not become a party if another State objected to the reservation and the reserving State wished to maintain it.

50. With regard to the question of the number of contracting States, he recalled that the Commission's 1962 text had referred to "a small group of States"; Governments had, however, objected to that expression as unduly vague and not providing an adequate criterion. The matter was one in which it had not been found possible to arrive at any decision, just as no precise definition of general multilateral treaties had been adopted. Paragraph 2 accordingly mentioned three factors: the nature of the treaty, the limited number of the contracting States, and the circumstances of its conclusion.

51. Personally, he thought that States would not accept the idea that a reserving State could, while maintaining its reservation, become a party to any treaty merely because one other State accepted the reservation.

52. Mr. ROSENNE suggested the deletion of the word "limited" which, in the context, was ambiguous. It was not the number of contracting States that was relevant but the number of States to which the treaty was initially open. All the members were agreed on the thought which it was desired to express in paragraph 2, and consequently the matter might perhaps be explained in the commentary.

53. He shared Mr. Lachs's doubts concerning the introduction of the concept of "the nature of the treaty"; the essential factors should be the initially limited number of

contracting States and the circumstances of the conclusion of the treaty.

Paragraph 3

54. Mr. ROSENNE said that the use of the term "admissibility of a reservation" was not consistent with the terminology adopted in the remainder of the draft, which would have required the use of the term "acceptance". He also proposed the phrase "competent organ of that organization" in the penultimate phrase. The constituent instruments of WHO and IMCO had been adopted at conferences convened by the United Nations, the Secretary-General of the United Nations being designated as the depositary.⁶ In the case of reservations to the WHO Constitution, their acceptance had been decided by the World Health Assembly, but in the case of reservations to the IMCO Convention, the General Assembly of the United Nations had decided, by resolution 1452 A(XIV), that the IMCO Assembly was the competent organ to decide upon their acceptance, and that rule should be included in the Commission's articles.

55. Mr. LACHS recalled the situation with regard to the International Atomic Energy Agency.

56. The CHAIRMAN pointed out that IMCO's constitution had not been adopted by a constituent Assembly of IMCO. Article 19 did not deal with the case where the constituent instrument of an organization was drawn up by the organ of another organization.

Paragraph 4

57. Mr. CASTRÉN said that the substance of paragraph 4 was acceptable to him. He asked in what sense the expression "contracting State" was being used in that paragraph as well as paragraphs 1, 2 and 6 and in articles 20 and 22; the expression "any State to which it is open to become a party to the treaty" had been used in the text adopted in 1962 and the word "party" in the Special Rapporteur's proposal. The meaning of the new expression was not clear. In paragraph 4 it appeared to refer to States which had adopted the text of the treaty, or which had signed subject to ratification.

58. Sir Humphrey WALDOCK, Special Rapporteur, said that the question was both pertinent and awkward. Personally, he would prefer to leave the matter pending until all the draft articles were in final form. It would then be appropriate to go through all the articles to give final form to all the passages which referred to "parties" and to "contracting States". The latter expression was used in a technical sense and would have to be defined; it had been adopted as a substitute for the very vague notion of "States concerned". The intention was to refer, in most cases, to the States which had adopted the text and to those to which it was open to accede to the treaty. The question which States constituted "contracting States" had been left open and would have to be re-examined when the work on all the draft articles was completed.

⁶ Constitution of the World Health Organization in United Nations *Treaty Series*, Vol. 14; Constitution of the Inter-Governmental Maritime Consultative Organization in United Nations *Treaty Series*, Vol. 289.

59. Mr. CASTRÉN said that he was satisfied with the Special Rapporteur's explanation and his assurance that the question would be dealt with later.

60. Mr. BRIGGS said that he would have to vote against article 19 because of paragraph 4. Quite aside from the principle—with which he disagreed—the drafting of paragraph 4 was defective. Acceptance of a reservation by one contracting State could not make the reserving State a party to the treaty. Nor could an objection to a reservation preclude the entry into force of the treaty as between the objecting and reserving State, but it would preclude the application of the treaty between them.

61. Mr. LACHS said he agreed with Mr. Briggs's objection to sub-paragraph (a).

62. He also had misgivings about sub-paragraph (b), which should not start with the presumption that an objection to a reservation would prevent the establishment of treaty relations between the reserving State and the objecting State. It should first stipulate that the particular provision to which a reservation had been made would not be binding as between the two States, and then add that the treaty as a whole would not be binding between them if that was the clear intention of the objecting State. There were a number of different possibilities to take into account, particularly those to be found in the practice of Latin American States.

63. Mr. ROSENNE asked what had been the fate of paragraph 5 in the Special Rapporteur's revised text of article 19 in his fourth report (A/CN.4/177/Add.1), which had been an important and welcome innovation introduced to solve the very problem that had prompted the Secretary-General of the United Nations to bring before the General Assembly the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The rule as formulated by the Special Rapporteur in that paragraph had been correct and had filled a serious gap in the draft.

64. Sub-paragraph (a) of the Drafting Committee's text for paragraph 4 might require modification, but the structure of sub-paragraph (b) seemed to him correct, and he found Mr. Lachs's criticism unwarranted.

65. Sir Humphrey WALDOCK, Special Rapporteur, in reply to Mr. Rosenne's question, said that a rule similar to that which had appeared in paragraph 5 of the text in his fourth report was set out in paragraph 6 of the Drafting Committee's proposal for article 19; it laid down that an act expressing consent to be bound became effective when at least one other contracting State that had expressed its consent to be bound by the treaty had accepted the reservation. The former instrument would then count for the purpose of establishing whether or not the treaty had come into force, if its entry into force required a certain number of ratifications or acceptances.

66. With regard to sub-paragraph (b), he said the general view in the Commission appeared to be that the natural interpretation of an objection was that the treaty would come into force with the reservation as between the reserving and the objecting State, unless there was some indication to the contrary.

Paragraph 5

67. Mr. ROSENNE said that the phrase "it was notified" was too vague, since it was virtually impossible to determine in general terms the precise moment when a notification had been received, for reasons which he had explained at the 803rd meeting.

Paragraph 6

68. Mr. ROSENNE said that to be consistent with the language used in earlier articles, the phrase "is effective" should be replaced by the phrase "becomes operative".

69. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said, in reply to Mr. Ruda's inquiry,⁷ that the question of safeguarding the position of regional organizations such as the Organization of American States which applied a different rule concerning reservations to treaties concluded under their auspices, might perhaps be examined in conjunction with the proposal he had made in his fourth report (A/CN.4/177) for including an article 3 *bis*, dealing with the constituent instruments of international organizations.⁸ The Commission might then consider whether or not such a general provision should be extended to cover the Latin-American practice regarding reservations, which had formed the subject of the 1962 text of article 20, paragraph 3 (b).

70. He suggested that article 19 should be referred back to the Drafting Committee in the light of the comments made, particularly on paragraph 2.

71. Mr. RUDA said that the Special Rapporteur's explanation satisfied him entirely. The question had been asked in the Drafting Committee, and he wanted to make sure that the Special Rapporteur's answer would appear in the record and would be taken into account in the drafting of the new article 3 *bis*.

*Article 19 was referred back to the Drafting Committee, as suggested by the Special Rapporteur.*⁹

ARTICLE 20 (Procedure regarding reservations)¹⁰

72. The CHAIRMAN invited the Commission to consider the new text of article 20 proposed by the Drafting Committee, which read:

"1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other contracting States.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been formulated on the date of its confirmation."

⁷ *vide supra*, para. 37.

⁸ For text of article 3 *bis*, see 820th meeting.

⁹ For resumption of discussion, see 816th meeting, paras. 43-53.

¹⁰ For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2 contained the rule approved by the Commission in 1962 that, when a reservation was formulated at the time of the adoption of the text of a treaty or at the moment of signature subject to ratification, it had to be formally confirmed when the reserving State expressed its consent to be bound.

74. The discussion on the matter at the current session had made him wonder whether one point had been overlooked, namely, how such a provision would dovetail with the rules laid down in article 19 about acceptance, rejection or tacit acceptance of a reservation. The view he had put forward in the Drafting Committee, which had been accepted, was that probably the rules would apply as from the time the reservation had been confirmed; otherwise, it might be difficult to frame a rule governing the case of tacit consent.

75. The CHAIRMAN, speaking as a member of the Commission, asked whether the final passage in paragraph 2, reading "the reservation shall be considered as having been formulated on the date of its confirmation", did not conflict with the provisions of article 17¹¹ relating to the obligation of good faith. Was the reserving State bound during the period between the formulation and the confirmation of the reservation?

76. Sir Humphrey WALDOCK, Special Rapporteur, said that the question put by the Chairman was more pertinent to article 17 and to the whole issue of how the obligation of good faith operated when a State made a reservation.

77. The CHAIRMAN, speaking as a member of the Commission, said that article 17 specified that a State was obliged in good faith to refrain from acts calculated to frustrate the object of a treaty when it had expressed its consent to be bound by the treaty pending the entry into force of the treaty.

78. Mr. LACHS said that he was preoccupied by the same kind of problem as that mentioned by the Chairman. Some thought would have to be given to the question what was the status of a reservation between the time it was formulated and the time it was confirmed.

79. Paragraph 1 of article 20 was correct as far as it went, but should be expanded to cover the case of tacit acceptance; States often preferred to accept a reservation tacitly rather than expressly.

80. He was not in favour of retaining the provision requiring an acceptance or an objection to be communicated to the other States direct, particularly as that provision might lead to difficulties if there were no diplomatic relations between some of the parties. Greater flexibility was needed and notification would suffice. Some such wording as was used in article 15 (c) would be preferable.

81. Sir Humphrey WALDOCK, Special Rapporteur, explained that the word "communicated" did not necessarily denote the process Mr. Lachs had in mind. The Drafting Committee had endeavoured to simplify the language in response to Mr. Tunkin's criticism of the elaborate earlier texts, where provision had been made

for cases where there was a depositary and for cases where there was none.

82. Paragraph 1 would in no way detract from the force of article 19, paragraph 5, which allowed for tacit consent to a reservation. He would not have thought any change was needed to meet Mr. Lachs's objection.

83. Mr. LACHS said that, even at the risk of repetition, article 20 should mention tacit acceptance.

84. He was satisfied with the Special Rapporteur's reply to his second point.

85. Mr. REUTER said that the Chairman had raised a very important point. He himself had asked that the phrase "the object and the purpose of the treaty" should be used at the appropriate point in article 17, because of the link between article 17 and article 20. The Drafting Committee had, however, decided against that symmetrical arrangement.

86. It was not so much the case referred to in article 20, paragraph 2, which raised difficulties in relation to article 17, for if a State formulated a reservation upon signing the treaty, its obligations would be less than if it had formulated no reservation. The reverse situation, however, raised a very serious problem, for the obligation of a State which signed a treaty without formulating any reservation and then formulated one at the time of ratification would be very much stricter during the period between signature and ratification. Article 17 thus encouraged States to formulate reservations at the time of signature. The principle of good faith determined the extent of the obligation under article 17.

87. Mr. TSURUOKA asked whether a State which had objected to a reservation during the period between the signature and the ratification of a treaty had to renew its objection after the reserving State confirmed its reservation.

88. Mr. AGO said that he appreciated the points raised by the Chairman and by Mr. Reuter about the relationship between article 17 and article 20, but thought they were contemplating an extreme case. Article 17 spoke expressly of the "object" of a treaty, and it had been stated clearly that no reservation could be formulated with respect to a clause affecting the essential object of a treaty. Some of the Commission's members said that under article 17 the obligations of a State would be stricter if it had entered no reservation. That was not really true, for the obligations could not vary so far as the actual object of the treaty, within the meaning of article 17, was concerned.

89. The CHAIRMAN, speaking as a member of the Commission, said that cases might occur in which the formulation of a reservation might partially frustrate the object of a treaty. For example, the various conventions on the conservation of species laid upon the contracting States an obligation to conserve certain species, and not those affected by reservations; it might be said that, in respect of the species not covered by the treaty, the object of the treaty was "frustrated".

90. Sir Humphrey WALDOCK, Special Rapporteur, said that the answer to Mr. Tsuruoka's question was in the affirmative. An objection to a reservation had to be confirmed, and if within a period of twelve months after

¹¹ See 812th meeting, para. 97.

the instrument expressing consent to be bound by a treaty had been deposited by the reserving State an objection was not made, the inference was that the reservation had been accepted.

91. The Chairman had raised an interesting academic point, but Mr. Ago was right in thinking that the Commission would run into difficulties if it sought to consider reservations in the context of the application of article 17. The point was covered by the notion of good faith, whether referred to explicitly or not, dealt with in that article.

92. Mr. ROSENNE said that the Special Rapporteur's reply to Mr. Tsuruoka had raised serious doubts in his mind about the advisability of retaining the last sentence in paragraph 2, as it would greatly complicate matters if a double confirmation of an objection to or an acceptance of a reservation was required for multilateral treaties. The Drafting Committee should consider clarifying that point. There should be a precise correlation between article 19, paragraph 6, and article 20, paragraph 2.

93. The CHAIRMAN suggested that article 20 should be referred back to the Drafting Committee.

*It was so agreed.*¹²

ARTICLE 21 (Legal effects of reservations)¹³

94. The CHAIRMAN invited the Commission to consider the new text of article 21 proposed by the Drafting Committee, which read :

" 1. A reservation established as effective with regard to any other party in accordance with articles 18, 19 and 20 :

(a) Modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

2. The reservation does not modify the application of the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agreed nevertheless to consider the treaty in force between itself and the reserving State, the provision to which the reservation relates does not apply as between the two States to the extent of the reservation. "

95. Sir Humphrey WALDOCK, Special Rapporteur, said that the new text of article 21 contained no change of substance. The Drafting Committee had spent some time in considering whether paragraph 1 (a) should refer to a reservation modifying the provisions or to one modifying the application of the provisions of a treaty.

96. Paragraph 3 dealt with the case—not altogether easy to express—where a State, though objecting to a reservation, nevertheless regarded the treaty, except for the provision to which the reservation related, as in force between itself and the reserving State.

97. Mr. LACHS said that the meaning of the word " modifies " in paragraph 1 should be carefully explained in the commentary, because it should denote all possible types of reservations : the elimination of a clause, the reduction or the extension of an obligation.

98. It seemed inappropriate to refer to " provisions " (in the plural) when a reservation might apply to only one article or even to one part of one article in a treaty.

99. Some modification of paragraph 3 was necessary in order to indicate that an objection to a reservation to a treaty as a whole, as distinct from a reservation to one of its provisions, should be treated as an exception.

100. Mr. CASTRÉN said that he could accept the changes suggested by Mr. Lachs.

101. He also thought the Drafting Committee could delete paragraphs 2 and 3. Paragraph 2 followed from and merely elaborated on the previous paragraph. Paragraph 3 did not specify whether a State which had objected to a reservation and which agreed nevertheless to consider the treaty in force between itself and the reserving State had to renew the objection, a point to which Mr. Tsuruoka had drawn attention earlier. If the objection was not renewed, it was, in effect, withdrawn.

102. Mr. ROSENNE said that further thought should be given to the question whether or not the word " modifies " was appropriate in the context.

103. Paragraph 1 (a) should be re-worded so as to indicate that a reservation affected the application of the treaty and not its provisions.

104. Mr. RUDA asked whether the word " effective " meant " valid " (*válida* in Spanish) or whether it meant something more than the Spanish word *efectiva*, which had no meaning in law.

105. Sir Humphrey WALDOCK, Special Rapporteur, said that, as far as the English language was concerned, the word " effective " did not bear any connotation of the reservation being absolutely valid; such a meaning would be injudicious in the context, now that the Commission had decided to adopt acceptance or objection as the criterion for establishing the validity of a reservation in regard to each individual State.

106. Mr. AGO said that in his opinion the Special Rapporteur was right in saying that the word " valid " could not be used. Nor did he think that the expression " established as effective " could be translated into French as *devenue effective*; the correct rendering would be *ayant pris effet*.

107. Mr. Rosenne had suggested that paragraph 1 (a) should speak of " the application of the treaty " rather than " the provisions of the treaty " ; but surely it was the treaty itself that came into force as between the two parties in its modified form. The modifications made by the reservation did not affect the application of the treaty.

108. Paragraph 3 should stand, for without it very grave doubts might arise, in that the State which had objected to a reservation would be uncertain whether the treaty came into force, with or without that reservation. In international law, the fact that an objection was not renewed would not mean that it had been withdrawn. A question of principle was involved.

¹² For resumption of discussion, see 816th meeting, paras. 54 and 55.

¹³ For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

109. Mr. AMADO said that, to his mind, the phrase “ a reservation established as effective ” meant primarily that the reservation had not been declared void. He was by no means sure that the phrase “ established as effective ” was correct.

The meeting rose at 12.55 p.m.

814th MEETING

Tuesday, 29 June 1965, at 3.30 p.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldoock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2,
A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (continued)

ARTICLE 21 (Legal effects of reservations) (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 21 as proposed by the Drafting Committee.

2. Mr. ROSENNE, replying to a remark by Mr. Ago at the previous meeting, said that there was some controversy as to what happened when a reservation was accepted or withdrawn. There was a danger in carrying too far the idea that a separate treaty was thus concluded. Acceptance, rejection and withdrawal of reservations were very frequently effected without bringing into play the full domestic treaty-making process, and it might therefore be better to refer in paragraph 1 to modification of the application of the provisions of a treaty, rather than simply to modification of those provisions. The impact of acceptance, rejection or withdrawal of reservations on domestic processes was a sensitive matter, and the Commission should hesitate before adopting a text which might have the effect of extending it to an area where that sensitivity had not hitherto been particularly noticeable.

3. Mr. TSURUOKA said that the Drafting Committee's attention should be drawn to the use of the word “ modifies ” in paragraph 1 (a) and (b). In his opinion, the word “ restricts ” or “ limits ” might be more acceptable as a description of the effect of a reservation on the provisions

of the treaty, since that effect would bound to be somewhat impaired whenever a reservation was made.

4. He could accept the idea contained in paragraph 3, and even the wording proposed by the Drafting Committee, but would ask the Special Rapporteur to prepare a detailed commentary on the effect of objection to a reservation. The question at issue was the position of States which objected to a reservation and yet consented to maintain treaty relations with the reserving State; that should be made quite clear in the commentary.

5. Mr. YASSEEN said he had considerable doubts about the Drafting Committee's text of paragraph 3. The original text had been acceptable to him because it had reflected the difference between the effects of objection and those of acceptance; when different—or, as in the case under discussion, diametrically opposed—terms were used, objection and acceptance, it was logical to expect that different effects were intended. In the text before the Commission, however, objection to a reservation and acceptance thereof seemed to produce the same effect, and objection was therefore made tantamount to acceptance. Stress should be laid on the principle of objection itself and on the specific effect of expressing such objection.

6. Mr. AGO suggested that Mr. Rosenne's and Mr. Tsuruoka's wishes might be met by replacing the word “ modifies ”, in paragraphs (a) and (b), by the word “ limits ”. That suggestion might be submitted to the Drafting Committee.

7. Paragraph 3 was indispensable if the Commission intended to retain the last phrase of the Drafting Committee's text for article 19, paragraph 4 (b),² which read: “ (b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State ”. He could agree with Mr. Yasseen that the objection referred to in paragraph 3 might not be regarded as a genuine objection, but he would submit that the paragraph could not be deleted if the passage which he had cited was retained, for the legal effect of the intention expressed by the objecting State should be set out in article 21, in order to forestall ambiguous situations.

8. Mr. TUNKIN said that the Commission would be going too far if it decided to eliminate both the provisions to which Mr. Ago had referred. In modern practice, States sometimes objected to reservations, but declared that they maintained treaty relations with the reserving State. Paragraph 3 should therefore be retained, even though it was debatable whether the objection was a genuine objection, or a purely political declaration having no legal effect; whatever opinion was held on the matter, however, the situation frequently arose and should be mentioned in the draft convention.

9. With regard to paragraph 1, he considered it of no great importance whether the wording used was “ modifies the provisions of the treaty ” or “ modifies the application of the provisions of the treaty ”; he tended to prefer the Drafting Committee's wording, because in

¹ For text of article 21 as proposed by the Drafting Committee, see 813th meeting, para. 94.

² *Ibid.*, para. 30.

actual fact a reservation modified a part of the treaty in the relations between the States concerned.

10. Mr. YASSEEN said that the essential point was to make it clear that the institution which the Commission was formulating in paragraph 3 was acceptance in the form of an objection.

11. Mr. AGO said he wished to dispel any possible misunderstanding. He was in favour of retaining paragraph 3, and had merely pointed out that it could not be deleted if article 19, paragraph 4 (b), was to be retained. In actual cases where a State objecting to a reservation nevertheless declared that it was establishing treaty relations with the reserving State, such objection was usually followed by consultations between the States concerned, and those consultations normally resulted in either the withdrawal of the objection or the withdrawal of the reservation.

12. Mr. BRIGGS said that article 13 of the Harvard Research Draft of 1935 referred to a reservation as limiting the effect of the treaty in so far as it might apply in the relations of the reserving State with other States. That provision was satisfactory, and the Drafting Committee's text was also acceptable.

13. He had no particular preference as between a text stating that the provisions of a treaty were modified and one stating that the application of those provisions was modified; a reservation affected what was taken out of a treaty, in respect of the reserving State and States accepting the reservation. The provision in question related to the modification of a treaty to that extent.

14. With regard to paragraph 3, he said that the normal effect of an objection to a reservation was defined in article 19, paragraph 4 (b); such an objection precluded the application of any part of the treaty as between the reserving and the objecting States. In reviewing governments' comments on the article, however, the Commission had considered yet another possibility, that described in article 21, paragraph 3, where as an exceptional measure the objecting State might agree that the treaty would be applicable between it and the reserving State except for the provisions to which the reservation had been made. In his opinion, both cases should be mentioned in the draft.

15. Mr. TUNKIN, referring to Mr. Ago's suggestion for replacing the word "modifies" by "limits", pointed out that a reservation might extend the application of a treaty, not limit it. The word "modified" was therefore preferable, since it covered both cases.

16. Mr. TSURUOKA pointed out that, if both obligations and rights were taken into consideration, a reservation must of necessity limit the effect of the provisions of a treaty to some extent. He would not, however, go so far as to propose an amendment.

17. The CHAIRMAN, speaking as a member of the Commission, said he agreed that a reservation could in some cases extend, rather than limit, the effects of a treaty. If a clause of a treaty was exclusive, and the reservation to that clause was also exclusive, the two negatives would result in a positive proposition. The Drafting Committee should take that point into account.

18. Mr. REUTER said that the situation dealt with in paragraph 3 was classical and purely juridical. If two States engaged in a controversy, one of them was at liberty to declare that it renounced the manner of settling the dispute which consisted in declaring the entire treaty to be inapplicable, for States had at their disposal all the other means of suasion provided for under international law and, particularly if the two States were bound by a compulsory jurisdiction clause, they should be able to engage in processes for settling the question whether or not the reservation was justified. The situation was not political, but legally classical and correct.

19. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Reuter's and Mr. Ago's interpretation of paragraph 3, but could not share Mr. Yasseen's view, which implied that States did not mean what they said when they objected to reservations.

20. He had no strong views on the drafting of paragraph 1; almost any phraseology would serve the purpose, as the Commission seemed to be agreed on the substance. He was not sure, however, that it would be wise to replace the word "modifies" by "limits". Both the Commission and the Drafting Committee had discussed possible variants, but after careful consideration had decided that the word "modifies" most accurately described what happened to a treaty in the event of a reservation. According to one school of thought, a reservation was a proposed amendment of a treaty, and acceptance of a reservation led to actual amendment. The word "modifies" had ultimately been chosen on the understanding that no special connotation was conferred on it by its use in connexion with the revision of treaties. Although the Drafting Committee might wish to make another attempt to find a better word, he considered the existing drafting to be satisfactory.

21. The CHAIRMAN suggested that the Commission should refer article 21 back to the Drafting Committee.

*It was so agreed.*³

ARTICLE 22 (Withdrawal of reservations)⁴

22. The CHAIRMAN invited the Commission to consider the new text of article 22 proposed by the Drafting Committee, which read:

"1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative when notice of it has been received by the other contracting States".

23. Sir Humphrey WALDOCK, Special Rapporteur, said that the only difficulty in connexion with article 22 arose in paragraph 2, which departed somewhat from the rules concerning notification which the Commission had assumed would apply in other cases. Mr. Rosenne had

³ For resumption of discussion, see 816th meeting, paras. 56-60.

⁴ For earlier discussion on the section concerning reservations, see 796th meeting, paras. 9-58, 797th meeting, paras. 5-78, 798th meeting, 799th meeting, paras. 10-85, and 800th meeting.

submitted a more general proposal (A/CN.4/L.108) concerning notices,⁵ which would be considered later, in the light of the Drafting Committee's recommendations concerning the proposal.⁶ Paragraph 2 of the new article 22, however, deliberately provided that the withdrawal of a reservation became operative only on receipt of notice by the contracting States; that provision was justified because the act of making a reservation put the reserving State in an exceptional position and, when it withdrew its reservation, a certain onus was placed on it, with the consequence that the other contracting States should not be affected until they received notice of the withdrawal.

24. Some other possibilities had been considered in the Commission, including that of including a provision along the lines suggested by the United Kingdom Government⁷ that a certain period should be allowed to elapse in order that any necessary changes required by the withdrawal could be made in domestic law. The Commission had, however, considered that such a clause would unduly complicate the situation and that, in practice, any difficulty that might arise would be obviated during the consultations in which the States concerned would undoubtedly engage. Moreover, he had heard of no actual difficulty arising in the application of a treaty from a State's withdrawal of its reservation. For those reasons, a simplified text had been recommended and adopted by the Drafting Committee.

25. Mr. BRIGGS pointed out that it was the reserving State which wished to know when the withdrawal of its reservation would become operative, since it thus assumed new obligations. Paragraph 2 was much too vague, for there might be a large number of contracting parties to a treaty, and it would be difficult to ascertain when notice had actually been received. He would therefore suggest that the last phrase of the paragraph be replaced by some such wording as "when notice has been given and notified", so that the withdrawing State would know exactly when it had been released from obligations or had assumed new ones. Such wording would still not be strictly accurate, but it should be borne in mind that the article was part of a system adopted by the Commission with regard to reservations to multilateral treaties.

26. Mr. ROSENNE said he was not sure whether it was necessary to include the provision in article 22. What was needed was a clause providing that the State withdrawing a reservation should give notice; the question when notice would become operative could then be stated in the general clause along the lines which he had proposed (A/CN.4/L.108) and which was to be considered by the Special Rapporteur and by the Drafting Committee. It was essential to have a more objective criterion than that given in paragraph 2.

27. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that he had made no proposal to the Drafting Committee for a general formula concerning the time at which notification should begin to operate; he had drafted a general article along the lines indicated by Mr. Tunkin, and had left it to the Drafting Committee to consider Mr. Rosenne's proposal. That proposal might

raise some important issues, and a decision to introduce an arbitrary period for notifications might change existing practice considerably; the Commission should approach the whole matter with great care.

28. The alternative to adopting the Drafting Committee's text of article 22 was to leave the matter to normal processes and simply to provide that the withdrawing State should notify the other contracting States, either through the depositary or directly. In the case of notification to a depositary, unless a new general rule was adopted, withdrawal would normally become operative immediately, and that solution had given rise to no difficulties in practice. In the case of the withdrawal of a reservation, however, it had been thought desirable that notice should reach the States concerned before it became operative, and the provision to that effect had been welcomed by certain of the governments which had commented on the 1962 draft. In any case, the time-lag involved would only be two or three months, and there again no great difficulties should be expected. Paragraph 2 reflected that situation, and he would suggest that, if it were to be changed, the clause should merely state the normal rule in the matter.

29. Mr. TSURUOKA said he could accept paragraph 2, but hoped that it would be accompanied by a detailed commentary concerning the responsibility of a State which had accepted the reservation but was not in a position, immediately upon receipt of the notification of withdrawal of the reservation, to apply the treaty as if no reservation had been made. Thus, his acceptance of the paragraph was based on the understanding that the general principle of good faith would apply in that connexion.

30. The CHAIRMAN suggested that article 22 should be referred back to the Drafting Committee.⁸

It was so agreed.

ARTICLE 23 (Entry into force of treaties)⁹

31. The CHAIRMAN invited the Commission to consider the new text of article 23 prepared by the Drafting Committee, which read:

"1. A treaty enters into force upon such date and in such manner as it may provide or as the States which adopted its text may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as all the States which adopted its text have expressed their consent to be bound by the treaty.

3. Where a State expresses its consent to be bound after a treaty has come into force, the treaty enters into force for that State on the date when its consent to be bound is expressed, unless the treaty otherwise provides."

32. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had before it two articles on entry into force, the first of which, article 23, dealt with straightforward cases. Its substance was much the same

⁵ 803rd meeting, paras. 30-35.

⁶ For subsequent action, see 815th meeting *in fine*.

⁷ A/CN.4/175, that Government's comments on article 22.

⁸ For resumption of discussion, see 816th meeting, paras. 61-71.

⁹ For earlier discussion, see 789th meeting, paras. 59-74 and 790th meeting, paras. 1-70.

as in the 1962 draft, but the amount of detail had been reduced. As a result, a small point of substance had been omitted; in its 1962 text the Commission had provided that, where a treaty, without specifying the date upon which it was to come into force, fixed a date by which ratification, acceptance or approval was to take place, it would come into force on that date. The Drafting Committee, however, had satisfied itself that that presumption should not appear in article 23. It had considered that it would in any event be necessary for all the instruments to have been exchanged or deposited and that it would perhaps be unnecessarily rigid to say that the date mentioned for deposit should in all cases be the date on which entry into force should take place. The former paragraph 2 (b), which the Commission had agreed to be unnecessary, had been dropped, as had the former paragraph 2 (c) because, although it dealt with a special case, that case was covered by paragraph 1.

33. Mr. Briggs had expressed what might be termed doctrinal objections to the use of the expression "enters into force" in a case where the treaty had already come into force.¹⁰ That, however, was the way in which the matter was expressed in treaty practice, and the Drafting Committee had not considered that there was sufficient doctrinal reason for departing from the normal language of treaty practice as used in the various codifying conventions, such as the Geneva Conventions on the law of the sea and the two Vienna Conventions on diplomatic and consular relations.

34. Mr. BRIGGS said that he had regarded his objection not as a point of doctrine but as a question of precision; in his view, paragraph 3 did not belong to article 23. Since, however, the Drafting Committee had considered his point and rejected it, he would not press it.

35. Mr. ROSENNE said that, in general, he accepted the article. He was not sure, however, whether it was fully correlated with the new scheme of articles 11, 12 and 15. As he read those articles, they made a distinction between the expression of consent by one of the various means specified in them and the moment when that expression of consent became operative, as provided in article 11, paragraph 1, or in article 15. Presumably the words "expresses its consent" in article 23 meant the moment when that expression of consent became operative in accordance with articles 11 or 15, whichever was appropriate to the particular case.

36. Sir Humphrey WALDOCK, Special Rapporteur, said that that was a valid point; the words "expresses its consent" as used in article 23 were intended to refer to the case where the expression of consent became operative under article 15. It would be very difficult to convey the idea neatly in drafting, but the Drafting Committee might be asked to consider the point.

37. The CHAIRMAN suggested that article 23 be referred back to the Drafting Committee.

*It was so agreed.*¹¹

¹⁰ 790th meeting, para. 66.

¹¹ For resumption of discussion, see 816th meeting, paras. 72 and 73.

ARTICLE 24 (Entry into force of a treaty provisionally)¹²

38. The CHAIRMAN invited the Commission to consider the new text of article 24 proposed by the Drafting Committee, which read:

"1. A treaty may enter into force provisionally if:

- (a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or
- (b) The contracting States otherwise so agree.

2. A part of a treaty may also enter into force provisionally pending the entry into force of the treaty as a whole if the treaty so prescribes or the contracting States otherwise so agree".

39. Sir Humphrey WALDOCK, Special Rapporteur, said that, during the previous discussion in the Commission, some difference of opinion had arisen as to whether, in the case contemplated by the article, the treaty entered into force provisionally or there was an agreement to apply certain provisions of the treaty. The Drafting Committee had framed article 24 in terms of the entry into force provisionally of the treaty because that was the language very often used in treaties and by States. Moreover, it seemed to him that the difference between the two concepts—entry into force provisionally and application of the clauses of the treaty provisionally—was a doctrinal question. He did not believe that there was a distinct institution of treaty law known as "entry into force" that excluded cases of provisional entry into force.

40. Article 23 in fact contemplated cases where a treaty did not provide for its entry into force but where, by separate agreement, the States concerned agreed that it should be brought into force by a certain date. He could not see that there was any great difference between such a case and cases where the States concerned agreed that, though it was subject to ratification, the treaty was to come into force provisionally; the only difference was that, in the second case, the treaty came into force subject to the condition that it would cease to be in force if ratification did not occur.

41. Mr. TUNKIN said that he had some doubt whether the word "accession" was appropriate in paragraph 1 (a); accession usually meant consent to be bound by a treaty which was already in force.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that, whereas members of the Commission were all accustomed to the notion that accession was the process whereby a State became party to a treaty already in force, a great number of multilateral treaties and codifying conventions which specified a limited period for signature provided otherwise and used the word "accession" as expressing merely another form of acceptance. For that reason the word "accession" was used in the article in accordance with modern State practice.

43. Mr. RUDA said that, during the earlier discussion, he had raised the question of the circumstances in which a treaty ceased to be in force provisionally in cases where it was not ratified or approved.¹³ He still held that to be an important point, since cases arose where a treaty came

¹² For earlier discussion, see 790th meeting, paras. 71-103, and 791st meeting, paras. 1-60.

¹³ 790th meeting, para. 86.

into force provisionally, and subsequently a State decided that it did not wish to ratify it or adhere to it. That situation was not covered by article 24.

44. Sir Humphrey WALDOCK, Special Rapporteur, said that he had come to the conclusion that it was somewhat inconsistent that article 24 should be the only article in part I which dealt with termination. He had therefore dropped the provision regarding termination which appeared in the 1962 draft and in his fourth report; the matter should be dealt with under termination of treaties. The Drafting Committee had decided that article 24 should deal only with the case of a treaty's entry into force provisionally.

45. Mr. LACHS said that Mr. Ruda had apparently been referring to bilateral treaties; but a like question could also arise in connexion with multilateral treaties. For instance, a treaty might come into force pending ratification. It might be that one of the parties then rejected the treaty. If the treaty contained no provision about entry into force, was it then superseded?

46. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not think that the text excluded the possibility of a treaty being brought into force provisionally between certain of the parties. If no provision was made in the treaty itself, States could not be prevented from bringing the whole or part of the treaty into force by separate agreement.

47. Mr. LACHS said that article 23, paragraph 2, provided for unanimity; did that unanimity cease to exist if one of the parties refused to ratify? In what circumstances did the treaty become a definitive obligation for all the other States?

48. Mr. AGO said that it was impossible to cover all cases. There would be cases where the circumstances of the conclusion of the treaty made it evident that the parties intended that all the States taking part in the negotiations were to be bound by the treaty, failing which the treaty would not exist. If, however, that was not the situation, and interpretation showed that that condition had not been laid down, the treaty would remain in force between the signatories. Everything would depend on the circumstances in which the treaty had been concluded.

49. With regard to Mr. Ruda's point, he thought that the Special Rapporteur's suggestion that the matter should be dealt with in the provisions concerning termination was a good solution. It was open to a State which had accepted provisional entry into force to say that its competent organs were not prepared to ratify the treaty and that, therefore, the treaty which had provisionally entered into force ceased forthwith to be in force.

50. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with Mr. Ago that the point raised by Mr. Ruda should be dealt with in the articles relating to termination. The Special Rapporteur should, however, draw attention to it in his commentary to article 24.

51. Mr. RUDA said that he, too, agreed about the placing of the relevant provision; he had merely wished to bring the point to the Commission's attention.

52. Mr. TSURUOKA said that he did not greatly like the use of the word "provisionally". He agreed with the

Special Rapporteur that the term was in current use, but it gave the impression that the whole matter was rather vague. The Drafting Committee might search for a more adequate word. It might be possible to state straightforwardly that the articles dealt with the entry into force of a treaty depending on certain acts.

53. Mr. AGO said he agreed that the situation was not an ideal one, but it was adequately described by the term "provisionally". The article dealt with a situation where a treaty might cease to be in force when a State declared unilaterally that it would not ratify it.

54. Mr. BRIGGS said that he accepted article 24 in principle, but considered the word "otherwise" in paragraph 2 ambiguous.

55. Sir Humphrey WALDOCK, Special Rapporteur, explained that the Drafting Committee had merely been trying to express the idea of entry into force by an agreement not necessarily included in the terms of the treaty; the Drafting Committee would seek some other way to express the idea.

56. The CHAIRMAN suggested that article 24 should be referred back to the Drafting Committee.

*It was so agreed.*¹⁴

The meeting rose at 5.5 p.m.

¹⁴ For resumption of discussion, see 816th meeting, paras. 74-77.

815th MEETING

Thursday, 1 July 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castren, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L. 107 and L. 108)

(continued)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

ARTICLE 25 (Registration and publication of treaties)¹

1. The CHAIRMAN invited the Commission to consider the new text of article 25 proposed by the Drafting Committee, which read:

"Treaties entered into by parties to the present articles shall as soon as possible be registered with

¹ For earlier discussion, see 801st meeting, paras. 1-62.

the Secretariat of the United Nations. Their registration and publication shall be governed by the regulations adopted by the General Assembly of the United Nations.”

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the problem with article 25 was the overlap of its provisions with those of Article 102 of the Charter. The Drafting Committee had come to the conclusion that the only satisfactory way of dealing with the problem was to state the rule on the registration and publication of treaties without mentioning Article 102. The rule would apply to all States which subscribed to the draft articles, without raising the question of safeguarding the provisions of Article 102.

3. The CHAIRMAN, speaking as a member of the Commission, said that he supported the article as a contribution to open diplomacy. The Drafting Committee had succeeded in working out a formula which eliminated all the controversial points in the former draft of the article, particularly the question of the obligations of States Members of the United Nations under the Charter and the question of treaties concluded between States not Members of the United Nations. Under the new text, the sole source of the obligation to register treaties was the convention which the Commission was preparing.

4. The question of the obligation, if any, of the Secretary-General of the United Nations to perform the tasks laid upon him by that article was answered by the second sentence of the article. If the regulations adopted by the General Assembly so permitted, registration and publication would take place; if not, the responsibility would fall on another authority. Nevertheless, inasmuch as the existing regulations made a distinction between registration, on the one hand, and filing and recording on the other, the Commission should, when drafting the commentary to the article, draw the General Assembly's attention to the need for the revision of certain provisions of the regulations.

5. He invited the Commission to vote on article 25.

Article 25 was adopted by 13 votes to none.

ARTICLE 26 (Correction of errors in texts or in certified copies of treaties)³

6. The CHAIRMAN invited the Commission to consider the new text of article 26 proposed by the Drafting Committee, which read :

“ 1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected :

(a) By having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) By executing or exchanging a separate instrument or instruments setting out the correction which it has been agreed to make; or

(c) By executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter :

(a) Shall notify the contracting States of the error and of the proposal to correct it if no objection is raised within a specified time-limit;

(b) If on the expiry of the time-limit no objection has been raised, shall make and initial the correction in the text and shall execute a *procès-verbal* of the rectification of the text, and communicate a copy of it to the contracting States;

(c) If an objection has been raised to the proposed correction, shall communicate the objection to the other contracting States and, in the case of a treaty drawn up by an international organization, to the competent organ of the organization.

3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which it is agreed should be corrected.

4. (a) The corrected text replaces the defective text *ab initio*, unless the contracting States otherwise decide.

(b) The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

5. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a *procès-verbal* specifying the rectification and communicate a copy to the contracting States.”

7. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 1 of the new article 26 dealt with the correction of errors in the text of treaties for which there was no depositary; paragraph 2 dealt with the same question in cases where there was a depositary. Paragraph 3 dealt with the different case in which there was no error in the text, but a lack of concordance between two or more language versions. The wording of that paragraph had been chosen so as to avoid the problem whether the provision should be stated as relating to a text or to a version of the text.

8. Mr. TSURUOKA said that he accepted the article as a whole and merely wished to make two drafting suggestions.

9. First, in paragraph 1 (b), the personal pronoun *y* in the French version should be deleted, as it was not very clear and had no equivalent in the English text.

10. Secondly, in paragraph 2 (a), the words “ if no objection is raised within a specified time-limit ” were not clearly related to the rest of the sentence. Perhaps an explanation should be given in the commentary.

11. Mr. PESSOU said that Mr. Tsuruoka's suggested amendment might make the French text of paragraph 1 (b) incomprehensible. If the personal pronoun *y* was deleted it would be necessary to say *d'apporter au texte*.

³ For earlier discussion of article 26 (The correction of errors in the texts of treaties for which there is no depositary) and article 27 (The correction of errors in the texts of treaties for which there is a depositary), see 802nd meeting, paras. 1-64. In the light of the discussion the Drafting Committee prepared the new version of article 26, which incorporates the substance of the former article 27.

12. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the phrase "within a specified time-limit" had not caused any difficulty for governments; it reflected the procedure invariably followed by the Secretary-General in the matter.

13. Mr. TSURUOKA said that he had no objection to the substance of paragraph 2 (a) but had merely wished to point out that that provision required careful reading to be understood. It should be explained that the depositary notified the contracting States of the error and of the proposal to correct it, and requested a reply within a specified time-limit, on the understanding that the error would be corrected in the manner indicated if no objection was raised within that time-limit.

14. The CHAIRMAN proposed that the Commission should adopt article 26 and request the Special Rapporteur and Mr. Reuter, the Acting Chairman of the Drafting Committee, to settle the drafting questions which had been raised.

Article 26 was adopted by 16 votes to none.

ARTICLE 28 (Depositaries of treaties)³

15. The CHAIRMAN invited the Commission to consider the new text of article 28 proposed by the Drafting Committee, which read:

"1. The depositary of a treaty, which may be a State or an international organization, shall be appointed by the contracting States in the treaty, or in some other manner, to perform the functions set forth in article 29.

2. The functions of a depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance."

16. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 1 of article 28 represented a simplified version of the former article 28; it dealt with the appointment of a depositary by the treaty or by a separate agreement of the contracting States. The former article 28 had contained two presumptions: the first, that a competent organ of an international organization would be the depositary in the case of a treaty drawn up within an international organization, and the second, that in the case of a treaty drawn up at a conference, the depositary would be the State in whose territory the conference had been convened. The Drafting Committee had considered that those presumptions were not likely to be very useful in practice and, since they had given rise to some question, had decided to drop them.

17. Paragraph 2 embodied the provision previously contained in the second sentence of paragraph 1 of the former article 29, to the effect that a depositary was under an obligation to act impartially and internationally.

18. Mr. BRIGGS proposed that, in paragraph 1, the word "appointed" be replaced by the word "designated", a more appropriate term and one which corresponded to the French *désigné*.

19. Mr. TSURUOKA questioned whether the last phrase in paragraph 1, "to perform the functions set

forth in article 29", was entirely appropriate, inasmuch as article 29, paragraph 1⁴, said that the functions of a depositary "comprise in particular" those indicated in the following sub-paragraph. Perhaps the words "in particular" should be inserted after the word "perform" in article 28, paragraph 1.

20. Mr. PESSOU said that he found the text of article 28 excellent. The apparent defect to which Mr. Tsuruoka had drawn attention was more imaginary than real and should not prevent the reader from grasping the meaning of the article.

21. Mr. TSURUOKA said that he would gladly follow Mr. Pessou's line of reasoning if the phrase "comprise in particular" in article 29, paragraph 1, could be interpreted to mean that there were other functions in addition to those mentioned but that they were simply not described. In that case there would be nothing illogical about the passage.

22. Mr. PESSOU said that article 29 was not meant to describe functions which were known to all. The phrase used indicated that the functions described were the essential functions.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that he was inclined to share Mr. Pessou's view but thought that the whole question was not a very important one. Paragraph 1 (g) of article 29 stated in general terms that the depositary performed "the functions specified in other provisions of the present articles". In point of fact, paragraphs 1 (a) to (g) covered most of the possible functions of a depositary.

24. He could accept Mr. Briggs's proposal that the word "appointed" should be replaced by the better term "designated".

25. He would like to draw the Commission's attention to the fact that the Drafting Committee had decided, in the light of its new text of articles 28 and 29, that no definition of "depositary" could be included in article 1.

26. Mr. ROSENNE said that he also was inclined to share Mr. Pessou's view, but suggested that Mr. Tsuruoka's point might be met by modifying the wording "set forth in article 29" to read "as set forth in article 29", a phrase which would indicate that the enumeration of functions was not exhaustive.

27. Mr. TSURUOKA said that he accepted article 28 in any event. The sole purpose of his comment had been to improve the form. Since the Special Rapporteur seemed to consider that a cross-reference to article 29 was not indispensable in article 28, he suggested that the last phrase in article 28, paragraph 1, "to perform the functions set forth in article 29", should simply be deleted.

28. Mr. REUTER suggested that, in deference to Mr. Tsuruoka's comment, the words "set forth" might be replaced by the words "referred to" or "provided for".

29. Sir Humphrey WALDOCK, Special Rapporteur, said that he could accept Mr. Reuter's suggestion.

³ For earlier discussion, see 802nd meeting, paras. 65-102, and 803rd meeting, paras. 18-26.

⁴ *vide infra*, para. 35.

30. Mr. PAL proposed the deletion of the words "to perform the functions set forth in article 29"; they were not absolutely necessary and their deletion would dispose of the difficulty which had arisen.

31. Mr. AGO said that article 28 would lose some of its value if the phrase "to perform the functions set forth in article 29" was deleted.

32. Mr. YASSEEN said that the definition of "depository" given in one of the clauses of article 1 had been replaced by a generalization in article 28, indicating what a depository was; the phrase "to perform the functions set forth in article 29" therefore had its use and should be retained.

33. Mr. REUTER said he doubted very much whether the phrase in question should be retained at all. Paragraph 1 introduced two substantive rules of law; the first that the depository might be a State or an international organization; the second, that the depository was appointed by the contracting States in the treaty or in some other manner. That was the essence of the paragraph, and the deletion of the words "to perform the functions set forth in article 29" could not have any serious consequences, whereas it would have the advantage of preventing any discussion.

34. The CHAIRMAN put to the vote Mr. Pal's proposal for the deletion of the phrase "to perform the functions set forth in article 29".

Mr. Pal's proposal was adopted by 10 votes to 3, with 3 abstentions.

Paragraph 1 as thus amended was adopted by 16 votes to none.

Article 28 as amended was adopted as a whole by 16 votes to none.

ARTICLE 29 (Functions of depositaries)⁵

35. The CHAIRMAN invited the Commission to consider the new text of article 29 proposed by the Drafting Committee, which read:

"1. The functions of a depository, unless the treaty otherwise provides, comprise in particular:

(a) Keeping the custody of the original text of the treaty, if entrusted to it;

(b) Preparing certified copies of the original text and any further texts in such additional languages as may be required by the treaty or by the established rules of an international organization, and transmitting them to the contracting States.

(c) Receiving any signatures to the treaty and any instruments and notifications relating to it;

(d) Examining whether a signature, an instrument or a reservation is in conformity with the provisions of the treaty and of the present articles and, if need be, bringing the matter to the attention of the State in question;

(e) Informing the other contracting States of acts and notifications relating to the treaty;

(f) Informing the contracting States when the number of signatures or of instruments of ratification,

accession, acceptance or approval required for the entry into force of the treaty have been received or deposited;

(g) Performing the functions specified in other provisions of the present articles.

2. In the event of any difference appearing between a State and the depository as to the performance of the latter's functions, the depository shall bring the question to the attention of the other contracting States or, where appropriate, of the competent organ of the organization concerned."

36. Sir Humphrey WALDOCK, Special Rapporteur, said that, in consequence of the transfer to article 28 of the provision which had appeared in the second sentence of paragraph 1 of article 29 of the 1962 text,⁶ the Drafting Committee had reworded the paragraph to state the basic functions of the depository, and in so doing had shortened the wording.

37. The new paragraph 2 of article 29 represented a shortened version of the former paragraph 8, from which it did not differ in substance.

38. Mr. ROSENNE said that he was prepared to accept article 29 as it stood, but would propose the insertion in paragraph 1 of an additional sub-paragraph reading "registering the treaty in accordance with article 25 of these articles". In articles 4 and 5 of the regulations adopted by the General Assembly for the registration and publication of treaties and international agreements,⁷ provision was made for the registration of a treaty by the depository.

39. He suggested that the commentary to article 29 should state that the enumeration in paragraph 1 was not intended to be exhaustive, either with respect to the law of treaties or with respect to other branches of the law. For example, a depository might be asked who were the parties to the treaty and it would have to answer. Requests for such information were addressed to the depository by the Registry of the International Court of Justice in cases where Article 63 of the Statute of the Court had to be applied.

40. Mr. AGO said that in paragraph 1 (e) the word "acts" apparently covered signatures, reservations and instruments. As notifications were also acts, the word "acts" alone would suffice.

41. Mr. TUNKIN proposed the deletion from paragraph 1 (e) of the word "other" before "contracting States". The depository might be not a State but an international organization.

42. Sir Humphrey WALDOCK, Special Rapporteur, said that he did not know enough about existing practice to form a firm opinion on Mr. Rosenne's proposal; at first sight, it seemed a reasonable one.

43. With regard to Mr. Ago's point, he said it would be preferable to maintain the English text of paragraph 1 (e) unchanged as the word "acts" could include legal instruments but hardly notifications.

⁶ *vide supra*, para. 17.

⁷ For the text of the regulations, see *Yearbook of the International Law Commission, 1962*, Vol. II, pp. 194 and 195.

⁵ For earlier discussion, see 803rd meeting, paras. 27-107.

44. Mr. BRIGGS said he agreed with the Special Rapporteur about the text of paragraph 1 (e).

45. The CHAIRMAN, speaking as a member of the Commission, said that he could not agree with Mr. Ago. In his opinion, the word "acts" meant the acts of other contracting States, whereas "notifications" were actions initiated by the depositary.

46. Mr. AGO said that he did not think that the word "notifications" could mean acts emanating from the depositary; in his view, what was meant was notifications made to the depositary. It was provided that instruments of ratification, accession, acceptance or approval would be communicated to the depositary, the contracting States being free either to deposit the instruments itself or to send a "notification" of it. Notification was therefore a true act which emanated from a contracting State. The word "communications" might perhaps be substituted for "notifications".

47. Mr. REUTER said that the title and text of article 29 *bis*⁸ differentiated "communications" and "notifications". The terminology used in articles 29 and 29 *bis* should be concorded.

48. The CHAIRMAN, speaking as a member of the Commission, said that some communications were simply statements of fact made by the depositary, such as that a treaty had entered into force, or else had not entered into force on the date specified in the treaty itself. He would therefore agree to the substitution of the word "communications" for "notifications".

49. Mr. ELIAS said that, in order to meet Mr. Ago's point, paragraph 1 (e) might be redrafted to read: "informing the other contracting States of all acts, including notifications, relating to the treaty". Alternatively, the words "and notifications" might be dropped and the commentary might explain that the term "acts" included notifications.

50. Mr. LACHS said that, although he had no strong objection to Mr. Rosenne's proposal, he hesitated to support it because of the consequences it might have for Member States of the United Nations. Article 102 of the Charter imposed obligations concerning the registration of treaties with the Secretariat, and failure to discharge them would debar Member States from invoking a treaty to which they were parties before any United Nations organ. What would be their position if a depositary neglected to perform its duty to register the treaty? Rather than include a rule of the kind proposed by Mr. Rosenne, the Commission should leave to the parties, at their own risk, the decision whether or not to delegate the function of registration to a depositary.

51. The CHAIRMAN, speaking as a member of the Commission, said that as a general rule the depositary was not expected to submit the treaty to the Secretary-General of the United Nations for registration, but might be authorized to do so. He knew of several cases in which a treaty had specified that the depositary—not a signatory to the treaty—was to arrange for the registration of the treaty. Should that practice be made

a general rule or not? If it was, would that not be inconsistent with actual practice? He had no fixed opinion on the point.

52. Mr. ROSENNE said that, as he had indicated during the discussion,⁹ the provisions concerning a depositary could not be based on the assumption that it would fail to carry out its functions. In any case, it was impossible to provide in the text against any such eventuality. Presumably if a depositary neglected to register the treaty with the United Nations, though required to do so under the terms of the treaty, and one of the parties wished to invoke it in a United Nations organ, that party would effect the registration itself. The practice of imposing the duty to register on the depositary was sufficiently well established to warrant the inclusion of the rule he had proposed. It would still be open to the parties to agree on some other method.

53. Mr. LACHS said that he would not press an objection to the proposal, but he still doubted whether it was necessary to enumerate all the possible functions of a depositary. It was clear from the introductory sentence of paragraph 1 that the list was not intended to be exhaustive.

54. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prefer not to incorporate Mr. Rosenne's proposal in article 29 until its implications for the operation of Article 102 of the Charter, and for the United Nations regulations concerning the registration and publication of treaties, had been fully examined.

55. Mr. REUTER asked whether the Commission had to take a final decision at that juncture. What was being proposed was simply an addition which would not upset the text and which could be introduced during the final reading. He suggested that the Commission should decide to consider the matter at that later stage.

56. Mr. TUNKIN said he supported Mr. Reuter's suggestion that the provision proposed by Mr. Rosenne should be examined at the next session. The Commission might find that article 29 was not the right context.

57. The CHAIRMAN said that the United Nations rules of procedure concerning reconsideration were rather complicated. He believed, however, that if the Commission wished to adopt article 29, it could do so with the proviso that whatever it adopted at that stage would be reviewed again, if necessary, at a later session, and Mr. Rosenne's reservation could be placed on record and examined later, together with the few articles left pending.

58. Mr. CASTRÉN said that when the Commission had decided not to prepare commentaries on part I of the draft articles for the time being, it had also decided that the whole text would be submitted to governments forthwith. It was perfectly free, therefore, to add further provisions and to modify any particular article at a later stage.

59. Sir Humphrey WALDOCK, Special Rapporteur, said he supported Mr. Reuter's suggestion.

60. It would be helpful if the Secretariat could prepare a short paper on existing practice to enable the Commis-

⁸ *vide infra*, para. 61.

⁹ 803rd meeting, para. 43.

sion to reach a decision on Mr. Rosenne's proposal at the next session.

It was agreed to defer consideration of Mr. Rosenne's proposal for an additional sub-paragraph in article 29 until the next session.

Article 29 was adopted by 16 votes to none.

ARTICLE 29 (*bis*) (Communications and notifications to contracting States)

61. The CHAIRMAN invited the Commission to consider the text of a new article 29 (*bis*) proposed by the Drafting Committee, which read :

"Whenever it is provided by the present articles that a communication or notification shall be made to contracting States, such communication or notification shall be made :

(a) In cases where there is no depositary, directly to each of the States in question;

(b) In cases where there is a depositary, to the depositary for communication to the States in question".

62. Sir Humphrey WALDOCK (Special Rapporteur) explained that the purpose of the new article proposed by the Drafting Committee was to give effect to Mr. Tunkin's suggestion¹⁰ that the drafting of the provisions concerning the depositary should be simplified by consolidating in one article provisions covering both the case where there was and the case where there was not a depositary.

Article 29 (bis) was adopted by 16 votes to none.

63. Sir Humphrey WALDOCK, Special Rapporteur, said that, after examining Mr. Rosenne's proposal (A/CN.4/L.108)¹¹ for the inclusion of a provision dealing with the time at which a notification became effective and providing a short interval for the necessary administrative processes to be carried out, the Drafting Committee had decided that the proposal should be discussed at a later stage, after virtually all the articles in the draft had been completed, because it had a bearing on the provisions concerning withdrawal from and termination of a treaty.

64. Mr. ROSENNE said that the Drafting Committee's decision was acceptable to him.

The meeting rose at 11.40 a.m.

¹⁰ 803rd meeting, para. 72.

¹¹ 803rd meeting, para. 30.

816th MEETING

Friday, 2 July 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(continued)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

1. The CHAIRMAN invited the Commission to consider the texts of the articles which had been referred back to and revised by the Drafting Committee.

ARTICLE 2 (Treaties and other international agreements not within the scope of the present articles)¹

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the only changes in the revised text of article 2 were drafting changes; it read :

"The fact that the present articles do not relate

(a) To treaties concluded between States and other subjects of international law or between such other subjects of international law; or

(b) To international agreements not in written form

shall not affect the legal force of such treaties or agreements or the application to them of any of the rules set forth in the present articles to which they would be subject independently of these articles."

Article 2 was adopted by 14 votes to none.

ARTICLE 3 (Capacity of States to conclude treaties)²

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 3 read :

"1. Every State possesses capacity to conclude treaties.

2. States members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down."

4. Paragraph 1 in the English version had been re-drafted in order to conform to the French. Paragraph 2 had been modified on the lines suggested by Mr. Ago at the 811th meeting. The Drafting Committee hoped that the changes would go a considerable way towards meeting some of the objections to the earlier text and that the revised text would commend itself to the majority of the Commission.

5. Mr. BRIGGS asked that the two paragraphs be put to the vote separately.

Paragraph 1 was adopted by 11 votes to 2, with 1 abstention.

Paragraph 2 was adopted by 7 votes to 3, with 4 abstentions.

Article 3 as a whole was adopted by 7 votes to 3, with 4 abstentions.

¹ For earlier discussions, see 777th meeting, in particular paras. 71-73 and 78, and 810th meeting, paras. 12-27.

² For earlier discussions, see 779th meeting, paras. 1-88, 780th meeting, paras. 1-16, 810th meeting, paras. 28-78, and 811th meeting, paras. 2-51.

6. Mr. BRIGGS said that he had voted against article 3 because as it stood it was inaccurate and inadequate.

7. Mr. RUDA explained that he had voted against article 3 because he could not see any real difference between the new text and the earlier one.

8. Mr. ROSENNE said that he had voted in favour of paragraph 2—though with some hesitation—because it was an improvement on the previous text and could be submitted to governments.

9. Mr. TSURUOKA explained that he had abstained from voting on the article as a whole because he had voted for paragraph 1 and against paragraph 2.

ARTICLE 4 (Full powers to represent the State in the negotiation and conclusion of treaties)⁸

10. Sir Humphrey WALDOCK, Special Rapporteur, said that the only changes in the revised text of article 4 were drafting changes; it read :

“ 1. Except as provided in paragraph 2, a person is considered as representing a State for the purpose of negotiating, adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty only if :

(a) He produces an appropriate instrument of full powers; or

(b) It appears from the circumstances that the intention of the States concerned was to dispense with full powers.

2. In virtue of their functions and without having to produce an instrument of full powers, the following are considered as representing their State :

(a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;

(b) Heads of diplomatic missions, for the purpose of the negotiation and adoption of the text of a treaty between the accrediting State and the State to which they are accredited;

(c) Representatives accredited by States to an international conference or to an organ of an international organization, for the purpose of the negotiation and adoption of the text of a treaty.”

11. Mr. ROSENNE said that, in order to bring paragraphs 2 (b) and (c) into line with paragraph 2 (a), the words “ negotiating and adopting ” should be substituted for the words “ the negotiation and adoption of ”.

12. Although he still maintained the view he had expressed earlier⁴ concerning paragraph 2 (c), he would vote in favour of the article.

13. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne’s drafting change was acceptable.

Article 4, as thus amended, was adopted by 16 votes to none.

⁸ For earlier discussions, see 780th meeting, paras. 27-85, 781st meeting, paras. 1-41, and 811th meeting, paras. 52-82.

⁴ 811th meeting, paras. 57, 80 and 81.

ARTICLE 11 (Consent to be bound expressed by signature)⁵

14. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 11 read :

“ 1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when :

(a) The treaty provides that signature shall have that effect;

(b) It appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that signature should have that effect;

(c) The intention of the State in question to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiations.

2. For the purposes of paragraph 1 :

(a) The initialling of a text constitutes a signature of the treaty when it appears from the circumstances that the contracting States so agreed;

(b) The signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.”

15. The Drafting Committee had rejected the suggestion made in the Commission that the order of paragraph 1 (b) and (c) should be reversed.⁶ The wording of paragraph 1 (c) had been altered without any change of substance.

16. Mr. ROSENNE said that, for the sake of consistency with earlier articles, the words “ instrument of ” should be inserted before the words “ full powers ” in paragraph 1 (c).

17. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Rosenne’s amendment was acceptable.⁷

Article 11, as thus amended, was adopted by 17 votes to none.

ARTICLE 12 (Consent to be bound expressed by ratification, acceptance or approval)⁸

18. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 12 read :

“ 1. The consent of a State to be bound by a treaty is expressed by ratification when :

(a) The treaty or an established rule of an international organization provides for such consent to be expressed by means of ratification;

(b) It appears from the circumstances of the conclusion of the treaty that the States concerned were agreed that ratification should be required;

(c) The representative of the State in question has signed the treaty subject to ratification; or

(d) The intention of the State in question to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiations.

⁵ For earlier discussions, see 782nd meeting, paras. 74-95, 783rd meeting, paras. 1-81, and 812th meeting, paras. 1-34.

⁶ 812th meeting, para. 7.

⁷ But see paras. 19-21 *infra*.

⁸ For earlier discussions, see 783rd meeting, paras. 82-98, 784th and 785th meetings, 786th meeting, paras. 5-101, 787th meeting, paras. 99-110, and 812th meeting, paras. 35-64.

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification."

19. Mr. ROSENNE said that the words "instrument of" should be inserted before the words "full powers" in paragraph 1 (d).

20. Mr. TUNKIN said he was opposed to Mr. Rosenne's amendment, because it would be restrictive. The representative's full powers might be embodied not in an instrument but, for instance, in a telegram from his government or in a *note verbale*.

21. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Tunkin's point was pertinent and was possibly applicable to the previous article. The best course would be to leave the two articles unchanged and for the Drafting Committee to review the definition of full powers at the next session, bearing in mind in particular the modern trend towards less formality over the form of full powers.

22. Mr. TSURUOKA said he thought that the Commission had agreed that the words "apply to" in paragraph 2 should be replaced by the words "are required for".

23. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prefer the French text to be brought into line with the English by using the words *s'appliquent* instead of *valent*.

24. Mr. REUTER considered that both the formula proposed by the Drafting Committee and that of the Special Rapporteur served the purpose and that there was no reason why the words *s'appliquent* should not be used.

25. Mr. LACHS said he supported the Special Rapporteur's suggestion concerning Mr. Rosenne's amendment. It might be found appropriate to refer to the instrument of full powers in article 11, but article 12, paragraph 1 (d), should be left as it stood.

26. Mr. ROSENNE said that he would be satisfied if the point was considered when the Commission came to review the draft articles as a whole.

Article 12 was adopted by 17 votes to none.

27. The CHAIRMAN, speaking as a member of the Commission, explained that he had voted for articles 11 and 12 out of gratitude to the Drafting Committee, even though he still maintained his view that ratification should be the general rule.

ARTICLE 15 (Exchange or deposit of instruments of ratification, accession, acceptance or approval)⁹

28. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had introduced some drafting changes and had shortened article 15 to read:

"Unless the treaty otherwise provides, instruments of ratification, accession, acceptance or approval become operative:

(a) By their exchange between the contracting States;

(b) By their deposit with the depositary; or

(c) By notification to the contracting States or to the depositary, if so agreed."

29. The CHAIRMAN, speaking as a member of the Commission, said that he did not find the drafting of sub-paragraph (c) very satisfactory, but approved the idea expressed in the provision.

Article 15 was adopted by 16 votes to none, with 1 abstention.

ARTICLE 16 (Consent relating to a part of a treaty or to alternative clauses)¹⁰

30. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 16 read:

"1. Without prejudice to the provisions of articles 18 to 22, the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other contracting States so agree.

2. The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is made plain to which of the provisions the consent relates."

31. The opening phrase in paragraph 1 had been inserted in order to meet the point, made during the earlier discussion of the article, that it was important to safeguard against any inconsistency between the article and the provisions concerning reservations.

32. In substance, paragraph 2 remained the same but the wording had been changed and was somewhat closer to that approved at the fourteenth session. It was not easy to find suitable wording to express the idea of a choice between alternative texts.

33. In reply to remarks by Mr. CASTRÉN and Mr. AGO, he said that there was a mistake in the title of the article, which should read "Consent relating to a part of a treaty and choice between differing provisions".

34. Mr. LACHS said that surely the choice was not between differing provisions but between two sets of alternative clauses with the same content but differently expressed.

35. Sir Humphrey WALDOCK, Special Rapporteur, said he disagreed. Paragraph 2 dealt with the choice between substantively different provisions and the English text was correct. The word "differing" had been substituted for the word "alternative", which had given rise to criticism both in the Commission and by governments.

Article 16, with the amended title, was adopted by 17 votes to none.

ARTICLE 17 (Obligation of a State not to frustrate the object of a treaty prior to its entry into force)¹¹

36. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 17 read:

"A State is obliged to refrain from acts calculated to frustrate the object of a proposed treaty when:

¹⁰ For earlier discussion, see 812th meeting, paras. 78-96.

¹¹ For earlier discussions, see 788th meeting, 789th meeting, paras. 1-58, and 812th meeting, paras. 97-118.

⁹ For earlier discussions, see 787th meeting, paras. 4-98, and 812th meeting, paras. 65-77.

(a) It has agreed to enter into negotiations for the conclusion of the treaty, while the negotiations are in progress;

(b) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

(c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

37. The Drafting Committee had inserted the word “proposed” in the introductory phrase in order to overcome the objection to the previous text, on grounds of logic, that at the time when a State agreed to enter into negotiations, or while they were in progress, there was no treaty in existence, although there could be said to be an object of the treaty.

38. The wording of sub-paragraph (b) had been modified in response to complaints that the previous text was too vague and subjective.

Article 17 was adopted by 16 votes to none, with 1 abstention.

39. Mr. ROSENNE explained that, although he had voted in favour of the article, he still maintained his reservation concerning sub-paragraph (b), as he did not consider that signature could be regarded as the only point in time from which the obligation became operative; in his opinion, provision should be made for the case where a State took part in the adoption of the text of a treaty but only became a party to it through accession.

40. He was also not satisfied with sub-paragraph (c).

ARTICLE 18 (Formulation of reservations)¹²

41. Sir Humphrey WALDOCK, Special Rapporteur, said that the changes in article 18 were of a purely drafting character; the revised text now read:

“A State may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty or by the established rules of an international organization;

(b) The treaty authorizes specified reservations which do not include the reservation in question; or

(c) In cases where the treaty contains no provisions regarding reservations, the reservation is incompatible with the object and purpose of the treaty.”

Article 18 was adopted by 16 votes to none, with 1 abstention.

42. Mr. TSURUOKA explained that he had abstained in the vote on the article because he doubted whether sub-paragraph (c) would work satisfactorily in practice for the benefit of international law.

ARTICLE 19 (Acceptance of and objection to reservations)¹³

43. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 19 read:

“1. A reservation expressly or impliedly authorized by the treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the contracting States, the object and purpose of the treaty and the circumstances of its conclusion that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound, a reservation requires acceptance by all the States parties to the treaty.

3. When a treaty is a constituent instrument of an international organization, the reservation requires the acceptance of the competent organ of that organization, unless the treaty otherwise provides.

4. In cases not falling under the preceding paragraphs of this article:

(a) Acceptance by another contracting State of the reservation constitutes the reserving State a party to the treaty in relation to that State if or when the treaty is in force;

(b) An objection by another contracting State to a reservation precludes the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is expressed by the objecting State;

(c) An act expressing the State's consent to be bound which is subject to a reservation is effective as soon as at least one other contracting State which has expressed its own consent to be bound by the treaty has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.”

44. Certain drafting changes had been made in paragraph 2. The word “nature” had been criticized for not being entirely concordant with the earlier articles and had been replaced by the phrase “the object and purpose”. The Drafting Committee had also decided to change the order in that paragraph and to refer first to the limited number of contracting States.

45. In paragraph 3, the reference to “admissibility” had been changed to a reference to “acceptance” in order to bring the provision into line with the general scheme of the articles concerning reservations.

46. The content of the previous paragraph 6 had been transferred to form a new sub-paragraph (c) in paragraph 4, to which it more properly belonged.

47. Mr. ROSENNE asked whether the words “if or when” in paragraph 4 (a) should not read “if and when”.

48. Sir Humphrey WALDOCK, Special Rapporteur, replied in the negative. A reservation might be accepted when a treaty was already in force or at a moment when, for want of the requisite number of ratifications, the treaty was not yet in force. The words “or when” could be omitted, though he thought that they should stand, as they rendered the provision more exact.

¹² For earlier discussion, see 813th meeting, paras. 1-29.

¹³ For earlier discussion, see 813th meeting, paras. 30-71.

49. At the request of Mr. BRIGGS, the CHAIRMAN put article 19 to the vote paragraph by paragraph.

Paragraph 1 was adopted by 17 votes to none.

Paragraph 2 was adopted by 17 votes to none.

Paragraph 3 was adopted by 17 votes to none.

Paragraph 4 was adopted by 15 votes to 2.

Paragraph 5 was adopted by 16 votes to none, with 1 abstention.

Article 19 as a whole was adopted by 15 votes to 1 with 1 abstention.

50. Mr. BRIGGS explained that he had voted against article 19 as a whole because the rule set out in paragraph 4 was not an existing rule of international law and was not one that he regarded it as desirable that the Commission should recommend to States.

51. Mr. ROSENNE said that he had abstained in the vote on paragraph 5, because he was not convinced that the expression "it was notified" dealt adequately with the problem of the relevant time factor.

52. Mr. TSURUOKA explained that he had abstained in the vote on the article as a whole because he objected to paragraph 4, for reasons similar to those given by Mr. Briggs.

53. Mr. RUDA explained that he had voted for paragraph 2, which was intended to cover the case of treaties concluded between a small number of States, on the understanding that the Commission would later consider the case of a treaty concluded within a small group of States belonging to an international organization which applied a different rule to treaties concluded under its auspices, thereby taking into account the practice of the Latin American States.

ARTICLE 20 (Procedure regarding reservations)¹⁴

54. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 20 read:

"1. A reservation, an express acceptance of a reservation, and an objection to a reservation must be formulated in writing and communicated to the other contracting States.

2. If formulated on the occasion of the adoption of the text or upon signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation. However, an objection to the reservation made previously to its confirmation does not itself require confirmation."

55. A change of substance had been made in paragraph 2, to which a sentence had been added dispensing with the requirement of confirmation of an objection to a reservation, one of the reasons being that political considerations might render such an obligation unacceptable to States.

Article 20 was adopted by 17 votes to none.

¹⁴ For earlier discussion, see 813th meeting, paras. 72-93.

ARTICLE 21 (Legal effects of reservations)¹⁵

56. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 21 read:

"1. A reservation established with regard to another party in accordance with articles 18, 19 and 20:

(a) Modifies for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Modifies those provisions to the same extent for such other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

3. When a State objecting to a reservation agrees to consider the treaty in force between itself and the reserving State, the provision to which the reservation relates does not apply as between the two States to the extent of the reservation."

57. The changes were of a drafting character. The Drafting Committee had discussed the objections to the word "modifies" but had decided not to change it.

58. Mr. TSURUOKA suggested that, in paragraph 3, the word "provision" should perhaps be in the plural.

59. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed that, to be consistent with paragraphs 1 and 2, the word "provision" should be used in the plural in paragraph 3.

60. Mr. REUTER agreed with the Special Rapporteur that the plural should be used in both texts for the sake of symmetry.

Article 21, as amended, was adopted by 17 votes to none.

ARTICLE 22 (Withdrawal of reservations)¹⁶

61. Sir Humphrey WALDOCK, Special Rapporteur, said that article 22 read:

"1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides or it is otherwise agreed, the withdrawal becomes operative when notice of it has been received by the other contracting States."

62. The Drafting Committee had no changes to propose to that text, which was the same as had been referred back to it at the 814th meeting.

63. Mr. ROSENNE said that he would vote in favour of the article although he maintained a reservation to paragraph 2 similar to that which he had made to article 19, paragraph 5.¹⁷

64. Mr. TSURUOKA said that he had expressed the hope¹⁸ that the Special Rapporteur would comment in

¹⁵ For earlier discussion, see 813th meeting, paras. 94-109, and 814th meeting, paras. 1-21.

¹⁶ For earlier discussion, see 814th meeting, paras. 22-30.

¹⁷ *vide supra*, para. 51.

¹⁸ 814th meeting, para. 29.

detail on paragraph 2, with regard to the responsibility of the State which had accepted the reservation.

65. Mr. BRIGGS said that he would vote in favour of the text, even though he had the same reservation concerning paragraph 2 as Mr. Rosenne.

66. Sir Humphrey WALDOCK, Special Rapporteur, said that the problem raised during the discussion, as to the time when notice of the withdrawal of a reservation should be deemed to have been received, had not been finally settled either by the Commission or by the Drafting Committee; it might need further thought at the next session.

67. Mr. PESSOU said that there appeared to be a contradiction in paragraph 2 between the phrases *Sauf disposition contraire du traité* and *et à moins qu'il n'en soit convenu autrement*.

68. Mr. REUTER said that it was due to the fact that the English word "or" had been rendered in French by *et*.

69. Mr. ROSENNE said that Mr. Pessou's comments led him to wonder whether the opening phrase of paragraph 1 was correct. Surely the purpose of the article was to facilitate the withdrawal of reservations; it was inconceivable that a treaty could come into being reservations to which could not be withdrawn.

70. The CHAIRMAN said that, after lengthy discussion, it had been recognized that the withdrawal of reservations was sometimes prohibited or made subject to certain conditions, in order to forestall unexpected situations for the other parties to the treaty.

71. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman was perfectly correct and had sufficiently explained the reason for including the words "Unless the treaty otherwise provides", which should certainly be retained.

Article 22 was adopted by 16 votes to none.

ARTICLE 23 (Entry into force of treaties)¹⁹

72. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 23 read:

"1. A treaty enters into force in such manner and upon such date as it may provide or as the States which adopted its text may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as all the States which adopted its text have consented to be bound by the treaty.

3. Where a State consents to be bound after a treaty has come into force, the treaty enters into force for that State on the date when its consent becomes operative, unless the treaty otherwise provides."

73. Drafting changes had been introduced in paragraphs 2 and 3 to bring the language into line with article 15, as suggested by Mr. Rosenne.

Article 23 was adopted by 17 votes to none.

¹⁹ For earlier discussions, see 789th meeting, paras. 59-74, 790th meeting, paras. 1-70, and 814th meeting, paras. 31-37.

ARTICLE 24 (Entry into force of a treaty provisionally)²⁰

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the revised text of article 24 read:

"1. A treaty may enter into force provisionally if:

(a) The treaty itself prescribes that it shall enter into force provisionally pending ratification, accession, acceptance or approval by the contracting States; or

(b) The contracting States have in some other manner so agreed.

2. The same rule applies to the entry into force provisionally of part of a treaty."

75. Paragraph 1 (b) had been amended in response to the criticisms raised during the discussion, and paragraph 2 had been considerably shortened.

76. Mr. PESSOU asked if there were some technical reason for using the words "in some other manner" in paragraph 1 (b), instead of the word "otherwise" which appeared in other articles.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that he held no brief for the phrase "in some other manner" but the original text, which had contained the word "otherwise", had been criticized. Drafting difficulties of that kind were not easy to overcome.

Article 24 was adopted by 17 votes to none.

78. The CHAIRMAN said that the Commission had adopted all the articles on the law of treaties which it had decided to complete at the current session. The articles were, of course, adopted provisionally, subject to whatever amendments might be made at later sessions.

79. He expressed the Commission's gratitude to the Drafting Committee, and particularly to the Special Rapporteur, for the contributions they had made to the progress achieved on the law of treaties.

Draft Report of the Commission on the work of its seventeenth session

(A/CN.4/L.111 and Add.1)

80. The CHAIRMAN invited the Commission to consider its draft report.

CHAPTER I: ORGANIZATION OF THE SESSION

(A/CN.4/L.111)

81. Mr. ELIAS, Rapporteur, said that chapter I contained, as in previous annual reports, particulars on the organization of the session.

Paragraphs 1-3

Paragraphs 1 to 3 were adopted without comment.

Paragraph 4

82. The CHAIRMAN suggested that perhaps the words "at least part of" should be added after the word "attended". During the session, cases of absence had been more numerous than usual, and that was rather a dangerous trend.

²⁰ For earlier discussions, see 790th meeting, paras. 71-103, 791st meeting, paras. 1-60, and 814th meeting, paras. 38-56.

83. Mr. ELIAS, Rapporteur, said that previous reports had not contained any indication of that kind.

84. Mr. BRIGGS said that, in the early years of the Commission, volume I of the *Yearbook* used to indicate the names of the members who had attended each meeting. That practice had been discontinued, with the result that it was impossible to tell whether a member had attended all the meetings of a session or only a few. He accordingly supported the Chairman's suggestion that paragraph 4 should be amended so as to indicate that all the members but one had attended the session at least in part.

85. Mr. ROSENNE said that it would be invidious to give any indication in the report on the question of attendance. The presentation of paragraph 4 was based on a decision taken by the Commission at a previous session. He proposed, therefore, that paragraph 4 should be adopted as it stood, but that the Commission should decide that, in future, volume I of the *Yearbook*, containing the summary records, should indicate, at the beginning of the record for each meeting, the names of the members who had attended that meeting.

86. Mr. BRIGGS supported Mr. Rosenne's proposal.

Mr. Rosenne's proposal was adopted.

Paragraph 4 was adopted, on the understanding that, for the future, volume I of the Yearbook would list the names of the members attending each meeting.

Paragraph 5

Paragraph 5 was adopted without comment.

Paragraph 6

Paragraph 6 was adopted with minor drafting amendments.

Paragraphs 7-10.

Paragraphs 7 to 10 were adopted without comment.

Chapter I, as a whole, was adopted.

CHAPTER IV : PROGRAMME OF WORK AND ORGANIZATION
OF FUTURE SESSIONS
(A/CN.4/L.111/Add.1)

87. Mr. ELIAS, Rapporteur, said that chapter IV outlined the main decisions of the Commission on its future work, and laid particular stress on the need for a winter session.

The first paragraph was adopted without comment.

88. Sir Humphrey WALDOCK proposed the deletion of the word "regretfully" before "concluded" in the last sentence of the second paragraph.

The second paragraph as thus amended was adopted.

89. Mr. LACHS said that the third sentence of the third paragraph indicated that the report on the work of the second part of the seventeenth session "would be published together with the report of the eighteenth session of the Commission". He thought, however, that each session of the Commission should constitute an entity; that remark applied to a winter session just as much as to a summer session.

90. Mr. BRIGGS said that the words "published together" should be replaced by "published at the same time", so as to bring the English text into line with the French. The reports could be presented in separate documents, but published at the same time.

91. Mr. AGO said that the sentence accurately described the situation. It had been necessary to reconcile two conflicting conditions. First, the Commission had decided that its winter session in January 1966 would be considered as the second part of its seventeenth session, and secondly, it would be physically impossible to submit the report on that winter session before the report on the eighteenth session, and to publish it elsewhere than in the 1966 *Yearbook*. To acknowledge the contradiction, the word "However" might be added in the third sentence of the paragraph.

92. Mr. ROSENNE pointed out that chapter II, on the law of treaties, would show that the January 1966 session would be devoted entirely to that topic, which would be fully reported on only at the end of the 1966 summer session. In the circumstances, there was no need to refer in chapter IV of the report to the question of the publication of the report for the January 1966 session. He proposed therefore the deletion of the words "would be published together with the report of the eighteenth session of the Commission, and".

93. Mr. ELIAS, Rapporteur, said that the question had been discussed very thoroughly by the officers of the Commission. He suggested that the Secretariat should explain the position.

94. Mr. WATTLES (Secretariat) said that the intention had been to produce in a single bound volume both the report of the second part of the seventeenth session and that of the eighteenth session; publication of separate volumes might have budgetary implications. It was unlikely that the second part of the seventeenth session would produce any results needing separate treatment: the work on the law of treaties and on special missions would be completed in the summer session of 1966 and it would be more practical if the report on the January 1966 session was presented together with the report of the eighteenth session.

95. Mr. BRIGGS supported Mr. Rosenne's proposal.

96. Sir Humphrey WALDOCK said he agreed with the Secretariat that the January 1966 session was unlikely to produce a long report, since it would be devoted largely to work on improving the text of the articles on the law of treaties. It would therefore be advisable to join the report of the January 1966 session with the final and full report for the summer session of 1966.

97. Mr. TUNKIN, also supporting Mr. Rosenne's proposal, said that details of publication could be left to the Secretariat.

98. The CHAIRMAN, speaking as a member of the Commission, likewise supported Mr. Rosenne's proposal.

Mr. Rosenne's proposal was adopted.

The third paragraph was adopted as amended.

Fourth paragraph

99. Mr. AGO proposed that the end of the first sentence be amended to read: "... to complete its

programme, and hence wishes to reserve the possibility of a two-week extension of its 1966 summer session.”

Mr. Ago's proposal was adopted.

The fourth paragraph, as thus amended, was adopted.

Fifth paragraph

The fifth paragraph was adopted without comment.

Sixth paragraph

The sixth paragraph was adopted, subject to a drafting change.

Chapter IV, as amended, was adopted.

The meeting rose at 1 p.m.

817th MEETING

Monday, 5 July 1965, at 3 p. m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Special Missions

(A/CN.4/179)

(resumed from the 809th meeting)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLE 17 (General facilities) [17]¹

1. The CHAIRMAN said that the redraft of article 17 read:

“The receiving State shall accord to the special mission full facilities for the performance of its functions, having regard to the nature and task of the special mission.”

2. Speaking as Special Rapporteur, he said that article 17 was modelled on article 25 of the Vienna Convention on Diplomatic Relations, with the addition of the final phrase.

3. Mr. CASTRÉN pointed out that several members had opposed the final phrase.

4. The CHAIRMAN, speaking as Special Rapporteur, replied that several others had supported it, first because they considered that there should be no absolute analogy with diplomatic missions, and secondly, because there were cases where a special mission should have wider facilities than the permanent mission.

Article 17 was adopted by 14 votes to none.²

¹ For earlier discussion, see 804th meeting, paras. 16-48.

² For adoption of commentary, see 820th meeting, paras. 43-51.

ARTICLE 18 (Accommodation of the special mission and its members) [18]³

5. The CHAIRMAN said that the redraft of article 18 read:

“The receiving State shall assist the special mission in obtaining appropriate premises and suitable accommodation for its members and staff and, if necessary, ensure that such premises and accommodation are at their disposal.”

6. Speaking as Special Rapporteur, he said that the article reproduced article 21 of the Vienna Convention on Diplomatic Relations, with the addition of the final phrase.

Article 18 was adopted by 14 votes to none.⁴

ARTICLE 19 (Inviolability of the premises) [19]⁵

7. The CHAIRMAN said that article 19 read:

“1. The premises of a special mission shall be inviolable. The agents of the receiving State may not enter the premises of the special mission, except with the consent of the head of the special mission or of the head of the permanent diplomatic mission of the sending State accredited to the receiving State.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the special mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.”

8. He explained that the article reproduced *mutatis mutandis* the corresponding provisions of the Vienna Convention on Diplomatic Relations and of the Vienna Convention on Consular Relations.

9. Mr. TSURUOKA asked whether the words “the peace” in paragraph 2 were entirely adequate.

10. The CHAIRMAN said that they were used both in article 22 of the Vienna Convention on Diplomatic Relations and in article 31 of the Vienna Convention on Consular Relations.

Article 19 was adopted by 16 votes to none.⁶

ARTICLE 20 (Inviolability of archives and documents) [20]⁷

11. The CHAIRMAN said that article 20 read:

“The archives and documents of the special mission shall be inviolable at any time and wherever they may be.”

12. The article reproduced textually article 24 of the Vienna Convention on Diplomatic Relations.

Article 20 was adopted by 16 votes to none.⁸

³ For earlier discussion, see 804th meeting, paras. 49-76.

⁴ For adoption of commentary, see 820th meeting, paras. 52-60.

⁵ For earlier discussion, see 804th meeting, paras. 77-105, and 805th meeting, paras. 1-28.

⁶ For further discussion, see 820th meeting, paras. 29-31.

⁷ For earlier discussion, see 805th meeting, paras. 29-57.

⁸ For adoption of commentary, see 821st meeting, para. 2.

ARTICLE 21 (Freedom of movement) [21]⁹

13. The CHAIRMAN said that article 21 read:

“Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the special mission such freedom of movement and travel in its territory as is necessary for the performance of its functions, unless otherwise agreed.”

14. Speaking as Special Rapporteur, he said that the revised version was shorter than his original draft and differed from article 26 of the Vienna Convention on Diplomatic Relations in that it guaranteed the freedom of travel necessary for the performance of the special mission's functions. He would explain in the commentary that, if a special mission was to perform its functions in a prohibited zone, it would be deemed to have received permission in advance to enter the zone.

*Article 21 was adopted by 16 votes to none.*¹⁰

ARTICLE 22 (Freedom of communication) [22]¹¹

15. The CHAIRMAN said that article 22 read:

“1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including its couriers and messages in code or cipher. However, the special mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the special mission shall be inviolable. Official correspondence means all correspondence relating to the special mission and its functions.

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the special mission may designate couriers *ad hoc* of the special mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the special mission's bag in his charge.

⁹ For earlier discussion, see 805th meeting, paras. 58-76.

¹⁰ For adoption of commentary, see 821st meeting, paras. 3-14.

¹¹ For earlier discussion, see 805th meeting, paras. 77-90, and 806th meeting, paras. 1-37.

7. The bag of the special mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the special mission. By arrangement with the appropriate authorities, the special mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.”

16. Speaking as Special Rapporteur, he said that the article was based on article 27 of the Vienna Convention on Diplomatic Relations, with one provision—that relating to the possibility of employing the captain of a ship or of a commercial aircraft as a courier *ad hoc*—taken from the Vienna Convention on Consular Relations. As agreed, he would mention in the commentary the Commission's opinion that the special mission should receive every facility for communication purposes.

*Article 22 was adopted by 16 votes to none.*¹²

ARTICLE 23 (Exemption of the mission from taxation) [23]¹²

17. The CHAIRMAN said that article 23 read:

“1. The sending State, the special mission, the head and members of the special mission and the members of its staff shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the special mission, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the special mission.”

18. Speaking as Special Rapporteur, he said that the article covered the institutional element—the mission, and the personal element—its members. The question of the fees and charges levied by the mission would be dealt with in the commentary.

19. Mr. JIMÉNEZ de ARÉCHAGA said that the reference to the members of the staff of a special mission was unnecessary, since article 23 dealt with exemption from taxes in respect of the premises.

20. The CHAIRMAN said that the exemption from taxation referred to was “in respect of the premises” and not personal exemption.

21. Mr. AGO said that in article 23, and in other articles, the repetition of the words “of the special mission” made the text clumsy. He suggested that a definition should be given in an earlier clause of the meaning of “member of the special mission”.

22. The CHAIRMAN, speaking as Special Rapporteur, said that that procedure for simplifying the text had been proposed by Mr. Pal and Mr. Rosenne and had been agreed to. Although he was opposed to definitions for doctrinal reasons, he would comply with the Commis-

¹² For adoption of commentary, see 821st meeting, paras. 15-44.

¹³ For earlier discussion, see 806th meeting, paras. 38-54.

sion's decision, but preferred not to hurry over the definitions and would submit them in January.

23. Mr. ROSENNE suggested that special mention should be made in the commentary of the fact that the Special Rapporteur was reluctant to put forward hastily prepared definitions. He shared the Special Rapporteur's hesitation in that regard, and perhaps in lieu of definitions a section on the use of terms might be included in the draft.

24. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the words "and members" and the words "and the members of its staff", in paragraph 1; the article would then be consistent with article 23 of the Vienna Convention on Diplomatic Relations.

25. The CHAIRMAN, speaking as Special Rapporteur, said that it would then be necessary to state in the commentary that the reference was to the head of the mission acting for the State, or perhaps to say "the head of the special mission or another person acting on his behalf . . .".

26. Mr. JIMÉNEZ de ARÉCHAGA pointed out that the case was provided for, since the exemptions were accorded to the mission.

27. The CHAIRMAN, speaking as Special Rapporteur, said that the special mission was not a body corporate and consequently a person could not act on its behalf: a person could act for the individual who acted for the sending State.

28. Mr. JIMÉNEZ de ARÉCHAGA suggested that the provision should be deleted and that the question should be dealt with in the commentary, for the sake of consistency with the Vienna Convention on Diplomatic Relations, under which the question also arose.

29. The CHAIRMAN said he agreed that the question arose in connexion with the Vienna Convention on Diplomatic Relations and that it was generally settled by a note; that was one of the major defects of the Convention.

30. Speaking as Special Rapporteur, he suggested that the commentary should mention the Commission's view that a like exemption should be accorded to the members of the mission or of its staff who acted on behalf of the sending State for the purpose of obtaining premises for the special mission.

31. Mr. AGO proposed that, in paragraph 1, the words "the special mission", immediately after the words "The sending State", should be omitted; the relevant provision of the Vienna Convention on Diplomatic Relations did not contain any words corresponding to those words.

32. The CHAIRMAN, speaking as Special Rapporteur, said he could accept that proposal, since the mission was an emanation of the sending State.

Article 23, as thus amended, was adopted by 16 votes to none.¹⁴

¹⁴ For adoption of commentary, see 821st meeting, paras. 45 and 46.

ARTICLE 24 (Inviolability of the property of the special mission) [19, para. 3]¹⁵

33. The CHAIRMAN said that article 24 read:

"The premises of the special mission, their furnishings, all property used in the operation of the special mission and the means of transport used by it, shall be immune from any measure of search, requisition, attachment, execution or inspection by the organs of the receiving State."

34. Speaking as Special Rapporteur, he said that the article referred not to the property owned by the special mission, but to the property used in its work; the emphasis was not so much on acts of search, requisition, attachment, execution or inspection, as on the physical effects of those acts.

35. Mr. CASTRÉN said he noted that the Drafting Committee had added the words "the premises", whereas the title spoke only of "the property". The premises were dealt with in article 19. At the first reading, Mr. Elias and others had proposed that articles 19 and 24 should be combined,¹⁶ just as in the Vienna Convention on Diplomatic Relations article 22 covered both property and premises. He wished to revive that proposal.

36. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission had left the matter in suspense. Article 19 referred to the inviolability of premises, whereas article 24 concerned immunity from certain measures. He thought it would be difficult to deal with both questions in a single article.

37. Mr. TUNKIN said that article 24 should certainly be moved to article 19 to form a new paragraph 3 as it would then be covered by paragraph 1 of the latter and no doubt could arise as to the complete inviolability of the premises of a special mission.

38. The CHAIRMAN, speaking as Special Rapporteur, said that neither during the first reading nor in the Drafting Committee had he opposed the idea that the substance of article 24 should form a paragraph 3 in article 19.

39. Mr. JIMÉNEZ de ARÉCHAGA said he agreed that article 24 should be incorporated in article 19 as a new paragraph 3. The words "any measure of" and the words "or inspection" should be deleted, for the sake of consistency with the Vienna Convention on Diplomatic Relations.

40. The CHAIRMAN, speaking as Special Rapporteur, said he was opposed to the deletion of the article, because without it there would be no safeguard for special missions which were not housed in embassies.

41. Mr. AGO said that article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations referred to "property . . . on the premises of the mission", whereas article 24 of the draft on special missions referred to "property used in the operation of the special mission". Was it desirable to depart from the text of the Convention?

¹⁵ For earlier discussion, see 806th meeting, paras. 55-75.

¹⁶ See 804th meeting, para. 86 and 806th meeting, para. 56.

42. Moreover, the Vienna Convention mentioned "the means of transport of the mission", whereas the draft referred to the "means of transport used by it". Was the divergence justified?

43. The CHAIRMAN, speaking as Special Rapporteur, pointed out that there was a difference between property owned by and physically present on the premises of a permanent mission, and property used by the special mission, which was often mobile. The permanent mission had its own means of transport, whereas the special mission used borrowed means of transport. It would be dangerous to follow the texts of the Vienna Conventions too closely, to the detriment of special missions and despite the recommendations of the Vienna Conference and of the General Assembly.

44. Mr. YASSEEN said that he had no objection to the substance of the article, but thought that if the text was left as it stood, there would be obvious duplication. The draft contained several articles on inviolability—of premises, archives, property and persons. If the article was to fit into the system adopted by the Commission, the opening phrase "The premises of the special mission, their furnishings . . ." would have to be deleted; the premises were covered by article 19 and the furnishings were part of "the property used in the operation of the special mission".

45. Mr. JIMÉNEZ de ARÉCHAGA said that it was important to follow the Vienna Convention on Diplomatic Relations so as not to prejudice the application of its provisions to such diplomatic missions as had to live in hotels and rent cars. Not all permanent missions were lodged in permanent premises and owned their means of transport; that was particularly true of those of small States. It would be a very serious matter if rented cars were subject to inspection.

46. The CHAIRMAN, speaking as Special Rapporteur, said that he was totally opposed to that idea. There should be a distinction between general rules and special rules; they were not on the same footing, and general rules could not be interpreted on the same basis as special rules.

47. Sir Humphrey WALDOCK said that, although he did not disagree with the Chairman's contention, he was unable to endorse his conclusion. So far as the English text was concerned, there was no difference between search and inspection; consequently, the reference to inspection, which did not appear in article 22, paragraph 3, of the Vienna Convention on Diplomatic Relations, was unnecessary.

48. The only important departure from the Vienna Convention was the reference to property "used in the operation" of the special mission, and he was open to argument as to the need for that change.

49. The CHAIRMAN, speaking as Special Rapporteur, said that in administrative law, a search—which involved rummaging and even seizure—was very different from inspection, which might simply mean checking the water, gas or electrical installations, or machinery.

50. With regard to property and premises, he suggested that the phrase might perhaps be amended to read

"all property used in the operation of the special mission or used by it."

51. Mr. AGO said he did not think that the words "The premises of the special mission" could be omitted, for the premises above all had to be immune from search, requisition, attachment, execution and inspection, and there was nothing concerning that immunity in article 19.

52. Mr. BRIGGS said he agreed that article 24 should become paragraph 3 in article 19. The wording should be modelled as closely as possible on the corresponding provision of the Convention on Diplomatic Relations. It might be modified to read "The premises of the special mission, their furnishings and other property thereon and the means of transport of the special mission shall be immune from search, requisition, attachment or execution by the organs of the receiving State".

53. Mr. ELIAS said that the words "used by it", "any measure of", and "or inspection" should be deleted and the provision transferred to article 19. Possibly it would need to be brought into line with article 31, paragraph 4, of the Vienna Convention on Consular Relations.

54. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the provision cited by Mr. Elias referred to property of the consular post. The case of the property of the special mission was quite different.

55. Mr. CASTRÉN said he supported Mr. Yasseen's proposal that the first phrase of the article should be deleted. Article 19 covered all cases, as it laid down the inviolability of the premises; as the authorities of the receiving State were not allowed to enter the premises, they could not carry out any of the acts mentioned.

56. Mr. RUDA said that article 24 was an important one and should be referred back to the Drafting Committee in the light of the numerous observations made during the discussion.

57. Mr. ROSENNE said he agreed with Mr. Ruda. The Special Rapporteur's justification for departing from the Vienna Convention on Diplomatic Relations and using the phrase "used in the operation of" was convincing. When the article had first been discussed, Mr. Reuter had explained the reason why the words "any measure of" should be retained.¹⁷

58. He had understood that the words "or inspection" had been added because there was a difference of meaning between the French terms *perquisition* and *inspection*. If that was not the case, the words "or inspection" should be dropped in both versions.

*Article 24 was referred back to the Drafting Committee.*¹⁸

ARTICLE 25 (Personal inviolability) [24]¹⁹

59. The CHAIRMAN said that article 25 read:

"The person of the head and members of the special mission and of the members of its diplomatic

¹⁷ See 806th meeting, para. 71.

¹⁸ For resumption of discussion, see 820th meeting, paras. 29-31.

¹⁹ For earlier discussion, see 806th meeting, paras. 76-84, and 807th meeting, paras. 1-33.

staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.”

60. Speaking as Special Rapporteur, he said that the article reproduced *mutatis mutandis* article 29 of the Vienna Convention on Diplomatic Relations.

61. Mr. AGO asked what was the reason for the reference to “members of its diplomatic staff”.

62. The CHAIRMAN, speaking as Special Rapporteur, said that the Vienna Convention dealt with diplomatic agents. He had used the expression “staff of the special mission” in his draft but, in view of objections, had submitted the new formula to the Drafting Committee.

*Article 25 was adopted by 16 votes to none.*²⁰

ARTICLE 26 (Inviolability of the private accommodation) [25]²¹

63. The CHAIRMAN said that article 26 read :

“1. The private accommodation of the head and members of the special mission and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the special mission.

2. The papers, correspondence and property of the persons referred to in paragraph 1 shall likewise enjoy inviolability.”

*Article 26 was adopted by 17 votes to none*²²

ARTICLE 27 (Immunity from jurisdiction) [26]²³

64. The CHAIRMAN said that article 27 read :

“1. The head and members of the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. Unless otherwise agreed, they shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except in the case of :

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless the head or member of the special mission or the member of its diplomatic staff holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the person referred to in sub-paragraph (a) is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person referred to in sub-paragraph (a) in the receiving State outside his official functions.

3. The head and members of the special mission and the members of its diplomatic staff are not obliged to give evidence as witnesses.

²⁰ For adoption of commentary, see 821st meeting, paras. 48-55.

²¹ For earlier discussion, see 807th meeting, paras. 34-49.

²² For adoption of commentary, see 821st meeting, paras. 56-68.

²³ For earlier discussion, see 807th meeting, paras. 50-80.

4. No measures of execution may be taken in respect of the head or of a member of the special mission or of a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 2 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

5. The immunity of the head and members of the special mission and of the members of its diplomatic staff from the jurisdiction of the receiving State does not exempt them from the jurisdiction of the sending State.”

65. Speaking as Special Rapporteur, he said there were two schools of thought in the Commission : the supporters of the so-called “functional” immunity, and the supporters of complete immunity as laid down in article 31 of the Vienna Convention on Diplomatic Relations. After due reflection, the Drafting Committee had adopted the principle of complete immunity, which it had qualified by adding at the beginning of paragraph 2 the words “Unless otherwise agreed”.

66. Mr. VERDROSS said that it was going too far to give to all special missions more immunities than were accorded to missions to the United Nations. What might be understandable in the case of high-level special missions was not so in the case of technical missions.

67. The CHAIRMAN, speaking as Special Rapporteur, said that the Drafting Committee had wished to give all possible immunities to special missions, subject to the proviso he had mentioned, which left States free to come to an agreement before the arrival of the mission. In his opinion, the cases mentioned in paragraphs 2 (a), (b) and (c) were rare and should not be mentioned, but he had yielded to the majority. He would, however, mention the other school of thought in the commentary.

68. Mr. RUDA said that he was in favour of a much more restricted provision of the kind originally proposed by the Special Rapporteur.

69. Mr. JIMÉNEZ de ARÉCHAGA said the Drafting Committee’s text was acceptable. The particular danger mentioned by Mr. Verdross could be avoided by States agreeing in any given case not to confer diplomatic status on the members of a special mission.

70. He doubted the desirability of retaining the words “unless otherwise agreed” in paragraph 2, for they might be interpreted to mean that the provisions of the Vienna Convention on Diplomatic Relations constituted *jus cogens* in the matter of immunity; his doubts were strengthened by the fact that, in a recent case, the two Vienna Conventions had been examined together for the purpose of interpreting the rules laid down in one of them.

71. The CHAIRMAN, speaking as Special Rapporteur, said that he had originally proposed a provision (article 40 of his draft) reproducing article 73 of the Vienna Convention on Consular Relations, which contained a rule of *jus cogens*. The Commission had rejected that proposal and had declared itself ready to accept

Mr. Rosenne's view that all the articles should be regarded as residual rules.²⁴

72. Mr. ROSENNE said that the decision on article 27 should be postponed until the Commission had in front of it the Drafting Committee's text for article 40 which, in the form proposed by the Special Rapporteur, had not found favour. If article 40 were so framed as to render article 17 onwards residual rules, then the phrase "unless otherwise agreed" in paragraph 2 would be unnecessary.

73. The CHAIRMAN said that the majority had been ready to accept the articles as residual rules. It was therefore impossible to alter the phrase in question.

74. Mr. AGO said he hoped the Commission would consider carefully the phrase "Unless otherwise agreed". He was convinced that the rules in question were residual, but he was also convinced that other rules in which that phrase did not occur were likewise residual. He feared that confusion might ensue in the interpretation. Furthermore, even the final rule of the Vienna Convention on Consular Relations caused him much anxiety: why should it be impossible to restrict by bilateral consular conventions the privileges and immunities laid down in that Convention?

75. In his opinion, it would be better to decide, at the end of the consideration of the entire draft, what would be the best way of dealing with that delicate question.

76. Mr. TUNKIN said that there might be some inconvenience in keeping the phrase "Unless otherwise agreed".

77. The CHAIRMAN, speaking as Special Rapporteur, said that he was a supporter of functional immunity and therefore feared that, without the words "Unless otherwise agreed", it would be difficult to restrict the scope of the privileges which the Commission's draft intended to give to special missions.

78. Mr. YASSEEN said that, from the psychological point of view, it would be difficult for a conference of plenipotentiaries to accept the article without those words. The Commission was about to place special missions on the same footing as permanent missions in general. It was doubtful whether the rule, in such general terms, would be accepted without those words, for they gave States some assurance that they were free to regulate their relations in a particular manner with respect to a particular special mission.

79. Mr. TSURUOKA said that he was prepared to agree to the deletion of the words "Unless otherwise agreed" in paragraph 2 in order to ensure that the members of special missions should have minimum privileges; if they wished, the sending State and the receiving State could agree to more extensive privileges. Such a formula seemed to him preferable to the present text, which provided for maximum privileges unless otherwise agreed. States would find it easier to accept the first solution, which, being simpler and more flexible, was also more practical.

80. Mr. AGO said that the whole question turned on whether a general exceptions clause would or would not

be inserted later. The Drafting Committee's text might therefore be adopted for the time being, and the words "Unless otherwise agreed" deleted subsequently if a general exceptions clause was inserted.

81. Mr. TSURUOKA said that he would agree to that procedure.

*Article 27 was adopted by 11 votes to 2, with 3 abstentions.*²⁵

82. The CHAIRMAN said that he had voted against article 27 because he considered that minimum privileges and immunities should be provided for special missions, with the possibility of extension by agreement between the parties concerned.

83. Mr. VERDROSS said he had voted against the article for the same reasons as the Chairman.

ARTICLE 27 bis (Waiver of immunity) [27]

84. The CHAIRMAN said that article 27 bis, which was based on article 32 of the Vienna Convention on Diplomatic Relations, read:

"1. The immunity from jurisdiction of the head and members of the special mission, of the members of its staff and of the members of their families, may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by one of the persons referred to in paragraph 1 of this article shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary."

*Article 27 bis was adopted by 17 votes to none.*²⁶

ARTICLE 28 (Exemption from social security legislation) [28]²⁷

85. The CHAIRMAN said that article 28, which was based on article 33, paragraphs 1-3, of the Vienna Convention on Diplomatic Relations, read:

"1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the receiving State for the purpose of carrying out the tasks of the special mission, from the social security provisions of that State.

2. The provisions of paragraph 1 of this article shall not apply:

(a) To nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission;

(b) To locally recruited temporary staff of the special mission, irrespective of nationality.

²⁵ For adoption of commentary, see 821st meeting, paras. 69 and 70.

²⁶ For adoption of commentary, see 821st meeting, para. 70.

²⁷ For earlier discussion, see 808th meeting, paras. 1-12.

²⁴ See 809th meeting, paras. 83-93.

3. The head and members of the special mission and the members of its staff who employ persons to whom the exemption provided for in paragraph 1 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.”

*Article 28 was adopted by 17 votes to none.*²⁸

ARTICLE 28 *bis* (Exemption from dues and taxes) [29]²⁹

86. The CHAIRMAN said that article 28 *bis* read :

“The head and members of the special mission and the members of its diplomatic staff shall be exempt from all dues and taxes, personal or real, national, regional or municipal in the receiving State on all income attaching to their functions with the special mission and in respect of all acts performed for the purposes of the special mission.”

87. Speaking as Special Rapporteur, he said the text was based on article 34 of the Vienna Convention on Diplomatic Relations, of which, however, only what was essential for special missions had been retained.

88. Mr. AGO said that, if that was the case, the words “personal or real” were unnecessary and could be deleted.

89. The CHAIRMAN, speaking as Special Rapporteur, said he could accept that amendment.

*Article 28 bis, as so amended, was adopted by 17 votes to none.*³⁰

ARTICLE 29 (Exemption from personal services and contributions) [30]³¹

90. The CHAIRMAN said that article 29, which was based on article 35 of the Vienna Convention on Diplomatic Relations, read :

“The receiving State shall exempt the head and members of the special mission and the members of its diplomatic staff from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.”

*Article 29 was adopted by 17 votes to none.*³²

ARTICLE 30 (Exemption from customs duties and inspection) [31]³³

91. The CHAIRMAN said that article 30 read :

“1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on :

(a) Articles for the official use of the special mission ;

(b) Articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

2. The personal baggage of the head and members of the special mission and of the members of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the person concerned, of his authorized representative, or of a representative of the permanent diplomatic mission of the sending State.”

92. Speaking as Special Rapporteur, he said the text was based on article 36 of the Vienna Convention on Diplomatic Relations with slight adjustments to reflect the temporary presence of special missions in the receiving State’s territory.

*Article 30 was adopted by 17 votes to none.*³⁴

ARTICLE 31 (Administrative and technical staff) [32]³⁵

93. The CHAIRMAN said that article 31, which was based on article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations, read :

“Members of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 25 to 30, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 27 shall not extend to acts performed outside the course of their duties.”

*Article 31 was adopted by 17 votes to none.*³⁶

ARTICLE 32 (Members of the service staff) [33]³⁷

94. The CHAIRMAN said that article 32, which was based on article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations, read :

“Members of the service staff of the special mission who are not nationals of or permanently resident in the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, and exemption from duties and taxes on the emoluments they receive by reason of their employment.”

*Article 32 was adopted by 17 votes to none.*³⁸

²⁸ For adoption of commentary, see 821st meeting, paras. 71-73.

²⁹ For earlier discussion, see 808th meeting, paras. 33-35.

³⁰ For adoption of commentary, see 821st meeting, paras. 74 and 75.

³¹ For earlier discussion, see 808th meeting, paras. 13-32.

³² For adoption of commentary, see 821st meeting, paras. 76-79.

³³ For earlier discussion, see 808th meeting, paras. 36-47.

³⁴ For adoption of commentary, see 821st meeting, paras. 80-87.

³⁵ See 808th meeting, para. 88.

³⁶ For adoption of commentary, see 821st meeting, para. 87.

³⁷ For earlier discussion, see 808th meeting, paras. 62-74.

³⁸ For adoption of commentary, see 821st meeting, para. 87.

ARTICLE 33 (Private staff) [34]³⁹

95. The CHAIRMAN said that article 33 read :

“ Private staff of the head and members of the special mission and of members of its staff who are authorized by the receiving State to accompany them in the territory of the receiving State shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all others respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission. ”

96. Speaking as Special Rapporteur, he said the text was based on article 37 paragraph 4, of the Vienna Convention on Diplomatic Relations. The term “ servants ” had been replaced by the term “ staff ”.

*Article 33 was adopted by 17 votes to none.*⁴⁰

Organization of Work

97. The CHAIRMAN said that the Secretariat was hoping that the Commission would request the General Assembly to transmit to Governments, and request their comments on, the second part of the draft articles on special missions, together with the first part which had been adopted at the Commission's sixteenth session.

98. Mr. TUNKIN asked what would be the Special Rapporteur's opinion concerning the further course to be followed with regard to the draft articles on special missions. The Commission had still to consider at least one important article, that on definitions, and the rest of the articles had been considered by the Commission in some haste. Possibly the best course might be for the Commission to give some further consideration to the articles at the session in January 1966, so that they could be submitted to governments in February 1966.

99. The CHAIRMAN said that his personal view was that the Commission should review the draft articles once more before inviting Governments to comment on them.

100. Mr. ROSENNE said that postponement until January 1966 of consideration of the draft articles on special missions would involve two dangers. The first was that the Commission might not be able to complete its work on the law of treaties before its composition was changed. The second was that it might prove impossible for any Government to submit its comments on the draft articles on special missions between February and May 1966.

101. The January 1966 session would have to be devoted in its entirety to the law of treaties if the Commission wished to complete its work on that topic in 1966. The only possible course with regard to the articles on special

missions was, as suggested by the Secretariat, to transmit them to Governments. At the same time, the Drafting Committee could, in the remaining days of the current session, examine the suggestions in the Special Rapporteur's second report for amendments to articles 1 to 16.

102. Mr. BAGUINIAN (Secretary of the Commission) said that it would not be possible for Governments to submit their comments, and for those comments to be communicated to the Commission, in the short period between February and April, 1966.

103. Mr. TSURUOKA said he supported Mr. Tunkin's view that the Commission should give further consideration to the draft articles on special missions.

104. Mr. LACHS said that, if the Commission wished to have constructive comments from Governments, it was most desirable that it should submit a complete draft on special missions. If the Commission was unable to complete its work on special missions in 1966 with its present composition, the work could be finished later when the Commission had a different composition.

105. Mr. BRIGGS said that any postponement of consideration of the draft articles on special missions would represent a threat to the Commission's whole programme of work. He thought that no part of the January 1966 session should be devoted to any other matter than the law of treaties.

106. Mr. TUNKIN said that, in the light of the Secretary's explanations, he would agree that the draft articles on special missions should be submitted to Governments at the end of the current session although he had some hesitations with regard to their contents. The law of treaties should always have preference in the Commission's programme of work; that topic had to be completed by the Commission before its present composition was changed. If a choice had to be made of a topic to be completed after 1966, the topic to be chosen should be special missions rather than the law of treaties.

107. Mr. AGO said that the Commission was agreed that nothing should be allowed to prevent it from concluding the study of the law of treaties and that at the winter session no other topic should be dealt with. As far as the draft articles on special missions were concerned, if the Commission could complete them at the current session, it could transmit the full text to Governments, whose comments should then reach the Commission in June; if not, the Commission would complete its first reading of the draft articles in June 1966 and would not transmit them to Governments until then.

108. The CHAIRMAN suggested that, in the circumstances, the text of the draft articles should be sent to Governments either for their information or for comment, as appropriate.

It was so agreed.

The meeting rose at 6.10 p.m.

³⁹ For earlier discussion, see 808th meeting, paras. 62-74.

⁴⁰ For adoption of commentary, see 821st meeting, paras. 88-95.

818th MEETING

Tuesday, 6 July 1965, at 11.30 a.m.

Chairman : Mr. Milan BARTOŠ

Present : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Draft Report of the Commission on the work of its seventeenth session

(A/CN.4/L.111 and addenda)

(resumed from the 816th meeting)

1. The CHAIRMAN invited the Commission to consider chapter V of its draft report.

CHAPTER V : OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.111/Add.1)

2. Mr. ELIAS, Rapporteur, said that, as in previous reports of the Commission, a number of different matters were dealt with in chapter V. The Commission would need to decide whether or not it wished to endorse the fifth paragraph in section A.1. The words "Alternative I" in parentheses above that paragraph should be deleted.

3. As Mr. Sen, the Secretary of the Asian-African Legal Consultative Committee, had only visited Geneva in a private capacity, the reference to him in the second paragraph of section A.2 should be deleted; the sentence would then end with the words "who addressed the Commission".

4. The main conclusions of the Committee set up to consider the exchange and distribution of documents of the Commission were summarized in section B.

5. In section D, two corrections should be made. In the third sentence, the words "in respect of" should be replaced by the words "during the discussion by the General Assembly of"; in the second paragraph, the word "nineteenth" should be replaced by the word "twentieth".

6. Mr. RUDA said that, if the Commission decided to retain the fifth paragraph of section A.1, it should at least amend the second sentence, which gave the impression that there was a wide gulf between the Commission and the bodies mentioned.

7. Mr. ROSENNE said that if the statement in that sentence was intended to reflect a change of policy, he could not support it. The Commission had never previously made its decision on whether or not to send an observer to meetings of other bodies contingent on either the nature of the items to be discussed or their connexion with its own agenda. If it maintained formal relations with other bodies in accordance with the provisions of its Statute, surely it would wish to be represented at their sessions and vice versa.

8. Mr. ELIAS, Rapporteur, said that the Commission was free to accept or to reject the wording suggested.

9. Mr. JIMÉNEZ de ARÉCHAGA proposed that the words "In view, however, of the relatively remote connexion of the subjects of the meetings described above with the topics under discussion by the Commission, and also" be deleted.

10. Mr. TUNKIN said he agreed, of course, that it was open to the Rapporteur to make suggestions for inclusion in the draft report. It would, however, be interesting first to hear the views of members from the Latin American countries on the question of sending an observer to an appropriate body.

11. Mr. RUDA said he entirely agreed with Mr. Rosenne that the Commission ought not to take as a criterion the topics dealt with by the bodies with which it maintained relations. In principle, it was desirable that the Commission should co-operate as closely as possible with other bodies active in the field of international law.

12. On the initiative of the Brazilian Government, a conference on the utilization of international rivers and lakes was to be held at Rio de Janeiro in 1966. It would be an inter-American conference, which would raise many legal and political problems of great importance in relations among South American States, and the International Law Commission should be represented.

13. Mr. TSURUOKA said it would be rather paradoxical if, in section A.1, the financial difficulties of the United Nations were advanced as a reason for not sending an observer to inter-American meetings, and in section A.2, the Chairman was requested to attend the session of the Asian-African Legal Consultative Committee. The reasons which applied to one body held good for the others. Perhaps the Commission could be represented at the Rio conference by one of its members who lived in the region.

14. Mr. AMADO, referring to Mr. Ruda's comments, said that if there was one subject of vital importance in international law at the moment, it was the industrial use of international waters. It was certainly of vital importance for the Latin American States, which had not been able to reach agreement on it either at the Havana Conference of 1928 or at the Montevideo Conference of 1933. The utilization of hydro-electric resources had in the past been regulated bilaterally, on the basis of arbitration by experts. Ever since the Barcelona Conference, however, the trend had been towards the drafting of a convention. The conference to be held at Rio was a bold venture which did honour to the legal capacity of the Latin American States; their aim was to exchange views in the hope of establishing rules of law which could not only be applied by them, but could also serve other States as a model and a stimulus.

15. Mr. JIMÉNEZ de ARÉCHAGA said he had been willing to accept the suggestion put forward in the fifth paragraph of section A.1, not because he minimized the importance of the Rio conference, but because it had not been the Commission's practice to send observers to international conferences. The United Nations would in any case be represented at the Rio conference, for which its Secretariat had done some extremely useful work. If

the Commission decided to appoint an observer, however, he would not oppose that course.

16. Mr. ELIAS, Rapporteur, said that an additional reason for his suggestion had been that, according to the information available, the proposed conference would be mainly concerned with economic and political considerations, so that an observer from the Commission was unlikely to be able to make any useful contribution.

17. Mr. TUNKIN said that the Commission co-operated with the Inter-American Juridical Committee and the Asian-African Legal Consultative Committee, but it had never sent a representative to an international conference, whether universal or regional. He therefore agreed with the view expressed by Mr. Jiménez de Aréchaga.

18. Mr. BRIGGS said that in his opinion it was not advisable to give any reason for not sending an observer to a particular meeting. He therefore suggested that the second sentence of the fifth paragraph of section A.1 be reworded to state that the Commission, while recognizing the importance of the proposed conference, had, with regret, arrived at the conclusion that it would not be in a position to send an observer.

19. Mr. AMADO said that he accepted the arguments advanced by Mr. Jiménez de Aréchaga and Mr. Tunkin against sending an observer to a conference which would be essentially a diplomatic one.

20. The CHAIRMAN said he noted that in the fourth paragraph of section A.1 it was stated that "the Commission has been informed . . .". He would like to know who had informed it.

21. Mr. WATTLES (Secretariat) said that, in reply to a request for information on the legal meetings to be held in 1966 under the auspices of the Organization of American States, the Legal Division of the Pan-American Union had informed the Secretariat of the Commission that there would probably be a specialized conference on the utilization of the waters of international rivers and lakes, and possibly also a joint meeting of the Inter-American Economic and Social Council and the Inter-American Council of Jurists for the purpose of examining the economic and legal aspects of development. That explained the paragraph in the draft report.

22. The CHAIRMAN asked what was the relationship between the Inter-American Juridical Committee and the Inter-American Council of Jurists.

23. Mr. JIMÉNEZ de ARÉCHAGA said that the observer who attended the meetings of the Commission was the Vice-Chairman of the Inter-American Juridical Committee and had been appointed as observer by the Inter-American Council of Jurists. The Inter-American Council of Jurists was a body of twenty-one jurists, one from each American State; the Inter-American Juridical Committee was a standing Committee of the Council, consisting of seven of its members. The exact date of the next session of the Council, to be held in Caracas, was not yet known. He therefore proposed that the Commission postpone its decision regarding the appointment of an observer to attend that session.

24. Mr. AMADO said that, so far as the Rio conference was concerned, the Commission should decide forthwith

that it would not participate in a diplomatic meeting of that kind.

25. Mr. RUDA said he fully agreed with Mr. Amado. He could not accept the two reasons given in the report for not sending an observer, namely, the nature of the topics and the financial situation. The report should state that the reason for not sending an observer was that the proposed conference was of a diplomatic character.

26. Mr. AGO observed that since the Commission maintained relations with the Inter-American Council of Jurists it was only necessary for the Council's representative to inform the Commission of the date and place of the next session. The heading of section A.1, "Inter-American juridical bodies", should be amended to read "Inter-American Council of Jurists" and it should be explained that the Inter-American Juridical Committee was the Council's executive body. The last two paragraphs of the section, referring to the invitation, should be deleted.

27. Mr. ELIAS, Rapporteur, said it might perhaps be better to delete the reference to the proposed conference altogether, rather than state the reason for not sending an observer, namely, that the Commission was not normally represented at diplomatic conferences.

28. Mr. TUNKIN said he supported Mr. Jiménez de Aréchaga's proposal; the Secretariat should be asked to redraft the fifth paragraph.

29. The CHAIRMAN, speaking as a member of the Commission, said he had always opposed the Commission's being represented at the meetings of certain bodies, for which provision was made in the United Nations budget, and not at the meetings of others.

30. Mr. ROSENNE said that the statement that "the Commission desired to stress the importance it attaches to consultation with the bodies with which it co-operates under article 26 of its Statute" applied to all such bodies in general, and should be moved to the first paragraph of section A.1.

31. The CHAIRMAN suggested that the first part of the first sentence of the fifth paragraph, down to the words "under article 26 of its Statute", should be added to the first paragraph to form an introductory paragraph to section A. Then, under the heading "Inter-American Council of Jurists" would come the existing second and third paragraphs, after which Mr. Ago's proposal would be followed.

It was so agreed.

32. The CHAIRMAN invited the Commission to consider section A.2.

33. Mr. AGO suggested that the second sentence of the third paragraph be amended to begin with the words "In view of the interest which the Committee shows in the Commission's work".

34. Mr. ELIAS, Rapporteur, said he could accept Mr. Ago's suggestion. In the same sentence, the word "indispensable" should be replaced by the word "useful".

35. Mr. JIMÉNEZ de ARÉCHAGA suggested that, in the same sentence, the references to "the Committee's practice of discussing the work done by the Commission"

and to "the Committee's decision to prepare comments on the Commission's draft on the law of treaties" be dropped. The Commission might wish to send an observer to a meeting of the Committee even if it was discussing a topic which was not on the Commission's agenda.

36. Mr. TUNKIN proposed that the sentence be reworded to state that the Commission had considered it useful to send a representative to the Committee's eighth session, which would be considering the Commission's draft on the law of treaties. In that way, a connexion would be established with the topic, without necessarily implying that the reason for sending an observer resided in the topics on the agenda of the Committee.

37. Mr. BRIGGS said he supported the proposal to delete all reference to the reasons for sending an observer.

38. Mr. RUDA said he supported Mr. Jiménez de Aréchaga's proposal. The Commission had already decided, in connexion with co-operation with Inter-American bodies, that the choice of topics was not a decisive consideration; the same reasoning should apply to the Asian-African Legal Consultative Committee.

39. Mr. AGO said he understood Mr. Tunkin's proposal to be that all reference to the reasons for sending an observer should be deleted, while the reference to the Committee's decision to prepare comments on the Commission's draft on the law of treaties should be retained.

Mr. Tunkin's proposal was adopted.

40. Mr. BRIGGS formally proposed that the Chairman of the Commission be requested to attend the eighth session of the Asian-African Legal Consultative Committee; if the Chairman were unable to do so, he could appoint another member of the Commission, or its Secretary, to represent the Commission.

41. Mr. YASSEEN, supporting the proposal, expressed the hope that the Chairman himself would be able to attend.

42. The CHAIRMAN said he would be very honoured to represent the Commission at Baghdad if he could. He suggested that the Rapporteur be asked to redraft section A.2.

It was so agreed.

43. Mr. AGO said that, during his term of office as Chairman, he had received an informal communication from Mr. Wiebringhaus intimating that the European Committee on Legal Co-operation, set up by the Council of Europe, would like to know whether the Commission was willing to be officially invited to take part in its meetings.

44. The CHAIRMAN proposed that Mr. Ago be authorized to reply unofficially in the affirmative, the Commission's final decision being reserved until it had received an official request.

It was so agreed.

The meeting rose at 1.10 p.m.

819th MEETING

Wednesday, 7 July 1965, at 9.30 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Also present: Mr. Provenzali-Heredia, observer for the Inter-American Council of Jurists.

Co-operation with Other Bodies

(A/CN.4/176)

(resumed from the 801st meeting)

[Item 7 of the agenda]

1. The CHAIRMAN invited Mr. Jiménez de Aréchaga to introduce his report on the fifth meeting of the Inter-American Council of Jurists (A/CN.4/176).

2. Mr. JIMÉNEZ de ARÉCHAGA, introducing his report, said that it had been his privilege to represent the Commission as an observer at the fifth meeting of the Inter-American Council of Jurists held at San Salvador from 25 January to 5 February 1965. The Council attached the greatest importance to co-operation with the Commission and had shown the keenest interest in the Commission's approach to the topic of State responsibility.

3. The next meeting of the Council was due to take place at Caracas, probably not before May 1966. He suggested, however, that the Commission should decide, as it had done on similar occasions in the past, to request its Chairman to represent it at the meeting at Caracas, on the understanding that he could appoint another member of the Commission, or its Secretary, to replace him if he was unable to attend in person.

4. There might also be a joint meeting of the Inter-American Economic and Social Council and the Inter-American Council of Jurists to examine the economic and legal aspects of social development, but it would be at some place other than Caracas and probably not before 1967. The Commission would no doubt wish to take a decision regarding that meeting when it had more information.

5. The CHAIRMAN invited the observer for the Inter-American Council of Jurists to address the Commission.

6. Mr. PROVENZALI-HEREDIA (Observer for the Inter-American Council of Jurists) said that the Council was concerned to secure the utmost co-operation between the International Law Commission and the legal bodies of the Organization of American States, and the attendance of an observer for the Commission at meetings of those bodies was deeply appreciated. The topics being considered by the Council and its subsidiary bodies included "The contribution of the Americas to the

principles of international law that govern the responsibility of the State” and “The programming of studies on the international aspect of legal and institutional problems of the economic and social development of Latin America”. With regard to the economic and legal aspects of development, the proposed joint meeting of the Inter-American Economic and Social Council and the Inter-American Council of Jurists would be very important. Since many of the questions discussed by the legal bodies of the Organization of American States were of more than purely continental interest, he hoped that the United Nations would be represented at their meetings.

7. The CHAIRMAN thanked the observer for the Inter-American Council of Jurists and, on behalf of the Commission, expressed the hope that co-operation between the Council and the Commission would continue.

Draft Report of the Commission on the work of its seventeenth session

(A/CN.4/L. 111 and addenda)

(resumed from the previous meeting)

CHAPTER V : OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.111/Add.1) (continued)

8. The CHAIRMAN invited the Commission to continue consideration of chapter V of its draft report.

B. Exchange and distribution of documents of the Commission

9. Mr. CASTRÉN suggested that the text of footnote 2 be inserted in sub-paragraph (i).

10. Mr. ROSENNE, agreeing with Mr. Castrén, proposed that the Rapporteur and the Secretariat be asked to find a suitable place and form for the incorporation of footnote 2 in the text.

11. Mr. ELIAS, Rapporteur, said he could accept that proposal.

It was so agreed.

Section B was adopted.

C. Dates and places of next year's meetings

12. Mr. TUNKIN said he noticed that it was proposed to begin the regular session on 2 May 1966; that date would be inconvenient for members from countries in which 1 and 2 May were public holidays, as it would not allow them time to reach Geneva for the opening meeting. He therefore proposed that the Commission should decide to begin its regular session on 9 or possibly 5 May.

13. Mr. BRIGGS, supporting Mr. Tunkin, suggested that the opening date be Monday, 9 May.

14. Mr. CASTRÉN said that there were also reasons for not postponing the opening date. If it was postponed, the session would have to be extended beyond the scheduled closing date.

15. Mr. VERDROSS suggested that the session should open on the last Monday in April.

16. Mr. ROSENNE said he supported the proposal to open the session on 9 May, because it would allow a slightly longer interval between the end of the January session and the commencement of the regular session.

17. Sir Humphrey WALDOCK suggested, as a compromise, that the session should open in the middle of the week, perhaps on Thursday 5 May 1966. The Commission could then dispose of some necessary formal business by the end of the week and start work on substantive items on Monday 9 May.

18. Mr. PESSOU supported Mr. Castrén's objection.

19. Mr. AGO said that the opening date of the session should be set as close as possible to the date proposed; he suggested that the Commission should meet on the afternoon of 4 May.

20. Mr. TUNKIN said he could accept Mr. Ago's suggestion that the regular session should begin on Wednesday 4 May 1966.

Mr. Ago's suggestion that the Commission hold its next regular session from 4 May to 8 July 1966 was adopted.

Section C, as amended, was adopted.

D. Representation at the twentieth session of the General Assembly

21. Mr. AMADO said that the phrase “who had been entrusted by the Commission with certain explanations in that connexion”, at the end of the first paragraph, was not satisfactory.

22. Mr. AGO said he was not clear about the meaning of the words “for purposes of consultation” at the beginning of the first paragraph.

23. The CHAIRMAN said that those words were unnecessary. The last sentence of the first paragraph might be amended to read: “. . . the Commission emphasized the importance of its decision to be represented in the General Assembly, in respect of its work in 1964, by Mr. Ago”.

24. Mr. ROSENNE pointed out that the phrase “for purposes of consultation” had been used in a similar context in all previous reports. To be consistent, the Commission should use that phrase not only in the first paragraph, but also in the second.

25. Mr. AMADO said it was a regrettable practice which should not be perpetuated.

26. The CHAIRMAN proposed that section D be adopted with the amendments he had suggested.

Section D, as amended, was adopted.

E. Seminar on International Law

27. Mr. AMADO said it was not correct to say, in the second sentence of the second paragraph, that a “careful” choice had been made, or, in the third sentence, that the seminar had “turned out to be a rewarding experience” for the members of the Commission who had taken part in it.

28. Mr. AGO said he agreed that the word “careful” should be deleted, although the standard of the participants had been particularly high.

29. The CHAIRMAN and Mr. PESSOU supported Mr. Ago.

30. Mr. LACHS said he entirely agreed with Mr. Amado. The sentence should be amended to state simply that the Seminar had proved a useful experience for all participants. It could perhaps be added that the Seminar had served to establish useful contacts between members of the International Law Commission and students of international law.

31. Mr. ROSENNE said he supported Mr. Lachs on the last point.

32. He also proposed the deletion from the first paragraph of the opening words "In connexion with the present session of the Commission", and the addition, at the end of the first sentence, of the words, "to take place during the present session of the Commission". The emphasis would then be on the fact that the Seminar had been organized by the European Office of the United Nations.

33. A reference should be included somewhere to General Assembly resolution 1968 (XVIII)¹ on technical assistance to promote the teaching, study, dissemination and wider appreciation of international law; that would be useful in connexion with the suggestion at the end of the third paragraph that the General Assembly might wish to consider the possibility of granting fellowships to enable nationals of developing countries to attend future seminars.

34. Mr. BRIGGS said that, at its 816th meeting, the Commission had adopted a proposal by Mr. Rosenne that, in future, volume I of the *Yearbook* should include, at the beginning of the record of each meeting, the names of the members who had attended it.² Perhaps it would be appropriate to include some reference to that decision in the report.

35. Mr. ROSENNE said he thought it was sufficient that the Commission's decision appeared in the record of the 816th meeting; it might seem invidious to include a reference to the matter in the report. It would not be desirable to enter into the reasons for the absence of members, which could include sickness or recall to official duties.

36. At the first meeting of the present session, Mr. Paredes had made a number of observations regarding the presentation of the *Yearbook*,³ and the Commission, after hearing an explanation from the Legal Counsel of the United Nations, had reached certain practical conclusions in the matter. He suggested that a short paragraph be included in the report, indicating that the Commission had reviewed the form of its *Yearbook* and had adopted certain decisions which would be reflected in the presentation of future *Yearbooks*.

37. The CHAIRMAN suggested that section E be adopted with the amendments proposed.

Section E, as amended, was adopted.

Chapter V, as amended, was adopted.

¹ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 15, p. 71.*

² 816th meeting, paras. 85-86.

³ 775th meeting, para. 26 *et seq.*

CHAPTER II : LAW OF TREATIES (A/CN.4/L.111/Add.2)

38. The CHAIRMAN invited the Commission to consider chapter II of its draft report.

39. Sir Humphrey WALDOCK, Special Rapporteur, said it would be remembered that the Commission had decided not to attach any commentaries to the draft articles adopted at the present session, and had asked him to prepare an introduction to the draft articles which would explain the reasons for that decision.

40. Chapter II of the report began with five paragraphs (10-14) of a formal character, similar to those included in earlier reports. There followed two paragraphs (15-16) on the form of the draft articles, one paragraph (17) on the question of a single draft convention, and three paragraphs on the scope of the draft articles (18-20). The remaining eight paragraphs (21-28) dealt with the revision of the draft articles at the present session, giving an account of the more important changes made and ending with an explanation of the reasons for not attaching a commentary.

Paragraphs 10 and 11

Paragraphs 10 and 11 were adopted without comment.

Paragraph 12

41. Mr. TUNKIN asked that the paragraph should state the number of Governments which had submitted written comments.

42. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed : a footnote would also be added giving the names of the countries in question.

Paragraph 12, thus amended, was adopted.

Paragraph 13

43. Mr. WATTLES (Secretariat) explained that the Secretariat report on "Depositary Practice in Relation to Reservations" (A/5687) had no connexion with any of the items on the agenda of the General Assembly and so would not be printed as part of the General Assembly's official records; it would therefore remain in mimeographed form unless the Commission decided that it should be included in volume II of the *Yearbook* for 1965.

44. Mr. RUDA proposed that the Secretariat report on Depositary Practice be included in volume II of the 1965 *Yearbook* and that the concluding words of paragraph 13 "in response to the request of a Member of the Commission", be amended to read "in response to the request of some Members of the Commission".

It was so agreed.

Paragraph 13, thus amended, was adopted.

Paragraph 14

Paragraph 14 was adopted without comment.

Paragraph 15

45. Mr. ROSENNE proposed that the words "and submitted its final report on the topic to the General Assembly" be added at the end of the paragraph.

It was so agreed.

Paragraph 15, thus amended, was adopted.

Paragraph 16

Paragraph 16 was adopted without comment.

Paragraph 17

46. Mr. BRIGGS proposed that the last sentence of paragraph 17 should include a reference to the number of the meeting at which the decision had been taken.

It was so agreed.

Paragraph 17, thus amended, was adopted.

Paragraph 18

47. Mr. RUDA proposed the deletion of the words "a certain" before the word "capacity" in the second sentence of paragraph 18. Those words did not make the meaning of the sentence any clearer.

48. Mr. YASSEEN said that as the Commission had not discussed the matter thoroughly, it would be better to keep the word "certain" before the word "capacity".

49. Sir Humphrey WALDOCK, Special Rapporteur, said he agreed with Mr. Yasseen; the wording in question had been adopted to take into account the fact that some members had less liberal views than others on the subject of the treaty-making capacity of international organizations.

50. Mr. JIMÉNEZ de ARÉCHAGA said that at first he had had doubts similar to those of Mr. Ruda. However, he noticed that the same wording was used in the corresponding passage of the Commission's report on its fourteenth session.

51. Mr. ROSENNE proposed that, in order to make the meaning clear, the words "at that session", be inserted after the word "However" at the beginning of the second sentence.

It was so agreed.

Paragraph 18, thus amended, was adopted.

Paragraph 19

52. Mr. ROSENNE proposed that the opening words of the paragraph be amended to read: "The Commission, at its present session, noted that . . .".

It was so agreed.

53. Mr. TUNKIN proposed that the latter part of the first sentence, from the words "that considerable modifications" down to the end, should be deleted. Since the Commission had not considered the question of treaties concluded between States and other subjects of international law, or between such other subjects of international law, it would not be appropriate to say that, in order to cover that question "considerable modifications in the wording of these articles would be necessary" or that, before the Commission could determine the modifications and additions required, it would be necessary "to undertake a further special study of treaties concluded by international organizations".

54. Sir Humphrey WALDOCK, Special Rapporteur, said it was undoubtedly true to say that alterations would be necessary to adapt the draft articles to cover that category of treaties, and also that a special study would be required for the purpose. The draft articles were couched

in terms that covered only treaties between States. It would be necessary to study the special procedures for the conclusion of treaties by international organizations, and such questions as who would represent an organization for that purpose. He was willing to condense the passage but would oppose its being deleted altogether.

55. Mr. TUNKIN said that the difficulty arose from the fact that the Commission had not made any study of the question of treaties concluded by international organizations. Some of the draft articles might not apply to such treaties at all. Moreover, the Commission had not decided whether it would undertake a study of that category of treaties once it had completed its work on the law of treaties concluded between States.

56. Sir Humphrey WALDOCK, Special Rapporteur, said that the words "if found desirable" in the third sentence, made it clear that the Commission had not taken any decision in the matter. The passage in the first sentence was necessary to explain why the Commission had dropped from the draft articles all references to treaties concluded by international organizations.

57. Mr. ROSENNE suggested that the word "considerable" before the word "modifications" be deleted and that the rest of the first sentence be shortened so as to state merely that it would be necessary to undertake a special study.

58. Mr. LACHS said he was in favour of deleting the whole passage. It was undesirable to suggest to Governments the possibility of inviting the Commission to adapt the draft articles to cover the treaties of international organizations. It would be better to suggest instead that, if Governments were interested in the subject, they should consider the possibility of a separate study of that category of treaties.

59. Mr. BRIGGS said that, if the words "might be necessary" were substituted for the words "would be necessary", a full stop substituted for the semi-colon after the words "international law" and the rest of the sentence deleted, that would allow for the possibility of some of the articles, at least, being applicable to treaties concluded between international organizations.

60. Mr. ELIAS said that it would be better to delete the whole passage, since the point was adequately covered in the rest of the paragraph.

61. Sir Humphrey WALDOCK, Special Rapporteur, said that his intention had been to explain why, after so long a time spent on the law of treaties, the Commission had not succeeded in producing a comprehensive draft that would include treaties concluded by international organizations. If members did not favour such an explanation, the text could be abbreviated on the lines suggested by Mr. Rosenne.

62. Mr. TUNKIN and Mr. LACHS said that that course would be acceptable.

It was so agreed.

Paragraph 19, thus amended, was adopted.

Paragraph 20

Paragraph 20 was adopted without comment.

Paragraph 21

63. Mr. CASTRÉN said that since, for the time being, all the Commission's decisions were provisional, the word "provisionally" in the third sentence should be deleted.

64. The CHAIRMAN said that the Commission had voted for the omission of article 5, but that the provisional text of the draft would be revised when it was ready.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that, although the Commission had provisionally decided to omit article 5, it had been agreed that it would still be open to any member to submit a text for an article on the negotiation of a treaty, since some members had been in favour of including such a provision. As Special Rapporteur, however, he did not intend to put forward any new proposal on the subject.

66. Mr. CASTRÉN said that in that case, he would not press his amendment.

Paragraph 21 was adopted.

Paragraph 22

67. Mr. TSURUOKA proposed that in the French text the words "pour conclure" in the fourth sentence be deleted.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that the French translation was not correct and would be rectified.

Paragraph 22 was adopted.

Paragraph 23

69. Mr. JIMÉNEZ de ARÉCHAGA proposed that at the end of the seventh sentence the words "residuary rule" be substituted for the words "general rule".

70. Mr. ROSENNE proposed that the words "in international law" be inserted after the word "rule" in the same passage.

71. Mr. TSURUOKA suggested that in the French text the phrase "selon ces directives" in the eighth sentence should be replaced by some more adequate formula, such as "dans le sens indiqué ci-dessus".

72. Mr. AGO suggested that in the third sentence, the word "basic" should be deleted, leaving the term "residuary rule" without qualification.

73. Sir Humphrey WALDOCK, Special Rapporteur said that all the proposed amendments were acceptable.

Paragraph 23, thus amended, was adopted.

Paragraph 24

74. Mr. RUDA asked whether the Special Rapporteur intended to add to chapter II a paragraph on the definitions in article 1, or to insert in paragraph 24 a definition of general multilateral treaties, since the adjournment of the discussion on articles 8 and 9 had been closely connected with the definition of such treaties.

75. Sir Humphrey WALDOCK, Special Rapporteur, said that article 1 was to be examined by the Drafting Committee that very day. He had prepared a paper on the subject suggesting that consideration of the definition of a general multilateral treaty be deferred until the Commission discussed articles 8 and 9. He would prefer not to go into too much detail on the matter in paragraph 24.

76. Mr. BRIGGS said that the French translation of the first sentence was not wholly satisfactory. The words "la question des parties" did not adequately render the meaning of "participation in a treaty".

77. Mr. LACHS said that some mention should be made of the fact that the Commission had discussed the question of participation in general multilateral treaties.

78. Sir Humphrey WALDOCK, Special Rapporteur, said he was willing to insert a statement that the Commission had decided to defer consideration of the problem.

It was so agreed.

Paragraph 24, thus amended, was adopted.

Mr. Jiménez de Aréchaga, first Vice-Chairman, took the chair.

Paragraph 25

Paragraph 25 was adopted without comment.

Paragraph 26

79. Mr. TSURUOKA proposed that the last part of the last sentence, beginning with the words "when its work", be replaced by the words "before concluding its work on the draft articles".

80. Mr. ROSENNE proposed the insertion of the word "provisionally" before the words "adopted revised texts" in the first sentence, and the insertion of the words "and concordance of the three language versions" after the word "terminology" in the second sentence. He also proposed that the last sentence of the paragraph should be deleted.

81. Mr. TUNKIN said he was opposed to Mr. Rosenne's first amendment, because it might detract from the value of the work done by the Commission during the session.

82. The CHAIRMAN,* speaking as a member of the Commission, said he agreed with Mr. Tunkin. He proposed the deletion of the words "provisional and" in the last sentence.

83. Mr. RUDA suggested that the words "in general", the meaning of which was not clear, be deleted from the last sentence.

84. Mr. PAL proposed the substitution of the words "is expected to be completed" for the words "will be completed" in the last sentence.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that for the reasons given by Mr. Tunkin he would be reluctant to insert the word "provisionally" in the first sentence. There was no real need for Mr. Rosenne's second amendment and he considered that the last sentence should be retained because it formed an introduction to paragraphs 27 and 28. Mr. Ruda's amendment was acceptable and the words "provisional and" in the last sentence could be omitted. He did not, however, favour the change proposed by Mr. Pal.

Paragraph 26, with the amendments accepted by the Special Rapporteur, was adopted.

Paragraph 27

86. The CHAIRMAN*, speaking as a member of the Commission, said it would be preferable not to refer to

* Mr. Jiménez de Aréchaga.

the provisional character of the texts adopted at the session, but to indicate that they were subject to review. Perhaps some other wording could be found for the passage dealing with the comments of governments, which seemed rather offhand in tone.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that the Chairman's first point was well taken, but he did not think the criticism of the remainder of the first sentence was justified, or that governments could possibly take offence at what was said.

88. Mr. LACHS said he agreed with the Special Rapporteur. As to the Chairman's first point, he thought it would suffice to delete the word "provisional"; there was no need to refer yet again to the fact that the texts were subject to review.

89. Mr. AGO said it would be simpler to begin the paragraph with the phrase "In the light of the considerations set out in the foregoing paragraphs . . .".

90. Mr. ROSENNE said that the Commission had decided not to present commentaries on the texts adopted at the present session, not only because of their provisional character, but also because it had decided to present commentaries when the complete draft was submitted to the General Assembly. It would therefore suffice to re-draft the first sentence on some such lines as "Having regard to the foregoing considerations, the Commission did not think that any useful purposes would be served etc.". Furthermore, instead of speaking of detailed commentaries, it would be better to use some such wording as "Commentaries which by its Statute the Commission is required to attach to its draft articles".

91. Sir Humphrey WALDOCK, Special Rapporteur, said that he could re-draft the first sentence on the lines suggested by Mr. Rosenne, but it was hardly necessary to refer to the Commission's statutory obligation to prepare commentaries, as that would make the text unnecessarily heavy.

It was so agreed.

Paragraph 27, thus amended, was adopted.

Mr. Bartoš resumed the Chair.

Paragraph 28

Paragraph 28 was adopted without comment.

Chapter II, as amended, was adopted.

Special Missions

(resumed from the 817th meeting)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(continued)

92. The CHAIRMAN invited the Commission to consider the draft articles on special missions proposed by the Drafting Committee.

ARTICLE 34 (Members of the family) [35]⁴

93. The CHAIRMAN, speaking as Special Rapporteur, said that article 34 read :

" 1. The members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving State to accompany them shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 25, 26, 27, 27 bis, 28, 28 bis, 29 and 30.

2. Members of the families of the administrative and technical staff of the special mission who are authorized by the receiving State to accompany them shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 31 "

*Article 34 was adopted by 14 votes to none.*⁵

ARTICLE 35 (Nationals of the receiving State and persons permanently resident in the territory of the receiving State) [36]⁶

94. The CHAIRMAN, speaking as Special Rapporteur, said that article 35 read :

" 1. Except in so far as additional privileges and immunities may be recognized by special agreement or by decision of the receiving State, the head and members of the special mission and the members of its diplomatic staff who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the special mission and private servants who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission "

95. Mr. TSURUOKA said he hoped that in his commentary the Special Rapporteur would explain the meaning of the word "unduly", in paragraph 2.

96. The CHAIRMAN, speaking as Special Rapporteur, said that the word was taken from article 37 of the Vienna Convention on Diplomatic Relations.⁷

*Article 35 was adopted by 15 votes to none.*⁸

ARTICLE 36 (Duration of privileges and immunities) [37]⁹

97. The CHAIRMAN, speaking as Special Rapporteur, said that article 36 read :

" 1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State for the purpose of performing his functions in a special mission, or, if already in its territory, from the moment when his

⁵ For adoption of commentary, see 821st meeting, paras. 96-108.

⁶ For earlier discussion, see 808th meeting, paras. 75-90.

⁷ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 86.*

⁸ For adoption of commentary, see 821st meeting, paras. 109 and 110.

⁹ For earlier discussion, see 809th meeting, paras. 1-4.

⁴ For earlier discussion, see 808th meeting, paras. 48-61.

appointment is notified to the competent organ of that State.

"2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the special mission, immunity shall continue to subsist".

98. Mr. CASTRÉN said that the word "*pénètre*" in the French text of paragraph 1 gave the impression that the person in question entered the receiving State's territory against that State's will. He suggested that the wording of article 53 of the Vienna Convention on Consular Relations,¹⁰ "*dès son entrée sur le territoire . . .*", should be used, as the Drafting Committee had intended.

It was so agreed.

99. The CHAIRMAN, speaking as Special Rapporteur, pointed out that article 39 of the Vienna Convention on Diplomatic Relations used the words "*dès qu'elle pénètre . . .*" though he personally preferred "*dès son entrée . . .*".

*Article 36, thus amended, was adopted by 16 votes to none.*¹¹

ARTICLE 37 (Death) [38]¹²

100. The CHAIRMAN, speaking as Special Rapporteur, said that article 37 read :

"1. In the event of the death of the head or of a member of the special mission or of a member of its staff, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

"2. In the event of the death of the head or of a member of the special mission or of a member of its staff, or of a member of their families, if those persons are not nationals of or permanently resident in the receiving State, the receiving State shall facilitate the collection and permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

"3. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as the head or member of the special mission or member of its staff, or as a member of their families".

101. Mr. LACHS said that the title in the English text was too bald and should be expanded.

102. Mr. BRIGGS suggested that the Special Rapporteur might be asked to revise the title so as to indicate that

the subject of the article was the continuation of privileges and immunities for the members of the family.

103. The CHAIRMAN, speaking as Special Rapporteur, suggested that a possible wording would be "Consequences of the death of a member of the mission or of a member of his family".

104. Sir Humphrey WALDOCK said that all that was necessary was to bring the English title into line with the French so that it read "Cases of death".

105. Mr. PESSOU suggested that, since in the event of death there was cessation of functions, articles 37 and 43 might be combined.

106. The CHAIRMAN, speaking as Special Rapporteur, said that article 37 dealt with succession *mortis causa* and with the privileges of members of the family after the death of the member of the special mission.

107. Mr. AGO thought that the French title "*Cas de décès*" should be retained and that a corresponding title should be found for the English text, for the article did not cover all the consequences of the death, but only the situation which arose in the context of the articles.

It was so agreed.

*Article 37 was adopted by 16 votes to none.*¹³

ARTICLE 38 (Transit through the territory of a third State) [39]¹⁴

108. The CHAIRMAN, speaking as Special Rapporteur, said that article 38 read :

"1. Subject to the provisions of paragraph 4, if the head or a member of the special mission or a member of its diplomatic staff passes through or is in the territory of a third State, while proceeding to take up his functions in a special mission performing its task in a foreign State, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit of members of the administrative and technical or service staff of the special mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord.

4. The third State shall be bound to comply with the obligations mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the

¹⁰ *Conférence des Nations Unies sur les relations consulaires, Documents officiels, Vol. II, p. 188.*

¹¹ For adoption of commentary, see 821st meeting, para. 110.

¹² For earlier discussion, see 809th meeting, paras. 1-4.

¹³ For adoption of commentary, see 821st meeting, para. 111.

¹⁴ For earlier discussion, see 809th meeting, paras. 5-9.

transit of the special mission, and has raised no objection to it.

5. The obligation of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the special mission, whose presence in the territory of the third State is due to *force majeure* ”.

109. Mr. TSURUOKA said that he had been absent when the Commission had discussed the article. In his opinion, it was not certain that a third State had to accord inviolability to one of its own nationals. He would vote for the article, subject to that reservation.

110. The CHAIRMAN, speaking as Special Rapporteur, said that he was of the same opinion as Mr. Tsuruoka, but pointed out that, under paragraph 3 of article 38, the obligations of third States were no greater than those of receiving States, whose obligations vis-à-vis the persons concerned were laid down in article 35. Perhaps he might indicate in the commentary that the persons in question should enjoy all the necessary immunities, on condition that they were not greater than those accorded by the receiving State; in other words, the third State would not be obliged to accord to its nationals or permanent residents any immunity other than the functional immunity.

111. Mr. TSURUOKA said that that solution would satisfy him. He had been thinking of the case of a person accused of a criminal offence who was in transit through the territory of the country of which he was a national: the judicial authorities might perhaps object to his transit.

112. Mr. PESSOU said that a person who went on a mission, whether special or general, was provided with a passport, the nature of which determined whether transit was assured. He did not see any need to impose so many obligations on third States, and he doubted whether they would accept them.

113. The CHAIRMAN, speaking as Special Rapporteur, said that he agreed, but the Commission had decided to model the article on the corresponding provision of the Vienna Convention on Diplomatic Relations.¹⁵ except for paragraph 4, under which the transit State would be informed of the transit of the special mission and could object.

*Article 38 was adopted by 16 votes to none.*¹⁶

ARTICLE 39 (Obligation to respect the laws and regulations of the receiving State) [40]¹⁷

114. The CHAIRMAN, speaking as Special Rapporteur, said that article 39 read :

“ 1. Without prejudice to their privileges and immunities, it is the duty of all persons belonging to special missions and enjoying these privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

¹⁵ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 87, article 40.*

¹⁶ For adoption of commentary, see 821st meeting, para. 112.

¹⁷ For earlier discussion, see 809th meeting, paras. 52-66.

2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State ”.

*Article 39 was adopted by 16 votes to none.*¹⁸

ARTICLE 40 (Organ of the receiving State with which official business is conducted) [41]¹⁹

115. The CHAIRMAN, speaking as Special Rapporteur, said that article 40 read :

“ All official business with the receiving State entrusted to the special mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other organ, delegation or representative as may be agreed ”.

116. The Drafting Committee had deleted the paragraph relating to liaison officers, being of the opinion that “ the organ ” of the receiving State included those officers.

*Article 40 was adopted by 15 votes to none.*²⁰

ARTICLE 41 (Professional activity) [42]²¹

117. The CHAIRMAN, speaking as Special Rapporteur, said that article 41 read :

“ The head and members of the special mission and the members of its diplomatic staff shall not practise for personal profit any professional or commercial activity in the receiving State ”.

*Article 41 was adopted by 16 votes to none.*²²

ARTICLE 42 (Right to leave the territory of the receiving State) [43]

118. The CHAIRMAN, speaking as Special Rapporteur, said that article 42 read :

“ The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property ”.

*Article 42 was adopted by 16 votes to none.*²³

ARTICLE 43 (Cessation of the functions of the special mission) [44]

119. The CHAIRMAN, speaking as Special Rapporteur, said that article 43 read :

¹⁸ For adoption of commentary, see 821st meeting, paras. 113 and 114.

¹⁹ For earlier discussion, see 809th meeting, paras. 52-66.

²⁰ For adoption of commentary, see 821st meeting, paras. 115-117.

²¹ For earlier discussion, see 809th meeting, paras. 10-51.

²² For adoption of commentary, see 821st meeting, para. 118.

²³ For adoption of commentary, see 821st meeting, paras. 119-122.

“ 1. When a special mission ceases to function, the receiving State must respect and protect its property and archives, and must allow the permanent diplomatic mission or the competent consular post of the sending State to take possession thereof.

2. The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission.

3. In case of absence or breach of diplomatic or consular relations between the sending State and the receiving State and if the special mission has ceased to function,

(a) the receiving State must, even in case of armed conflict, respect and protect the property and archives of the special mission;

(b) the sending State may entrust the custody of the property and archives of the mission to a third State acceptable to the receiving State”.

120. Mr. PESSOU said that there was a certain connexion between article 43 and article 36 (Duration of privileges and immunities) and he suggested that they might be combined.

121. The CHAIRMAN, speaking as Special Rapporteur, said that the two articles dealt with different questions: one related to the privileges and immunities of the persons forming the special mission, the other to the termination of the special mission as an institution.

122. He was still uncertain whether article 43 should appear in Part I or Part II, but that point would be settled later.

*Article 43 was adopted by 16 votes to none.*²⁴

123. Mr. JIMÉNEZ de ARÉCHAGA, speaking as Chairman of the Drafting Committee, said that the Committee had not had time to discuss certain proposals by Mr. Rosenne which raised questions of substance, and it had therefore referred them to the Commission for consideration. One proposal was to substitute the words “ Part I — General Rules ” for the heading of the articles adopted in 1964; another was to insert as a heading for the articles adopted in 1965 the words “ Part II, Facilities, Privileges and Immunities ”.

124. Mr. Rosenne had also proposed the insertion of a new article reading:

“ ARTICLE 16 *bis* (Application of Part II)

“ 1. The provisions of Part II of these articles apply to all special missions, save as may be otherwise agreed between the sending State and the receiving State.

2. Nothing in this Part of these articles shall affect other international agreements in force as between the sending State and the receiving State, whether or not either or both of these States are parties to the present articles.

3. For the purpose of this Part, the following expressions have the meanings assigned to them:

(a) ‘ Head of the special mission ’ is the person designated by or in accordance with article 6 of the present articles;

(b) ‘ Members of the special mission ’ are the head of the special mission and the members of its staff;

(c) ‘ The members of the staff of the special mission ’, ‘ members of the diplomatic staff of the special mission ’, ‘ members of the administrative and technical staff of the special mission ’, ‘ members of the service staff ’, and ‘ premises of the special mission ’ have the same meanings as are set forth in article 1 of the Vienna Convention on Diplomatic Relations, of 18 April 1961 ”.

Mr. Rosenne’s proposals concerning the headings for Parts I and II were adopted.

125. The CHAIRMAN invited the Commission to consider Mr. Rosenne’s proposed article 16 *bis* paragraph by paragraph.

Paragraph 1

126. Mr. ROSENNE explained that the object of paragraph 1 was to show that the rules in Part II did not constitute *jus cogens* and that States were free to agree on something different in any given case. As he had already said during the earlier discussion, in his opinion articles 1-16 set out the distinguishing features of special, as opposed to permanent, missions. While not attaching much importance to the position of his proposed new article, he thought it might with advantage be used as an introduction to Part II.

127. Mr. AGO said that, while appreciating the points made by Mr. Rosenne, he would like to reflect further on a question which certainly called for thought. The new article might well have disquieting results: where the Commission did not introduce a clause of that kind, it might be inferred that the rules laid down were rules of *jus cogens*, which was hardly desirable in the case of special missions. The problem might perhaps be solved by adding in other articles clauses like those the Commission had adopted in the provisions concerning immunity from civil jurisdiction. In any case, no hasty decision should be taken.

128. The CHAIRMAN, speaking as a member of the Commission, said he was opposed to Mr. Rosenne’s proposal, and in particular to its application to Part II only. There could not be one system for Part I and another for Part II. The problems raised by the proposal were too delicate to be settled hastily.

129. Mr. TUNKIN said he was opposed to paragraph 1 for much the same reasons as those given by Mr. Ago and the Chairman. It was modelled on article 73 of the Convention on Consular Relations,²⁵ which was both unworkable and incorrect in law.

130. Another objection was that such a provision might be read as implying that States were not free to agree on some other procedure unless an express clause allowing them to do so appeared in every article.

²⁴ For adoption of commentary, see 821st meeting, paras. 123-126.

²⁵ *United Nations Conference on Consular Relations, Official Records, Vol. II, p. 187.*

131. Consideration of the whole problem should be postponed until the draft was re-examined by the Commission at a later stage.

132. Mr. ROSENNE said he could agree to consideration of paragraph 1 being deferred.

Consideration of paragraph 1 was deferred.

Paragraph 2

133. Mr. ROSENNE said that the purpose of paragraph 2 was to protect existing and future agreements between States in the same way as had been done in article 73, paragraph 1, of the Vienna Convention on Consular Relations. Such a provision was extremely important in order to emphasize the residuary character of the articles and should certainly be incorporated in the draft. Personally, he did not consider that it belonged to the final clauses; in the present case it was a matter of substance.

134. Mr. AGO suggested that paragraph 2 also should be considered at the last stage. He doubted whether it was right that it should apply only to Part II, instead of being placed at the end of the draft and applying to the articles as a whole. He could see that the clause would be useful for some conventions; but he doubted whether, if certain States should decide to adopt the convention on special missions, it was really advisable to lay down the principle that special agreements giving such missions a less important status should prevail over the convention. He thought the Commission should reserve its final decision.

135. Mr. RUDA said he agreed with Mr. Ago. He was not sure of the meaning of the words "whether or not either or both of these States are parties to the present articles"; they were not included in article 73, paragraph 1, of the Vienna Convention on Consular Relations. If one of the States was not a party to the articles, its special agreements concerning special missions would not be affected, as the provision was not *jus cogens*.

136. Mr. ROSENNE said that the issue was an important one and should be mentioned in the report, even though the Commission had reached no decision on it.

137. The CHAIRMAN, speaking as Special Rapporteur, said that the questions Mr. Rosenne had raised were too important to be left out of the report, and should be examined more thoroughly later on.

Paragraph 3

138. The CHAIRMAN, speaking as Special Rapporteur, said it was not advisable to give definitions applying to one part of the draft only; definitions should apply to the text as whole, so that a word would not have one meaning in one part and another meaning in the other. Besides, the Commission had already asked the Special Rapporteur to submit definitions at the next session.

139. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. Rosenne's idea of taking the Vienna Convention as a basis was excellent, and should be adopted.

140. The CHAIRMAN proposed that the Commission should decide not to transmit article 16 *bis* to the

Drafting Committee, but to mention in the report that it would be considered later, during the second reading.

It was so agreed.

The meeting rose at 1 p.m.

820th MEETING

Thursday, 8 July 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castren, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Also present: Mr. Provenzali-Heredia, observer for the Inter-American Council of Jurists.

Co-operation with Other Bodies

(A/CN.4/176)

(resumed from the previous meeting)

[Item 7 of the agenda]

1. The CHAIRMAN invited the observer for the Inter-American Council of Jurists to make a statement.

2. Mr. PROVENZALI-HEREDIA (Observer for the Inter-American Council of Jurists) said that although the subjects studied by the inter-American juridical bodies and the International Law Commission were not always the same, there was often an obvious parallel, so that the presence of observers was not a mere formality. As contemporary international life was characterized by co-operation in all sectors of human activity — political, economic and legal — it was important for the representatives of regional systems to be thoroughly familiar with the general rules of law formulated by international juridical bodies. It was also important that the new countries should make known their desire that certain principles essential for their independent existence and their political and social development should be studied with a view to enriching or modifying traditional international law.

3. The American continent had worked out rules of great juridical value. With regard to the legal effects of reservations to multilateral treaties, the Pan-American rule, which rejected the unanimity theory for the acceptance of a reservation and admitted reservations among countries *inter se*, facilitated the progress of international law and safeguarded the sovereignty of all States, both those which accepted and those which rejected such reservations.

4. With regard to territorial and diplomatic asylum, the Inter-American Juridical Committee of Rio de Janeiro had prepared drafts which, having acquired the status of conventions, constituted legal rules of the greatest value relating to an institution of which the countries of America were justly proud.

5. With regard to the international responsibility of States, various rules had been evolved in the Latin American countries and had been re-cast by the Inter-American Council of Jurists at its meeting at San Salvador in February 1965. Those rules concerned such matters as equal treatment of nationals and foreigners, the condemnation of diplomatic intervention and armed intervention for the protection of foreign private interests, and the acceptance of a new concept of denial of justice; they were bound to influence the changes being made in international law to adapt it to the realities of a period which was as turbulent, politically, as it was fertile in juridical and social innovations.

6. In the sphere of private international law, the American continent had a code known as the "Bustamante Code". The Inter-American Council of Jurists had adopted the recommendation of its Juridical Committee at Rio de Janeiro that that historic code should be brought up to date, and a special inter-American conference was to revise it in 1966. That ambitious work, for which preliminary studies had been in progress for more than ten years, would include the introduction into the Code of new rules which had become indispensable, such as those concerning conflict of laws relating to labour.

7. In addition, two international instruments for unifying the law were in preparation. The first was a convention on extradition, which would be applicable throughout the continent, as it had been approved by the Inter-American Council of Jurists and was on the agenda of the eleventh Inter-American Conference. The second was a draft treaty enumerating the cases deemed to constitute intervention and designed to secure constant and strict observance of the principle of non-intervention, which was laid down in the charter of the Organization of American States and was a fundamental principle both of the Organization and of each of its member States.

8. Other subjects under study were the legal aspects of the Alliance for Progress and the Common Market, and the legal aspects of economic integration of the American countries to secure the economic emancipation of Latin America.

9. Such were the projects on which the jurists of North and South America were working together in order to find precise and satisfactory rules of law; and that was why they kept themselves informed of the work of the International Law Commission, which was today making the most valuable contribution to the science of international law.

10. With its draft articles on the law of treaties, the Commission might well be offering the world what was perhaps the most outstanding legal product of the time in the international sphere. The draft involved the incorporation, to the extent that they were susceptible of general application, of all expressions of legal thought and of the attitudes of the communities which would apply them. For that reason, the Commission's acceptance of the American position regarding reservations had been widely welcomed.

11. It was essential that the adoption of the draft on the law of treaties should not be jeopardized by any

discrepancies between its content and the provisions of the various constitutional systems governing the internal procedure to be followed in respect of international instruments. That could be ensured by making a detailed study of the meaning and application of the simplest terms—signature or accession, legislative approval and ratification—and their synonyms, used to denote successive and indispensable steps in the conclusion of a treaty.

12. With regard to co-operation between the Commission and the inter-American juridical bodies, it was a pity that Mr. Jiménez de Aréchaga, the Commission's observer at the fifth session of the Inter-American Council of Jurists, with his usual modesty, had not reproduced in his report (A/CN.4/176) the resolution recognizing how fruitful that co-operation was. The Commission would gather from the resolution—with which it was surely familiar—why he had stressed the need to strengthen the contact between the Commission and the inter-American bodies.

13. After following the Commission's proceedings and reading the reports of the observers it had sent to regional juridical bodies, he was taking steps to propose to the Juridical Committee that it invite the Commission to appoint an observer to be present at Rio de Janeiro, if not for the entire ninety-day annual session, at least for long enough to see how the Committee worked and what subjects it dealt with. Meanwhile, it was essential to establish active communications between the Commission and the Committee through the exchange of documents, especially the latest documents, in order to dispel the erroneous belief that it was the slowness of juridical bodies which made the adoption of permanent rules by political organs lag so far behind events.

14. He thanked the Commission for giving him an opportunity to speak and expressed the hope that it would soon bring its work to a successful conclusion.

Law of Treaties

(resumed from the 816th meeting)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

ARTICLE 1 (Use of terms)¹

15. The CHAIRMAN invited the Commission to consider the Drafting Committee's proposals concerning article 1.

16. The Drafting Committee had decided to recommend the deletion of sub-paragraphs (b) and (g) and of the references to "signature" in sub-paragraph (d), and the postponement of decisions on sub-paragraph (c), on a new sub-paragraph (f) *ter* relating to the definition of a "contracting State", and on paragraph 2.

Those recommendations were adopted.

¹ For earlier discussions, see 777th meeting, paras. 5-78, 778th meeting, paras. 1-60, and 810th meeting, para. 11.

17. Sir Humphrey WALDOCK, Special Rapporteur, said that for the remainder of article 1, the Drafting Committee proposed the following text :

" 1. For the purposes of the present articles :

(a) 'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(d) 'Ratification', 'Accession', 'Acceptance' and 'Approval' mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.

(e) 'Full powers' means a document emanating from the competent authority of a State designating a person to represent the State for negotiating, adopting or authenticating the text of a treaty or for expressing the consent of the State to be bound by a treaty.

(f) 'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or to vary the legal effect of certain provisions of the treaty in their application to that State.

(f) *bis* 'Party' means a State which has consented to be bound by a treaty and for which the treaty has come into force.

(f) *quater* 'International organization' means an inter-governmental organization."

18. With regard to the changes made, the reference to "signature" had been dropped from sub-paragraph (d) because of the changes made in the rules concerning signature. The definition had been shortened and somewhat modified to bring out the fact that the draft articles concerning ratification, accession, acceptance and approval dealt with the international act and not with any internal procedures which might precede it.

19. Sub-paragraph (e) had been slightly modified. The 1962 text² had been more or less confined to a formal instrument of full powers, but the revised version took into account the modern practice of employing less formal methods.

20. Sub-paragraph (f) contained an extremely important definition, essentially the same as that agreed upon at the fourteenth session.³ The Drafting Committee had sought to bring out that, however designated, any statement purporting to exclude or vary the legal effects of certain provisions of a treaty would constitute a reservation.

21. In sub-paragraph (f) *bis*, the Drafting Committee had put forward a new definition that would need to be examined later in conjunction with the definition of a "contracting State" that might be included as sub-paragraph (f) *ter*.

22. Sub-paragraph (f) *quater* was also new and had been inserted so as to exclude non-governmental organizations.

23. The Drafting Committee had spent some time discussing paragraph 2, and while concluding that some provision on those lines would be necessary, had decided that for lack of time the matter would have to be postponed until the next session.

24. The Commission was invited to approve the text put forward for article 1 on a provisional basis as it would require further consideration when the Commission reviewed the draft articles as a whole.

25. Mr. JIMÉNEZ de ARÉCHAGA said that the Spanish text of sub-paragraph (f) *bis* would have to be slightly amended, as the word "parte" could not stand alone.

26. Mr. BRIGGS said that the French text of sub-paragraph (d) would need to be rectified as the word "international", qualifying the word "act", had been omitted. That was an important point because, as the Special Rapporteur had emphasized in the Drafting Committee, there was a tendency to confuse the internal and international aspects of the act of ratification.

Article 1 was adopted by 16 votes to none.

ARTICLE 3 *bis* (Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations)⁴

27. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had discussed the proposal he had made in his fourth report (A/CN.4/177) for the insertion of an article 3 *bis* concerning the constituent instruments of international organizations or treaties drawn up within them, and had decided to recommend that such a provision be included in the draft on a provisional basis.

The text read :

"The application of the present articles to treaties which are constituent instruments of an international organization or have been drawn up within an international organization shall be subject to the rules of the organization in question."

28. Mr. ROSENNE said that the title of the article in the French version should be brought into line with the English.

Article 3 bis was adopted by 16 votes to none.

Special Missions

(resumed from the previous meeting)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
(concluded)

ARTICLE 24 (Inviolability of the property of the special mission) [19, para. 3]⁵

29. The CHAIRMAN said that Mr. Elias had proposed that article 24 should be combined with article 19.

² *Yearbook of the International Law Commission, 1962, Vol. II, p. 161.*

³ *Ibid.*

⁴ For earlier discussion, see 780th meeting, paras. 17-26.

⁵ For earlier discussions, see 806th meeting, paras. 55-75, and 817th meeting, paras. 33-58.

After discussion the Drafting Committee had adopted a text for a third paragraph to be added to article 19, which was intended to satisfy both the supporters of the Vienna Convention and those who thought that the provisions of that Convention should be adapted to the case of special missions. The text read :

“ 3. The premises of the special mission, their furnishings, other property used in the operation of the special mission and its means of transport shall be immune from search, requisition, attachment or execution by the organs of the receiving State. ”

30. Mr. PESSOU said that the words “ search ” and “ requisition ” seemed to duplicate “ attachment ” and “ execution ”.

31. The CHAIRMAN explained that the purpose of a search was to look for something or to establish a certain state of affairs; a search could be carried out without anything being attached, whereas by attachment the disposal of a thing was restricted or something was taken away from someone. The list was taken from the Vienna Convention on Diplomatic Relations.⁶

The new paragraph 3 of article 19 proposed by the Drafting Committee was adopted by 16 votes to none.

Article 19 as a whole, as amended, was adopted by 16 votes to none.

Draft Report of the Commission on the work of its seventeenth session

(A/CN.4/L.111 and addenda)

(resumed from the 819th meeting)

CHAPTER V : OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

(A/CN.4/L.111/Add.1)

(continued)

32. The CHAIRMAN invited the Commission to resume consideration of section A.1. He proposed that the last two paragraphs be replaced by the text prepared by the General Rapporteur and Mr. Jiménez de Aréchaga, which read :

“ The Inter-American Juridical Committee, the standing organ of the Inter-American Council of Jurists, was represented by Mr. Elbano Provenzali-Heredia, who addressed the Commission.

A standing invitation has been extended to the Commission to send an observer to the Inter-American Council of Jurists. The Commission took note that the next meeting of the Council would be held in Caracas, Venezuela, but that the date had not yet been set. If the meeting is held before the next session of the Commission, the Commission requested its Chairman, Mr. Milan Bartoš, to attend it, or, if he were unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission. ”

It was so agreed.

Section A.1., as amended, was adopted.

33. Mr. WATTLES (Secretariat) said that Mr. Rosenne had suggested the following passage concerning the Commission's summary records for insertion between sections D and E of chapter V :

“ The Commission examined certain suggestions concerning the presentation of its records in the *Yearbook of the International Law Commission*, made for the purpose of facilitating its use. A number of suggestions were adopted and will be reflected in the volumes of the *Yearbook* for 1965. ”

34. Mr. BRIGGS said he did not wish to denigrate the utility of the more detailed table of contents now included in volume I, but the value of both volumes of the *Yearbook* would be greatly enhanced if they included an index.

35. The CHAIRMAN, speaking as a member of the Commission, supported Mr. Briggs's suggestion and expressed the hope that the next edition of the Commission's *Yearbook* would have a name and subject index.

36. Mr. ROSENNE said that he had looked into some of the technical problems of producing the Commission's *Yearbooks* and, while he agreed that indexes were useful, he had come to the conclusion that, apart from other considerations, their inclusion might delay the printing of the *Yearbooks* by as much as six months. There had been a marked improvement in the table of contents and method of cross-referencing in volume I of the 1964 *Yearbook*, and further improvements were to be introduced by the Secretariat. He therefore urged the Commission not to take a hasty decision on the matter but to wait until the 1965 *Yearbook* had come out and, in the meantime, to ask the Secretariat to submit a paper setting out the financial and administrative implications of providing an index to both volumes.

37. Mr. WATTLES (Secretariat) said that the question of indexing various United Nations publications had been thoroughly studied at Headquarters and it had proved virtually impossible to find qualified persons willing to undertake the work. Members would also be aware that an index could not be translated, but had to be separately compiled in each language, and the Commission's *Yearbooks* were published in three languages. If the Commission so desired, the Secretariat could certainly report on the problem at the next session.

38. Mr. BRIGGS said he was not entirely convinced by Mr. Rosenne's argument, but he would be satisfied if the Secretariat could submit a paper on the subject for consideration by the Commission at its eighteenth session.

39. The CHAIRMAN suggested that the Commission should adopt the proposed passage, which would be inserted before the section concerning the Seminar on International Law.

It was so agreed.

Chapter V, as amended, was adopted.

⁶ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 84, article 22, para. 3.*

CHAPTER III : SPECIAL MISSIONS
(A/CN.4/L.111/Add.3)

INTRODUCTION

40. The CHAIRMAN pointed out that paragraphs 1 to 11 of the Introduction reproduced paragraphs 25 to 35 of the Commission's report on the work of its sixteenth session;⁷ he suggested that it was unnecessary to discuss them.

It was so agreed.

Paragraphs 1-11 were adopted.

Paragraphs 12 to 14 were adopted without comment.

41. Mr. ROSENNE said that the present tense should be used in the second and third sentences of paragraph 15.

Paragraph 15, thus amended, was adopted.

Paragraph 16 was adopted without comment.

COMMENTARIES

42. The CHAIRMAN invited the Commission to consider the commentaries on the articles in Part II.⁸

Commentary on article 17 (General facilities) [17]

Paragraphs (1) to (3) were adopted.

43. Mr. TUNKIN said he doubted whether the third sentence in paragraph (4) could stand. The point needed further thought.

44. The CHAIRMAN, speaking as Special Rapporteur, suggested that the sentence should be amended by adding the words "for example, in the case of high-level special missions or frontier demarcation special missions".

Paragraph (4), thus amended, was adopted.

45. Sir Humphrey WALDOCK said he had doubts about the proposition in the last sentence of paragraph (5): "Facilities that are not listed may be required and due under the general norms of international law". It was not at all certain that there existed a general rule of international law obliging States to accord such facilities to special missions. Everything really depended on the effective interpretation of the agreement of the parties in the treaty relating to the special mission. He suggested that the sentence in question should be deleted.

46. Mr. BRIGGS suggested that paragraphs (5) and (6) should be combined, only the first sentence of each being retained. The remainder of both paragraphs should be dropped.

47. Mr. TUNKIN said that the facilities depended entirely on the terms of the agreement. The agreement might, of course, contain a general provision to the effect that all facilities necessary for the purpose of the special mission would be granted; in that case, the issue would depend on the interpretation of that general provision. However, if the facilities to be granted to the special mission were actually specified in the agreement,

there could be no question of any additional facilities being required by virtue of international law; he did not believe an obligation to grant such additional facilities existed under general international law. Nor was there any rule limiting the power of States to enumerate exhaustively the facilities to be granted to a special mission.

48. The CHAIRMAN said he believed, on the contrary, that even if the facilities to be accorded to the mission were not specified in the agreement establishing it, it was self-evident that it should enjoy all the facilities necessary for the performance of its task. That did not depend on the good will of the receiving State in any way; it was the prevailing international practice, to which reference had been made at the Vienna Conference. Since paragraph (5) dealt with the mission's task, while paragraph (6) dealt with its members, he proposed that, with a view to shortening the commentary and combining the two paragraphs, the beginning of paragraph (5) should be amended to read: "The Commission believes that it often happens in practice that the parties specify what facilities should be guaranteed to special missions, but these should include the facilities necessary for the normal performance of the task of the mission and the normal life of its members".

49. Mr. PAL pointed out that the text of article 17 was explicit enough, in that it specified that the receiving State should accord to the special mission "full facilities for the performance of its functions, having regard to the nature and task of the special mission". There was therefore no need for any interpretation of the article in the commentary, and he proposed that paragraph (5) should be deleted.

50. Sir Humphrey WALDOCK supported that proposal. The difficulty did not arise from the text of article 17, but from the much wider problem of the relation between a treaty and the provisions of the draft articles, a question with which it was unnecessary to deal in the commentary on article 17.

51. The CHAIRMAN proposed that paragraphs (5), (6) and (7) be deleted.

It was so agreed.

The commentary on article 17, as amended, was adopted.

Commentary on article 18 (Accommodation of the special mission and its members) [18]

Paragraph (1) was adopted.

52. Mr. AGO proposed the deletion of the word "temporary" before "accommodation" in the third sentence of paragraph (2).

53. Mr. ROSENNE said that the words "cannot claim" in the second sentence of paragraph (2) were too categorical; he suggested the words "cannot in general claim".

54. The CHAIRMAN said that the sending State could never make such a claim.

55. Mr. AGO proposed that the sentence should be redrafted to read: "The Commission is of the opinion that it is not necessary to provide that the State sending a special mission has in all cases the right to acquire

⁷ *Official Records of the General Assembly, Nineteenth Session Supplement No. 9, pp. 35-36.*

⁸ For discussions on the articles, see 804th-809th meetings, 817th meeting, paras. 1-96, 819th meeting, paras. 92-140, and 820th meeting, paras. 29-31.

land for the construction of accommodation for the mission.”

56. Mr. TUNKIN accepted that proposal.

Paragraph (2), thus amended, was adopted.

57. Mr. CASTRÉN proposed that in the French version of the fourth sentence of paragraph (3) the words “*mais nous croyons*” should be replaced by the words “*mais on considère*”.

Paragraph (3), thus amended, was adopted.

58. Sir Humphrey WALDOCK said that paragraph (4) went into unnecessary detail and was expressed in unduly strong terms.

59. Mr. TUNKIN agreed; the paragraph was more suited to a Special Rapporteur's report than to the Commission's own commentary.

It was decided to delete paragraphs (4), (5) and (6).

60. Mr. AGO proposed that the word “sometimes” should be substituted for “generally” in the penultimate sentence of paragraph (7) and that the word “generally” in the final sentence should be deleted.

Paragraph (7), thus amended, was adopted.

The commentary on article 18, as amended, was adopted.

Commentary on article 19 (Inviolability of the premises)
[19]

Paragraphs (1) and (2) were adopted.

61. Mr. AGO proposed that in the French version of the second sentence of paragraph (3) the word “*très*” before “*souvent*” should be deleted.

It was so agreed.

62. Mr. TUNKIN thought that the first sentence of paragraph (3) should not state that the rule laid down in the Vienna Convention on Diplomatic Relations “should be interpreted in a special way in the case of special missions”. He suggested that the sentence should be amended to state that, in the application of the rule in question to special missions, account should be taken of the fact that special missions were not always in the same position as permanent missions.

63. The CHAIRMAN, speaking as Special Rapporteur, suggested that the sentence should be amended to read: “In 1965 the Commission took the view that the provisions of the Vienna Convention on Diplomatic Relations should be applied to special missions, with due regard for the circumstances of such missions”.

64. Mr. TUNKIN accepted that formula.

Paragraph (3), thus amended, and with the deletion of the last sentence, was adopted.

65. In reply to Mr. AGO, the CHAIRMAN, speaking as Special Rapporteur, explained that the term “specialized mission” in the first sentence of paragraph (4) meant missions to international organizations or missions which dealt with special matters and had in practice the rank of embassies, such as the missions to NATO or the Marshall Plan missions.

66. Mr. AGO suggested that the words “ordinary or specialized” might be omitted.

67. Mr. BRIGGS proposed the deletion of the last sentence of paragraph (4).

68. The CHAIRMAN, speaking as Special Rapporteur, said that, although he believed the sentence was useful, it was not essential, and he could agree to its deletion.

69. Mr. AGO proposed that paragraph (4) should be redrafted to read: “The offices of special missions are often located in premises which already enjoy the privilege of inviolability. That is so if they are located in the premises of the permanent diplomatic mission of the sending State, if there is one at the place. If, however, the special mission occupies private premises, it must equally enjoy the inviolability of its premises, in order that it may perform its functions without hindrance and in privacy, irrespective of the location of the premises in question.”

Mr. Ago's proposal was adopted.

70. Mr. AGO proposed that paragraph (5) should be redrafted to read: “The Commission discussed the situation which may arise in certain exceptional cases where the head of a special mission refuses, with or without good reason, to allow representatives of the authorities of the receiving State to enter the premises of the special mission. In such cases, the Ministry of Foreign Affairs of the receiving State may appeal to the head of the regular diplomatic mission of the sending State, asking for permission to enter the premises occupied by the special mission.”

71. Mr. TUNKIN said that Mr. Ago's formulation was in general terms acceptable to him. The text proposed by the Special Rapporteur was not adequate; the Commission had decided to adopt, for special mission's premises, the rule on inviolability contained in the Vienna Convention on Diplomatic Relations.⁹ It was not possible, therefore, to place a different interpretation on that rule in the commentary. The Vienna Convention on Consular Relations was not relevant; the situation contemplated in article 19 was completely different from that of consular premises. Under the Vienna Convention on Consular Relations, the local authorities had the right to enter consular premises in certain circumstances in which the consent of the head of post was presumed. No such presumption existed with regard to diplomatic premises; under the Vienna Convention on Diplomatic Relations, the matter was left to the head of mission to decide: the local authorities could not dispute his decision.

72. Consequently he was not entirely satisfied with the text proposed by Mr. Ago, in so far as it suggested that the local authorities might consider the reasons given by the head of the special mission to be unjustified. The local authorities could not enter into the question whether the reasons were justified or not; all that they could do was to appeal to the head of the permanent diplomatic mission, asking for permission to enter the premises.

73. Mr. ROSENNE suggested that, in accordance with the usual practice, a passage might be included in the commentary to the effect that some members of the Commission had favoured the inclusion in article 19

⁹ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 84, article 22.*

of a provision similar to that embodied in paragraph 2 of article 31 of the Convention on Consular Relations,¹⁰ but that that view had not prevailed, and the Commission had decided to base the text on the corresponding provision of the Vienna Convention on Diplomatic Relations.

74. Mr. AGO said that Mr. Tunkin's objection was justified and that the reference to paragraph 2 of article 31 of the Vienna Convention on Consular Relations should be dropped. He therefore proposed that the latter part of paragraph (5), starting with the words "This practice", should be deleted.

75. The CHAIRMAN, speaking as Special Rapporteur, said that he would have preferred the reference to the Vienna Convention on Consular Relations to be retained at least in a footnote. However, he would not press the point, and he accepted Mr. Ago's first proposal.

Mr. Ago's first proposal was adopted.

76. Mr. AGO proposed that paragraph (6) be deleted.

It was so agreed.

77. In reply to Mr. AGO, the CHAIRMAN, speaking as Special Rapporteur, said that it was absolutely necessary to retain the words "by whomsoever owned" in paragraph (7).

Paragraph (7) was adopted.

The commentary on article 19, as amended, was adopted.

The meeting rose at 1.5 p.m.

¹⁰ *United Nations Conference on Consular Relations, Official Records, Vol. II, p. 180.*

821st MEETING

Friday, 9 July 1965, at 9 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Pessou, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Draft Report of the Commission on the work of its seventeenth session

(A/CN.4/L.111 and addenda)

(concluded)

CHAPTER III: SPECIAL MISSIONS

(A/CN.4/L.111/Add.3 to 5)

(concluded)

COMMENTARIES *(concluded)*

1. The CHAIRMAN invited the Commission to continue consideration of the commentaries on the articles in Part II.¹

¹ For discussions on the articles, see 804th-809th meetings, 817th meeting, paras. 1-96, 819th meeting, paras. 92-140, and 820th meeting, paras. 29-31.

Commentary on article 20 (Inviolability of archives and documents) (A/CN.4/L.111/Add.3) [20]

Paragraphs (1) to (3) were adopted.

2. The CHAIRMAN proposed that 'in the French version the latter part of the first sentence of paragraph (4) should be amended to read: "... *la possession des documents par les membres de la mission spéciale ou par son personnel*".

Paragraph (4), thus amended, was adopted.

The commentary on article 20, as amended, was adopted.

Commentary on article 21 (Freedom of movement) [21]

3. Sir Humphrey WALDOCK proposed that the last sentence of paragraph (1) be deleted, as it was unnecessary.

Paragraph (1), thus amended, was adopted.

4. Mr. TUNKIN proposed that the first two sentences of paragraph (2) should be deleted. The first sentence did not accurately reflect the fact that the Commission had reached the same conclusion at the present session as in 1960, and the second sentence purported to interpret the Vienna Convention on Diplomatic Relations. He also proposed the deletion of the last two sentences, concerning so-called prohibited zones. The paragraph would start with the sentence "Special missions have limited tasks", the words "on the other hand" being dropped in consequence of the deletion of the first two sentences.

5. Sir Humphrey WALDOCK supported Mr. Tunkin's proposed amendments.

Paragraph (2) was adopted with those amendments.

6. Mr. TUNKIN proposed the deletion of paragraph (3) concerning the case of States which imposed restrictions on the movement of aliens in their territory.

Paragraph (3) was deleted.

Mr. ROSENNE proposed that, in the first sentence of paragraph (4), the words "or to a consular post of the sending State" should be inserted after the words "permanent diplomatic mission to the receiving State". He also proposed the deletion of the second sentence, which purported to give the reasons for guaranteeing the freedom referred to in the first sentence.

Paragraph (4) was adopted with those amendments.

8. Mr. AMADO said that the word "stations" in the first sentence of paragraph (5) was not satisfactory.

9. Mr. AGO proposed that it should be replaced by the word "persons". In addition, he proposed the deletion of the words "a need which permanent diplomatic missions do not experience" in the second sentence.

Paragraph (5) was adopted with those amendments.

10. Mr. AGO proposed that paragraph (6) be deleted.

It was so agreed.

11. The CHAIRMAN, speaking as Special Rapporteur, suggested that paragraph (7), which dealt with a special case, should also be deleted.

It was so agreed.

12. The CHAIRMAN, speaking as Special Rapporteur, said that paragraph (8) was the result of a decision taken by the Commission at its sixteenth session, but he thought the wording should be changed.

13. Sir Humphrey WALDOCK said that paragraph (8) was too brief to be understandable; it should either be expanded, so as to explain the idea, or be deleted.

14. The CHAIRMAN, speaking as Special Rapporteur, said he would have no objection to deleting the paragraph.

Paragraph (8) was deleted.

The commentary on article 21, as amended, was adopted.

Commentary on article 22 (Freedom of communication)
[22]

15. Mr. ROSENNE said he noted a lack of uniformity in the opening words of the commentaries, some of which began "This article" or "The text of this article" and others "This draft article" or "The drafting of this article".

16. Mr. LACHS suggested that the opening words should be "This draft article" in every case.

17. The CHAIRMAN, speaking as Special Rapporteur, said that some of the articles reproduced verbatim the provisions of the Vienna Convention on Diplomatic Relations, while others merely reproduced the ideas contained in those provisions. However, he would agree to the use of a uniform phrase.

Paragraphs (1) to (3) were adopted.

18. Mr. AGO proposed that paragraph (4) should be redrafted to read: "For the most part, the special mission maintains its relations with the sending State through that State's permanent diplomatic mission, if there is one in the receiving State. For this reason, the special mission has the right, in particular, to send and to receive the courier who maintains relations between it and the permanent diplomatic mission."

19. Mr. TUNKIN said that a point of substance arose in connexion with the last sentence of paragraph (4), and probably also in connexion with the commentaries on some other articles. Expressions such as "the special mission has the right to send and to receive" should be avoided, for while the draft articles which the Commission adopted sometimes expressed an existing rule of international law, they often also contained suggestions *de lege ferenda*. He therefore proposed that the passage should be amended to read: "For this reason, the article provides that the special mission has the right . . ."

20. The CHAIRMAN, speaking as Special Rapporteur, said that the practice of States was not uniform in that matter, and legal opinion was divided. The Commission should not commit itself one way or the other.

21. Mr. AGO proposed that, in the circumstances, the second sentence of his proposal should read: "For this reason, particular provision is made for the special mission's right to send . . ."

22. Mr. PAL said that article 22 did not in fact provide for the right of the special mission to send and to receive

couriers; its provisions were based on the assumption that such a right existed.

23. The CHAIRMAN believed that Mr. Tunkin's proposal should be accepted, since the situation differed according to whether the Commission noted the existence of a right or merely considered that such a right should be recognized.

24. Mr. ROSENNE said that the point of substance raised by Mr. Tunkin was a very important one and affected the whole draft.

25. He therefore proposed that in paragraph 15 of the introduction to chapter III (A/CN.4/L.111/Add.3) the following sentence should be inserted: "In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law."

26. He had taken that sentence from the introduction to chapter II (Law of Treaties) of the Commission's report on its fourteenth session.² A similar sentence had appeared in all the Commission's reports on the law of treaties.

27. Mr. BRIGGS supported that proposal.

28. The CHAIRMAN, speaking as Special Rapporteur, accepted the proposal.

Mr. Rosenne's proposal was adopted.

29. Mr. AGO said that paragraph (5) might be interpreted as dealing solely with the case of a special mission functioning in a frontier area.

30. The CHAIRMAN, speaking as Special Rapporteur, said it would be better to delete paragraphs (4) and (5) in order to avoid any misinterpretation.

Paragraphs (4) and (5) were deleted.

31. The CHAIRMAN proposed that in the French text of paragraph (6) the words "*moyens de transmission sans fil*" should be replaced by the words "*postes émetteurs*".

32. Mr. AGO suggested that the beginning of paragraph (6) might read: "The Commission did not think that it should depart from the practice whereby special missions are not allowed to use . . ."

33. Mr. BRIGGS said that paragraph (6) did not seem necessary; the rule was laid down in the article and did not appear to need any commentary.

34. Mr. ROSENNE said it would be useful to retain paragraph (6) in the form suggested by Mr. Ago, because it reflected the provisions embodied in the two Vienna Conventions and the arrangements adopted by the International Telecommunication Union.

35. Sir Humphrey WALDOCK said it was desirable to retain paragraph (6), because the matter it dealt with had been the subject of much discussion at the two Vienna Conferences and some comment was necessary.

36. Mr. PESSOU said that the express reference to wireless transmitters might be interpreted as permitting certain espionage activities.

² *Yearbook of the International Law Commission, 1962, Vol. II, p. 161, para. 22.*

37. The CHAIRMAN suggested that the Commission should adopt the amendment suggested by Mr. Ago.

It was so agreed.

Paragraph (6), thus amended, was adopted.

38. The Chairman, speaking as Special Rapporteur, explained that paragraph (7) was intended to show that the Commission had been aware of the difference between the provisions of the Convention on Diplomatic Relations and those of the Convention on Consular Relations concerning the bag, and that it had decided in favour of the absolute inviolability of the bag of special missions.

39. Mr. PESSOU said that recent events in Africa, for example, had demonstrated the importance of the question.

Paragraph (7) was adopted.

40. Mr. AGO proposed that paragraph (8) should be deleted.

It was so agreed.

41. The CHAIRMAN proposed that in the last sentence of paragraph (9) the word "also" should be inserted after the word "may".

42. Mr. BRIGGS proposed that the last sentence of paragraph (9), which related to captains of commercial inland waterway vessels, should be deleted.

43. Mr. TUNKIN proposed the deletion of the word "for" before "it has been observed" in the first sentence of paragraph (9).

44. Sir Humphrey WALDOCK said that that change would bring the passage into line with the French text; the whole text should be checked to ensure the concordance of the two versions.

Paragraph (9) was adopted with the amendments proposed by the Chairman and Mr. Tunkin.

The commentary on article 22, as amended, was adopted.

Commentary on article 23 (Exemption of the mission from taxation) [23]

Paragraph (1) was adopted.

45. Mr. AGO proposed that in the first sentence of paragraph (2) the word "all" should be deleted and the words "were applicable" should be replaced by the words "should be applicable".

It was so agreed.

Paragraph (2), thus amended, was adopted.

46. Mr. AGO proposed that the third sentence of paragraph (3) should be amended to read: "Nevertheless, special missions may be authorized to charge such dues in certain exceptional cases provided for in international agreements", and that the fourth sentence should begin with the words "The Commission therefore decided...".

It was so agreed.

Paragraph (3), thus amended, was adopted.

The commentary on article 23, as amended, was adopted.

47. The CHAIRMAN said that article 24, concerning the inviolability of the special mission's property, was only mentioned *pro memoria*, since it had been incorporated in article 19.³

Commentary on article 25 (Personal inviolability) [24]

Paragraph (1) was adopted.

48. The CHAIRMAN, speaking as Special Rapporteur, suggested that in the second sentence of paragraph (2), the word "very" before the word "difficult" should be deleted.

49. Mr. BRIGGS said that the expression "minor consular immunity" was not clear.

50. The CHAIRMAN, speaking as Special Rapporteur, explained that the expression was convenient and was accepted in practice.

51. Mr. CASTRÉN thought it would be preferable to speak of functional immunity, as in the commentary on article 27.

52. Mr. AMADO suggested that the phrase "it is very difficult to adopt..." should be replaced by a statement to the effect that the Commission had been reluctant to lay down precise rules on the question.

53. Mr. AGO proposed that paragraph (2) should be replaced by the following text: "The Commission discussed the advisability of granting to the members of special missions only personal inviolability limited to the performance of their functions. The majority of the Commission did not consider that course acceptable".

54. Mr. LACHS and the CHAIRMAN accepted that proposal.

Paragraph (2), thus amended, was adopted.

55. Mr. AMADO proposed that paragraph (3) be deleted.

It was so agreed.

The commentary on article 25, as amended, was adopted.

Commentary on article 26 (Inviolability of the private accommodation) [25]

Paragraph (1) was adopted.

56. Mr. AMADO, referring to the French text, said that in the second sentence of paragraph (2) he was not satisfied with the word "durable" and found the expression "seulement provisoirement" rather awkward.

57. The CHAIRMAN, speaking as Special Rapporteur, proposed that the sentence in question, which reflected a remark made by Mr. Amado,⁴ should be deleted.

It was so agreed.

58. Mr. LACHS proposed that, in order to take account of Mr. Amado's remark, the phrase "by reason of the temporary nature of special missions" should be added to the first sentence.

It was so agreed.

³ See 820th meeting, para. 29.

⁴ See 807th meeting, para. 47.

59. Mr. PESSOU suggested that in the French text the term “*résidence*” might be preferable to “*demeure*” or “*logement*”.

60. The CHAIRMAN, speaking as Special Rapporteur, observed that the article had already been adopted by the Commission. Moreover, the meaning of “*résidence*” in diplomatic practice was not the same as in civil law, for it generally denoted the building in which the head of the mission lived.

Paragraph (2), as amended, was adopted.

61. Mr. ROSENNE said that, as far as the English text was concerned, the word “pretext” in the second sentence of paragraph (3) was too strong and had a pejorative tone.

62. The CHAIRMAN, speaking as Special Rapporteur, said he had deliberately used a pejorative term in order to indicate the false grounds the police might put forward for entering the accommodation of the special mission.

63. Sir Humphrey WALDOCK agreed with Mr. Rosenne and suggested that the words “ground” should be substituted for the word “pretext”. The Commission should not too emphatically criticize a practice of States, however much it might disapprove of it.

64. Mr. LACHS agreed with the previous speaker; the Commission should assume that States would act honestly in the matter of the inviolability of private accommodation.

65. Mr. ROSENNE said that the second sentence of paragraph (3) would need further modification, because the whole of a building in which a special mission was accommodated would presumably be accessible to the public.

66. The CHAIRMAN, speaking as Special Rapporteur, proposed that the last part of the second sentence, from the words “on the pretext” to the end, should be deleted.

It was so agreed.

67. Mr. TUNKIN proposed that the opening words “The Commission considers that” should be deleted, since the rest of paragraph (3) also set out rules applicable to permanent missions.

68. The CHAIRMAN, speaking as Special Rapporteur, agreed to the deletion of the words “The Commission considers that”. The paragraph would then begin: “The inviolability of the accommodation of the members of special missions should be guaranteed . . .”.

It was so agreed.

Paragraph (3), as amended, was adopted.

The commentary on article 26, as amended, was adopted.

Commentary on article 27 (Immunity from jurisdiction) [26]

Paragraph (1) was adopted.

69. Mr. AGO proposed the deletion of paragraph (2), which contained historical material that was no longer of great interest, and the combination of paragraphs (3) to (6) into a single paragraph reading:

“The Commission discussed the question whether members of special missions should or should not be

granted complete and unlimited immunity from criminal, civil and administrative jurisdiction. Some members of the Commission took the view that, in principle, only functional immunity should be granted to all special missions. There should be no deviation from this rule, except in the matter of immunity from criminal jurisdiction; for any interference with the liberty of the person prevents the free accomplishment of the special mission’s tasks. Disagreeing with that opinion, the majority of the Commission decided that full immunity from the jurisdiction of the receiving State in all matters (criminal, civil and administrative) should be granted to the members of special missions. However, the Commission added in paragraph 2 the phrase ‘Unless otherwise agreed’, to indicate that it was open to the States concerned to limit the immunity from jurisdiction. In short, the ordinary rule proposed by the Commission is complete immunity from criminal, civil and administrative jurisdiction, the States concerned being at liberty to agree on a limited form of immunity.”

70. Mr. ROSENNE said that the text proposed by Mr. Ago would need some amendment since the freedom of States to derogate from the rules set out in article 27 applied only to civil and administrative jurisdiction.

The text proposed by Mr. Ago was adopted, subject to the necessary amendment.

The commentary on article 27, as amended, was adopted.

Commentary on article 27 bis (Waiver of immunity) [27]

The commentary on article 27 bis was adopted.

Commentary on article 28 (Exemption from social security legislation) [28]

Paragraph (1) was adopted.

71. Mr. LACHS proposed that paragraphs (2) and (3) should be deleted as being unnecessary; they only contained an account of the historical background.

It was so agreed.

72. Mr. AGO, referring to paragraph (4), said it was doubtful whether the members of all special missions faced “risk to life and health”.

73. The CHAIRMAN, speaking as Special Rapporteur, proposed the insertion of the words “in certain cases” after the words “the difficulty of the special mission’s tasks”, and the deletion of the last sentence of the paragraph.

It was so agreed.

The commentary on article 28, as amended, was adopted.

Commentary on article 28 bis (Exemption from dues and taxes) [29]

74. The CHAIRMAN proposed that in paragraph (1) the words “Article 28 bis” should be replaced by the words “This article”.

It was so agreed.

75. Mr. AGO proposed that the last sentence of paragraph (2) be deleted.
It was so agreed.
The commentary on article 28 bis, as amended, was adopted.
- Commentary on article 29 (Exemption from personal services and contributions) [30]*
- Paragraph (1) was adopted.*
76. Mr. LACHS proposed that paragraph (2) be deleted.
It was so agreed.
77. Mr. AGO proposed that paragraph (3) be deleted.
78. The CHAIRMAN, speaking as Special Rapporteur, opposed that proposal. The paragraph contained his own views, which the Commission had decided to note in the commentary.
Paragraph (3) was adopted.
79. The CHAIRMAN, speaking as Special Rapporteur, proposed that paragraph (4) be deleted.
It was so agreed.
The commentary on article 29, as amended, was adopted.
- Commentary on article 30 (Exemption from customs duties and inspection) (A/CN.4/L.111/Add.4) [31]*
- Paragraph (1) was adopted.*
80. The CHAIRMAN, speaking as Special Rapporteur, proposed that paragraphs (2) and (3) be deleted.
It was so agreed.
81. Mr. ROSENNE asked what was the meaning of the passage in parentheses in paragraph (4), ("e.g. in the case of special receptions or special machine installations")
82. The CHAIRMAN, speaking as Special Rapporteur, said that differences of opinion on that subject had arisen between sending States and receiving States. However, he was prepared to accept the deletion of the passage in question.
83. Mr. AGO proposed that the words "in favour of special missions" in the last sentence be deleted.
It was so agreed.
Paragraph (4), as amended, was adopted.
84. The CHAIRMAN, speaking as Special Rapporteur, proposed that paragraphs (5) and (6) be deleted.
It was so agreed.
85. Mr. TUNKIN proposed that paragraph (7) be deleted.
It was so agreed.
86. The CHAIRMAN, speaking as Special Rapporteur, proposed the deletion from paragraph (8) of the reference to beverages, foodstuffs and cigarettes in the first sentence; the whole of the second sentence; and the word "deliberately" in the last sentence.
Paragraph (8) was adopted with those amendments.
87. Mr. AGO proposed that paragraph (9) be deleted.
It was so agreed.
The commentary on article 30, as amended, was adopted.
- Commentary on article 31 (Administrative and technical staff) [32]*
- The commentary on article 31 was adopted.*
- Commentary on article 32 (Members of the service staff) [33]*
- The commentary on article 32 was adopted.*
- Commentary on article 33 (Private staff) [34]*
- Paragraph (1) was adopted.*
88. Mr. AMADO proposed that the words "the idea", in the first sentence of paragraph (2) be deleted.
It was so agreed.
89. The CHAIRMAN, speaking as Special Rapporteur, proposed the deletion of the last part of the paragraph, from the words "to their personal comfort" to the end.
90. Mr. ROSENNE said he would prefer the reference to health to be retained.
91. Mr. AGO proposed the formula "to their health or personal comfort".
The proposal was adopted.
Paragraph (2), as amended, was adopted.
92. Mr. AGO proposed that the last three sentences of paragraph (3), beginning with the words "There are no special rules . . ." be deleted.
It was so agreed.
93. Mr. AMADO noted that the expression "the question arises, in practice" occurred twice in paragraph (3) and proposed that, in the second instance, it should be replaced by a different formula.
It was so agreed.
Paragraph (3), as amended, was adopted.
94. The CHAIRMAN, speaking as Special Rapporteur, proposed that in paragraph (4) the words "minor immunity" should be replaced by "functional immunity". He also proposed that the example at the end of the first sentence and the last part of the second sentence should be deleted.
It was so agreed.
95. Mr. AGO proposed that the word "also" in the first sentence of paragraph (4) be deleted.
It was so agreed.
Paragraph (4), as amended, was adopted.
The commentary on article 33, as amended, was adopted.
- Commentary on article 34 (Members of the family) [35]*
- Paragraph (1) was adopted.*
96. The CHAIRMAN, speaking as Special Rapporteur, proposed that the first sentence of paragraph (2) be deleted.
It was so agreed.

97. Mr. TUNKIN questioned whether the last sentence of paragraph (2) was consistent with the terms of article 34.

98. The CHAIRMAN, speaking as Special Rapporteur, proposed that the last sentence be deleted.

It was so agreed.

99. Mr. AGO proposed that the words “(involving travel)”, in the third sentence, be deleted.

It was so agreed.

Paragraph (2), as amended, was adopted.

100. Mr. AMADO said he was not satisfied with the first sentence of paragraph (3).

101. The CHAIRMAN, speaking as Special Rapporteur, proposed that the first two sentences of paragraph (3) should be replaced by one sentence reading: “The Commission realized that the attempt to specify what persons are covered by the expression of ‘members of the family’ had ended in failure at both the Vienna Conferences (in 1961 and 1963).”

It was so agreed.

102. Mr. JIMÉNEZ de ARÉCHAGA proposed that the sentence in brackets at the end of the paragraph “(A married daughter often accompanies her father . . .)” be deleted.

It was so agreed.

103. Mr. ROSENNE suggested that the words “However, in the case of special missions” should be inserted at the beginning of the third sentence of paragraph (3), in order to show that the situation was not the same as in the case of diplomatic or consular missions.

104. The CHAIRMAN, speaking as Special Rapporteur, proposed that the passage should be amended to read: “However, in the case of special missions, the Commission believes that the number of such persons should be limited.”

It was so agreed.

Paragraph (3), as amended, was adopted.

105. The CHAIRMAN, speaking as Special Rapporteur, proposed that paragraph (4) should begin with the words: “In practice, restrictions are sometimes general . . .” and that the last sentence of the paragraph should be deleted.

106. Mr. AGO proposed the deletion of all the passages in brackets.

Those amendments were adopted.

107. The CHAIRMAN, speaking as Special Rapporteur, proposed that paragraph (5) be deleted.

It was so agreed.

108. Mr. AGO proposed that paragraph (6) be joined to paragraph (4) as its last sentence.

It was so agreed.

Paragraph (4), as amended, was adopted.

The commentary on article 34, as amended, was adopted.

Commentary on article 35 (Nationals of the receiving State and persons permanently resident in the territory of the receiving State) [36]

Paragraph (1) was adopted.

109. Mr. AGO proposed that paragraph (2) be deleted.

It was so agreed.

Paragraph (3) was adopted.

110. The CHAIRMAN, speaking as Special Rapporteur, proposed that the last three sentences of paragraph (4), the whole of paragraph (5) and the last three sentences of paragraph (6) be deleted.

It was so agreed.

The commentary on article 35, as amended, was adopted.

Commentary on article 36 (Duration of privileges and immunities) [37]

The commentary on article 36 was adopted.

Commentary on article 37 (Case of death) [38]⁵

Paragraph (1) was adopted.

111. Mr. ROSENNE proposed that the words “very often” in the second sentence of paragraph (2) be deleted.

It was so agreed.

The commentary on article 37, as amended, was adopted.

Commentary on article 38 (Transit through the territory of a third State) [39]

112. The CHAIRMAN, speaking as Special Rapporteur, proposed the deletion of paragraph (2), which had been written before the Drafting Committee had prepared the final text of article 38.

The commentary on article 38 was adopted with that amendment.

Commentary on article 39 (Obligation to respect the laws and regulations of the receiving State) (A/CN.4/L.111/Add.5) [40]

113. Mr. LACHS said he was not satisfied with the word “standard”, which was used twice in paragraph (1).

114. Mr. AGO proposed that the word “standard” be replaced by the word “general” and that, in the third sentence, the words “to international law” be replaced by the words “to the general rules of international law”. He also proposed that the penultimate sentence be deleted.

Paragraph (1) was adopted with those amendments.

Paragraph (2) was adopted.

The commentary on article 39, as amended, was adopted.

⁵ See 819th meeting, paras. 101-107.

Commentary on article 40 (Organ of the receiving State with which official business is conducted) [41]

115. Mr. ROSENNE said that, to avoid unnecessary repetition, the passage beginning with the words "all the organs of the receiving State", in the second sentence of paragraph (1), and ending with the words "communicate with" in the fourth sentence, should be deleted.

It was so agreed.

Paragraph (1) was adopted with that amendment.

116. Mr. AGO proposed that the second sentence of paragraph (2) should be deleted, and that the next sentence should begin with the words "The relations of special missions are confined to ...".

It was so agreed.

117. Mr. ROSENNE said that the latter part of paragraph (2) went into too much detail and suggested that the passage from the sixth sentence onwards, beginning with the words "In practice", might be dropped.

It was so agreed.

Paragraph (2), as amended, was adopted.

The commentary on article 40 as amended, was adopted.

Commentary on article 41 (Professional activity) [42]

Paragraph (1) was adopted.

118. The CHAIRMAN, speaking as Special Rapporteur, proposed that the first sentence of paragraph (2) should be combined with the last two sentences of paragraph (3), the remainder of those two paragraphs being deleted.

It was so agreed.

The commentary on article 41, as amended, was adopted.

Commentary on article 42 (Right to leave the territory of the receiving State). [43]

119. Mr. AGO suggested that the words "who enjoy only ... from criminal jurisdiction" in paragraph (3) be deleted.

It was so agreed.

120. Mr. ROSENNE said that as article 42 reproduced word for word the text of article 44 of the Vienna Convention on Diplomatic Relations, paragraphs (2) to (6) of the commentary were unnecessary and should be deleted.

121. Sir Humphrey WALDOCK considered that paragraphs (4), (5) and (6) of the commentary could be dispensed with.

122. The CHAIRMAN, speaking as Special Rapporteur, said he could agree to the deletion of paragraphs (3), (4), (5) and (6), provided that those paragraphs were quoted in the summary record, viz:

"(3) Although this inviolability is not guaranteed to members of the service staff and of the private staff, such persons, if they are not nationals of the receiving State, have the right under article 42 to leave that State's territory.

(4) It should be stressed that, for the purposes of article 42, nationals of the receiving State and persons permanently resident in its territory are not treated on the same footing. The deciding factor is the nationality of the persons concerned.

(5) It should further be noted that this article, like the corresponding article of the Vienna Convention on Diplomatic Relations, is based on the notion of the unity of the family, a principle of humanitarian international law. The members of the family have the right to leave the territory of the receiving State even if they possess its nationality.

(6) The question was raised, from the point of view of theory, whether the right to leave the territory of the receiving State meant the right to repatriation or that the person in question was permitted to leave the territory of the receiving State for any destination of his choice. Modern thinking tends towards the latter view (freedom of movement of the individual)".

It was so agreed.

The commentary on article 42, as amended, was adopted.

Commentary on article 43 (Cessation of the functions of the special mission) [44]

Paragraphs (1) and (2) were adopted.

123. The CHAIRMAN, speaking as Special Rapporteur, said that in the parentheses in the second sentence of paragraph (3), the words "on that article" should be replaced by the words "on article 1" in order to avoid any possible confusion.

Paragraph (3), thus amended, was adopted.

124. Mr. AGO proposed that the last two sentences of paragraph (4) be deleted.

125. The CHAIRMAN, speaking as Special Rapporteur, said he could agree to that proposal provided that, in the first sentence, the words "by unilateral act" were added after the words "the right of the States concerned to terminate".

126. Mr. ROSENNE suggested that the passage in question should read "The right of each of the States concerned to terminate by unilateral act ...".

It was so agreed.

Paragraph (4), as amended, was adopted.

Paragraph (5) was adopted.

The commentary on article 43, as amended, was adopted.

C. SUGGESTIONS AND REMARKS BY THE COMMISSION

127. Mr. ROSENNE said that the title of section C was inadequate and should be amended to read "Other decisions, suggestions and observations by the Commission".

It was so agreed.

Paragraphs 1 and 2 were adopted.

128. Mr. ROSENNE said that, although he agreed with the content of paragraph 3, he thought it was not sufficiently explicit for obtaining suggestions from Governments concerning "high-level" special missions.

He suggested that the draft provisions submitted by the Special Rapporteur on the subject of such missions in his second report (A/CN.4/179) should be annexed to the Commission's report.

129. The CHAIRMAN, speaking as Special Rapporteur, said it should be explained that the draft provisions in question had been prepared by him, but had not been discussed by the Commission and were included merely for information.

Paragraph 3 was adopted.

130. Mr. TUNKIN proposed that paragraph 4 be deleted. It was premature to mention the question of the legal status of delegations to international conferences and congresses. The Commission could discuss that question later, when it had before it Mr. El-Erian's proposals on the topic of relations between States and inter-governmental organizations.

Paragraph 4 was deleted.

131. Mr. TUNKIN proposed that paragraph 5 should state simply that the Commission had, as usual, not dealt with the question of final clauses. When preparing the final draft, the Commission might perhaps make suggestions on the method of drafting the final clauses.

Mr. Tunkin's proposal was adopted.

132. The CHAIRMAN proposed that the last two sentences of paragraph 6, beginning with the words "Such differentiation" should be deleted.

It was so agreed.

Paragraph 6 was adopted with that amendment.

133. Mr. TUNKIN proposed that the concluding sentence of paragraph 7, which stated that the draft articles on special missions were residual in nature, should be deleted. That statement raised a very broad issue, with which the Commission was not called upon to deal at that stage.

It was so agreed.

134. The CHAIRMAN proposed that, in the first sentence of paragraph 7, the words "for the time being" should be added after "Nor did the Commission accept" and that the second sentence should be deleted.

It was so agreed.

Paragraph 7 was adopted with those amendments.

Section C, as amended, was adopted.

Chapter III of the draft report, as amended, was adopted.

The draft report of the Commission on the work of the first part of its seventeenth session (A/CN.4/L.111 and Add.1 to 5) was adopted as a whole, as amended, subject to drafting changes.

Closure of the first part of the seventeenth session

135. The CHAIRMAN thanked the members of the Commission for their co-operation and expressed his particular gratitude to the two Vice-Chairmen, the General Rapporteur, and the Special Rapporteur on the law of treaties. He added that the Commission had

greatly appreciated the excellent services provided by the Secretariat and by the European Office of the United Nations.

136. Mr. AGO paid a tribute to the Chairman's masterly conduct of the proceedings and commended him especially on the manner in which he had performed his duties as Special Rapporteur on special missions.

137. Mr. AMADO praised the Chairman's qualities of leadership, thanked his colleagues and expressed his gratitude to all members of the Secretariat.

138. Mr. TUNKIN said that the results achieved during the first part of the session were largely due to the efforts of the Chairman and other officers of the Commission. He also paid a tribute to the work of the Secretariat.

139. The atmosphere in which the Commission worked had been aptly described by one of its former members, the late Mr. Douglas L. Edmonds, when he had said: "We have disagreed without being disagreeable".

140. Mr. ROSENNE said that the achievement represented by the completion of work on the forty-four articles on special missions was entirely due to the vigour and enthusiasm of the Chairman as Special Rapporteur. He associated himself with the tributes paid to the Chairman and other officers of the Commission, and to the Secretariat.

141. Mr. PAL said that the Commission could congratulate itself on its choice of Chairman and other officers for the seventeenth session and associated himself with the gratitude expressed to the Secretariat for its contribution to the work of the Commission.

142. Mr. TSURUOKA and Mr. YASSEEN associated themselves with the tributes paid to the Chairman, the other officers of the Commission, the special rapporteurs and the Secretariat.

143. Sir Humphrey WALDOCK associated himself with the remarks of the previous speakers and said that, as Special Rapporteur on the law of treaties, he owed a debt of gratitude to the Chairman for his help.

144. Mr. JIMÉNEZ de ARÉCHAGA paid a tribute to the Chairman, the other officers and special rapporteurs, and to the work of the Secretariat.

145. Mr. RUDA said that the Chairman's leadership had helped to maintain the atmosphere of friendship, understanding and objectivity which was a characteristic feature of the work of the Commission. A special tribute was due to Sir Humphrey Waldock, as Special Rapporteur on the law of treaties, for his immense contribution to a task of historic importance. In associating himself with the tributes paid to the Secretariat, he said that the records provided by the language services were of great value to the Commission.

146. Mr. PESSOU associated himself with the tributes paid to the Chairman and to the other officers of the Commission and expressed his gratitude to the Secretariat.

147. Mr. ELIAS expressed his appreciation to the Chairman and the two Vice-Chairmen for their co-operation, and thanked the members of the Commission

for their kind words regarding his work as General Rapporteur. He also thanked the Secretariat for the services provided.

148. Mr. LACHS associated himself with the expressions of gratitude to the Chairman, the other officers of the Commission, the special rapporteurs and the Secretariat. He added a special tribute to Mr. Amado, for his unique combination of great humanism and deep knowledge of law, and to Mr. Pal, whose modesty and

whose contribution to international law would never be forgotten by the members of the Commission.

149. The CHAIRMAN thanked his colleagues for their kind words and declared the first part of the seventeenth session of the International Law Commission closed.

The meeting rose at 1.5 p.m.

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