

Document:-  
**A/CN.4/SR.656**

**Summary record of the 656th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**1962 , vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

implementation and suspension were retained by the President of the United States, powers which were out of keeping both with a contractual relationship in private law and with the principle of the equality of states.

61. The practice of states thus showed that there were a great many agreements partaking both of contract and of international treaty; as a rule, however, those agreements were governed by international law. In view of that complex situation, he thought the formulation should stand, with the order of the two provisos reversed in the manner suggested by Mr. Verdross and agreed to by the special rapporteur.

62. He agreed with Mr. de Luna that in everyday use, the expression "international law" meant public international law. For that reason he did not insist on the insertion of the qualifying adjective "public" before "international law" in the text. He urged, however, that the commentary should explain that in the draft articles the term "international law" meant public international law.

63. He did not favour the introduction into the text of the articles of any reference to communities. That could be dangerous and might encourage claims that communities such as minorities would be considered as having legal personality in public international law, seeing that they had been recognized as having certain prerogatives in international law but were not capable of being parties to treaties. A term of that kind was not appropriate to the object of their endeavours.

64. Mr. AGO urged that the text proposed by the Drafting Committee should be adopted with the sole change of the inversion of the order of the last two provisos. That change should meet the point raised by Mr. Amado. The first proviso would specify that the treaty was concluded between two or more states or other subjects of international law; the second proviso would automatically exclude international contracts even when concluded between two states, since those contracts were not "governed by international law". Naturally, it would be necessary in many cases to examine the intention of the parties to the agreement: if the parties, although states, had intended to undertake only obligations under municipal law, the agreement was a contract and not a treaty.

65. He agreed with Mr. Bartoš that all references to "communities" should be excluded. The term would not cover the Holy See, perhaps the most important example of those "other subjects of international law" which concluded treaties.

66. Moreover, if the definition were to specify that it covered only communities, it could lend itself by implication to the erroneous interpretation that the Commission might consider individuals as subjects of international law. In fact, even those writers who, unlike himself, considered individuals as subjects of international law, had never suggested that an individual could be a party to a treaty; therefore the proposed specification was entirely unnecessary.

67. He agreed with Mr. Gros that it was unnecessary to qualify "international law" by the word "public". The

point should simply be referred to in the commentary.

68. Mr. BRIGGS said he withdrew his proposal to transfer to a separate paragraph the list of instruments in parentheses.

69. Many of the difficulties encountered during the discussion had been due to the use of the title "Definitions" in article 1. In fact, the Commission did not propose to lay down theoretical definitions, but merely to study the manner in which certain terms were used in the draft articles. He therefore suggested that the title of article 1 should be amended to read "Use of terms".

70. The CHAIRMAN said it appeared to be generally agreed that the final passage of the paragraph should be amended so that the first proviso, "which is concluded between two or more states or other subjects of international law", would precede the second proviso, "and is governed by international law".

71. If there were no objection, he would consider that the Commission agreed to refer the article, with that amendment, back to the Drafting Committee for final drafting.

*It was so agreed.*

The meeting rose at 11.40 a.m.

#### 656th MEETING

*Monday, 4 June 1962, at 3 p.m.*

*Chairman: Mr. Radhabinod PAL*

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

ARTICLE 17.—POWER TO FORMULATE AND WITHDRAW RESERVATIONS (*resumed from the 654th meeting*)

ARTICLE 18.—CONSENT TO RESERVATIONS AND ITS EFFECTS (*resumed from the 654th meeting*)

ARTICLE 19.—OBJECTION TO RESERVATIONS AND ITS EFFECTS (*resumed from the 654th meeting*)

1. The CHAIRMAN invited the Commission to resume its consideration of articles 17, 18 and 19 on reservations.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that there seemed to be a strong majority in the Commission in favour of the principle stated in Alternative A, that in the case of general multilateral treaties the admissibility of reservations should be decided by each state within the framework of its relations with the reserving state. Some members had had difficulty in accepting that principle, but seemed to have agreed that for the time being the Commission could do little more than refer in the commentary to its disadvantages. Thus, the whole question seemed to be resolving itself into a matter for the Drafting Committee.

3. Mr. Ago had said that to adopt that principle could not be regarded as a very progressive step; he (the

special rapporteur) was inclined to agree, but felt that the principle approved by the majority of the Commission was the best solution in the circumstances.

4. The CHAIRMAN said he agreed with the special rapporteur that the majority of the Commission seemed to be in favour of the principle stated in Alternative A. The question therefore seemed ripe for referral to the Drafting Committee.

5. Mr. BRIGGS said he was not sure that there was a majority in favour of Alternative A. Although he would not ask for a vote on the question, he was against a provision that left the question of the admissibility of reservations to be settled between the reserving state and individual parties objecting to or accepting the reservation. In his opinion, the progressive development of international law had led from the abandonment of the unanimity rule to a swing towards the majority rule.

6. Mr. TSURUOKA said he hoped it was understood that the proposal for a collegiate decision on the admissibility of reservations, Alternative B, should be explained in detail in the commentary.

7. Mr. GROS said he agreed with Mr. Briggs that it was inappropriate to refer for the time being to a majority or minority view on the question, since the Chairman had wisely avoided taking votes, so as not to accentuate differences of opinion. Although there were two distinct trends of opinion in the Commission, discussion might eventually reconcile them. It could not yet be said that the Commission had agreed to propose as a rule the bilateral view of the effects of reservations. It would therefore be wiser to resume the study of other aspects of the law of treaties and defer further discussion on the subject of reservations, which was the most important before the Commission, in order to try to reach a joint solution.

8. The CHAIRMAN said he thought that the Commission's view on the main question before it, that of the admissibility of reservations, had emerged clearly enough, since nearly all members had expressed their opinion, but if any member considered that further discussion was required, he would not close the debate.

9. Mr. GROS said that a number of members were not present at the meeting. Perhaps a discussion on the three articles might be suspended for two or three days, during which time the articles prepared by the Drafting Committee could be considered.

10. The CHAIRMAN said that he would not press for a vote on the subject if there were any doubt as to whether the Commission had reached a decision on the matter.

11. Sir Humphrey WALDOCK, Special Rapporteur, thought that the Commission could give an indication to the Drafting Committee that the second draft of the articles should be based on the principles contained in his report. That would not, of course, constitute a final commitment on the part of the Commission.

12. Mr. YASSEEN pointed out that the special rapporteur had asked members of the Commission to give their views on the issue, and that those views had made it

quite clear where the dividing line lay between the majority who were in favour of the special rapporteur's solution and the minority who were against it.

13. Mr. AMADO said that, in the matter of reservations to multilateral treaties, international law was undergoing a radical transformation; it was changing from contract law and turning, in the case of general multilateral treaties, into quite a different legal system. He fully supported Mr. Yasseen's views; the special rapporteur's report, based on the English legal system, had been supported by members representing a wide variety of the legal systems of the world.

14. It might be said that the sole supporters of the contrary view were the exponents of the French legal system.

15. Mr. GROS said that French publicists had been neither the last nor the only ones to study the distinction between the law-making treaty and the contractual treaty, a distinction which was still of some importance at the present day. In the case of a law-making treaty like that being drafted by the Commission, he could not personally accept the idea that two states could to an unlimited extent vary a multilateral law-making treaty by means of a bilateral relationship without that system leading to the destruction of the very conception of the multilateral treaty. He would continue to hold that view, even if he remained in a minority of one. To convert law-making treaties into a series of different bilateral relationships was no contribution to the progressive development of international law.

16. Mr. CADIEUX said that the Commission was faced with the choice between suspending the discussion on reservations and referring the question to the Drafting Committee. He did not think that the time had yet come to take the former course, since absent members should be given an opportunity to comment; nor did he think that it would be desirable to take a vote, even though that might simplify the Drafting Committee's task.

17. The CHAIRMAN said it would be inadvisable to refer the articles to the Drafting Committee without a decision on the main principles concerned. For example, article 19, sub-paragraph 4(c), stated the principle that the effect of a reservation was confined to relations between the objecting and the reserving state, but several members had suggested that the question should be settled by a majority decision. The Drafting Committee could not take any useful action if the article were simply referred to it without any clear indication of the Commission's views.

18. Mr. YASSEEN said he did not think that either Mr. Gros or Mr. Briggs could deny that there was a preference in the Commission for the special rapporteur's solution. Of course, the two conflicting views could be discussed again when the Drafting Committee had reported back to the Commission.

19. Sir Humphrey WALDOCK, Special Rapporteur, said he thought the discussions of the past week had provided all the necessary indications. It was clear that the second draft of the three articles should be based on Alternative A, and not on Alternative B.

20. Mr. GROS said he agreed that the articles could be referred to the Drafting Committee, but only on the understanding that the Commission had made no definite pronouncement on certain important points, such as the one dealt with in article 19, paragraph 4.

21. The CHAIRMAN said that the problem of the applicability of the compatibility test to objections and consent would become less acute if the special rapporteur's solution with regard to the effect of objections to reservations were adopted.

22. Mr. ROSENNE said he was not abandoning his view that the compatibility rule was inherently applicable to objections to reservations.

23. Sir Humphrey WALDOCK, Special Rapporteur, said that he would like to have a few minor points of substance clarified. The Drafting Committee should be quite clear as to whether or not the Commission agreed to divide the whole question of reservations into the two spheres of general multilateral treaties, on the one hand, and other treaties, whether bilateral or plurilateral, on the other hand. In the case of plurilateral treaties, it would obviously be necessary to safeguard certain positions, such as the so-called inter-American practice. In other words, the Commission had to decide whether the residual rule for treaties other than general multilateral treaties was to be the unanimity rule.

24. The CHAIRMAN said that three classes of treaties were dealt with in article 19, paragraph 4. The rule had not been questioned in connexion with the treaties referred to in sub-paragraphs 4(a) and (b), since the debate had centred on the treaties dealt with in sub-paragraph 4(c).

25. Mr. JIMÉNEZ de ARÉCHAGA pointed out that several members had in fact disagreed with the suggestion that the unanimity rule should apply to reservations to plurilateral treaties, and had urged that the residual rule for general multilateral treaties should also be made applicable to general regional agreements, in conformity with inter-American practice.

26. Sir Humphrey WALDOCK, Special Rapporteur, said he sympathized with the point of view expressed by Mr. Jiménez de Aréchaga. It was indeed anomalous that the clauses favoured by the majority of the Commission, which were based on the inter-American system, should have to provide an exception for that very system. Although article 19, sub-paragraph 4(d), represented a saving clause for that practice, it should be borne in mind that the inter-American system was not followed by all regional groupings and that the contrary rule applied in European regional organizations. It had been difficult to cover the point in the way suggested by Mr. Jiménez de Aréchaga, and the Drafting Committee should therefore be asked to find some means of protecting the inter-American system, while making it quite clear that the Commission had not wished to create an intermediate class of treaties between general multilateral treaties of world-wide interest and treaties of concern to regional groups only.

27. Mr. JIMÉNEZ de ARÉCHAGA said he agreed that the matter might be referred to the Drafting Com-

mittee, but wished to point out that, since only a residual rule was being formulated, the paragraph proposed by the special rapporteur was not in fact a saving clause, but a proviso which appeared in all kinds of treaties.

28. Mr. TSURUOKA suggested that the Secretariat might prepare a study to show the advantages of the inter-American practice by tracing developments since 1938, when the system had been introduced. The study should state how many ratifications of treaties had been obtained before and after the introduction of the new system and, if there had been no marked acceleration of ratifications, whether the execution of treaties had been improved in other ways, from the point of view of attaining the objectives of the negotiators.

29. Mr. LIANG, Secretary of the Commission, said that he understood Mr. Tsuruoka's wish to be informed of the inter-American practice and that the Secretariat would be glad to prepare the study concerned. For the time being, he would refer members to his report to the Commission on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists in August-September 1959 which contained a section on reservations to multilateral treaties and a detailed history of the deliberations of the Organization of American States on the subject of reservations.<sup>1</sup> However, as Mr. Tsuruoka wished the Secretariat to investigate the inter-American system in detail, the assistance of the Organization of American States would have to be solicited; the document could not, therefore, be submitted to the Commission until the following year.

30. Sir Humphrey WALDOCK, Special Rapporteur, said that it would also be extremely useful for the Commission to be informed of all the developments that had taken place in connexion with reservations in the United Nations since 1951, when the General Assembly had adopted its resolution 598(VI) on reservations to multilateral treaties.

31. Another substantive point with regard to the articles on reservations was the question of the presumption of consent after the expiry of twelve months after receipt of notice of a reservation. Some speakers had expressed doubts on the matter and had even wanted to reverse the presumption. The Commission should decide whether the presumption stated in article 18, paragraph 3(b), of his draft should be maintained by the Drafting Committee.

32. Mr. GROS said he would agree to the presumption being included in the Drafting Committee's text, on the understanding that the question could be raised again in the Commission.

33. Sir Humphrey WALDOCK, Special Rapporteur, asked whether the Commission was in agreement with the rule laid down in article 17, paragraph 3(b), which dealt with the question whether a reservation formulated at the time of signature had to be repeated, in order to be effective, at the time of ratification. It was immaterial

<sup>1</sup> *Yearbook of the International Law Commission 1960, Vol. II* (United Nations publication, Sales No. : 60.V.1, Vol. II), p. 124.

what the rule was in that case, so long as states knew what action they had to take. The Harvard Research draft had laid down the opposite rule, while the Fourth Meeting of the Inter-American Council of Jurists had approved a rule along the lines of that which appeared in his draft; an argument in favour of the alternative he had adopted was that it provided a degree of certainty which was not present in the other rule. No member of the Commission had objected to his choice, but he wished to know in particular whether Mr. Briggs would concur with it.

34. Mr. BRIGGS said he would be prepared to accept the special rapporteur's rule.

35. Sir Humphrey WALDOCK, Special Rapporteur, asked whether the Commission had any objection to article 18, paragraph 3(c), which laid down the rule that a state which acquired the right to participate in a treaty by accession was obliged to consent to all the reservations already formulated.

36. The CHAIRMAN, noting that there were no objections to that rule, suggested that articles 17, 18 and 19 should be referred to the Drafting Committee with instructions to follow the principles of the special rapporteur's draft, on the understanding that further discussion could take place on the issues referred to by Mr. Gros and that the Commission was in agreement on the points raised by the special rapporteur.

*It was so agreed.*

ARTICLE 20. — MODE AND DATE OF ENTRY INTO FORCE

37. The CHAIRMAN invited the special rapporteur to introduce article 20.

38. Sir Humphrey WALDOCK, Special Rapporteur, said that the rules he had put forward in article 20 were a logical consequence of those which had gone before. He expected that, as in the case of some previous articles, the Commission would wish to simplify and shorten the text.

39. Mr. BRIGGS said that, although he found the substance of the provisions of article 20 acceptable, he had some drafting proposals to make designed to simplify the text. For example, the special rapporteur's paragraph 1 could be condensed to read simply: "Unless otherwise provided in the treaty itself". He therefore proposed that the following paragraph should be substituted for paragraphs 1, 2(a) and 3(a):

"1. Unless otherwise provided in the treaty itself, a treaty which is not subject to ratification shall come into force:

"(a) if a bilateral or a restricted multilateral treaty, upon signature by all the states which adopted its text; and

"(b) if a general multilateral treaty, upon signature by not less than one-quarter of the states which adopted the text".

Paragraphs 2(b) and (c) and 3(b) and (c) should be similarly condensed.

40. Mr. CASTRÉN said that, in general, the article was satisfactory but the drafting should be simplified. For example, sub-paragraphs (i) and (ii) of para-

graph 2(a) could be combined and paragraph 5 deleted altogether.

41. In connexion with the proviso stated in paragraph 1(a), he pointed out that international labour conventions could enter into force after the deposit of one ratification only, but presumably that case was covered by the reference in paragraph 1(b) to the constitution of an international organization.

42. He doubted whether the one-fourth rule proposed in sub-paragraph 3(a)(ii) would be acceptable. In some instances the number required might be too great and in others inappropriate, for example, in the case of treaties with only four signatories.

43. In paragraph 6, a reference should be inserted to article 21, paragraph 2, which explained what was meant by a treaty's provisional entry into force.

44. The special rapporteur had himself been hesitant about including paragraph 7, as he had explained in paragraph (8) of the commentary, and it seemed inadvisable to mention the possibility of a treaty being brought into force by "subsequent acts" of the states concerned.

45. Mr. JIMÉNEZ de ARÉCHAGA said that he was in fundamental agreement with the special rapporteur's draft but considered that the distinction between multilateral and plurilateral treaties was illogical and not justified by practice. The Commission was framing residual rules designed to safeguard the will of the parties, and there was no justification for treating those two categories of treaty differently. The same rules should hold for all multilateral treaties, whatever their nature.

46. If the Commission were to adopt a less progressive attitude in regard to regional treaties, its draft might provoke an adverse reaction in certain countries.

47. Sir Humphrey WALDOCK, Special Rapporteur, said that the argument for maintaining the distinction was less strong in the case of article 20 than in that of the articles on reservations, but nevertheless practice showed that in many plurilateral treaties the principle of unanimity was still applied. A number of the rules under article 20, for example the one-fourth rule, might not be appropriate for treaties of a restricted character. He was therefore reluctant to follow Mr. Jiménez de Aréchaga's suggestion. In the case of world-wide treaties of universal application, certain presumptions departing from the unanimity principle could be made.

48. The trend of the discussion seemed to indicate that the Commission wished to make a distinction between general multilateral treaties and others, and that it was anxious to safeguard the special position of plurilateral treaties in the second group. A considerable amount of redrafting would be necessary to eliminate the references to plurilateral treaties in his original text.

49. Mr. JIMÉNEZ de ARÉCHAGA said that he had understood the Commission to have agreed that the distinction between plurilateral and multilateral treaties should be eliminated. The special rapporteur appeared to have a different understanding.

50. Mr. YASSEEN said that it was important that the Commission should examine the general rules applied to plurilateral treaties, which should be equated with bilateral treaties unless the nature of the treaty itself called for some other system.

51. The real distinction was between general multilateral treaties of universal concern and others. The former should be governed by rules different from those applicable to bilateral instruments.

52. Mr. JIMÉNEZ de ARÉCHAGA said that the observations made by the special rapporteur and Mr. Yasseen implied that the Commission's progressive codification would stop short of regional treaties, to which the old rules would still apply. He did not wish to press his point too far since the inter-American system had long-established practices, but the Commission should perhaps give some thought to the needs of other regions.

53. Mr. YASSEEN said that a closely knit group of states could, without difficulty, reach agreement on the rules they wished to apply to treaties within the group, but the Commission was preparing universal rules of a residual and non-obligatory character for application if the treaty itself was silent.

54. Mr. de LUNA said that, if the Commission failed to arrive at a definition of plurilateral treaties on the one hand and multilateral treaties on the other, Mr. Jiménez de Aréchaga was right; if it succeeded in doing so, then he was inclined to agree with Mr. Yasseen. In any event, a distinction should be drawn between multilateral treaties which were not of universal application and to which residual rules were not relevant, and other multilateral treaties.

55. Mr. AMADO said he was still sceptical about the distinction between plurilateral and multilateral treaties. As the Commission was aware, he was not able to associate himself with the Latin American doctrine in that regard. Instead of focusing its attention on the number and identity of signatories, the Commission should look more to whether the treaty was a law-making instrument laying down objective rules. Such treaties were a special feature of the modern age.

56. Mr. BARTOŠ said that it might be a mistake to cover only universal multilateral treaties in the draft. There were multilateral law-making treaties even at the regional level. The kind of residual rules under consideration would not be appropriate, for example, in the case of defence treaties laying down specific obligations for certain parties where virtually complete ratification would be necessary for them to enter into force or, at the other end of the scale, in the case of treaties on cultural or political matters where ratification by two signatories would be enough to bring the instrument into force between them.

57. The special case of international labour conventions had not become a general rule and should only be mentioned in the commentary.

58. Mr. EL-ERIAN said that, as practice varied widely even at the regional level and as there were many

different kinds of treaties, the Commission should eschew rigid distinctions and over-emphasis on the difference between multilateral and plurilateral treaties. Wherever possible it should work out general rules.

59. The CHAIRMAN suggested that further consideration of article 20 should be deferred to the next meeting to enable the Commission to take up item 4, because the observer for the Inter-American Juridical Committee would shortly be leaving Geneva.

*It was so agreed.*

**Co-operation with other bodies (A/CN.4/146) (item 4 of the agenda)**

60. Mr. LIANG, Secretary to the Commission, said that he had recently received two letters from Mr. Sen, Secretary to the Asian-African Legal Consultative Committee. By the first Mr. Sen had informed him that the Committee had been unable to send an observer to attend the Commission's fourteenth session. In his capacity as Secretary, he had replied expressing his regret and informing Mr. Sen that the Committee had a standing invitation to send an observer to the Commission's sessions.

61. In his second letter, Mr. Sen, acting on the decision taken at the Committee's fifth session, invited the Commission to be represented by an observer at the sixth session in 1963; the date and place had not yet been settled. The subject of state responsibility and possibly the question of the legality of nuclear tests and the law of treaties would be on the agenda.

62. Mr. Sen had gone on to say that the Committee attached the greatest importance to the attendance of a representative of the International Law Commission at its meetings. At its fourth session Mr. García-Amador had contributed a great deal to the discussion on the status of aliens and at its fifth session Mr. Pal had considerably assisted in the deliberations. The Committee found the presence of an independent jurist, who was also a member of the Commission, of immense value and hoped that the Commission would find it possible to send an observer to the coming session.

63. The Inter-American Council of Jurists was to hold its next session in El Salvador and as soon as a decision was reached about the date he would inform the Commission.

64. The CHAIRMAN proposed that the Commission should decide to send an observer to attend the sessions of both bodies. The decision as to who should attend would depend on the date and place of the sessions.

*It was so agreed.*

65. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.

66. Mr. GOBBI, Observer for the Inter-American Juridical Committee, said he was gratified to note that certain Latin American ideas were beginning to gain wider recognition; that process was particularly interesting in relation to the problem of reservations, which was an explosive one, even within the Inter-American

Juridical Committee. In spite of the differences of opinion, however, the Latin American doctrine had found its expression in the conclusions adopted by the Committee.

67. At its ordinary session in 1961, the Inter-American Juridical Committee had prepared a report summing up the Latin American contribution to the development of the principles governing the international responsibility of the state and the codification of those principles. The majority of the Committee had taken the view that it was preferable to confine the study to the Latin American countries because it was those countries which had made an original American contribution in the matter; the position of the United States had remained closer to the principles current in Europe and its original contribution had therefore not been so great.

68. Mr. Murdock had dissented from the majority view and had maintained that the study should have had the scope intended by the organ which had asked for it, and should not have been limited in a way determined by particular views; he had added that, if the views of the United States were excluded, the study would only give a partial account of the problem, leaving out important arbitration experience which it would have been useful to include.

69. He (Mr. Gobbi) had also expressed a dissenting view, but for different reasons. The report dealt with the topic of state responsibility in its broad sense, and also with the customary sanctions in the matter. In those respects, he held a radically different view from the Latin American doctrine.

70. Not only on substance but also on choice of method, he had disagreed with the majority. He would have preferred the study to deal more systematically, in the first instance, with the problem of international responsibility in general, which formed part of the general theory of international law; the study would then have dealt with the various specific problems of responsibility, responsibility for damage to aliens being the one in which the most original Latin American contribution had been made.

71. Accordingly, he wished to stress that the statement which followed expressed only his own personal views, and did not coincide with the position of the majority of the Inter-American Juridical Committee.

72. In the matter of state responsibility, there had been a traditional opposition in America, as in other parts of the world, between the authoritarianism of the big countries and the logical reaction to it of the smaller countries, which tended to adopt restrictive attitudes in order to avoid the possibility of forceful interference. The conscious or unconscious acceptance of Latin American doctrines had led to a considerable decrease in imperialistic manifestations by the larger countries. For example, in a case such as the Corfu Channel case, the more powerful country would in the past have demanded reparation directly, without having recourse to international justice.

73. Similar processes had taken place in America, resulting in a useful interchange of ideas which the

Committee's study did not adequately reflect. The study of the Inter-American Juridical Committee, by recording the positions of the majority and of Mr. Murdock, gave the impression that the traditional antagonism had reappeared with renewed intensity. In fact, however, a careful study of American practice and doctrine showed that there was a growing reciprocal understanding in the matter. He would illustrate that proposition by considering the three questions in respect of which the traditional antagonism had been most apparent: treatment of aliens, denial of justice and waiver of protection.

74. In respect of the treatment of aliens, the Latin American position could be summed up in the principle of the equality of treatment of nationals and aliens, on the ground that an alien should accept the jurisdiction of the country where he lived and not lay claim to privileged treatment. The United States of America claimed that a country which received aliens on its territory had the duty to extend to them adequate protection in accordance with a minimum standard of rights determined by international law.

75. In spite of their apparent opposition, both the Latin American and the United States views were based on the idea that principles of municipal law could be transposed to the international plane. That fact was obvious in the case of the Latin American doctrine, but the minimum standard doctrine also often involved, in fact, the claim to impose in international law standards drawn from a particular municipal law.

76. That traditional opposition had lost much of its strength, for extreme views were being modified. The doctrine of equality of treatment, correctly stated, was valid only in so far as there was no violation of international law; that was the logical consequence of the primacy of international law. Besides, the minimum standard doctrine did not in modern times imply the assertion of rules other than those derived from international principles and practice.

77. In respect of denial of justice, the Latin American position coincided with the traditional European view that denial of justice was a wrong arising from the defective administration of justice. Some United States authorities tended to consider that any organ of the state, and not only the judiciary, could commit a denial of justice; that view could not prevail, because if the conception of the denial of justice were to be made so extensive, it would embrace all international wrongs.

78. If, however, one limited the discussion to wrongs committed by the courts, the Latin American doctrine considered that only two sets of circumstances could give rise to state responsibility: denial of access to the courts to aliens, and unjustified delay in the dispensation of justice. Some United States jurists considered as denial of justice not only the two cases which he had indicated, but also such cases as those where the courts were used as an instrument of the Executive power to persecute aliens, and cases in which a judgment violated international obligations or was discriminatory in character. In the Latin American doctrine, those cases were not considered as denials of justice, although they gave rise

to international responsibility as violations of international law, for example, a discriminatory judicial decision which violated the rule of equality of treatment of nationals and aliens.

79. It was therefore clear that the proponents of the two different views in the matter of denial of justice were moving progressively closer to each other.

80. The question of waiver of protection raised the problem of the so-called Calvo clause, the validity of which was upheld in Latin America, but denied in the United States and also by the majority of European jurists. Those who had regarded the Calvo clause as automatically null and void had argued that a private individual could not waive a prerogative vested in the state, and, secondly, that the Calvo clause could have no other effect than that of enjoining aliens to observe the well-known rule relating to the exhaustion of local remedies.

81. There had recently been in the United States doctrine a welcome change in the form of an increasing tendency to recognize the validity of the Calvo clause, albeit with a limited scope, for example in the book by Shea "The Calvo Clause" and in the most recent Harvard drafts. The Calvo clause had also been recognized in United States court practice, as was shown by the North American Dredging Company and the Inter-Oceanic Railway cases.

82. Those developments in the United States and the increasing recognition of the validity and necessity of the Calvo clause in the countries of Asia and Africa showed that its future was assured, for it was closely linked with the concept of the individual as a subject of international law.

83. The foregoing considerations showed the absolute necessity of a careful review of the rules governing the international responsibility of the state for damage to aliens. The fundamental principle in the matter was that international responsibility arose from a violation of a rule of international law: it was that violation which gave rise to the duty to repair the damage caused.

84. The responsibility of the state for, say, military aggression or the violation of an international treaty, though ultimately based on the same principle, arose from the violation of a different rule of international law. In the case of damage to aliens, the rule violated was that relating to the adequate treatment of aliens, on the basis of equality with nationals according to the Latin American doctrine, or on the basis of a minimum standard according to the United States doctrine.

85. It was essential to determine the nature of the international wrong which gave rise to state responsibility. The traditional doctrine since Vattel had regarded the claim as a claim of the state, so that the claimant state would have the right, after obtaining damages, to go so far as to distribute the amount awarded to persons other than those who had suffered the damage. In other words, the individual who had sustained the damage disappeared from the scene as soon as his claim was espoused by his state; that situation was flagrantly

unjust and resulted from the traditional dualist conception of international law.

86. That traditional conception, which artificially considered the alien's state itself as the injured party, had been necessary because international law had not formerly recognized non-subjects of international law as possessing any rights under that law. That artificial approach had become obsolete, and accordingly the institution of state responsibility should be placed on a more adequate basis, as indicated by the Latin American doctrine.

87. A re-examination of the law of international claims showed that it was the injured alien who was the holder of the right to reparation. It was the alien who possessed certain rights by virtue of international law and was entitled to have them asserted in an international forum; it was true that the state of the alien could refrain from taking the necessary action, but that fact merely showed that individuals did not as yet possess the capacity to initiate international proceedings. The injured individual needed to assign his claim to the state, but the state had rights which were no greater and no less than those of the individual concerned.

88. The traditional doctrine had led, among other flagrant injustices, to a statement by a Claims Commission to the effect that a state did not commit an international wrong when it injured a stateless person. The majority of jurists, however, recognized that a state committed an international wrong if it treated any alien unjustly, regardless of his nationality or lack of nationality. It was unthinkable, for example, that a stateless person should be denied access to the courts or be deprived of his freedom otherwise than on grounds specified by the law.

89. The real position was that, as a result of the imperfect character of international law, a stateless person did not have an effective remedy at his disposal in order to assert his rights. His position would be the same as that of an alien whose country did not wish to protect him.

90. An objective analysis of the law of international claims showed that the injured individual was the true interested party. For example, it was the actual damage sustained by the alien himself, and never the injury suffered by the state, which constituted the basis for the assessment of the damages.

91. In conclusion, he said that the Spanish-American position could be summed up in three propositions. First, there should be equality of treatment as between nationals and aliens. Secondly, it was necessary to abandon the outmoded doctrine that an injury to an individual in violation of a rule of international law necessarily implied a violation of the rights of the state. Thirdly, there was a need for a better and more precise determination of the cases in which claims were receivable, in order to avoid unwarranted acts of interference ostensibly for the purpose of asserting a claim based on state responsibility. In that respect, the abuse of state responsibility had caused more damage to that institution than all the doctrinal arguments put forward against it.

92. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his impressive account of the Committee's activities. He assured him that the International Law Commission had greatly benefited from its co-operation with the Committee and fully expected that co-operation to continue; he asked him to convey to the Committee the Commission's gratitude for its continuing co-operation and for sending an observer to the session.

93. Mr. GOBBI, Observer for the Inter-American Juridical Committee, thanked the Chairman for his kind words and assured him that he would transmit his message to the Inter-American Juridical Committee.

94. The CHAIRMAN said that there remained to be dealt with under item 4 the report which he, as the Commission's observer, had submitted on the fifth session of the Asian-African Legal Consultative Committee (A/CN.4/146). He had been much impressed by the high level of the work done at that session and was glad to note the Commission's decision to continue co-operation with that Consultative Committee by sending an observer to the Committee's next session. If there were no comment, he would consider that the Commission agreed to take note of his report.

*It was so agreed.*

The meeting rose at 5.40 p.m.

### 657th MEETING

*Tuesday, 5 June 1962, at 10 a.m.*

*Chairman: Mr. Radhabinod PAL*

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

ARTICLE 20. — MODE AND DATE OF ENTRY INTO FORCE (*resumed from the previous meeting*)

1. The CHAIRMAN invited the Commission to resume its discussion of article 20.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that a general desire had been expressed for the simplification of the wording of the article. There was also general agreement on the elimination of the distinction between plurilateral and multilateral treaties, as with other articles. There remained the problem of the treaty practice of regional organizations, and he suggested that the Drafting Committee should be asked to find a formula to deal with that problem.

3. The provisions of paragraph 6, together with those of article 21, paragraph 2, would in all probability be transferred by the Drafting Committee to article 19 *bis*, which would contain all the provisions on the rights and obligations of states prior to the entry into force of the treaty.

4. Mr. JIMÉNEZ de ARÉCHAGA said that he was perfectly satisfied with the special rapporteur's sugges-

tion that the Drafting Committee should formulate provisions to cover the question of regional treaties.

5. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 20 to the Drafting Committee, with the directions suggested by the special rapporteur, and to start to consider article 21.

*It was so agreed.*

ARTICLE 21. — LEGAL EFFECTS OF ENTRY INTO FORCE

6. Sir Humphrey WALDOCK, Special Rapporteur, said that the only question which arose in connexion with article 21 was whether it was necessary to include the provisions of paragraph 1(c). Perhaps the Drafting Committee could be asked to consider whether those provisions should not be transferred to the article on ratification.

7. Mr. CASTRÉN said he wished to propose the following drafting amendments:

8. First, the deletion of paragraph 1(a) as superfluous, and the consequential deletion of the word "accordingly" in the first line of paragraph 1(b).

9. Secondly, the deletion of the word "full" in the first part of paragraph 2(a); a treaty which entered into force provisionally could not be said to enter into "full" force.

10. Thirdly, the replacement in the last line of paragraph 2(a) of the words "until the treaty enters into full force" by the words "until the treaty enters into final force".

11. The expression "is unreasonably delayed" in paragraph 2(b) was far from clear, but it might not be possible to state the intention in more specific terms.

12. Mr. BRIGGS suggested that paragraph 1(b), instead of referring to rights and obligations which "come into operation", should state that the treaty would "become effective". The final proviso could then be redrafted to state that the treaty would become effective or come into force, even if it specified that some rights and obligations would only come into operation at some future date.

13. There would then be a clear distinction between the date when a treaty as such became effective, and the time when its provisions came into operation. As Manley Hudson put it, "The date of an instrument coming into force is not necessarily the date when its substantive provisions become applicable: the latter will depend upon the terms of the obligation assumed".<sup>1</sup> A good example was provided by the Geneva Convention of 1929 on the treatment of prisoners of war<sup>2</sup> which had become effective on 19 July 1931, the date of its entry into force, though its provisions had only come into operation on the outbreak of hostilities.

14. Mr. JIMÉNEZ de ARÉCHAGA said he doubted the advisability of the rule proposed *de lege ferenda* in

<sup>1</sup> *International Legislation*, Vol. I, Washington, 1931, Introduction, pp. LIV-LV.

<sup>2</sup> *League of Nations Treaty Series*, Vol. CXVIII.