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Summary record of the 701st meeting

Topic:
Law of Treaties

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701st MEETING

Monday, 17 June 1963, at 3 p.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

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

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

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

ARTICLE 4 (LOSS OF A RIGHT TO AVOID OR DENOUNCE A TREATY THROUGH WAIVER OR PRECLUSION)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 4 dealt with the question of preclusion — the case in which a party having a right to avoid or denounce a treaty disqualified itself by its subsequent acts from exercising that right. The question had arisen in connexion with other articles and the Commission had decided to deal with it when it came to consider article 4.

3. As he had pointed out in the commentary, the rule on the subject had a broader application than the law of treaties. However, the purpose of article 4 was to deal with its specific application to such matters as invalidity on grounds of error and termination of a treaty following upon its breach; perhaps the article was also applicable in connexion with the doctrine of *rebus sic stantibus*. The fact a State remained inactive would, in the cases covered by article 4, entitle the other party to assume that the treaty was still in force. The provisions of the article were intended to prevent a State from suddenly making a claim, after a great many years, for the purpose of evading a treaty it found inconvenient for other reasons.

4. In drafting article 4, he had had some doubts regarding the inclusion of the provisions contained in sub-paragraph (*b*), which might not work in certain cases. As sub-paragraph (*c*) was couched in general terms, it would also cover the case dealt with in sub-paragraph (*b*) if it were decided to drop that sub-paragraph.

5. Mr. PAREDES said that there were a number of points to be considered in connexion with article 4. In the first place, the opening paragraph provided that: " A right to avoid or denounce a treaty . . . shall not be exercisable if, after becoming aware of the fact creating such a right, the State concerned (*a*) shall have waived the right; ". With regard to that paragraph, it should be made absolutely clear that the rule applied only to valid treaties being avoided or denounced on supervening grounds, but not to treaties which were void *ab initio* and had therefore never existed. The latter treaties could not be affirmed or adjusted by any means except the conclusion of a new treaty without the defects of the former one, as had been stated at length during some of the previous meetings.

6. Secondly, the waiver provided for in sub-paragraph (*a*) was an express waiver, as the Special Rapporteur had pointed out in his commentary; consequently the word " expressly " was needed in the text to prevent it being interpreted as referring to any waiver, even a tacit one. It should also be stated that the waiver could only take effect when there had been a change in the circumstances creating the right, for otherwise a strong State might be able to exert a decisive influence to secure a waiver.

7. He therefore suggested that sub-paragraph (*a*) be redrafted to read: " (*a*) shall have expressly waived the right, following a change in the circumstances which gave rise to it; ".

8. He thought sub-paragraph (*b*) was entirely correct, since no one should benefit to the detriment of others. Sub-paragraph (*c*), on the other hand, was not satisfactory, since its vagueness left the way open for every kind of controversy and the most capricious interpretations: it was always possible to find an act or omission of which to accuse the claimant, in order to refute his claim. The acts or omissions which were sufficient to extinguish the legitimate right, should be more clearly defined.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that Mr. Paredes' remarks had reminded him of the need to take into account the provisions adopted by the Commission on the subjects of *jus cogens* and coercion; the provisions of article 4 did not apply to those particular grounds of invalidity.

10. With regard to sub-paragraph (*c*), he did not think it would be wise to attempt to define the law on preclusion more precisely, because it was largely a matter to be decided by the particular circumstances of each case. It would be better, in article 4, to safeguard the right in general terms.

11. Mr. YASSEEN said that in his introductory remarks the Special Rapporteur had brought into relief a point which had remained rather in the background. The principle of the effects of a contradiction between a State's earlier conduct or statements and its claims in an international dispute could be regarded as a general principle of law; it was known and applied in international case-law, as was shown not only by the judgments of the International Court of Justice in the cases of the *Arbitral Award made by the King of Spain* [1] and the *Temple of Preah Vihear*,[2] but also by many other judgments and arbitral awards.

12. The principle was clearly well founded, and it should be embodied in the draft, for it would prevent disputes and safeguard the stability of treaties. But the necessary particulars should be added, for the scope of the principle extended beyond the limits of the article itself. Its application raised no doubt in cases of error or fraud, but it was not applicable in the case of personal coercion against a State's representative or of pressure on the State itself.

[1] *I.C.J. Reports*, 1960, pp. 213-214.

[2] *I.C.J. Reports*, 1962, pp. 23-32.

13. The principle was naturally not applicable in the case of a treaty that was void through being contrary to a *jus cogens* rule. The Special Rapporteur was also of that opinion. On the other hand, he did not yet appear to have formed any definite opinion in regard to the principle of *rebus sic stantibus*. That principle was surely one of *jus cogens* and could be invoked whenever the conditions for its application were present. He did not think that preclusion, depending on delay or changes of circumstances, caused a State to lose the right to invoke the principle *rebus sic stantibus*.

14. Mr. Bartoš had asked very pertinently a few days previously whether a State could be blamed for being tolerant; to ask that question was to answer it. In his (Mr. Yasseen's) opinion if, for reasons which might be of various kinds, a State did not, for some time, invoke the *rebus sic stantibus* principle to release itself from a treaty which was no longer in keeping with the realities of international life, it should not on that account be deprived of the right to invoke that principle later.

15. To sum up, he subscribed to the principle on which the article was based, but its scope should be adequately restricted. In his view, the principle could not apply if there was coercion, if the treaty was void or non-existent, or if the *rebus sic stantibus* rule was invoked.

16. Mr. de LUNA said he had some doubts about article 4. With regard to the terminology, the French term "*forclusion*" and the English term "estoppel" seemed to have been treated as equivalent, but that was not quite correct. In Roman law countries "*forclusion*" was merely a particular form of "*déchéance*" (lapse), which occurred when the expiry of a time-limit set by the law barred performance. Contrary to the case of estoppel, that time-limit was usually made applicable by an act of another person.

17. Sub-paragraph (*a*), in which the right to avoid or denounce a treaty was extinguished by an explicit waiver, raised no special problems.

18. He would not dwell, either, on sub-paragraph (*b*) or on the first part of sub-paragraph (*c*) where the idea of estoppel was introduced.

19. But two problems arose in connexion with the second part of sub-paragraph (*c*): the effects in international law of omission to exercise a right for a protracted period and the effects of "silence" — two concepts which were similar but must not be confused. The result of not exercising the right to denounce the validity of a treaty for a long time was that the right lapsed by virtue of an objective norm of international law.

20. "Silence" might mean several things: indifference, disapproval, or approval. But it was clear that none of those three possibilities was absolute in international law. The true meaning of the silence had to be deduced from the particular circumstances. The main problem in regard to the omission with which the second part of sub-paragraph (*c*) was concerned, was when and in what circumstances silence should have the legal effect of recognition of the treaty's validity or of a waiver of any future challenge of its validity. Consequently the silence must be a qualified silence to which an objective rule of international law would ascribe the capacity to produce the results in question. At that point the concept of good faith, the cardinal principle of international law, intervened; hence the maxim *qui tacet consentire videtur si loqui debuisset ac potuisset*, which explained how the principle of good faith applied to such silence.

21. The doctrine therefore required fulfilment of three conditions: knowledge of the event concerning which silence was observed, a legal interest in that event, and the expiry of a reasonable period.

22. The Special Rapporteur was to be congratulated on his draft, but the second part of sub-paragraph (*c*) should be made more explicit in order to avoid confused situations likely to give rise to disputes. That was all the more necessary because the current trend in international law was to leave as little room as possible for uncertainty and ambiguity.

23. Mr. TSURUOKA said that he supported the ideas set out in article 4, but he had a few comments to make.

24. First, a question of terminology might arise, especially in the commentary, because of the use of the words "preclusion" and "estoppel". For although the idea expressed in article 4 was generally recognized in international law, to draw on the internal legal systems of particular countries might be a cause of error. It would therefore be better to state the idea explicitly.

25. Secondly, the provisions of the article were intended to apply to some articles in sections II and III, but not to others. In his view, article 4 applied to articles 5, 6, 7, 8 and 11, as adopted by the Drafting Committee, and to articles 20, 21 and 22. On the other hand it did not apply to articles 12, 13, 15 and 16, as adopted by the Drafting Committee, or to articles 17, 18 and 19. That list showed that his views were very close to Mr. de Luna's and somewhat different from those of Mr. Yasseen.

26. With regard to the question raised by Mr. de Luna, he cited the case of an error which was discovered after a treaty had been applied by both parties for ten years; if one of the parties then asked for the annulment of the treaty on the ground of error, unnecessary complications would ensue. That was, of course, an extreme case, but one that must be considered when drafting an article like the one under discussion.

27. The article should therefore be supplemented, if possible, by another paragraph, stating that the rights provided for in the articles he had mentioned were extinguished after a certain time, or alternatively, that after a reasonable period had elapsed the parties could not claim to exercise the rights conferred by those articles. The words "reasonable period" should not cause too much uncertainty for cases of that sort would, finally, be settled by an impartial authority under article 25. But if it was difficult to add a new paragraph, it could be explained in the commentary that the facts creating the rights referred to were usually known without much delay.

28. Mr. CASTRÉN said that, in principle, he favoured the inclusion of a provision on the lines of article 4. Sub-paragraph (*a*) he accepted without comment. The

other two sub-paragraphs were based in part on the findings of the International Court of Justice in two recent cases, which the Special Rapporteur had tried to generalize.

29. He had, perhaps, gone a little too far, as other members had already pointed out, for there were a number of exceptions that ought to be taken into account. Furthermore, the rules proposed by the Special Rapporteur were open to different interpretations, but for the moment, he had no specific proposal to make.

30. Sub-paragraph (*b*) should be omitted. The provisions of the article could not be applied as they stood to all the other articles in sections II and III of the draft. It might be better to specify which articles they did apply to. The Special Rapporteur had mentioned some of them in his introductory statement, and Mr. Tsuruoka had listed them, but the list should be discussed carefully as opinions differed on certain points.

31. Mr. VERDROSS said he would speak only on the waiving of rights under a treaty in general. There were two distinct cases: that in which a party waived one or more of the rights deriving from a treaty, and that in which it waived all those rights. In the first case, the treaty remained in force, but in the second it was terminated and ceased to exist. For example, after the 1914-1918 war, Germany had waived all its rights under the Treaty of Brest-Litovsk; it had been declared in a judicial ruling that, as a consequence, the right to denounce the treaty had lapsed.

32. Accordingly, section III should perhaps also deal with the case of a State which waived all its rights under a treaty. That was merely a suggestion for the Drafting Committee.

33. Mr. BRIGGS said he supported the principle embodied in article 4, subject to the exceptions which had been suggested by the Special Rapporteur himself, namely, the omission of sub-paragraph (*b*) and the non-applicability of the article to treaties which would be void because of violation of a rule of *jus cogens*.

34. With reference to the remarks made by Mr. de Luna and Mr. Tsuruoka regarding the term " estoppel ", he commended the Special Rapporteur for not having used that term in the text of the article and urged that the same course should be followed in the commentary. In a recent article Lord McNair had pointed out that " estoppel ", in the sense in which the term was understood in the common law systems, was little used in international law. In the case of *The Arbitral Award made by the King of Spain*, in which he had acted as counsel for one of the parties, the French term " *forclusion* ", used in an oral statement, had been translated, in the English version of the provisional verbatim record of the proceedings, as " estoppel " — a mis-translation he had been obliged to correct because of the implications of the term to lawyers accustomed to the restrictive rules of English and American law.

35. He could not support the suggestion by Mr. Paredes that the qualification " expressly " should be inserted before the word " waived " in sub-paragraph (*a*). The intention to waive a right of the type under discussion could well be implied by the behaviour of the party concerned.

36. Like the Special Rapporteur, he favoured the omission of sub-paragraph (*b*) but perhaps not for the same reasons. He found its provisions too limited, because they applied only to cases in which a party had accepted benefits or enforced obligations under the treaty. There were cases in which a State should be precluded by its previous conduct or admissions from later adopting a contrary position. The omission of sub-paragraph (*b*) would necessitate the deletion of the word " otherwise " in sub-paragraph (*c*).

37. He did not favour the suggestion that sub-paragraph (*c*) should be made more explicit; there were many acts or omissions on any of which it would be legitimate to base preclusion. The statement of the principle was therefore sufficient.

38. Lastly, he did not support the proposal to delete the words " or omissions ". The omission to protest at the appropriate time was one of the points that had arisen in the case of *The Arbitral Award made by the King of Spain.*

39. Mr. ROSENNE said that, under the definition of a treaty adopted by the Commission in Part I, article 1, paragraph 1 (*a*), a treaty was an international agreement " governed by international law ". Many rules of international law therefore came into play in connexion with treaties, so that although the Commission was at present dealing only with the law of treaties and not with other branches of international law, it should take those other branches into account and indicate their particular applications to the law of treaties. The provisions of article 4 were acceptable, since they reflected general rules of international law and attempted to apply them to the law of treaties.

40. In the opening sentence of the article, the term " fact " could hardly be taken as meaning any fact. however insignificant or remotely related to the matter under discussion; it should be understood in the sense in which it was used in article 61 of the Statute of the International Court, where it had to be of such a nature as to be a decisive factor.

41. Sub-paragraph (*b*) dealt with two entirely different aspects of the application of the general principle to the law of treaties. The second part, which referred to the enforcement of obligations under the treaty, was particularly useful and should be retained; he had been surprised to hear the Special Rapporteur suggest that the whole of sub-paragraph (*b*) could be dropped.

42. He had some doubts about the provisions of sub-paragraph (*c*), which was in a sense an attempt to codify the general law of evidence in international law. He suggested the deletion of the words " by its own acts or omissions " and also of the words " as against any other party or parties ". In was a matter for determination in each individual case whether the general principle was applicable and how far it was applicable.

43. The greatest care would therefore be needed in drafting the provisions of article 4. The Drafting Committee should consider retaining the second part of

sub-paragraph (*b*) and continuing it with sub-paragraph (*c*), omitting the word " otherwise " and the passages he had suggested should be deleted.

44. It should be made clear that article 4 applied only to the matters dealt with in Part II; he could not agree to its application to any of the matters dealt with in Part I, such as the law of reservations and the exercise of depositary functions. He attached particular importance to that point because of the broad wording of paragraph 2 of the commentary.

45. He reserved his position regarding the use of the term " essential " before the word " validity " in sub-paragraph (*c*), for the reasons he had given at the 676th meeting (paras. 8-10).

46. As to the scope of the article, its provisions should apply to cases in which denunciation was permitted, but not to cases in which the treaty was void *ab initio*; perhaps they should also apply to the suspension of a treaty or part of a treaty.

47. With regard to procedure, the Commission should consider whether the waiver mentioned in sub-paragraph (*a*) must be a formal waiver brought within the scope of article 4 of Part I, or whether an implicit waiver should also be recognized; it seemed that cases of implicit waiver were covered by sub-paragraphs (*b*) and (*c*), while sub-paragraph (*a*) related to express waiver.

48. Referring to the question of terminology, he said that " preclusion " and " estoppel " were technical terms which had different meanings in different legal systems, sometimes connected with the peculiarities of the law of evidence. The practice of the International Court, however, and contemporary doctrine, showed that international lawyers tended not to give any technical connotation to those terms, but used them indiscriminately, giving both of them the same meaning in international law. He therefore favoured the use of the term " preclusion " in the text of the article, but had no objection to the term " estoppel " being used in brackets in the commentary after the corresponding French term. Neither term should be defined in any detail.

49. Mr. AGO observed that article 4, the principle of which was generally accepted by the Commission, might present a few minor drafting problems but no serious problems of substance. His comments were therefore addressed mainly to the Drafting Committee.

50. One member had criticized the term " fact " in the third line. Clearly, it must not be divorced from its context; it must be a " fact " sufficiently serious to give one party the right to avoid or denounce the treaty. Perhaps the plural would be more appropriate; the singular was appropriate enough in the case of fraud, error, or resort to force, but less so in other cases. That was a difficulty which the Drafting Committee would have to resolve, possibly using different terms.

51. With regard to sub-paragraph (*a*), he agreed with those members who considered it preferable not to speak of an express waiver; for the waiver might be inferred from the conduct of a State. But it should perhaps be specified that the waiver must be valid and freely given. For example, if a State had been induced by force to conclude a treaty, it might happen that its waiver of the right to plead defective consent by reason of the use of force had also been secured by duress. In such a case, the waiver was itself vitiated and did not entail loss of the right to claim that the treaty was void.

52. Like the Special Rapporteur, he thought it would be better to combine sub-paragraphs (*b*) and (*c*). The acceptance of certain benefits under the treaty, like the enforcement of obligations under it, was only an example of acts or omissions which debarred the party concerned from claiming that the treaty was void. The two sub-paragraphs in question could accordingly be replaced by a single clause covering that idea.

53. To avoid the use of terms such as " estoppel " or even "*forclusion*", he suggested the wording: " shall have acted, or refrained from acting, in a way which debars it from asserting that the treaty lacks essential validity or, as the case may be, that it is not still in force ". That wording would meet every possible case, would avoid the use of a term of doubtful meaning, and would emphasize that the essential element was, precisely, the fact that the State's own conduct conflicted with the plea of nullity of the treaty.

54. The principle underlying article 4 was perfectly acceptable, and he therefore proposed that the text of the article should be referred to the Drafting Committee for redrafting in more precise language.

55. Mr. ELIAS said that all members agreed that the principle embodied in article 4 was generally acceptable.

56. Some definite decision should be reached, however, concerning the terms " preclusion " and " estoppel ". Unless the term " estoppel " was used, article 4 would not have, for lawyers of the common law systems, the precision which its importance required. If a precise term of English law were replaced by some general descriptive term the draft would be unsatisfactory and vague. The texts in the various languages should refer to doctrines with which their respective readers were familiar. Terms should be used in their accepted sense so that their meaning was clear to lawyers of the Common Law systems reading the English text, and to civil lawyers reading the other texts.

57. The question whether the rule in article 4 was a rule of substantive law or a rule of evidence was not of any great importance because, in English, the term " estoppel " had been defined as a rule, not necessarily a procedural rule, which precluded a party from making a claim that was in contradiction with its own previous representations or conduct. The question of the nature of the rule, would, however, affect the placing of article 4; if it was a substantive rule, the article was in its right place in section I, but if it was a purely procedural rule, the article should be moved to a position near articles 22 to 25.

58. Since the rule was one of general application, it was appropriate to restrict it in the manner proposed by the Special Rapporteur in article 4. The scope of its application still remained to be determined. The

Special Rapporteur had rightly pointed out that it did not apply to cases of invalidity on grounds of coercion or of conflict with a rule of *jus cogens*, and Mr. Yasseen had suggested that it would not apply in *rebus sic stantibus* cases; perhaps there were other cases as well.

59. With regard to the suggestion that sub-paragraphs (*b*) and (*c*) should be combined he agreed with Mr. Briggs that sub-paragraph (*b*) and the word " otherwise " in sub-paragraph (*c*) should be deleted. The case envisaged in sub-paragraph (*b*) was only a particular instance of the general principle stated in sub-paragraph (*c*).

60. The article should be redrafted in the form of two separate paragraphs, the first dealing with estoppel and the second with the question of waiver covered in sub-paragraph (*a*).

61. Mr. TUNKIN said he found the draft of article 4 generally acceptable, though its precise formulation presented considerable difficulties. For example, as Mr. de Luna had rightly pointed out, there could be different forms of silence on the part of a State.

62. Sub-paragraph (*a*) raised no important problems.

63. Perhaps there was some advantage in retaining sub-paragraph (*b*) as a useful illustration of the kind of situation in which the right to avoid or denounce would not be exercisable, though it must not be drafted in such a way as to lend itself to excessively wide interpretation. It was conceivable that a State, though aware of the existence of the right to avoid or denounce a treaty, might be unable to avail itself of that right because of certain special circumstances.

64. As to terminology, it would be undesirable to refer, even in the commentary, to the principle of estoppel, which was peculiar to Anglo-Saxon municipal law. It was inappropriate to apply to international law, which was formed in a different manner and for a different purpose, concepts belonging to municipal law. In that connexion, Judge Alfaro had made some enlightening comments in his separate opinion on the case concerning the *Temple of Preah Vihear*, in a passage which read:

> " However, when compared with definitions and comments contained in Anglo-American legal texts, we cannot fail to recognize that while the principle, as above enunciated, underlies the Anglo-Saxon doctrine of estoppel, there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features of the municipal system. It thus results that in some international cases the decision may have nothing in common with the Anglo-Saxon estoppel, while at the same time notions may be found in the latter that are manifestly extraneous to international practice and jurisprudence." [3]

65. Article 4 would only be acceptable if, as the Special Rapporteur had already agreed, it were not made applicable to treaties terminated on grounds of conflict with *jus cogens* or concluded under duress.

66. Mr. BARTOŠ said that if the principle underlying the text submitted by the Special Rapporteur were accepted, the first question which arose was that of the overriding force of *jus cogens*: should acts committed by States in breach of *jus cogens* rules be disregarded ?

67. He approved of the introduction of the principle of " estoppel ", though he was not quite sure that the French word " *forclusion* " was its exact equivalent. The principle was based on good faith and its effect was to debar a party which had waived its rights under a treaty and shown itself satisfied with the situation created, from deciding at some particular time to claim a ground for avoidance which it had known of but had not previously invoked.

68. First of all, waiver of the right to denounce a treaty needed to be defined; as Mr. Ago had pointed out it must be freely expressed, and he himself would add that it must be conscious, for even a tacit waiver could be recognized.

69. If a State had waived its right to avoid or denounce a treaty, could it claim that right later ? Apart from *jus cogens* rules, there were some cases in which a question of international ethics might be involved. A party to a treaty which had freely waived its right to denounce the treaty, could hardly afterwards plead some ground of nullity to justify a denunciation.

70. Sub-paragraph (*b*) raised a practical problem. Disputes had arisen in the past over the question whether benefits under a treaty had been accepted as such because they were provided for in the treaty, or whether they were the result of an obligation under a general rule of law. In particular, could certain clauses of a treaty be regarded as void separately ? If a party to a treaty had accepted benefits under some of its clauses which were not void or voidable by reason of error or on any other ground and were therefore not in dispute between the parties, was that party debarred from exercising the right to ask for the annulment of the treaty ? That question was closely bound up with the question of the severability of the clauses of a treaty for the purposes of denunciation.

71. As Mr. Tunkin had pointed out, a concatenation of circumstances might make it hard for a party to stop implementing an invalid treaty as soon as it became aware of the reason for its invalidity. Consequently, the fulfilment of obligations under a treaty could not be said invariably to bring the rule of estoppel into operation. The same question arose in connexion with the *rebus sic stantibus* rule. A State might, for instance, continue to implement a treaty despite a change in the circumstances, because it was trying to find means of preserving the contractual relations created by the treaty. Should it then be penalized for not having denounced the treaty immediately on becoming aware of the change in circumstances on which it could have based a plea of *rebus sic stantibus* ?

72. The meaning of the terms " act " and " omission " must be defined. The drafting of an article such as

[3] *I.C.J. Reports*, 1962, pp. 39 and 40.

article 4 called for great caution. The history of diplomacy showed that States had sometimes overlooked defective consent to a treaty and discussed its interpretation, but its validity had subsequently been contested. Even if it could be established that a State had been aware of the ground for avoidance, could its forbearance be regarded either as a waiver of its right to denounce or as a case in which the principle of estoppel applied ? That was a difficult question in international law, and even in municipal law the courts were not always inclined to accept the rule of estoppel unreservedly. United States case-law had, in some cases, drawn a distinction between a waiver in the strict sense and mere toleration.

73. The question was whether the Commission wished to introduce the principle of estoppel into its draft in its entirety, or whether it wished to make that principle, which was a rule of equity rather than a rule of law, even stricter in international law than it was in municipal law. If so, it should ascertain to what extent the principle could be applied in the law of treaties.

74. Provided that *jus cogens* was fully respected, he thought the Special Rapporteur's draft could well be included in a convention on the law of treaties, but it needed recasting to make it applicable in practice.

75. Mr. LACHS said that on the whole he agreed with the principle underlying the article and considered that it should be embodied in the draft. His observations would be mainly concerned with how it ought to be formulated, though he would touch on the extent to which such a principle had relevance to the law of treaties.

76. He questioned whether the term " to avoid " which to the best of his belief, had no legal connotation in the context, should appear in the title of the article.

77. Sub-paragraph (*a*) embodied a generally recognized principle and was acceptable.

78. He agreed with Mr. Elias that the content of sub-paragraph (*b*), whether it was combined with sub-paragraph (*c*) or not, should be retained, because it described the most typical way in which States manifested their relationship under a treaty, though some thought would have to be given to the point raised by Mr. Bartoš as to how it would apply if there was any question of the severance of certain provisions of a treaty. There had been instances of States deriving every possible benefit from a treaty and then attempting to denounce it when the time came to fulfil the obligations it imposed. That kind of action must certainly be prevented if the treaty had been freely entered into.

79. Sub-paragraph (*c*) would have to be carefully drafted and in particular it would be necessary to arrive at a narrower conception of silence than that favoured by Mr. Ago. He agreed with Mr. de Luna that the silence of a State could be open to many different interpretations.

80. He hoped that the reference to essential validity could be omitted, since otherwise a definition would have to be given.

81. Mr. CADIEUX said he agreed with the Special Rapporteur's estimate of the value of sub-paragraph (*b*), for three reasons. First, the general principle stated in sub-paragraph (*c*) covered the two examples given in sub-paragraph (*b*). All that was needed was appropriate wording. Secondly, if the two examples given in sub-paragraph (*b*), were retained, it would be necessary to make provision in the draft for a number of special cases, which might cause fairly serious difficulties. For example, it would be necessary to specify how long a party could continue to accept benefits under a treaty while seeking possible grounds for avoiding it. Thirdly, the reference to benefits under the treaty raised the question of the distinction between its essential and its secondary provisions, which involved a whole series of other problems.

82. The relationship between article 4 and the provisions concerning cases in which a party was automatically entitled to plead the nullity of a treaty should also be defined. It would accordingly be better not to make the wording too precise.

83. It was hard to decide in advance in what cases the principle of good faith could be introduced. Sub-paragraph (*c*) should therefore be drafted in general terms, without specifying particular cases.

84. The CHAIRMAN, speaking as a member of the Commission, said that he favoured the inclusion of article 4. The difficulties to which sub-paragraph (*b*) had given rise might be overcome by using the words " invokes the treaty either for the purpose of claiming rights or of enforcing obligations ", which appeared in the second sentence of paragraph 4 of the commentary.

85. Sir Humphrey WALDOCK, Special Rapporteur, said that there seemed to be general agreement on the idea underlying article 4 and on the need for such a provision in the draft.

86. With regard to terminology, it was perhaps necessary to point out that some judges of the International Court and some continental lawyers seemed to favour the Anglo-Saxon term " estoppel ", although Judge Alfaro had avoided technical terms as not being appropriate in an international context. English lawyers frequently used the word " preclusion " — a more general term which embraced estoppel and probably something more. For Anglo-Saxon lawyers estoppel had a more technical and narrower connotation, which ought perhaps to commend itself to some members of the Commission. He had followed the language of the International Court in the *Temple* case when using the word " precluded " in the text of sub-paragraph (*c*), and had thought that it was general enough to be unobjectionable. However, article 4 could be drafted in general terms more on the lines contemplated by Mr. Ago, without using words that had a special connotation in particular systems of municipal law. He had never intended to introduce the Anglo-Saxon concept of estoppel, and had only mentioned it in parenthesis in the commentary.

87. It was generally agreed that the application of article 4 should be restricted to certain specific articles in the draft. It would have to be made clear, if there were any obscurity in the present wording, that the

State had acted in full awareness of the fact creating a right to denounce; otherwise the provisions of the article would not apply.

88. Mr. AGO had criticized the use of the term " fact " in the opening sentence of the article, but that was perhaps a matter of drafting and could be dealt with by the Drafting Committee.

89. Most members seemed to have rejected the suggestion that sub-paragraph (*a*) should be confined to express waivers, on the ground that that would be unduly restrictive because of the possibility of clearly implied waivers. On the other hand, he thought it would be appropriate to stipulate, as Mr. Ago had suggested, that the waiver must have been freely made.

90. He was not sure whether the Chairman's suggestion for redrafting sub-paragraph (*b*) would remove all the difficulties. He himself had suggested incorporating sub-paragraph (*b*) in sub-paragraph (*c*) for the same kind of reason as that given by Mr. Bartoš. As at present worded, sub-paragraph (*b*) might not always meet the case; for example, when there was some question of the severance of certain provisions. He had also been troubled by the kind of situation that could arise if there had been a breach of a treaty, when it would be clearly unreasonable to deprive a State of the right to denounce because it had tried to induce the other party to fulfil its obligations under the treaty. Thus some qualification of the wording used in sub-paragraph (*b*) would appear to be necessary. Perhaps some more general formulation could be devised by the Drafting Committee, combining sub-paragraphs (*b*) and (*c*).

91. As far as sub-paragraph (*c*) was concerned, he would have been content to retain the word " precluded " but if it was not generally acceptable, some other formulation might be devised to express the principle applied by the International Court in the *Temple* case and in the case of the *Arbitral Award made by the King of Spain*, as well as that emphasized by Judge Alfaro in his extremely interesting separate opinion. Again the matter was largely one of drafting.

92. An objection had been made to the reference to " essential validity " in sub-paragraph (*c*); the expression did appear in the title of section II and should be self-explanatory, but it could be replaced by an indication of the provisions to which article 4 related.

93. The point made by Mr. Verdross about the renunciation of certain rights under a treaty had come up during the discussion of some of the articles in section III concerning termination, and would have to be left aside for consideration at a later stage.

94. The CHAIRMAN suggested that article 4 be referred to the Drafting Committee in the light of the discussion.

It was so agreed.

The meeting rose at 6 p.m.

702nd MEETING

Tuesday, 18 June 1963, at 10 a.m.

Chairman: Mr Eduardo JIMÉNEZ de ARÉCHAGA

Succession of States and Governments: Report of the Sub-Committee (A/CN.4/160)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Chairman of the Sub-Committee on Succession of States and Governments to present the Sub-Committee's report (A/CN.4/160).

2. Mr. LACHS, Chairman of the Sub-Committee on Succession of States and Governments, said that the Sub-Committee had held a few preliminary meetings during the Commission's fourteenth session and had met again in January 1963. It was in compliance with the Commission's instructions of 26 June 1962 that he now submitted the Sub-Committee's report.

3. The results of the Sub-Committee's work were set out in the conclusions and recommendations contained in paragraphs 5 to 18. The Sub-Committee had reached its conclusions after very thorough discussion based on memoranda submitted by a number of its members. Before agreement could be reached, certain issues of substance and procedure had had to be settled.

4. The first of those issues had been whether succession of States and succession of governments should be treated as one topic or as two, and in the latter case, which should receive priority. It had been unanimously agreed that special attention should be given to problems arising out of the birth of new States and that issues connected with succession of Governments should be examined only in so far as was necessary to complement the study of what was regarded as the main subject. The Sub-Committee had then proceeded to consider the headings under which the subject should be studied, and from the much larger number originally contemplated, had reduced them to three. It had also made a detailed breakdown of the subject comprising four aspects. Special attention had been devoted to succession in relation to treaties and members of the Sub-Committee had dwelt at length on the general issue of universal and partial succession and on the types of treaty involved. The Commission's objective had been defined, in paragraph 8, as a survey and evaluation of the present state of the law and practice on succession, and the preparation of draft articles having regard to new developments in international law.

5. The Sub-Committee had also made certain procedural recommendations for co-ordinating the work of the Special Rapporteur on State succession and that of the Special Rapporteurs on the law of treaties, State responsibility and relations between States and inter-governmental organizations.

6. The Sub-Committee was grateful to the Secretariat for its valuable studies: " The succession of States in