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**Summary record of the 765th meeting**

Topic:  
**Law of Treaties**

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## 765th MEETING

Tuesday, 14 July 1964, at 10 a.m.

Chairman : Mr. Roberto AGO

Law of Treaties

(A/CN.4/167/Add.3)

(continued)

[Item 3 of the agenda]

ARTICLE 70 (General rules) [concerning the interpretation of treaties],

ARTICLE 71 (Application of the general rules),

ARTICLE 72 (Effective interpretation of the terms : *ut res magis valeat quam pereat*) and

ARTICLE 73 (Effect of a later customary rule or of a later agreement on the interpretation of a treaty)

1. Sir Humphrey WALDOCK, Special Rapporteur, introducing part III, section III, of his report (A/CN.4/167/Add.3), said that the commentary to section III set out as briefly as possible the considerations which had led him to formulate the four articles on the general interpretation of treaties and two further ones on the interpretation of plurilingual treaties.

2. The first question to be decided by the Commission was whether its draft should contain articles on interpretation at all, and naturally that question could hardly be answered without some idea of the form which such articles might take. In preparing a few possible fundamental provisions on the subject he had in some measure been inspired by the work of the Institute of International Law and of Sir Gerald Fitzmaurice in his private capacity in connexion with his studies of the jurisprudence of the International Court of Justice. He (the Special Rapporteur) had tried to take into account State practice, though evidence of it was difficult to obtain as not much was to be found in publications of State practice which for the most part were content to reproduce the decisions of international tribunals and were not concerned with the interpretation of treaties by States themselves.

3. Mr. TUNKIN said that as the time left for the discussion of the articles was very limited it was to be hoped that members would not touch upon doctrinal controversies and would restrict themselves as far possible to comments of a practical character.

4. Mr. BARTOŠ supported Mr. Tunkin's suggestion that members should make their statements brief. At the same time, however, he considered that the Commission

should have a little more time at its disposal to discuss the important articles concerning the interpretation of treaties.

5. Mr. PAREDES said that the Special Rapporteur with his customary scruple had pointed out the many difficulties which could arise in the interpretation of treaties. Rules on the subject were indispensable for purposes of application. The requirement of good faith in article 70, paragraph 1, was acceptable and in conformity with certain other provisions already adopted.

6. The reference to "context" in paragraph 1(a) should be dropped, for it was appropriate only when the inter-relationship of the different articles in a treaty was under consideration.

7. He added that in the Spanish text of the provision the word *ordinario* should be replaced by *corriente*.

8. Mr. BRIGGS said that, as between the alternatives which the Special Rapporteur mentioned in paragraph (8) of his commentary, viz. that the Commission could either omit the topic of interpretation from the draft or else seek to isolate and codify the comparatively few rules which appeared to constitute the strictly legal basis of the interpretation of treaties, he would choose the second course. In attempting such a task the Commission would be fulfilling the function laid upon it in article 15 of its Statute.

9. He strongly supported the approach adopted by the Special Rapporteur in articles 70 to 73 and thought it not inconsistent with the wise caution displayed in the Harvard Research Draft.<sup>1</sup> The canons of interpretation were not always rules of international law but, as Judge de Visscher had said, they were working hypotheses, and the Special Rapporteur's decision to distil the essence of such fundamental principles as could properly be treated as rules of international law was sound. Extensive State practice, precedent and doctrine permitted of the precise formulation and systematization of rules of the kind he had set out.

10. The Special Rapporteur had rightly emphasized the primacy of the text of the treaty as an expression of the intentions of the parties.

11. While generally in agreement with both the substance and the wording of article 70 — though he was somewhat bothered by the use of the word "natural" — he thought that there was not a sufficiently clear distinction between paragraphs 1 and 2 : the former was not exclusively concerned with the situation where the text of the treaty gave rise to no ambiguity or doubt as to its meaning.

12. Possibly the substance of paragraph 2 (a), referring to the objects and purposes of the treaty, might be transferred to the end of paragraph 1 (a) and the words "in addition to the means referred to in paragraph 1" might be inserted after the word "interpreted" in paragraph 2.

<sup>1</sup> See passage cited in footnote to paragraph (1) of the Special Rapporteur's commentary

13. He welcomed the provision contained in article 71, paragraph 2, to the effect that reference might be made to the subsequent practice of the parties for the purpose of confirming the meaning of a term in the treaty and believed that a cross-reference to that possibility should be included in article 70, paragraph 1.

14. In conclusion, he said that the Special Rapporteur with his moderate approach had given the Commission a challenging opportunity to reach agreement on some fundamental rules.

15. Mr. de LUNA said that, having been sceptical about the possibility of framing rules for the interpretation of treaties, he particularly admired the Special Rapporteur for having devised articles and written a commentary that were in general satisfactory.

16. There had been much discussion, notably in the Institute of International Law, on the interpretation of treaties, on the difference between the Anglo-Saxon and continental conceptions, on whether any rules existed, whether interpretation should be by reference to the text itself or to the intention of the parties, and on whether interpretation was governed by subjective or by objective criteria.

17. Article 70 of the Special Rapporteur's draft laid down the fundamental rule and the succeeding articles enumerated what might be regarded as the techniques to be applied. In articles 70, 71 and 72 the subjective and objective elements should be clearly separated. The confusion in article 71, paragraph 2, between authentic interpretation and interpretation reflected in State practice and the *travaux préparatoires* should be eliminated. In article 71, paragraph 1, the Special Rapporteur had possibly arrived at the opposite effect to that intended. There were two decisions of the International Court relevant to the use of the preamble for the interpretation of a treaty, namely that in *the United States Nationals in Morocco*<sup>2</sup> case and that in the *Asylum*<sup>3</sup> case.

18. It was difficult to distinguish between treaties laying down rules of conduct for States and those of a contractual type involving an exchange of benefits. The rules being drafted should not become a strait-jacket capable of frustrating, for example, the institutional development of international organizations. Obviously, there was a difference between an extensive and a restrictive interpretation of treaties of a contractual type and that of constituent instruments of international organizations.

19. He was least satisfied with article 72. The choice was not between giving effect to a treaty and allowing it to lapse, but between different degrees of effectiveness. According to one principle of international law an obligation did not exist unless it was proved, and in the present context that principle was more important perhaps than the rule that limitations on sovereignty could not be assumed to exist. There was an old maxim saying *in dubio pro libertate*.

20. Mr. CASTRÉN, after congratulating the Special Rapporteur on his draft, said he had at first been somewhat sceptical as to the possibility of drafting rules of interpretation acceptable to Governments but, after studying the draft articles and the commentary, he had been led to adopt a more positive attitude. The Commission might submit a preliminary draft on the question and await the response of Governments.

21. The Special Rapporteur appeared to have succeeded in finding a very satisfactory solution to the complex problems of the interpretation of treaties and to have accurately defined the boundaries of the subject. The Special Rapporteur had rightly refrained from going into detail and had not committed himself on the subject of restrictive and extensive interpretations, except in article 72, in which he had dealt with interpretation from the point of view of its effectiveness, an approach which he (Mr. Castrén) did not consider advisable. As a whole, the rules had been drafted in terms which were both general and concise; but there was a certain amount of repetition and some of the provisions might well be shortened.

22. In article 70, paragraph 1(a), it was perhaps unnecessary to repeat the words "in the context"; the whole passage following "in its context in the treaty" might perhaps be omitted. In paragraph 2(a), there was a reference to the "objects and purposes" of the treaty, which seemed again to indicate that the treaty should be interpreted as a whole. In any case, the words "in the context of the treaty as a whole" in paragraph 1(a) should be replaced by the words "in the light of the treaty as a whole", if only to avoid unnecessary repetition.

23. He proposed that the words "in the context of the treaty as a whole" in paragraph 2 should be deleted, for it was already stated in the preceding provision that a treaty had to be interpreted as a whole. For the same reason, the words "its context and" might be omitted from paragraph 2(a).

24. Mr. TABIBI paid a tribute to the Special Rapporteur's attempt to formulate articles on a controversial subject and to his scholarly commentary. The difficulty of the subject and the scepticism of some eminent jurists as to the value of rules on interpretation, which some claimed might create more problems than they solved, should not deter the Commission from trying to codify the rules. Furthermore it would be of great value to frame draft articles in order to elicit comments from Governments.

25. Personally, for the purpose of the interpretation of treaties, he would give greater weight to the intention of the parties — as had been the opinion of Sir Hersch Lauterpacht<sup>4</sup> — and he believed that that aspect should be dealt with in article 70 since it constituted the most important element of any general rule. To give effect to that idea he suggested that articles 70 and 71 should be combined.

<sup>2</sup> *Rights of Nationals of the United States of America in Morocco*, I.C.J. Reports, 1952.

<sup>3</sup> I.C.J. Reports, 1950.

<sup>4</sup> Cited in paragraph (4) of the Special Rapporteur's commentary.

26. Mr. AMADO said it was perhaps fortunate that the subject of the interpretation of treaties — which, as Lord McNair had said,<sup>5</sup> was one that could not be approached without trepidation — was being considered at the end of the session. He had been pleasantly surprised at the manner in which the Special Rapporteur had succeeded in picking his way through the jungle of notions on the subject and in drafting rules to deal with it.

27. Nevertheless, speaking from what he hoped would be regarded as a purely objective point of view, he wished to draw attention to certain aspects of the subject which were causing him some difficulty.

28. The resolution of the Institute of International Law, cited in paragraph (11) of the Special Rapporteur's commentary, stated "The agreement of the parties having been reached on the text of the treaty...". But Sir Gerald Fitzmaurice, quoted in paragraph (12) of the commentary, had written "Treaties are to be interpreted primarily as they stand" and had gone on to say at another point, in connexion with integration, "treaties are to be interpreted as a whole...". The opening passage of article 70 read "The terms of a treaty...". But, in fact, a treaty consisted of a number of texts, contexts and terms; what had to be interpreted was the treaty itself, not its terms. In any case, it was impossible to begin with the "terms".

29. He associated himself with Mr. de Luna's remarks on article 71, paragraph 2, in which too much emphasis was placed on "preparatory work".

30. He added that the Commission should not hesitate to mention the teleological aspects of treaties.

31. Mr. RUDA associated himself with the congratulations addressed by other speakers to the Special Rapporteur on his excellent report on a very difficult subject. The subject raised two general problems: the first, which was in fact a preliminary question, was whether any rules on interpretation should be included in the draft articles. If the answer to the first question was "yes", then the next problem was which of the two existing methods of interpretation should be given greater weight.

32. With respect to the first, and more interesting problem, the Special Rapporteur had made, in paragraphs (6) and (7) of the commentary, a distinction between principles or maxims of interpretation, which were apparently non-obligatory in character, and "methods of interpretation", where the position was different. Although he (the speaker) was not quite clear as to the exact scope and significance of the distinction between principles and maxims on the one hand and methods of interpretation on the other, he noted that, in paragraph (8) of the commentary, the Special Rapporteur went on to deal with both of them along the same lines. That paragraph opened with the statement that "Any attempt to codify the conditions for the application of principles whose appropriateness in any given case depends so much on the particular context

and on a subjective appreciation of varying circumstances would clearly be inadvisable" and that it was not possible to go any further than to formulate "a permissive provision simply stating that recourse may be had to the principles in question for the purpose of interpreting a treaty". The Special Rapporteur, however, then proceeded to reject that argument and to say that the Commission had the choice of either omitting the topic of interpretation of treaties altogether from the draft articles or else seeking "to isolate and to codify the comparatively few rules which appear to constitute the strictly legal basis of the interpretation of treaty". In conclusion, the Special Rapporteur had inclined towards the second of those two alternatives.

33. He agreed with the Special Rapporteur that, for the time being, the subject of the interpretation of treaties should find its place in the draft, but his opinion was based on different reasons. He considered that, at the present stage of development of international law, there did not as yet exist for States any obligatory rules on the subject of interpretation; he stressed that he was referring to rules binding upon States. At least, if any rules existed, they were subject to considerable doubt, except for the rule *in claris non fit interpretatio*, which had been first formulated by Vattel and which meant that there could be no question of interpretation where the sense was clear and there was nothing to interpret.

34. Interpretation occurred at two different levels. First, as between States, the only legally valid interpretation of a treaty was the authentic interpretation by the parties to the treaty. The other level was that of interpretation by arbitration, for which there were fundamental principles; that form of interpretation, however, fell outside the discussion because the Commission was engaged in drafting a convention between States.

35. Although he did not wish to imply that the Commission could not formulate rules in the matter, he stressed that those rules would not constitute a codification of existing law; they would represent proposals for the progressive development of international law. With a view to progressive development, rules could thus be submitted to States for their guidance in the interpretation of treaties. Such rules would have the advantage, from the theoretical point of view, of being conducive to the certainty of international transactions. From the practical point of view, as had been indicated by other speakers, it would be useful to submit to States draft articles on interpretation, so as to elicit from them specific comments.

36. On the second problem, the choice of method, he agreed with the approach adopted by the Special Rapporteur, who had taken the text of the treaty as the authentic expression of the intention of the parties.

37. He had reservations regarding article 72 and agreed with Mr. Amado's remarks concerning the reference to "the preparatory work of the treaty" in paragraph 2 of article 71.

38. Mr. ROSENNE said that he had had serious misgivings about the possible effect of including rules

<sup>5</sup> *Law of Treaties*, 1961, p. 364.

on interpretation in the draft on the exercise of powers of interpretation by third parties when that was permitted, particularly if they were international organizations and to some extent if they were international arbitral tribunals. He was less disturbed by the possible effect on the decisions by the International Court of Justice because under its Statute they would be final. His concern was that such rules might not contribute to the settlement of international disputes which so often appeared at first sight to be disputes concerning the interpretation of treaties, in that they might make it easier for a dissatisfied party to put forward arguments based on a claim that the decision by the third party had been *ultra vires* or was otherwise vitiated by a failure by the third party to follow the rules prescribed.

39. However, the generally permissive form of the rules proposed by the Special Rapporteur and the argument he had put forward in paragraph (8) of his commentary had gone far towards allaying these doubts and he had reached a conclusion similar to Mr. Ruda's that the Commission should include such articles in its draft. As the matter was a delicate one, not only its decision on the text, but also its decision on whether to include the section in the draft should, however, be provisional pending the receipt of observations from Governments, whose task would be facilitated if the Commission could provisionally formulate some rules on the topic.

40. He agreed with the Special Rapporteur's view concerning the importance of stressing the text of a treaty as the expression of the parties' intention and therefore as the point of departure for the whole process of interpretation, but also found merit in Mr. Tabibi's suggestion that an attempt should be made to amalgamate articles 70 and 71.

41. It should be appreciated that rules of the kind under consideration were valid only for treaties in the normally accepted sense of the term, and a general reservation should therefore be included in the text itself concerning the special problems created by the constituent instruments of international organizations referred to at the end of paragraph (24) of the commentary. He had been greatly impressed by the views put forward by Sir Percy Spender and Judge Koretsky<sup>6</sup> concerning the effects of practice and voting in international organizations and the inadvisability of equating that with subsequent practice of the parties to other kinds of treaties.

42. On a matter of drafting he suggested that the expression "World Court" should be avoided in the commentary as, in view of the decisions of the San Francisco Conference, it could be misleading to speak in the same breath of the International Court of Justice and the Permanent Court of International Justice.

43. In conclusion he expressed agreement with many of the drafting changes proposed concerning article 70.

44. Mr. PESSOU said that, as usual, the Special Rapporteur had succeeded in gathering most diverse and

interesting material. But it was precisely because the material was so abundant that it was difficult to formulate an exact and concise set of rules embodying all the rules and methods used in interpreting treaties.

45. Articles 70, 71 and 72 undoubtedly mentioned all the known methods of interpretation — *ratio legis*, the principle of the general context and the principle of effective interpretation.

46. He thought that the text would be clearer if the three articles were combined. He therefore proposed that they should be replaced by the following text :

"In the light of the context and of the general rules of application, the provisions of a treaty shall be interpreted in good faith in conformity with the objects and purposes of the treaty and with the intention of the parties at the time of the conclusion of the treaty."

47. Mr. TUNKIN said that he favoured the codification of the rules on the interpretation of treaties, particularly since there existed already a substantial body of precedents and State practice on the subject. The Commission should therefore endeavour to formulate, perhaps tentatively, a few rules on the subject in order to see what the reactions of Governments to those rules would be.

48. He found himself in general agreement with the Special Rapporteur's approach to the subject, but thought that article 70 should be shortened so as to state concisely the general rule in the matter, which was referred to in the commentary. He therefore suggested that article 70 should be reworded along the following lines :

"The provisions of a treaty shall be interpreted in good faith and in the context of the treaty as a whole and in the light of the basic principles of international law".

49. Such a provision would make it clear that, whenever interpretation was necessary because of some ambiguity in the provisions of the treaty, that interpretation should be made in the context of the treaty itself. If necessary, the general principles of international law would then be resorted to. As indicated by his suggested text, he preferred the formulation put forward by the Institute of International Law, which referred to "the principles of international law" and not to the rules of international law in force at the time of the conclusion of the treaty. The rules of international law which should be applied were those in force at the time of interpretation, particularly since there existed certain rules in respect of which States were not permitted to contract out.

50. Turning to the expression "the treaty as a whole", which he suggested should be retained in article 70, he stressed that he attached to it a somewhat different meaning from that given to the expression by the Special Rapporteur in his article 71. In article 1 of part I of the draft, the Commission had already defined a treaty as capable of consisting either of a single instrument or of two or more inter-related instruments.<sup>7</sup> Accord-

<sup>6</sup> Case of *Certain Expenses of the United Nations*, I.C.J. Reports, 1962.

<sup>7</sup> Yearbook of the International Law Commission, 1962, Vol. II, p. 161.

dingly, the expression "treaty as a whole" meant all the instruments that together formed the treaty and could include such instruments as additional protocols.

51. He suggested that article 73 should follow immediately after article 70, because article 73 indicated what might be termed second degree sources of interpretation. As far as the items to be included in article 73 were concerned, he suggested that first place might be given to the contents of sub-paragraph (b), although perhaps they raised more a question of conflicting treaties than one of interpretation. The provisions of sub-paragraph (c) would come next, followed by a sub-paragraph covering subsequent agreements on interpretation.

52. He suggested that the provisions at present in article 73 should be followed by those in article 72 which dealt with subsidiary sources of interpretation. The reference to "the preparatory work of the treaty" (*travaux préparatoires*) would find its place in that article.

53. Paragraph 2 of article 70 could be omitted, since its contents should be covered by the subsequent articles. In particular, the reference in sub-paragraph (a) to the objects and purposes of the treaty should be moved to article 72; the contents of paragraph 2 (b) should be covered by article 71.

54. He considered that paragraph 3 should be omitted from article 70, but did not have strong feelings on the subject.

55. Mr. YASSEEN said that in his view it was necessary and indeed essential that the draft should contain some articles on interpretation, which made it possible to determine the exact meaning of a treaty. But excessive detail should be avoided; the Commission should confine itself to the leading principles governing interpretation and especially to the rules reflecting the special nature of a treaty as the expression of the will of several different parties. In general, the Special Rapporteur's draft articles satisfied that requirement.

56. He approved the Special Rapporteur's approach to the subject matter of article 70. The text of the treaty should form the basis of any inquiry into the scope and meaning of its provisions; but interpretation could not be confined to the context of the treaty, for a treaty also had to be regarded as an expression of will in the light of the legal order in force at the time of its conclusion.

57. He disagreed with Mr. Tunkin, but only with respect to the form. His (Mr. Yasseen's) view was that interpretation was a method of ascertaining the exact meaning of a text or of a rule of law. In principle, the parties, in preparing the text of the treaty, took into account the legal order prevailing at the time when it was concluded. Like Mr. Tunkin, he considered that, at the time of its application, a treaty could not be incompatible with the fundamental rules of the legal order then in force; but what was really involved was not interpretation but modification, the limitation of the scope of a particular rule in the light of new rules.

Interpretation in the true sense should be based on the legal order in force at the time of the conclusion of the treaty.

58. He therefore regarded the draft rules as accurate; but he wished to emphasize that it was not the "terms" but the "provisions" of the treaty which had to be considered, for literal interpretation, covered by the rule in article 70, paragraph 2, was only one aspect of interpretation in the legal sense.

59. Paragraph 3 also referred to the literal meaning; the provision which it contained was useful, but it was necessary to go further and to determine how one could ascertain that the parties had wished to attach a special meaning to the terms used.

60. Mr. VERDROSS congratulated the Special Rapporteur on his draft and said that he supported Mr. Tunkin's proposal for simplifying the text.

61. Who would be bound by the rules? In the first place, it would be the judicial or arbitral body to which a matter was referred by the parties for decision; secondly, a State wishing to interpret a treaty which it had concluded would take the rules as a guide. But, in a case where two States had concluded a treaty, they would not be bound by the rules in question because they could agree to use other means of interpretation. That was a fact that should at least be mentioned in the commentary. Furthermore, when a quasi-legislative body like the General Assembly interpreted the Charter of the United Nations by a document like the Declaration on the granting of independence to colonial countries and peoples, it would not be bound by the rules of the articles of the draft.

62. He agreed with Mr. Tunkin that article 70, paragraph 1, should be based on the text of the resolution of the Institute of International Law.

63. Mr. BARTOS expressed his appreciation of the Special Rapporteur's draft which he found acceptable, though he had a few remarks to make on points of principle.

64. The draft articles were based on the general concept, so dear to the English school of legal thought, that interpretation meant interpretation of the text rather than of the spirit of a treaty. Like Mr. Tunkin, he thought it would be better to take as a basis the general principles of international law than to concentrate on the "terms" of the treaty. He did not greatly favour the exegetical method in international law. Where interpretation was concerned, the autonomy of the will of the parties was paramount. What the parties had intended was more important than what they had actually said in the treaty.

65. The Special Rapporteur proposed in article 71, paragraph 2, that for the purpose of determining the parties' intention recourse should be had to what were in fact secondary elements, such as the preparatory work and the circumstances surrounding the conclusion of the treaty. It was preferable to use objective criteria, even for determining the meaning of treaties.

66. He shared Mr. de Luna's view that the question of authentic general interpretation should be dealt with first and arbitral interpretation afterwards. The articles made no reference to arbitral interpretation, which was binding on the parties irrespective of their intentions and which was a source of subsequent interpretation.

67. Mr. Verdross had rightly pointed out that it was judicial or arbitral bodies which would have to apply the rules formulated by the Commission; in that case, he considered that not only would those rules be general but the convention on the law of treaties would be binding on States parties to it and would form a part of the body of rules which a tribunal would take into account.

68. In his view the interpretation of a treaty should be based on the general spirit of the treaty. The two concepts—his own and the Special Rapporteur's—were difficult to reconcile, since there was a question of primacy. He might offer further comments at the second reading of that part of the draft.

69. With regard to the drafting of the articles, he drew attention to a minor point in article 71, paragraph 2 (b), in the French text: was it certain that the words *cet article* referred to article 70? In sub-paragraph (c) the expression *dudit article* was used.

70. Article 73 laid down, not rules of interpretation but the rules to be followed to bring the text of the treaty into line with certain juridical practices emerging later. The matter lay mid-way between the institution of interpretation and that of the modification of the treaty by *jus superveniens*.

71. Mr. AMADO said that the word "provisions" suggested by Mr. Yasseen and Mr. Tunkin was hardly more satisfactory than the word "terms". According to article 71 the treaty as a whole included the preamble; though the preamble was in fact part of the treaty it contained no "provisions".

72. Mr. TSURUOKA, after associating himself with the speakers who had congratulated the Special Rapporteur, pointed out that the group of articles under consideration indicated how treaties should be interpreted but did not specify who was to interpret them. In international practice many disputes arose from the fact that a third Power sought to interpret a treaty concluded between other parties. It would be desirable to mention that question either in the articles or in the commentary.

73. Mr. PAL commended the Special Rapporteur for his enlightening commentary which set out most clearly the grounds on which the articles on interpretation were based.

74. The discussion of the articles on interpretation one by one was based on the assumption that the Commission accepted the idea of including articles on interpretation in the draft articles on the law of treaties. For his part, he would make some brief comments on that assumption.

75. With regard to the formulation of article 70, the Commission had before it the proposal by the Special

Rapporteur and the alternative put forward by Mr. Tunkin. He personally inclined in substance in favour of the formulation submitted by the Special Rapporteur. Mr. Tunkin's formulation seemed too general for the Commission's purpose; he agreed, however, with his remarks on article 73.

76. Subject to those observations, he expressed himself in general agreement with the Special Rapporteur's articles 70 to 73.

77. The CHAIRMAN said that no decision could be taken on the question whether the Commission's draft should include rules concerning the interpretation of treaties. No member had proposed that such rules should not be included in the draft. At most, the articles under consideration should be considered to be of an even more provisional nature than the rest of the draft.

78. Speaking as a member of the Commission, he said that he had found the Special Rapporteur's arguments convincing. Some members had asked who would observe the rules to be formulated by the Commission. His reply to that question was that the Commission was not creating *jus cogens*. If the parties agreed to interpret the treaty in another way, there was nothing to prevent them from doing so; but that would no doubt occur rarely, for those rules were eminently reasonable. They would be useful in a number of ways: in eliminating uncertainty in the law, which was the basic purpose of codification, and in facilitating the work of arbitral bodies, but particularly between the parties and even in the case cited by Mr. Tsuruoka, where a State sought to interpret a treaty to which it was not a party. Between the parties themselves, those rules could facilitate the settlement of disputes concerning the interpretation of treaties.

79. The principles embodied in the articles were, on the whole, sound. The Special Rapporteur proposed that the interpretation should be based first on the text of the treaty and secondly on the context; where the text was obscure, he proposed that recourse should be had to subsidiary methods. That was what happened in practice. Vattel's rule, cited by Mr. Ruda, was in fact implicit in the proposed articles. For his part, he would prefer not to lay too much stress on that rule, which was also a trap, used by those who refused to interpret the treaty according to common sense. There were cases where two States both found a treaty perfectly clear but interpreted it in two different ways.

80. On the question of the form to be given to the articles, he was inclined to share Mr. Tunkin's view, and he would even go a little further. Article 70, paragraph 1, could be redrafted to read:

"Treaties shall be interpreted in good faith in accordance with the ordinary meaning of each term in the context of the treaty and in the light of the principles of international law."

That wording would permit the elimination of the word "terms", which had a broader meaning than the corresponding word in French. It would also permit the elimination of the word "natural", which he would find

it difficult to accept, since the meaning of a term was a convention created by the human mind. The last phrase, "and in the light of the principles of international law", was in line with Mr. Tunkin's suggestion. The Commission should stop there, without specifying whether the principles in question were those in force at the time of the conclusion of the treaty. He was inclined to share Mr. Yasseen's view on the subject; in the case envisaged by Mr. Tunkin, where a new rule of *Jus cogens* appeared, it was not a matter of changing the interpretation of the treaty but of the treaty's becoming partly or wholly void.

81. After that paragraph, the Commission might add as paragraph 2 what was at present article 71, paragraph 1, the definition of "context". The first phrase of that paragraph would be worded: "The context of the treaty shall be understood as comprising in addition to the entire text of the treaty". Next would come sub-paragraphs (a), (b) and (c) as they appeared at present in article 71, paragraph 1.

82. As paragraph 3, the Commission could use the existing paragraph 2 of the article 70, amended to read:

"If in the context the meaning of a term seems to be obscure or ambiguous, its meaning shall be determined by means of the rules of interpretation set out in the following articles."

The present paragraph 3 of article 70 was not indispensable; the new paragraph 3 which he proposed would be more suitable for concluding the first article of section III.

83. While he made that proposal in his personal capacity, he had taken into account the remarks made by the members of the Commission.

84. Mr. PESSOU suggested that the word "ordinary" before the word "meaning" should be replaced by the word "usual".

85. Mr. de LUNA found the Chairman's proposal sound. However, as he shared Mr. Bartoš's concern, he regretted that it deferred mention of the objects and purposes of the treaty to the following articles. In his view, the objects and purposes were an integral part of the treaty, and all the intrinsic methods or interpretation should be exhausted before recourse was had to extrinsic methods. For that reason he suggested that the objects and purposes of the treaty should be mentioned in the definition of the context of the treaty proposed by the Chairman.

86. The CHAIRMAN pointed out that according to article 70, paragraph 2, as proposed by the Special Rapporteur, the objects and purposes of the treaty were taken into consideration only if the ordinary meaning would lead to an absurd or ambiguous interpretation. In the wording which he had proposed, he would prefer that the objects and purposes of the treaty should be mentioned in the first paragraph.

87. Sir Humphrey WALDOCK, Special Rapporteur, said that, when he had drafted paragraph 1 of article 70 and in particular the passage referring to "the context

of the treaty as a whole", he had had very much in mind the objects and purposes of the treaty. It was, however, in paragraph 2 that he had found it necessary to spell out that point because it would be difficult to formulate any basic rule for the cases envisaged in paragraph 2 where the meaning was in doubt without a statement that the interpretation should be dominated by the objects and purposes of the treaty. He realized, however, that some discrepancy in the drafting became apparent when a comparison was made between paragraphs 1 and 2.

88. If the Commission were to consider the adoption of the text suggested by him, it would be necessary to add, after the words "in the context of the treaty as a whole" a passage along the following lines: "and taking into account its objects and purposes".

89. The CHAIRMAN accepted the Special Rapporteur's suggestion: the words "and with due regard to the objects and purposes of the treaty" should be added to the paragraph 1 which he had proposed.

90. Mr. TUNKIN said that the fate of article 70, and in particular whether its paragraph 2 should be retained or not, would depend very largely on the formulation of a subsequent article. For his part, he considered that paragraph 2 was unnecessary because its contents should be covered by the following articles.

91. Mr. BARTOŠ said that he had not proposed any amendments to the articles because he considered that his view and that of the Special Rapporteur could hardly be reconciled. The Special Rapporteur had not taken the objects and purposes of the treaty as the starting point for the purposes of its interpretation; instead of going from the general to the particular he went from the particular to the general, in proposing in article 70, paragraph 2, that in the event of ambiguity or obscurity the objects and purposes of the treaty should be considered. He suggested that perhaps at the second reading an introductory article might be proposed in which the treaty as a whole, including its objects and purposes, would be the basis of any interpretation.

92. The CHAIRMAN pointed out that his proposal, as revised, should to some extent allay Mr. Bartoš's concern for it referred to the objects and purposes of the treaty, not in the rule concerning the special case of an absurd or ambiguous interpretation but in the general rule to be stated in paragraph 1.

93. Mr. YASSEEN considered that the wording proposed by the Chairman improved the text of article 70. However, it would be regrettable if the Commission neglected a very important point, namely that the principles of the international order which should be taken into consideration were those prevailing at the time of the conclusion of the treaty. It should not be difficult to reach a compromise by modifying article 73. If article 70 expressly stated that the rules of law in force at the time of the conclusion of the treaty should be taken into consideration, then it would be possible, in reliance on such a provision, to give the treaty a definite meaning. It would suffice subsequently to modify ar-



title 73 to state that where that meaning was incompatible with rules of *jus cogens* emerging after the conclusion of the treaty, the meaning should be altered in conformity with those rules.

94. Sir Humphrey WALDOCK, Special Rapporteur, said that he agreed with Mr. Yasseen but thought that the point was a formal one; there was not much difference in substance between himself and Mr. Tunkin. The reference in paragraph 1 of article 70 should be to the interpretation of a treaty in the context of the rules of international law contemporary to its conclusion. The question of substance raised by Mr. Tunkin was covered by article 73, sub-paragraph (a), which dealt with the emergence of any later rule of customary international law affecting the subject-matter of the treaty; that provision would cover also the emergence of a rule of *jus cogens*.

95. The purpose of paragraph 1 (b) of article 70 was to cover such matters as the need to interpret a treaty in the light of the linguistic usages of the law at the time of the conclusion of the treaty. Clearly, only the contemporary law would be relevant from that point of view.

96. Lastly, in view of the inter-relation of the articles on interpretation, it was not possible to appreciate the Chairman's proposed article 70 unless his views were known on what should be the contents of the following articles.

97. The CHAIRMAN said that, to his mind, the following articles should be along the lines of those proposed by the Special Rapporteur.

The meeting rose at 1 p.m.

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### 766th MEETING

Wednesday, 15 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

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#### Law of Treaties (A/CN.4/167/Add.3)

(continued)

[Item 3 of the agenda]

ARTICLE 71 (Application of the general rules) [concerning the interpretation of treaties]

1. Sir Humphrey WALDOCK, Special Rapporteur, introducing article 71 of his draft (A/CN.4/167/Add.3),

said that he had little to add to his commentary; in particular, the controversy regarding the value, for purposes of interpretation, of the preparatory work of a treaty was well known.

2. Difficulties of interpretation arose in the cases, envisaged in paragraph 2 of article 70, where the text of the treaty itself was not sufficient to elucidate its meaning and it became necessary to have recourse to other means of interpretation.

3. There existed general agreement on the importance of the subsequent practice of the parties in relation to a treaty. However, it was only when that practice was concordant that it could be regarded as having the value of an authentic interpretation. In the case of multilateral treaties, the subsequent practice of only some of the parties was not automatically excluded as a means of interpretation; if it did not cover a broad group of parties it would, of course, only serve as an indication, and more evidence would be required in support of the alleged interpretation. It was for that reason that he had dealt with the matter of subsequent practice in two different provisions, in paragraph 2 of article 71 and in article 73. In article 73, the subsequent practice mentioned was the concordant practice of all the parties to the treaty, which gave a clear indication of their authentic interpretation of the treaty.

4. The CHAIRMAN, speaking as a member of the Commission, said that he entirely agreed with the principles stated in paragraph 2 of article 71, even though not everything set out in sub-paragraphs (a), (b) and (c) was entirely necessary and the paragraph might accordingly be drafted more concisely.

5. Experience had convinced him of the importance of the three elements referred to in the paragraph, and not least of the preparatory work. It would be hard to understand exactly what the intentions of the parties had been without reference to the *travaux préparatoires*, the term being taken in its broadest sense, akin to the English "legislative history". Secondly, it could happen that some of the intentions of the parties were not reflected in the preparatory work but might be inferred from the circumstances surrounding the treaty's conclusion. Thirdly, the subsequent practice of parties in relation to the treaty was a reliable guide for the purpose of its interpretation, but that was true only of the concordant practice of the parties, for any unilateral practice which was disputed by the other parties was not an element of interpretation. Accordingly, it would have to be specified that the subsequent practice to be taken into account in the interpretation of the treaty had to be concordant.

6. Mr. BRIGGS said that he supported the contents of both paragraphs of article 71.

7. In paragraph 1, as a matter of drafting, he considered that sub-paragraph (a) was unnecessary. In addition, sub-paragraphs (b) and (c) could be incorporated into the opening sentence. He therefore suggested that paragraph 1 should be reworded along the following lines: