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**Summary record of the 777th meeting**

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

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

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

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

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

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

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

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

The meeting rose at 1.5 p.m.

## 777th MEETING

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

Chairman: Mr. Milan BARTOŠ

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

### Appointment of a Committee on the Distribution of Documents

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

*It was so agreed.*

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

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

### Appointment of a Drafting Committee

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

*It was so agreed.*

### Law of Treaties

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

*(resumed from the previous meeting)*

[Item 2 of the agenda]

### ARTICLE I (Definitions)

#### Article 1

#### Definitions

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

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

<sup>1</sup> *Yearbook of the International Law Commission, 1964, Vol. II, p. 227.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. The Commission had had good reasons for not making a detailed study of treaties concluded between "other subjects of international law", in particular, treaties concluded between States and international organizations and treaties concluded between international organizations; but it had certainly not meant to deny the existence of such treaties or their binding force in international law. He therefore proposed that the new formula suggested by the Special Rapporteur for article 1, paragraph 1 (a) be adopted with a few changes, and that a new paragraph be added to article 2<sup>3</sup> reading: "The fact that the present articles do not, except to the extent that the particular context may otherwise require, apply to international agreements other than treaties as defined in article 1, paragraph 1 (a), shall not be understood as affecting the legal force that such agreements possess under international law". That suggestion should be adopted if the Commission adopted the formula proposed by the Special Rapporteur and retained article 2, paragraph 2.

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

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

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

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

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

<sup>3</sup> Text of article 2:

" Scope of the present articles

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

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

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

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

2. The fact that the present articles do not apply

(a) to international agreements not in written form,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34. With regard to the definitions article, he was not in favour of replacing the opening phrase of the English text by wording similar to that used in the French version; the text which had been put forward on those lines<sup>5</sup> did not bear close scrutiny. The definition of a " treaty " in paragraph 1 (a), should be retained, but without the enumeration. He did not believe it was a sound idea to introduce a reference to the intention of the parties into that definition, for the reasons given when the Commission had first discussed articles 1, 2 and 3 at its fourteenth session.<sup>6</sup>

<sup>5</sup> Para. 16 above.

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

<sup>4</sup> Para. 65.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so decided.*<sup>7</sup>

The meeting rose at 1.5 p.m.

<sup>7</sup> For resumption of discussion, see 810th meeting, paras. 10-27.

## 778th MEETING

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

Chairman : Mr. Milan BARTOŠ

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

## Law of Treaties

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

(continued)

[Item 2 of the Agenda]

### ARTICLE 1 (Definitions) (continued)

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

*It was so decided.*<sup>1</sup>

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

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

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

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

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

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

<sup>1</sup> For resumption of discussion, see 820th meeting, paras. 15 and 16.

<sup>2</sup> *Yearbook of the International Law Commission, 1962, Vol. II, p. 164.*