Document:-
A/CN.4/SR.793

Summary record of the 793rd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
1965, vol. I

and voted on by all conferences convened to draw up general multilateral treaties. Why, then, should any such treaties be silent on that question? Only because proposals on the subject had been rejected. It was not irrelevant to recall that at most conferences, a two-thirds majority was needed for the adoption of any provision of substance. A one-third minority, plus one vote, was therefore enough to reject any proposal of that kind. Consequently, it was not unreasonable to say that a proposal similar to the formula currently prevailing in international practice could be rejected by a minority, plus one vote, supporting the " any State " formula, with the consequence that the treaty would not contain any provision concerning the States to which it would be opened. In such a case, it would be absurd to argue that the will of most of the States participating in the conference was presumed to be in favour of the " any State " formula.

21. In his opinion, therefore, the " any State " formula, as a presumptive rule, was often unjustified, and the argument advanced for its inclusion in the draft convention was unsound.

22. Article 8, paragraph 1, should either be drastically amended or else be omitted altogether.

23. The CHAIRMAN, speaking as a member of the Commission, said that at a diplomatic conference to which a text prepared by the International Law Commission was submitted a two-thirds majority would be needed to reject it; if there was no such text, a simple majority would be sufficient to approve a text in committee, and a two-thirds majority would be necessary to adopt it in the plenary. It was therefore the forces at work in a diplomatic assembly rather than the drafting which were the decisive factor.

24. Accordingly, the problem for the Drafting Committee was to find one formula or two alternatives. If the Commission rejected every formula, however, as from time to time it was inclined to do, it would leave the diplomatic conference in a most embarrassing position for at such meetings the major obstacle was often the lack of a basic text.

The meeting rose at 5.50 p.m.

793rd MEETING

Tuesday, 1 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr.Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tabibi, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

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

(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. CADIEUX said that he would base his statement on his experience as an adviser to the Government of his country, not only on the legal aspects of the problem but also on its broad foreign policy aspects, particularly as it raised closely interrelated legal and policy considerations.

3. Neither the comments submitted by governments nor the arguments which had been adduced in support of article 8, paragraph 1, had caused him to alter the views which he had expressed in 1962.[2]

4. In support of the formulation of article 8, it had been suggested that it constituted an acceptable compromise. In fact, that formulation did not represent a compromise between the view that general multilateral conventions should be open to any State and the view that the article should reflect the existing United Nations practice on the question. A real compromise would favour neither position, and might, for instance, leave it to the States to decide the issue at each conference, with no presumption either way. Even such a solution, however, would depart from the existing practice and, to that extent, would take sides on the issue. In the circumstances, the deletion of the article was perhaps the only compromise that the Commission could reach. At any rate, neither the 1962 version nor the new text proposed by the Special Rapporteur constituted a compromise, since they laid down a presumption contrary to the existing United Nations practice and put the onus on every conference of accepting or rebutting that presumption.

5. It had also been suggested that article 8 constituted progressive development. In his view, the mere desirability of developing an article on participation was by no means universally accepted, and the formulation of a rule on what was a highly contentious question could well exacerbate the very dispute which the Commission was trying to solve. The discussions in the Commission and in the Sixth Committee, and the written comments by Governments all showed that the question constituted a serious political problem, a fact which must be accepted.

6. From the practical point of view, since the Commission had not provided an adequate legal definition of the term " general multilateral treaty ", article 8 would open for every conference the question whether a general multilateral treaty was in issue. An unnecessary complication would be introduced into the multilateral treaty-making processes. The question of participation in a conference would be debated in the United Nations, then that of accession would be debated in the conference

[1] See 791st meeting, preceding para. 61, and para. 63.

[2] See *Yearbook of the International Law Commission, 1962*, Vol. I, 667th meeting, paras. 7-10.

and, finally, it would be left to the Secretary-General to determine whether various entities constituted " any State " or not; in many cases it might be necessary for him to raise the matter again in the United Nations.

7. Moreover, the Commission, as the organ of the United Nations, could not lightly create for the Secretary-General, as depositary, problems which were well illustrated by the conclusion of the statement made by the Secretary-General in the General Assembly in 1963;

> " . . . if the ' any State ' formula were to be adopted, I would be able to implement it only if the General Assembly provided me with the complete list of the States coming within that formula, other than those which are Members of the United Nations or the specialized agencies, or parties to the Statute of the International Court of Justice ".[3]

8. To the argument that the fate of the draft convention on the law of treaties was at stake, he would reply that it was precisely the 1962 formulation which could jeopardize the position of the convention, and that the more extreme formulations since proposed could effectively kill its chances of general acceptance. The existing practice reflected the majority view and it would be unwise to favour what so far had in effect been the minority view. The proposed formula would give one-third plus one of the States in a conference the right to dictate to the others who should be allowed to accede to the treaty, so that it was not the majority view which would necessarily prevail. Some governments might well decline to participate in certain conferences in the face of the presumption embodied in article 8.

9. With regard to the problem of recognition, it was unquestionable, from the legal point of view, that participation with an unrecognized régime in a multilateral treaty open to general accession did not give rise to an implication of recognition. At the same time, it was not possible to ignore the fact that certain unrecognized régimes did use their participation in multilateral treaties as an argument to enhance their status. It was therefore an over-simplification to say that the question of recognition could be ignored : it was part of the complex political problem raised by article 8.

10. The most important argument adduced in support of the 1962 formulation, however, or a more extreme version of it, was that it was of the essence of general multilateral treaties that they should be open to acceptance by all States, and that to state otherwise would be contrary to the principle of the sovereign equality of all States. In fact, it would be illogical to exclude certain entities from a conference and subsequently permit them to accede to the treaty resulting from that conference. Treaties resulted from the meeting of minds and the establishing of a consensual relation; the question of participation in a treaty should therefore always be left to the decision of the States participating in a conference, as the only solution consistent with their sovereign equality.

11. It had also been suggested that all States must be permitted to participate in the formulation of rules of *jus cogens*. That argument presupposed that the entities which were being excluded constituted States; it also assumed that a State must accede to a multilateral convention in order to participate in the law-making process. In fact, the universality theory did not apply either to the codification of customary international law or to the conventional law-making processes.

12. It was generally accepted that a rule of customary law could develop through the practice of a large number of important States, or even relatively small numbers of States important in a particular field, such as, for instance, the maritime nations. Rules of customary international law developed whether or not every member of the international community accepted them. Entities claiming recognition as independent States must in any case apply the customary rules of international law; otherwise the question would arise for some States whether they should ever be recognized.

13. As for conventional rules, if they were the result of codification, every entity claiming to be a State was already bound to accept them : if they constituted progressive development, there was nothing to prevent those entities from declaring unilaterally their intention to be bound by them.

14. It was therefore clear that for those entities to become bound by generally accepted rules of international law or by rules considered desirable by the international community as a whole, it was not necessary to depart from the well-established practice of the organized international community.

15. While it was thus scientifically inaccurate to say that every State must participate in the formulation of a peremptory norm, it was clear that such a theory benefited the larger States more than the smaller ones: a large and powerful State could perhaps refuse to be bound by a norm accepted by virtually all other States, but not so a small State.

16. The Nuclear Test Ban Treaty, and the unusual depositary arrangements adopted for it, showed that when political considerations militated in favour of opening a general multilateral treaty to all States, that result would be achieved with or without an article such as article 8. Furthermore, making accession available to all States did not mean that all States would in fact accede.

17. Experience had shown that the " any State " provision was not a decisive element in determining whether the provisions of the treaty were, or could develop into, a binding rule of international law. The Charter of the United Nations, which was the classic example of a law-making treaty, enshrined many fundamental principles of international law, some of which were perhaps *de lege ferenda* at the time of its drafting, while others were already *lex lata*. Yet no one could doubt that the Charter constituted a general multilateral treaty laying down rules of *jus cogens*, despite the restrictions on accession contained in its Article 4.

18. It had been suggested that the present practice in the matter was an outcome of the cold war, but regardless of the position in that respect, it was obvious that the Commission could not eliminate the cold war

[3] See *Official Records of the General Assembly, Eighteenth Session, Plenary Meetings*, 1258th meeting, para. 101.

by adopting article 8. The members of the international community, as Members of the United Nations, could not refuse to allow certain entities to accede to the Charter, which was the most important of all law-making treaties, and at the same time allow those same entities to accede to less important law-making conventions.

19. The Commission was not called upon to take sides in an important political dispute, but to see whether it could devise a formula which could be of assistance to the international community. If the Commission was unable thus to be of assistance, it was better to abandon the attempt than to adopt a formulation which ran counter to the existing practice and did not seem to meet the requirements of a new rule, in other words, to be incontrovertible on purely scientific grounds and broadly acceptable politically. He had therefore reached the conclusion that it was best to omit article 8 altogether.

20. Mr. YASSEEN said he did not think that the Commission should change the decisions it had taken in 1962 with regard to article 8. Paragraph 1, in particular, embodied a reasonable rule so far as general multilateral treaties were concerned. Admittedly, the unanimity rule existed and dominated the whole of the law of treaties; its consequence was that every State was free to choose its partners and that no State could be compelled to conclude a treaty with a partner not of its own choice. Yet general multilateral treaties were in a class apart, in that they related to questions affecting the entire international community or were designed to codify, or even to create, general rules of international law. How then, should the question of participation in such treaties be settled?

21. In his view, paragraph 1, as adopted by the Commission in 1962, reconciled the unanimity principle with the special requirements of treaties that were intended to be universal. The paragraph was cautious, for it did no more than raise the presumption—applicable not in all cases, but only in those where the treaty itself contained no provisions on participation—that all States could become parties to the treaty by reason of the treaty's object and nature.

22. Furthermore, paragraph 1 achieved a compromise between two opposing schools of thought. According to one, general multilateral treaties were open by virtue of the international public order and of *jus cogens*. Without expressing a value judgement on that theory he would emphasize that it did exist and that it was supported by strong arguments. According to the opposing theory, no participation was possible except by virtue of the treaty itself; if, therefore, the treaty was silent, its silence was construed as meaning that the treaty was not open to all States. In his opinion, that theory went too far, for it disregarded the realities of the modern world. On the contrary, paragraph 1 recognized the role which general multilateral treaties were called upon to play in international relations.

23. Various practical objections had been advanced against the proposed rule. It had been said, in particular that it would cause many difficulties. But those difficulties would disappear if, in accordance with a principle that had gained acceptance, participation in general multilateral treaties were dissociated from the question of recognition.

24. It had also been said that the rule would place the depositary in an embarrassing position. He did not think that that argument was sound, for the depositary could not decide whether an entity wishing to participate in a treaty was or was not a State. The Secretary-General and the Legal Counsel had been right to stress that that was a highly political question that fell outside the competence of the United Nations Secretariat as depositary. It also fell outside the competence of the depositary if the depositary was a State. While it was true that the question of participation by an entity whose status was contested might cause disputes between the parties, it was equally true that many other disputes could arise in the application of the rules of international law.

25. The paragraph was cautious, it did not go too far, and, as the Special Rapporteur himself had said, it did not raise insurmountable difficulties. The Commission should remember that in drafting a general convention on the law of treaties it was working for an unlimited future; it should not therefore allow itself to be influenced by ephemeral political considerations or by political attitudes which could change unexpectedly fast.

26. Mr. ELIAS said that in 1962, he had taken the view that general multilateral treaties should be open to participation on as wide a basis as possible. He therefore regarded paragraph 1 of article 8, which had been accepted in that form by the majority of the Commission, as an acceptable compromise between the two opposing views on the subject.

27. The main argument put forward against the provisions of article 8 was that they violated the principle of the freedom of the original parties to a treaty to determine who could become a party to it. But there were other ways of protecting interests of a non-universal character. The Commission had considered in 1962 the notion of a " plurilateral treaty ",[4] a notion which it had wisely dropped, to describe such multilateral treaties of a special character as the Charter of the Organization of American States and the Charter of the Organization of African Unity. In fact, the original parties could always conclude a treaty in such a form as to exclude the possibility of accession by certain parties to whom they might have objection. To take one example, no State in Africa, Asia or Europe would wish that the Organization of American States should be open to it. There was no suggestion either that article 8 should affect in any way such organizations as the North Atlantic Treaty Organization or the South-East Asia Treaty Organization which, by their very nature, were specialized and limited to a certain area or to certain group interests. It was merely suggested that, in the case of general multilateral treaties of universal interest, it was the principle of the open door that must be maintained.

28. A previous speaker had stated that non-participation in a general multilateral treaty would not necessarily affect the universal character of the rules that might emerge from that treaty. That argument might

[4] See *Yearbook of the International Law Commission, 1962*, Vol. I, 642nd and 643rd meetings.

have been valid before the outbreak of the Second World War, when a group of States could lay down rules regarded as binding upon all States. The modern trend, since 1945, was that, as far as possible, international organizations and international treaty-making processes should be open to as great a number of States as possible. In other words, there should be an increasing participation by the newer States in the United Nations, in its organs such as the Security Council, and in the specialized agencies. Such participation would not, of course, of itself make those States follow or accept the rules laid down; they did not need to have participated in order to be bound by generally-accepted rules of international law. However, it was desirable that, as far as possible, there should be an increasing participation by States other than those which had had responsibility for making the rules of international law, whether conventional or customary. In particular, the possibility of becoming parties to multilateral treaties was particularly important to the new nations, and it was inconceivable that they would henceforth accept any development in the international field that might still appear to reserve the process of law-making to a group of States.

29. Another speaker, who had expressed a preference for maintaining the present United Nations arrangements in the matter, had admitted that the United Nations Charter could be regarded as containing elements that were both *de lege ferenda* and *lex lata*. Since the Charter contained elements of progressive development, there was no reason why that process should not continue, and the Commission would do no violence to the development of international law if it adopted the principle embodied in paragraph 1 of article 8.

30. With regard to the problem of the depositary, he had not been convinced by the arguments derived from the practice of the League of Nations with regard to multilateral treaties. General Assembly resolution 1903 (XVIII) of 18 November 1963, which the Special Rapporteur cited in his report, did not go much further than the Vienna Convention on Consular Relations[5] concluded in April of that year, and merely confirmed the pre-existing restrictive practice. Personally, he felt that it was possible for the United Nations to be persuaded to abandon that restrictive practice.

31. In paragraph 3 of his observations on the article (A/CN.4/177) the Special Rapporteur said that if the residuary principle in paragraph 1 were made absolute, it would override the expressed will of the contracting States, thereby denying the principle of the freedom of the parties to decide by the clauses of the treaty itself which States could become a party to it. In fact, all that was being urged by advocates of as nearly universal participation as possible was that the practice of restrictive provisions should be discouraged for the purpose of future general multilateral treaties involving universal interests.

32. He agreed that the definition adopted by the Commission of a " general multilateral treaty " was far from satisfactory, and should be improved.

33. Opening treaties to as wide a participation as possible did not necessarily mean that participation in a general treaty implied recognition. If any misgivings were felt on that point, they could easily be allayed by introducing a clause, inspired by an understanding reached in connexion with the adoption of the Constitution of the World Health Organization and of certain other important instruments, that participation of a State in a general multilateral treaty should in no way imply recognition of the government of such a State by the other parties to the treaty. Under article 3 of the Constitution of the World Health Organization, membership was open to all States. The point was an important one and had been the subject of comments by a number of governments, but he would not go so far as to suggest, as had been done by the Venezuelan delegation in the Sixth Committee (A/CN.4/177), that it should be the subject of a separate article. It should, however, be emphasized in a separate paragraph of article 8.

34. Mr. VERDROSS said that in 1962, during the first reading of what was now article 8, he had drawn attention to an apparent contradiction between the will of an international conference to codify general international law or enunciate new rules of general international law, and yet at the same time to exclude certain States by preventing them from becoming parties to the treaty. Since, however, the wording proposed by the Special Rapporteur corresponded to current international practice, the question had to be asked, what was the reason for that apparently contradictory practice?

35. At first glance, it might be explained by the present division of some States into two political entities, one of which was considered a State by one group of States and the other a State by another group. In his opinion, however, there was a deeper reason for the practice : it was that as yet there was no international organ competent to determine, by a ruling binding on all States of the international community, whether a political entity was a State within the meaning of international law. It was still a matter for each individual State to make that determination.

36. Consequently, it could happen that a political entity was considered a State by one group of States, whereas another group of States took the view that that entity did not fulfil all the conditions laid down by international law to qualify for recognition as an independent State. That determination was quite distinct from political recognition, although the two acts were normally connected.

37. So long, therefore, as the imperfection of international law in that respect remained, the wording proposed by the Special Rapporteur would be correct. At the same time, however, it had to be conceded that if certain States were denied the possibility of becoming parties to such an international convention, the rules laid down in the convention would bind only the contracting States and, consequently, would not be general rules of international law, for a rule of international law could not be imposed on a State which had not freely accepted it.

38. That did not mean that an international conference was obliged by international law to permit all States to

[5] *United Nations Conference on Consular Relations, Official Records*, vol. II, p. 175.

become parties to such a convention. The only consequence of the exclusion of certain States was that such a convention was incapable of creating, by the treaty-making process, rules of truly general international law.

39. For those reasons, he proposed that the compromise worked out during the first reading of article 8 should be retained.

40. Mr. EL-ERIAN said that, by its formulation of the rule contained in article 8 and the related provisions of article 1 (*c*) on " general multilateral treaty " and article 13 on " accession ", the Commission had incorporated a fundamental principle of contemporary treaty law. It was therefore not surprising that that formulation should have given rise to theoretical discussions, political controversy and practical difficulties.

41. The comments by governments and the discussions in the Commission had shown that four main issues were involved. The first was the philosophical basis and juridical logic of the right of accession; the second was the relationship of that right to sovereign equality, which entitled all States to participation in the formulation of the general rules of international law; the third was the bearing of the " any State " formula on the problem of recognition; and the fourth was the complications which that formula might involve from the point of view of the functions of a depositary. Since Mr. Lachs and other speakers had adequately dealt with the third point, and since the fourth point had been the subject of considerable comment by other members, he would confine his remarks to the first and second points.

42. On the first point, the Commission had adopted an approach which consisted in specifying a certain category of treaties as " general multilateral treaties " by its definition in article 1 (*c*), a definition which had been criticized by governments.

43. The first Special Rapporteur on the law of treaties, Mr. Brierly, in his first report had not put forward any classification of treaties but on the subject of accession had proposed the following provision as article 7 (3): " Unless the contrary is indicated in a treaty, a State . . . which has not taken part in its negotiation may accept that treaty only with the consent of all the parties thereto. "[6] In his second report he had put forward a similar proposal in his article 9.[7]

44. The second Special Rapporteur on the law of treaties, Sir Hersch Lauterpacht, in his first report submitted in 1953, had not included in his draft articles any classification of treaties but had proposed an article 2 reading: " Agreements, as defined in article 1, constitute treaties regardless of their form and designation, " and in his article 7, on accession, had included a paragraph 2, reading: " Accession is admissible only subject to the provisions of the treaty. "[8] On the issues involved, that learned writer had stated in his report:

> " In so far as the original instrument makes accession dependent upon some subsequent action or condition, there is room, so far as the future development of the law is concerned for relaxing in cases of doubt the requirement of unanimous consent. In theory there is force in the view that every contracting party must possess the right to agree to—or reject—the participation of a new party in the contractual relation. However, multilateral treaties regulating matters in the sphere of the general interest of the international community cannot properly be viewed as mere contractual bargains. There is in them an inherent tendency to universality which deserves encouragement. . . . Except where the treaty contains rigid provisions to the contrary, the result ought to be avoided which would permit a single contracting party to prevent the accession of a State to a humanitarian and non-political convention intrinsically aiming at general application. "[9]

45. In his second report, Sir Hersch Lauterpacht had introduced into paragraph 2 of article 7 a provision making accession possible by a decision taken by a two-thirds majority of the States parties to the treaty, unless otherwise expressly provided by the treaty itself.[10] By thus making an exception and admitting two-thirds majority rule, that eminent writer had departed from the contractual approach which would require unanimity for purposes of accession.

46. His own view was that the right of accession did not derive from a contractual relationship but from the character of treaties as a general source of international law, in the formulation and consolidation of which all States had the right to participate.

47. The judgment of the Permanent Court of International Justice in the *Case concerning certain German interests in Polish Upper Silesia*[11] was frequently cited against the inherent right of accession to a treaty. In fact, that judgment concerned the particular case of an armistice convention and it was implicit in the Court's ruling that there might be certain categories of treaties which were subject to the right of accession. An armistice convention was by its very nature not a general multilateral treaty.

48. In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the International Court of Justice had stated: " The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. " The Court had gone on to say:

> " In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention . . . The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States

[6] *Yearbook of the International Law Commission, 1950*, Vol. II, p. 223.

[7] *Yearbook of the International Law Commission, 1951*, Vol. II, p. 70.

[8] *Yearbook of the International Law Commission, 1953*, Vol. II, pp. 90 and 91.

[9] *Ibid.*, p. 119, para. 6.

[10] *Yearbook of the International Law Commission, 1954*, Vol. II, p. 129.

[11] *P.C.I.J.*, 1926, Series A, No. 7.

which adopted it that as many States as possible should participate. "[12]

49. What was involved was the right of participation in general multilateral treaties, a right which derived not from a contractual relationship but from the sovereign equality of States. The issue was that of the right to be heard in the formulation and consolidation of general rules of international law, a right which was particularly significant at the present time, when conventions were becoming a more important source of international law than customary rules and international legislation was coming to the fore as a result of multilateral and parliamentary diplomacy.

50. It had been suggested that the rule in the matter should be adapted to practice. But it must be remembered that the practice of limiting participation in a treaty to States that were Members of the United Nations or of any of the specialized agencies, or parties to the Statute of the International Court of Justice, was strongly contested. Whenever the United Nations discussed the question of convening a conference, that practice had invariably given rise to controversy in the Sixth Committee. In 1963, at the Vienna Conference on Consular Relations, an attempt to discard that restrictive practice had almost succeeded.

51. To conclude, he would quote from the personal message of the Secretary-General to a symposium held recently at Nice, a message transmitted by the Legal Counsel of the United Nations: " The very title of this colloquy, ' The adaptation of the United Nations to the world of today ', poses a basic question. Is it the United Nations, its Charter and its main organs which should adapt themselves to the world of today? Is it not also the world of today which should try to conform to the ideals and objectives of the Charter? " The Secretary-General had thereby drawn attention to the need not only to adapt principles to practice, but also to consider adapting practice to principle. The basic principle involved in article 8 was that of universality, so fundamental to the United Nations and its Charter. With that principle in mind, the Commission should lay down universal rules that would contribute to the development of international relations.

52. Mr. TABIBI said that the division of opinion in the Commission on the question of the participation of States in general multilateral treaties proceeded mainly from the traditional concepts and practice of participation, from the difficulties that the acceptance of the " any State " formula might involve for the depositary, from the different purposes and interests of States when concluding treaties, from the conflicts of treaties concluded by member nations with different objectives and national policies and, lastly, from the problem of reconciling the principle of universality of treaties, now regarded by many States as a rule of *jus cogens*, with the principle of the freedom of States to choose their own partners when concluding a multilateral treaty.

53. The problem facing the Commission was one which involved legal, practical, economic and humanitarian elements; as a result, it was all the more difficult to formulate a rule acceptable to all, whether as a residual rule or as a rule of *jus cogens*.

54. The difficulties arising for the depositary from the " any State " formula could be overcome by some technical device, as had been done in the case of the Moscow Nuclear Test Ban Treaty. The major obstacle, however, was the problem of non-recognition, which made it difficult for some States to accept the rule of universality for participation in multilateral treaties.

55. What the Commission had to decide was whether it should formulate a rule or leave it to the plenipotentiary conference of States to deal with the issue. In his view, the Commission should formulate a rule which was in the interests of international law and which would strengthen relations between States; it should therefore depart from the United Nations practice, which had been inspired mainly by political motives.

56. It was not in the interests of any State to cling to the rule of the freedom of States to choose their own partners, up to the point of extending it to treaty-making processes which were vital to mankind. It was inadmissible that States should have such freedom in the case of conventions such as those which outlawed slavery and genocide or the great 1949 humanitarian conventions of Geneva. Any approach of that kind would be contrary to the interests of mankind as a whole and would constitute a violation of the rule of law.

57. Acceptance of the rule of free participation by all States in no way conflicted with the policy of non-recognition; that policy could be safeguarded by a declaration of non-recognition, as had been done in the case of many treaties, or by establishing machinery such as that devised for the Moscow Nuclear Test Ban Treaty.

58. Since the Commission could not permit itself to sacrifice the interests of humanity to the principle of the freedom of contracting States or to the political practice evolved in the United Nations since 1949, it should adopt a rule such as that embodied in paragraph 1, as now proposed by the Special Rapporteur. That text presented a compromise solution, accepted by the majority of the Commission and approved as progressive development of international law by the bulk of those States which had submitted comments. He sincerely believed that acceptance of the rule in paragraph 1 would in no way compromise the purpose of regional treaties or the universal character of other legal rules such as the rule of the freedom of choosing contracting States, but would contribute to understanding among nations and to the strenghtening of the rule of law.

59. Mr. PAL said that Mr. Cadieux's statement had revealed that the cleavage of opinion in the Commission was rather more profound than Mr. Lachs had thought. Mr. Lachs held that the main difficulty felt by those who opposed the 1962 text was the fear that the rule, if accepted, would open the door to unmerited recognition and he thought that the gulf could easily be bridged by giving an assurance that the rule carried with it no such implication of recognition. Mr. Cadieux, however, had made it clear that the gulf was much wider and involved broader issues of foreign policy.

[12] *I.C.J. Reports 1951*, pp. 23 and 24.

60. He (Mr. Pal) thought that there was no need to pursue the question to such lengths. In article 8 the Commission had simply attempted to express a residuary rule concerning participation, in the event of a general multilateral treaty being silent on the matter. Since the proposed rule was limited to a specific category of treaties and, even then, only to cases where the treaty was silent on the point, there seemed to be no reason for ascribing hidden intentions to it. Two texts were now before the Commission, namely, the one it had adopted in 1962 as article 8, and the revised formulation suggested by the Special Rapporteur after considering the comments of Governments. If the Special Rapporteur considered that drafting changes were needed to make it clear that the rule was to be only a residuary rule, the matter should be submitted to the Drafting Committee with instructions to that effect. The Commission should also note that a third draft had been suggested by the Swedish Government (A/CN.4/177).

61. Personally, he would have thought that the residual character of the rule could have been brought out by some such opening formula as " Unless otherwise provided in the treaty itself or by the established rules of an international organization, any State may become a party to the treaty . . . " He did not consider that the Special Rapporteur's suggestion improved the text; he preferred the language adopted by the Commission in 1962.

62. In order to assist a better understanding of the real nature of the disagreement in the Commission he would recapitulate the history of article 8, which had originally been article 7 in the Special Rapporteur's first report considered by the Commission in 1962.[13] In that report, the Special Rapporteur had not included in the article the question of participation as such; his article 7 had been devoted to the question which States were entitled to sign the treaty, his article 13 to participation in a treaty by accession, and his article 16 to participation by acceptance. He had offered no definition of a general multilateral treaty in that report, but had defined accession and acceptance in article 1 (*j*) and (*k*). When article 7 in the Special Rapporteur's first text had come up for discussion, Mr. Briggs had suggested that consideration of it should be postponed until the Commission discussed the articles on accession or participation. Ultimately the article had been taken up together with article 13, the Special Rapporteur having suggested that it would be easier to reach a decision on article 7 if the Commission first settled some of the problems raised by article 13, for which alternative texts had been put forward by Mr. Briggs and Mr. Jiménez de Aréchaga. The discussion had disclosed that the Commission was sharply divided on several issues. Ultimately, without taking any decision on controversial points, the articles had been referred to the Drafting Committee, which had produced new texts numbered articles 7, 7 *bis* and 7 *ter*.[14] At that point, a definition of a general multilateral treaty had been incorporated without much argument. The new draft of article 7 had purported to deal with the question of participation in general, but had not dealt with the specific case of general multilateral treaties, which was the real source of controversy; that question was covered by article 7 *bis*, on the opening of a treaty to the participation of additional States. When the Commission came to discuss the Drafting Committee's new proposals, Mr. Elias had put forward a redraft of article 7[15] which had eventually formed the basis of the present article 8.

63. In view of the extremely circumscribed scope of the rule thus introduced, it was surprising that article 8 should still arouse such strong objections. The rule it contained was only a residuary rule and was in the domain of progressive development rather than in that of pure codification. Those who accepted the article in the form finally given to it in 1962 did so because it represented the progressive development required as a result of the changing situation in the world community; but even so they had taken care to ensure that it was only a residuary rule. If the Commission had responded to Mr. Yasseen's appeal at the fourteenth session to view the whole question of participation in a treaty in the proper perspective and had treated article 8 as a residuary rule of very limited scope, the discussion would not have been so protracted.

64. He himself would urge members of the Commission to avoid confusing the issue by claiming that their individual views represented finality, and thus in effect overlooking the possibility of unconscious bias. The essentially partial nature of human knowledge should lead each to supplement his information by considering the views of others, biased though they might also be. The Commission should not shirk considering whether the scope of the article should be extended in the interests of progressive development; and progressive development must not serve hidden sectional interests, as it was sometimes claimed to do. What were alleged to be fundamental principles were certainly not immutable; even if they were fundamental, that was no reason why they should obstruct all development. Technically, it might be said to be open to dispute whether any real right of accession or participation existed. A treaty might indeed be described as being always the result of a meeting of wills involving the principle of freedom of choice. But even that principle was not immutable in all circumstances. The way must always be left open for remedying any unjust result of changing conditions and for the peaceful revision of all relationships. That indeed was fundamental.

65. Even if there were grounds for disputing the existence of a right of participation *stricto sensu* because the treaty-making process presupposed a free choice of partners, States had a duty in contemporary society to collaborate with each other on a footing of equality, as Mr. Bartoš had said at the fourteenth session. It had to be conceded that every State in the contemporary world community had the right to participate actively in the life of that community; it was the duty of all States to co-operate in promoting universality in international community life. The principle of universality should no longer be relegated to the background. Social objectives on the world community level certainly

[13] See *Yearbook of the International Law Commission, 1962*, Vol. II, p. 42.

[14] *Ibid.*, Vol. I, 660th meeting, para. 51.

[15] *Ibid.*, Vol. I, 667th meeting, para. 2.

demanded and deserved greater attention. The time had come to show a capacity for new thinking and to cease following well-trodden paths; that was so even where politics were concerned. Enough had happened in the world in recent times to impair mankind's philosophical and optimistic belief that real progress could be achieved without adequate exertion. It was necessary to shake established opinion out of its rut, since the responsibilities created by life itself could never be discharged by clinging to abstract principles. The peoples of the newly-independent States were aware that, if their freedom was to have any significance, the entire economic and political structure of their countries would have to be re-examined. Admittedly he was entering the realm of philosophy, which might not always yield either precise knowledge or practical suggestions, plans or programmes; but the philosophical approach could nevertheless create a disposition to seek guiding principles.

66. The principle expressed in article 8 as adopted in 1962 did not conflict with any fundamental principle that could be deduced from contemporary practice. On the other hand it did reflect the need for the law on the subject to evolve. The obligation to build and to perfect community life on a universal basis was forced on the people of the world by the need to come to terms with the many changed circumstances. The principle of universality was no longer a piece of rhetoric, however commendable. The many new forces at work in the international community, not always with beneficial results, rendered it imperative that the world should direct its efforts towards finding a new unity on a universal basis.

67. He was therefore in favour of retaining the article, subject to redrafting changes that would make its meaning clearer. He would also be prepared to go to the length of supporting Mr. Tunkin's proposal, should that be necessary.

68. Mr. ROSENNE said that he had carefully re-examined his own views on articles 8 and 9, which had caused him more perplexity than any of the articles formulated by the Commission during the past three years. After hearing some of the uncompromising statements made during the present discussion, he wondered whether the whole question of participation in a treaty had been adequately analysed so as to bring out all the elements.

69. Unlike some members of the Commission, he would find it difficult to confine his remarks to paragraph 1, because generalizations about a single, and possibly not the most important issue, could engender an emotional approach which in turn might distort the Commission's whole work on the law of treaties. He would try to list in a systematic way the points at issue without suggesting that all need be dealt with in the article. They were; first, who were the parties; secondly, who might become parties and thirdly, could other States not within the first two categories ever become parties? In each case a distinction must be drawn between bilateral and other types of treaty. For the purposes of article 8, there was no need to deal with bilateral treaties because the position was clear and at most merited a mention in the commentary. Any further secondary points pertaining to bilateral treaties could be dealt with, if that were at all necessary, in connexion with articles 58 to 61.

70. As far as the other types of treaty were concerned, a practical distinction must be drawn between those for which there was a depositary and those for which there was none. Though it would have to be tackled later, for the time being the first point could be left aside and he would merely suggest that the essential elements of a definition already existed in article 1 (*c*) of the Special Rapporteur's first report in which he had defined a " party " as a State which had definitively given its consent to be bound by a treaty in force.[16] That definition was more accurate than the one proposed by the Netherlands Government in its comments on article 1 (A/CN.4/175/Add.1)

71. The second point was who might become a party; in principle that was determined by the States which " made the treaty ". He used that neutral expression advisedly in order to avoid, for the purposes of the present discussion, the problems created by definitions in terms of participants in the adoption of the text, for example, which only complicated the issue. Such a principle had been laid down in the original version of article 8 and in the new text proposed by the Special Rapporteur, which he (Mr. Rosenne) found preferable. The principle, which placed some emphasis on the text of the treaty itself, though perhaps not quite enough, ought to be retained as the point of departure for all treaties. There was nothing to prevent the makers of a treaty from agreeing at the outset to include the " all States " formula if that were regarded as appropriate and if the necessary majority support were forthcoming, but the decision as to whether that formula was desirable must always remain a political one, to be reached only in the light of the exigencies of the particular case. In that connexion the Commission would be wise to adopt the same approach as the International Court of Justice which consistently refused to substitute its own judgment for a political judgment which it found right and appropriate in any given set of circumstances.

72. The next question for consideration was whether there were any exceptions to that principle, and if so, what kind of exceptions and on what basis they existed. In particular, did so-called general multilateral treaties, within the definition agreed upon at the fourteenth session, constitute a real exception? In his opinion, the Commission had answered the question in the negative when drafting article 8 in its present form, though the language could certainly be improved and rendered clearer.

73. As to what was the *lex lata* in the matter, some guidance could be obtained from the Court's Advisory Opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. That Convention had come to be regarded as an example of a general multilateral treaty *par excellence*. The Court had pointed out that " the right to become a party to the Convention does not express any very clear notion "[17] and had concluded that such

[16] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 31.

[17] *I.C.J. Reports, 1951*, p. 28.

a right did not derive either from the Convention or from any other source. While he was open to persuasion, he was not yet able to discern any clear foundation in existing law for the contention that participation in a general multilateral convention or any other treaty existed as of right.

74. Throughout the Commission's discussion on the draft article, strong emphasis had been placed on the essentially contractual features of an international treaty and he had a vivid recollection of the forceful objections put forward at the sixteenth session to the Special Rapporteur's proposal for the inclusion of an article recognizing what he had called objective international régimes.[18] One argument had been that the world was not yet ready to accept anything analogous to the legislative process on the internal level, and that the concept of a treaty creating something so objective that it was applicable to all States did violence to the essentially contractual nature of international instruments, whatever the number of parties. The Commission must draw the logical conclusion from that approach. Furthermore, the matter under discussion must not be confused with the entirely different one raised earlier in the meeting about treaties as a source of international law.

75. In regard to participation in general multilateral treaties, he was even less able to find any element of a *jus cogens* principle within his own definition of such principles as put forward at the fifteenth session.[19] Possibly the Commission might suggest that, if enough States were interested in doing so, the issue was one that would be worth referring to the International Court for an advisory opinion.

76. It remained to consider what guidance could be sought in practice for framing a rule *de lege ferenda*. It was evident from the Secretariat's memorandum about resolutions of the General Assembly concerning the law of treaties,[20] and more particularly from paragraphs 60-65, that the views of the majority of Member States had not undergone any radical change but had remained consistent since the inception of the United Nations and during the successive extensions of its membership. That fact, coupled with the conflicting opinions of governments submitted to the Commission in document A/CN.4/175, led him to doubt whether any kind of "all States" rule would secure a two-thirds majority in the General Assembly or at a diplomatic conference on the law of treaties. As far as he could see, there did not exist any preponderant weight of opinion in favour of changing the *lex lata* as he saw it or even less any kind of agreement as to what change was necessary. Accordingly it was important for the Commission not to obfuscate the issue, as had been done in the case of the article concerning the breadth of the territorial sea in its 1956 draft on the law of the sea, which had led to such serious confusion at the Conference in 1958. He had noted that the practice concerning participation, described in the Secretariat's memorandum, applied both to convening conferences and to accession clauses. That was entirely logical since the two aspects were closely related and neither was susceptible of general *a priori* regulation: each must always depend upon practical requirements.

77. He agreed with Mr. Lachs that the issue of recognition did arise in connexion with article 8 but disputed his contention that it had never been mentioned during the discussions, in view of the express references to it made by Mr. Gros at the fourteenth session.[21] Certainly the Commission would perform a useful service if it could succeed in dissociating that issue from the question of participation in treaties, so as to allay the apprehensions expressed by certain governments. Treaty registers, both national and international, were getting cluttered up with unnecessary declarations, counter-declarations and so-called reservations concerning recognition, all of which were irrelevant and confusing and some of which created tension. As the Commission had decided in 1949 to include the recognition of States and governments in its provisional list of topics for study,[22] until that task was broached it should take care not to prejudice the outcome and should reserve that aspect of article 8, as had been done at the previous session with article 64.

78. However, recognition was by no means the only issue at stake. The difficulties of a depositary should not be overlooked, but he was unable to subscribe to the argument that they were procedural and not substantive in character, because he maintained the view he had expounded in 1957 that the distinction between procedure and substance did not exist with any degree of precision in international law.[23]

79. He thanked the Secretariat for the material it had furnished in answer to the questions he had asked at the 782nd meeting, concerning the two classic examples of governments or of the secretariats of international organizations acting as depositaries and the related problem of the Secretariat as registrar. It had shown that the difficulties were as great in either case, even though they might take different forms. At its fourteenth session the Commission's general view had been against allowing excessive discretionary powers to the depositary, on which subject Mr. Jiménez de Aréchaga had made some wise observations.[24] The position in law and practice had in no way been altered by what had happened over the Moscow Nuclear Test Ban Treaty of 1963. Perhaps those members of the Commission who asserted that what they described as procedural difficulties could be easily overcome, even when an international organization was the depositary, ought to explain how in fact that could be done. Personally, he had found the Secretary-General's statement at the 1258th plenary meeting of the General Assembly[25] extremely convincing on that point, which had also

[18] See *Yearbook of the International Law Commission, 1964*, Vol. I, 738th-740th meetings.

[19] See *Yearbook of the International Law Commission, 1963*, Vol. I, 685th meeting.

[20] *Ibid.*, vol. II, p. 1.

[21] See *Yearbook of the International Law Commission, 1962*, Vol. I, 667th meeting, para. 46.

[22] See *Yearbook of the International Law Commission, 1949*, p. 39.

[23] *The International Court of Justice, An Essay in Political and Legal Theory* (Leyden: Sijthoff's, 1957), p. 210; repeated in *The Law and Practice of the International Court* (Leyden: Sijthoff's, 1965), p. 541.

[24] See *Yearbook of the International Law Commission, 1962*, Vol. I, 658th meeting, paras. 26 and 27.

[25] See above, para. 7.

been touched upon by the Swedish Government in its comments.

80. On the question whether articles 8 and 9 could be jettisoned altogether, as proposed by the Japanese Government, the difficulty was that, in law, the distinction between the original parties and subsequent parties, by whatever process they became parties, was a fundamental one, especially from the point of view of interpretation, and clearly most of the articles in the draft had been drawn up with that distinction in mind. If those two articles were dropped, nearly all the remaining ones would call for some structural modification, a difficult though not impossible task.

81. The controversy really arose over the question of participation in general multilateral treaties. He reserved his position regarding the change in the definition of such treaties proposed by the Special Rapporteur, not having been very convinced by some of the objections to the original definition arrived at in 1962. If article 8 were retained, it must be made plain that participation in multilateral treaties of whatever kind had nothing whatever to do with the entirely different process of admission to international organizations, whether small or large, regional or universal. Illuminating material on that process was to be found in the dissenting opinion of 1948 of Judges Basdevant, Winiarski, McNair and Read on the conditions of admission of a State to membership in the United Nations [26] and in Morelli's book "*Nozioni di diritto internazionale*".[27] The comments of certain governments revealed some confusion on that cardinal issue which ought to be clarified in the commentary.

82. The significance of the problems connected with general multilateral conventions should not be exaggerated now that the Commission had formulated article 62, which went a long way towards preventing the dangers of the dualism mentioned by Mr. Lachs at the previous meeting.

83. To conclude, the material concerning participation in a treaty ought to be rearranged. One provision should be devoted to original participation, even though that might later be found redundant. A second provision should deal with additional participation under the terms of the treaty, and might be drafted on the lines of the text now being proposed by the Special Rapporteur but with greater emphasis on the supremacy of the text of the treaty. A third provision should deal with extended participation, the subject covered in article 9, but in simplified form. Such a rearrangement would avoid the present distortion of certain essential elements in the law of treaties as a whole, and would place a controversial matter in its right perspective. The mechanics of participation could be dealt with in subsequent articles, and even accession ought to be handled separately from the subject-matter of articles 8 and 9.

84. As any "all States" formula was unlikely to be acceptable because there was insufficient justification for it either *de lege lata* or *de lege ferenda*, the Commission ought to reach a clear decision on that point at an early stage, by vote if necessary, in order to avoid a repetition of what had happened over its provision concerning the breadth of the territorial sea.

The meeting rose at 12.55 p.m.

[26] *I.C.J. Reports 1948*, p. 84.

[27] G. Morelli, *Nozioni di diritto internationale*, 6th ed. (1963), p. 313.

794th MEETING

Wednesday, 2 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. Pal, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

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

(continued)

[Item 2 of the agenda]

ARTICLE 8 (Participation in a treaty) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 8.

2. Mr. PAREDES said that during the earlier discussion on other articles he had expressed the opinion that, in a codification, each article should contain only a single precept relating to a single question. If an article dealt with several questions, the formula adopted, however flexible it might be, could not cover all the aspects of the problems considered.

3. The expression "general multilateral treaty" in paragraph 1 of article 8 really covered treaties of an entirely different nature which called for different rules. First, there were treaties which recognized and stated a universally binding international practice; secondly, there were treaties relating to special interests of nations.

4. The former concerned the very foundations of the co-existence of States and established universally binding laws. Mr. Lachs had said that there were certain types of treaty which were binding on all States, even when they had not been parties to drawing them up, such as the Conventions on the abolition of slavery or the Convention on the Prevention and Punishment of the Crime of Genocide, or the Moscow Nuclear Test Ban Treaty. He (Mr. Paredes) thought that those treaties were legislative and required the observance of a certain

[1] See 791st meeting, preceding para. 61, and para. 63.