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Summary record of the 802nd meeting

Topic:
Law of Treaties

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the Council of Europe. In any case, the question would arise when the agenda item concerning co-operation with other bodies was discussed again, and the Commission would then consider the Special Rapporteur's proposal for mobilizing all available forces in an endeavour to improve the draft articles still further.

86. He suggested that the Commission should approve the report by its observer.

The report by the Commission's observer (A/CN.4/180) was formally approved.

The meeting rose at 5.55 p.m.

802nd MEETING

Tuesday, 15 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Jiménez de Aréchaga, 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)

(resumed from the previous meeting)

[Item 2 of the agenda]

ARTICLES 26 (The correction of errors in the texts of treaties for which there is no depositary) and 27 (The correction of errors in the texts of treaties for which there is a depositary)

Article 26

The correction of errors in the texts of treaties for which there is no depositary

1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested States shall by mutual agreement correct the error either:

(*a*) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(*b*) By executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

2. The provision of paragraph 1 above shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

3. Whenever the text of a treaty has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

Article 27

The correction of errors in the texts of treaties for which there is a depositary

1. (*a*) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to the attention of any other States which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction.

(*b*) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the States which are or may become parties to the treaty.

2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the States mentioned in paragraph 1 (*b*) above.

3. The provisions of paragraph 1 above shall likewise apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

4. If an objection is raised to a proposal to correct a text under the provisions of paragraphs 1 or 3 above, the depositary shall notify the objection to all the States concerned, together with any other replies received in response to the notifications mentioned in paragraphs 1 and 3. However if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the States concerned shall otherwise decide.

6. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

1. The CHAIRMAN invited the Special Rapporteur to introduce his proposals for article 26, which was the first of two complementary articles on the correction of errors in the texts of treaties.

2. Mr. CASTRÉN, speaking on a point of order, proposed that the Commission should deal at the same time with article 27, since the Special Rapporteur suggested the rearrangement in three articles of the

material in articles 26 and 27 and the Japanese Government had suggested (A/CN.4/175) that there should be only one consolidated article.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that he would prefer to proceed as proposed by Mr. Castrén.

4. The CHAIRMAN said that, if there were no objection, he would consider Mr. Castrén's proposal adopted.

Mr. Castrén's proposal was adopted.

5. Sir Humphrey WALDOCK, Special Rapporteur, said that, in order to take into account Government comments, he proposed in his report (A/CN.4/177/Add.1) that the ten paragraphs of articles 26 and 27 as adopted in 1962 should be replaced by a shorter text consisting of three articles. He had arrived at that result by placing in his new article 27 (*bis*) certain procedural provisions which applied to all treaties and which, in the 1962 version, were stated in paragraphs 3 and 4 of article 26 and repeated in paragraphs 5 and 6 of article 27.

6. The consolidated text proposed by the Japanese Government omitted three questions of substance which were covered both by the 1962 text and by his own proposal. The first was that of the non-concordance of two or several authentic texts, in cases where the treaty had more than one language version; the problem was similar to that of the correction of a treaty having a single text. The second was that of certified copies; the inclusion of a provision regarding them was useful, since certified copies were very frequently used by governments to determine the text of the treaty for purposes of internal legislation. The third was that of an objection to a proposed correction. Inclusion of a reference to that third question undoubtedly complicated the exposition of the subject, but that reference was necessary: the articles dealt with the case where no objection was made and would not be appropriate to omit all mention of the contrary case.

7. If those three points were retained, as he believed they should be, it would appear preferable, from the point of view of drafting, to arrange the various provisions in three separate articles as he proposed:

Article 26

1. Unless otherwise agreed between the interested States, where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the error shall be corrected:

(*a*) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(*b*) By executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

(*c*) By executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

2. Paragraph 1 applies also where there are two or more authentic texts of a treaty which are not concordant and where it is agreed to correct the wording of one of the texts.

Article 27

1. (*a*) Unless otherwise agreed, where an error is discovered in the text of a treaty for which there is a depositary after the text has been authenticated, the depositary shall bring the error to the attention of all the interested States, and shall inform them that it is proposed to correct the error if within a specified time-limit no objection shall have been raised to the making of the correction.

(*b*) If on the expiry of the specified time-limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the interested States.

2. The same rules apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

3. If an objection is raised to a proposal to correct a text under paragraph 1 or 2, the depositary shall communicate the objection to allt he interested States, together with any other replies received in response to the notifications mentioned in those paragraphs. However, if the treaty was drawn up within an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

4. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to each of the interested States.

Article 27 (bis)

Taking effect and notification of correction to the text of a treaty

1. Whenever the text of a treaty has been corrected in accordance with article 26 or 27, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the interested States otherwise decide.

2. Notice of any such correction to the text of a treaty that has entered into force shall be communicated to the Secretariat of the United Nations.

8. Mr. CASTRÉN said that the Special Rapporteur's proposed redraft was shorter and simpler than the 1962 text and was an improvement in several respects. He thought nevertheless that the subject might perhaps be covered in a single article, drafted on the lines proposed by the Japanese Government. If, as the Special Rapporteur considered, there were gaps in the Japanese text, they could be filled by adding the substance of paragraph 2 of articles 26 and 27 as redrafted by the Special Rapporteur, concerning corrections to two or more authentic texts of a treaty which were not concordant, and, secondly, paragraphs 3 and 4 of article 27 as redrafted by the Special Rapporteur, dealing with objections raised to proposals to correct a text, and the duties of the depositary with regard to the correction of errors in certified copies of treaties.

9. The articles as revised by the Special Rapporteur used the phrase " the interested States " in several passages.

That phrase had been proposed by the Netherlands Government (A/CN.4/175/Add.1, *ad* article 27). It probably had the advantage of making the text lighter, but he still thought that it was a little too vague.

10. Sir Humphrey WALDOCK, Special Rapporteur, said that " interested States " was a reserved phrase. Considerable difficulty had been experienced in finding expressions to describe the States which had to be consulted in the various circumstances contemplated in the draft; the Drafting Committee was giving its attention to the matter and he hoped that it would be able to propose an improvement.

11. Mr. ELIAS said that, since the whole of section V was devoted to the functions of the depositary, the order of the articles in the section should be altered. The section should commence with article 29, which set out the general functions of the depositary, article 28 would then follow and the section would conclude with the provisions on the correction of errors in the text of treaties.

12. It should be possible to simplify the text of articles 26 and 27 even further than the Special Rapporteur proposed, though he would hesitate to say whether the material should be arranged in one article or in two articles; in any case, it should certainly not be spread over three articles.

13. Mr. ROSENNE said that the Special Rapporteur had introduced a valuable simplification. He noted, however, that, under his new proposals, there would be four articles dealing with error, namely, articles 26, 27 and 27 (*bis*) on the correction of errors, and article 34, which contained the substantive provisions on error. He saw some psychological danger in inflating the provisions on the various manifestations of error.

14. With regard to the rearrangement of the material, he recalled the suggestion at a previous meeting by Mr. Tunkin [1] for a general article dealing with the differences of a procedural character between treaties having a depositary and treaties having no depositary. If that suggestion was adopted, it might be possible to simplify considerably the statement of the substantive rules in articles 26 and 27, and any special provisions relating to the duty of the depositary in relation to that type of error could be dealt with elsewhere. The first rule would be that embodied in paragraph 1 of article 26 as proposed by the Special Rapporteur. Then would follow a provision on lack of concordance between two or more authentic language versions; in that connexion, he proposed that the word " texts " be replaced by the word " versions ", not only in articles 26 and 27 but also in articles 72 and 73. He also suggested that the provisions on the correction of discordant texts be embodied in a separate article, so as to avoid over-emphasizing the problem of error.

15. He accepted as the statement of a general rule of law the contents of paragraphs 1 of the Special Rapporteur's article 27 (*bis*), but felt that the contents of paragraph 2 should be covered by the provisions of article 25, on the registration of treaties.

16. He next wished to refer to paragraph 4, and only paragraph 4, of article 34. At its fifteenth session, in 1963, the Commission had discussed whether that paragraph should be retained and where it should be placed and the Special Rapporteur had indicated that its retention " would have to be reconsidered during the discussion on articles 26 and 27 ".[2] He (Mr. Rosenne) thought the point should be covered in article 27 (*bis*), paragraph 1.

17. The title of section V seemed inappropriate since it embraced two completely separate subjects.[3]

18. Mr. RUDA said that, while appreciating the Swedish Government's proposal for deleting articles 26 and 27 on the grounds that they were " more appropriate for inclusion in a code of recommended practices than in a convention " (A/CN.4/175), he supported the Japanese Government's proposal that articles 26 and 27 should be amalgamated.

19. The Special Rapporteur had made a commendable effort to simplify the wording, but he wished to raise a number of points in connexion with his new proposals. The Special Rapporteur's article 26, paragraph 1, commenced with the proviso " Unless otherwise agreed between the interested States "; in the light of that proviso, sub-paragraphs 1 (*a*), 1 (*b*) and 1 (*c*) were unnecessary, since they represented three possible methods which could be adopted by the interested States, by agreement. It would be appropriate to state a residuary rule if there was only one rule applicable where there was no agreement to the contrary, but since a choice of several courses was offered, the sub-paragraphs were redundant. It would be sufficient to say that the interested States chose by agreement the method of correction.

20. Paragraph 2 of the same article dealt with exactly the same subject as the Special Rapporteur's paragraph 2 of article 27, and the Drafting Committee should consider combining the two into a single provision. Contrary to what was suggested by the Japanese Government, he would urge that the provision should be retained. It was a matter of great practical importance to cover the case of non-concordance of two or more authentic texts. He had recently had occasion to deal with an important case of that kind : the non-concordance of the English, French, and Spanish authentic texts of the Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone.

21. The Drafting Committee could endeavour to simplify the language of the Special Rapporteur's article 27, particularly paragraphs 1 (*b*) and 3, which were unduly detailed for the purposes of a draft convention.

22. He commended the Special Rapporteur on his proposed article 27 (*bis*), which was very suitable as the concluding provision for a consolidated article on the correction of errors.

23. Mr. AGO said that the Special Rapporteur had done a great deal to simplify the text, and perhaps the Drafting Committee might try to simplify it still further. As Mr. Rosenne had said, to devote too many provisions to the question of error might exaggerate its importance.

24. There was one other matter to which Mr. Rosenne had quite rightly drawn attention : the word " error "

[1] 800th meeting, para. 87.

[2] *Yearbook of International Law Commission, 1963*, Vol. I, p. 211, para. 17.

[3] The title of section V in the 1962 draft read : " Correction of errors and the functions of depositaries ".

occurred in two passages in the draft articles, with different meanings. In articles 26 and 27 and in article 34, paragraph 4, it meant an error in the wording which did not affect the validity of a treaty; but in the rest of article 34 it meant an error which invalidated the consent of a State and which accordingly affected the validity of the treaty.

25. Not only could articles 26 and 27 be condensed, and perhaps amalgamated, but it should be made clear in that way that they referred to the correction of errors, so as to prevent any confusion with the matter dealt with in article 34.

26. Mr. REUTER said that he, too, had been struck by Mr. Rosenne's remarks. Article 26 was not comprehensible to anyone not familiar with the Commission's earlier proceedings. It was not until article 34, paragraph 4, that the meaning of " error " as used in article 26 was defined and the definition was not very clear. What, precisely, was an error of wording? The question was more complex than appeared at first sight. Slips of the pen or typographical errors caused no difficulty. Where, however, the error was one of translation, the matter was quite different and the error much more serious; and it seemed that paragraph 2 of article 26 as proposed by the Special Rapporteur might cover errors of translation. In his (Mr. Reuter's) opinion, the Commission would be well advised to defer consideration of article 26 and the following articles and to make a careful study of each category of error, for the problems they raised differed widely.

27. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission should keep clearly in mind the distinction between errors in copying or translation, which were covered in articles 26 and 27, and errors which affected the validity of a treaty. It had approached the whole subject from the standpoint that, for an error to come within the scope of the provisions of articles 26 and 27, all the parties had to be agreed that it constituted an error. In the absence of such agreement, the matter became a difference between States which had to be settled by other means; in extreme cases, the error could affect the validity of the treaty. It was therefore important that the Commission's understanding of the scope of articles 26 and 27 should be clearly expressed.

28. Mr. AGO asked Mr. Reuter whether his intention had been to propose that the procedure to be followed for the correction of errors which did not affect the validity of the treaty should be specified after article 34.

29. Mr. REUTER said that, despite what Mr. Jiménez de Aréchaga had said, he still thought that, as they stood, articles 26 and 27 did not make it clear that they referred to all errors, of whatever kind, so long as the States agreed to correct them.

30. It had been pointed out that the title of section V covered two different subjects, the correction of errors and the functions of the depositary. Preferably, the correction of errors should be dealt with in the context of article 34; in other words, in the provisions concerning " error " in general, but as a case particularly easy to settle.

31. If the Commission preferred not to upset the scheme of the draft articles, then it should be made clear right at the beginning of article 26 that the article was concerned with a particular case of error, that of an error, whatever it might be, which the States agreed to correct.

32. Mr. TUNKIN said that he did not share Mr. Reuter's fears. Practice showed clearly that errors of the type contemplated in articles 26 and 27 were regarded as purely linguistic errors. In such cases, no difference arose over the contents, only over the expression or wording, and the errors were corrected by much simpler methods than those used for errors that affected substance, which were dealt with in article 34.

33. He welcomed the Special Rapporteur's efforts to shorten the articles, but thought that they might be simplified even further. However, he was not certain that that result could best be attained in that case by the proposal he himself had put forward at a previous meeting, for a separate article on procedural rules for treaties having a depositary.[4] He was inclined to the view that it was better to devote one article rather than three to the correction of errors in the text, so as to avoid attributing an exaggerated importance to the subject.

34. Mr. AMADO said that, while he understood Mr. Rosenne's and Mr. Reuter's concern about the matters dealt with in article 34, he wished to point out that articles 26 and 27 related to the external aspect of the treaty. Coming, as they did, after an article dealing with the registration and publication of treaties, article 26 and those following indicated that treaties should be registered in a correct form and that errors, if any, should be rectified; then, the article on the functions of the depositary dealt with the additional acts which were still necessary to establish the external form of the treaty.

35. He would not be very happy if the almost exclusively formal question of the correction of errors was transferred to a section dealing with the substance and validity of the treaty. It would be better to simplify the provisions than to shift their position in the text. Mr. Ruda's suggestions on that point were completely acceptable; the draft should not give greater prominence to the question than it merited.

36. The CHAIRMAN said that, in his opinion, articles 26, 27 and 27 *bis* dealt with so-called errors of expression and not with errors of substance.

37. Mr. YASSEEN said that there was a very clear difference, of kind and not of degree, between the question dealt with in article 34 and that dealt with in articles 26 and 27. Article 34 concerned errors affecting the formation of the consent, whereas articles 26 and 27 concerned errors affecting the expression of the consent. The Drafting Committee might perhaps make that distinction still clearer in the actual text of the articles. The provisions concerning the correction of slips should not be shifted and should on no account be linked to article 34, for a slip was quite distinct from an error of substance.

38. In his revised version the Special Rapporteur had evidently tried hard to simplify the provisions. The Drafting Committee might perhaps simplify the text even further, for the question was not so important as to deserve elaborate provisions.

[4] 800th meeting, para. 87.

39. Mr. AGO said that the text should not only be simplified but should be made very clear. Articles 26 and 27 described the procedure for correcting errors which States agreed to treat as errors. It was therefore unnecessary in the draft to specify the nature of those errors. They might be more serious than mere typographical errors; conversely, sometimes States agreed to replace a certain term by another which, in their opinion, better expressed their meaning, even though there was not, strictly speaking, an error. The essential point was that articles 26 and 27 covered errors which States were prepared to correct and which they did not plead as having vitiated their consent. In those articles, therefore, the emphasis should be on the idea of correction rather than on the idea of error.

40. He agreed with Mr. Tunkin that the question should not be given more space than it deserved; a single article would probably be amply sufficient.

41. Mr. TSURUOKA said that, in his opinion, the provisions under consideration were in their right place in the draft, for in practice, the correction of errors of form was part of the treaty-making process.

42. To meet the objections of Mr. Rosenne and Mr. Reuter, the Drafting Committee should bring out more clearly the idea that the provisions in question covered errors of form and not errors of substance. The difference between the two kinds of errors was quite clear; the difference was one of kind and was reflected in the procedure, which was much simpler for errors of form than for errors of substance.

43. The Special Rapporteur was to be commended for his efforts to simplify the text adopted in 1962.

44. Mr. REUTER said it was easy to tell *ex post facto* what kind of error had been involved. If the States agreed that an error was one of drafting, then it was in fact a drafting error and no one would question the matter; if the States did not agree, what some considered a drafting error was regarded by others as an error of substance, and that difference of views might lead to international litigation.

45. He would readily agree to Mr. Ago's suggestion that that section of the draft should contain an article on the correction of errors by agreement among States. Whereas, however, States were free to correct almost anything, the same was not true of the depositary, who could correct an error only if a genuine slip or a purely drafting question was involved. In the case of a translation error, even if, for example, three of the texts were concordant and a fourth differed, who was to say whether the error was a slip or an error of substance? Disputes arose between States over such points. Consequently, if the Commission followed Mr. Ago's suggestion, it would be necessary to specify whether the corrections in question applied to all errors, whatever their nature, or to some errors only, and in the latter case, to what errors. Such an article would merely indicate a procedure and the scope of its application. If any error whatsoever could be corrected in that way, a distinction would have to be made between cases where the initiative for the correction came from States, and those in which it came from the depositary.

46. Moreover, if the Commission wished to keep the present order of the articles, and if there had to be a cross-reference between article 26 and article 34, it was better that the cross-reference should appear in article 26.

47. Mr. PAL said he was surprised that the question of what kind of errors were covered by articles 26 and 27 should have been raised, as though it were something new. In fact, the question had been very thoroughly discussed at the fourteenth session in 1962 when the Commission had examined article 24, as proposed in the Special Rapporteur's first report (A/CN.4/144/Add.1),[5] corresponding to the present article 26, and devoted the bulk of its 657th and 661st meetings to it.[6] It was perfectly clear from that discussion that the Commission had had in mind all kinds of errors, whether clerical or substantial, provided only that they were agreed to be errors. The essential prerequisite was the agreement of the parties on the existence of the error, and that had been repeatedly emphasized by the Special Rapporteur.

48. Mr. AMADO said that Mr. Pal had put the question with the utmost clarity: articles 26 and 27 dealt with errors which States agreed to correct. Article 34, on the other hand, dealt with errors of substance which the States could claim invalidated their consent. The two questions had nothing to do with each other and should be kept quite distinct.

49. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on articles 26 and 27.

50. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission had taken the right course at its fourteenth session when it had dealt separately with error in substance and error in expression; any attempt to deal with all errors in the same provisions would lead to confusion. He therefore urged that the rules on errors in wording should be kept in their present context in part I, Conclusion, Entry into Force and Registration of Treaties, and that the provisions on errors which affected the validity of treaties should be left in article 34.

51. A question to be settled was whether the distinction between the two types of error had been made sufficiently clear in the wording of articles 26 and 27 on the one hand and article 34 on the other. As far as the English text was concerned, the use in articles 26 and 27 of the expression " errors in the text " as opposed to the expression " an error respecting the substance " used in article 34 made the distinction clear. The Drafting Committee would however consider whether any improvement was possible in that connexion, and ensure that the French and Spanish texts were equally clear. In any case, none of the Governments appeared to have had any doubts regarding the matters dealt with in articles 26 and 27, which suggested that the 1962 text was reasonably clear in that respect.

52. With regard to the scope of the articles, he fully agreed with Mr. Pal that the determination of what constituted errors of expression must be a matter of agreement. That point was more clearly brought out in his proposed article 27 than in article 26, although paragraph 1 (*b*) of article 26 gave an indication of the need for agreement.

[5] *Yearbook of the International Law Commission, 1962*, Vol. II, p. 80.

[6] *Ibid.*, Vol. I, pp. 182-185 and 212-214.

53. Articles 26 and 27 obviously covered all corrections in expression, regardless of the source of the fault. In all those cases an error would be involved, and he was not prepared to follow Mr. Ago on that point. Even where the parties agreed that the text of the treaty contained some infelicitous expression, which might perhaps be unfortunate because of some political nuance, the case would still be one of error in expression. If, however, the parties admitted that the text was completely correct but merely wished to change it by agreement, the case was really one of amendment and should be governed by the separate provisions on the amendment of treaties.

54. With regard to the drafting of the articles and the suggestion that articles 26, 27 and 27 (*bis*) should be amalgamated into one article, he sympathized with the view expressed by Mr. Rosenne that it was undesirable to lay excessive emphasis on the correction of errors. However, if all the three points omitted from the Japanese Government's proposal were to be included, as he believed they should be, the single article which would result would be unduly long. He noted that Mr. Castrén had urged the retention of those three points and that no member had advocated the deletion of any of them. The Drafting Committee should therefore work on the basis that all three would be included.

55. Regarding Mr. Rosenne's drafting suggestion to make use of Mr. Tunkin's proposal for a general article on the distinction between the case where a treaty had a depositary and the case where it had none, he was glad to note that Mr. Tunkin himself did not think that his proposal could cover the present case. The problems which arose were not connected with a procedural point but affected rather the formulation of the agreement for correction. Where there was no depositary, the parties would settle the question face to face; where there was a depositary, as was almost inevitable in the case of important multilateral treaties, it was necessary to ascertain through the depositary whether all the parties agreed on the existence of the error and on the decision to correct it. Such a matter could not conveniently be dealt with in a general article dealing with procedure in cases where there was or was not a depositary.

56. He would therefore propose that articles 26, 27 and 27 (*bis*) should be referred to the Drafting Committee to be re-examined with a view to shortening them in the most convenient manner possible in the light of the discussion.

57. The CHAIRMAN said that, if there was no objection, he would consider that the Commission agreed to refer articles 26, 27 and 27 (*bis*) to the Drafting Committee as proposed by the Special Rapporteur.

It was so agreed.

58. Mr. TSURUOKA suggested that, to forestall any possibility of misunderstanding, the commentary should explain that the measures provided for in those articles were normally taken during the process of the conclusion of the treaty, between the authentication of the text and signature, ratification or analogous act.

59. Mr. ROSENNE said that the question of the correction of an error could also arise after ratification, and the position of the three articles in the draft must therefore be carefully considered. He would hesitate to agree with Mr. Tsuruoka.

60. Mr. TSURUOKA said that, in his view, any change made after ratification was an amendment to the treaty and not merely a correction of the text, although such a modification was made by simplified procedure.

61. The CHAIRMAN recalled that in 1962 the Commission had held that it should be possible to correct errors discovered after the text had become final. Mr. Tsuruoka's suggestion would, however, be transmitted to the Drafting Committee.

62. Sir Humphrey WALDOCK, Special Rapporteur, said he thought that Mr. Tsuruoka's suggestion went too far, since it would unduly restrict the application of the articles concerning the correction of errors.

63. He suggested that the Drafting Committee should be asked to consider two further points, additional to those he had mentioned in his summing up. First, the title of section V was not well chosen and should be revised, though that point might have to be left aside pending the final decisions about the rearrangement of the articles.

64. The second point was whether or not the content of article 34, paragraph 4, should be transferred to the articles dealing with corrections of error and removed from the section on invalidity. Possibly, as he had already indicated, it might be found unwise to give the point too much prominence, but he was clear in his own mind that article 34 was not the right context for dealing with the matter.

It was so agreed.[7]

ARTICLE 28 (The depositary of multilateral treaties)

Article 28

The depositary of multilateral treaties

1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the States which adopted it shall have otherwise determined, the depositary shall be:

(*a*) In the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

(*b*) In the case of a treaty drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating States shall consult together concerning the nomination of another depositary.

65. The CHAIRMAN invited the Special Rapporteur to comment on article 28.

66. Sir Humphrey WALDOCK, Special Rapporteur, said that article 28 had not given rise to any criticism on the part of governments. The Swedish Government, usually critical on the grounds that the Commission's texts were either procedural or descriptive in character, recognized that article 28 contained a dispositive rule, and the United States Government regarded it as declaratory

[7] For resumption of discussion, see 815th meeting, paras. 6-14.

of a well-accepted practice and useful. He had no proposal to make regarding the text.

67. Mr. TUNKIN said that most governments had not commented on article 28 because for practical purposes it was useless. There was nothing objectionable in such a residuary rule but it could be dispensed with altogether, because in modern treaty-making practice, provision was always made for a depositary, and as far as the cases dealt with in paragraph 2 were concerned, they would be regulated by subsequent agreement between the parties.

68. Mr. AGO said he was not convinced that the article was either necessary or desirable. It dealt with the case where the treaty failed to designate a depositary, where the parties had not otherwise determined and where it was quite impossible, owing to the treaty's silence, to deduce from the text which depositary had been chosen by the parties. In one case, that where the treaty had been drawn up within an international organization, the depositary, under paragraph 1 (*a*) of the draft adopted in 1962, would be the competent organ of that international organization. In his opinion, no such rule needed to be laid down : either it would be expressed in the statute of the international organization concerned or it would appear in the rules of the organization, and if not, the Commission could not venture to say that the organ of an organization would be the depositary. If neither the statute of the organization, nor the rules of the organization, nor the treaty itself designated that organ as the depositary, the Commission could not adopt a general rule to that effect.

69. In the case described in paragraph 1 (*b*), that of a treaty drawn up at a conference convened by the States concerned, the depositary should be the State in whose territory the conference was convened. Actually, the choice of a meeting place was sometimes fortuitous, or the place was chosen for its amenities; why should it follow that, if nobody had designated the host country as depositary, it must be the host country, simply because the conference had been held in its territory ?

70. In his opinion, no case had been made out for introducing those residual rules into the Commission's draft, which should not be concerned with such cases.

71. Mr. AMADO pointed out that paragraph 2 covered cases where the depositary declined to take up its functions, and therefore also had a bearing on paragraph 1 (*a*), under which the depositary was the competent organ of an international organization : did that mean that such an organ could decline to act as depositary ? Obviously not, but the wording was not so clear as it should be in a text intended to be approved by States and to govern their contacts and activities.

72. The CHAIRMAN, speaking as a member of the Commission, said that, while he had no intention of defending the text, he could see some logic in it. There had in fact been disputes over who was the depositary, and in such cases some means had to be found of filling the gap in the treaty itself, even though it was arguable that the provision was unnecessary and that the parties would find a solution.

73. Secondly, there were cases—and they were not inventions of the Special Rapporteur's or of his predecessors—where an organ was in fact competent to be a depositary, but declined to act for political reasons. Political trends in an international organization might change, and at a given moment the organization might hesitate to assume the function of depositary of a treaty concluded at a conference which it had convened when its political orientation had been different, and it might wish subsequently to dissociate itself from the treaty.

74. Mr. AMADO said that States decided on their own course of action, but could hardly give instructions to the competent organ of an international organization.

75. The provision in paragraph 2 was not drafted in legal language : it went without saying that States would " consult together " concerning the nomination of a depositary if that were necessary. It was surely unnecessary to state such a truism in solemn terms.

76. The CHAIRMAN, speaking as a member of the Commission, said that the Baghdad Pact [8] was a case in point : Iraq had broken away from the other contracting parties and unilaterally relinquished its depositary functions. Was the right view in such a case that another depositary could not be designated or that the remaining parties to the treaty had to nominate one ? The text before the Commission was perhaps not necessary because it stated what was self-evident, but there was nothing illogical in it.

77. Mr. ROSENNE said that, although he had no great objection to article 28, the comments made by Mr. Tunkin, Mr. Ago and Mr. Amado prompted him to question whether it needed to be retained. If it was retained, the title should be amended so as not to limit the article to the depositary of multilateral treaties only. The fundamental rule regarding a depositary was stated in the definition contained in article 1, paragraph 1 (*g*) and article 29, paragraph 1, which should perhaps be combined, and the content of article 28 might be consigned to the commentary.

78. Mr. EL-ERIAN said he was in favour of retaining article 28, despite the fact that it stated a residuary rule, in the interests of presenting in a systematic way the material concerning the depositary. As the Chairman, with his encyclopaedic knowledge of modern practice, had indicated, controversy could arise over the matter of the depositary of a multilateral treaty; provided that article 28 was not too detailed or cumbersome in form, it would render the draft more complete.

79. Mr. REUTER said he would like to be certain about the purpose of the article, read in the light of article 29. After all, the depositary had a twofold function; the function of physical custodian of the instruments and another function derived from the first. But article 28 would then mean that it was recognized, in certain cases, that a depositary could perform his functions without being a depositary of physical instruments, that he had a function which could be dissociated from that of a physical custodian. Or was that not what the Commission wished to say ? It could happen that, in consequence of the annexation of a depositary State or of some other events affecting it, the original text of the treaty disappeared, as had happened in the case of the Versailles

[8] Pact of Mutual Co-operation between Iraq and Turkey, signed at Baghdad on 24 February 1955; United Nations *Treaty Series*, Vol. 233, p. 199.

Treaty. Did the Commission accept the idea that it was possible to entrust the functions of depositary to somebody who was not the custodian of the instrument?

80. The CHAIRMAN, speaking as a member of the Commission, said that on several occasions fire had broken out in Foreign Ministries and had destroyed the original texts of treaties; the States which had been depositaries had not on that account ceased to be depositaries. The issue was whether the idea of depositary was to be understood in the literal or in the legal sense. Personally, he thought that the depositary continued to be the depositary, even if deprived of the object which he had accepted in deposit.

81. Mr. YASSEEN said that the importance of the role of the depositary was particularly noticeable in the case of multilateral treaties. The Commission had always planned to draw up a residuary rule to fill in gaps in the agreement of the parties and had generally succeeded in its choice, but that was not the case with paragraph 1 (*a*) and (*b*) of article 28. Paragraph 1 (*a*) would vest the functions of depositary in " the competent organ " of the international organization within which the treaty was drawn up; since the competence of that organ depended on the organization's constitution, that was a question which might give rise to considerable doubt.

82. He could not accept paragraph 1 (*b*) : a conference might be convened in the territory of a State because it had a pleasant climate, but that was not a sound reason for preferring that State to any other.

83. The question of the depositary was so important that it was unthinkable that the parties would leave it undecided. He would hesitate between the logical argument advanced by Mr. Bartoš and actual practice, of which there was no lack, but he would be inclined to favour the deletion of the article, since the rules chosen were not the most suitable ones.

84. Mr. CASTRÉN said that at first glance he had thought that the article should stand, but after listening to the debate he had some doubts concerning the necessity and desirability of such a provision. The criticisms of paragraph 1 were relevant, and Mr. Amado was right in saying that the idea expressed in paragraph 2 was self-evident, for it was almost inconceivable that the parties would not consult with each other in the event of the depositary's withdrawal. For that reason, if the Commission decided to retain the article, it should at least revise paragraph 1 (*a*).

85. Mr. JIMÉNEZ de ARÉCHAGA said he was in favour of retaining the article because the existence of a depositary was essential to the smooth operation of a treaty; and the article would be all the more necessary if the draft took the form of a convention because some of the other provisions gave the depositary important functions. As the Special Rapporteur had indicated, it was not uncommon for treaties to have no clauses designating a depositary, and it was therefore useful to have a residuary rule on the subject, which, as the Special Rapporteur had rightly indicated at the fourteenth session, reflected existing practice. No government had offered any objections, and to jettison the article at that juncture might create doubts about the existence of the rule.

86. The exposition of residuary rules was one of the most useful functions that the Commission could perform in its draft, but he agreed with Mr. Ago and Mr. Amado that certain points in the text would need further polishing by the Drafting Committee. For example, it would need to modify the text so as to bring out more clearly Mr. Ago's point that States could not confer on an organ of an international organization powers which it did not possess by virtue of the organization's constituent instrument, although an attempt had been made to express that idea by the word " competent ". Possibly Mr. Amado's preoccupation arose from the fact that the wording of the French text of paragraph 2 appeared less mandatory than the English and Spanish texts.

87. Mr. RUDA said that he did not see any need for the residuary rule stated in paragraph 1.

88. On the other hand, he thought that it was necessary to formulate some rule to cover the cases mentioned in paragraph 2, which had occured in practice, where a depositary declined, failed or ceased to act in that capacity. He added that the French text of paragraph 2 differed from the Spanish, which was even more categorical than the English in that it did not mention the idea of consultation. Accordingly, he thought that paragraph 1 should be omitted but that the rule in paragraph 2 should stand.

89. Mr. AGO said that the organ referred to in paragraph 1 (*a*) was " competent " by virtue of a rule established by the organization in question. Consequently, the Commission did not need to adopt any residuary rule on that subject, and should disregard a case which was of no concern to it.

90. Paragraph 2 should cover also the case where the depositary ceased to exist, for instance, through merging with another State, if the depositary was a State, or disappeared, if the depositary was an international organization. Moreover, he agreed with Mr. Amado that the passage " the negotiating States [shall] consult together " (*se consultent*) was a mere statement of fact that was out of place in a convention. Surely, the Commission would not wish to go so far as to lay down a sort of rule which would oblige States to consult with each other and to conclude an agreement for the purpose of designating a depositary, which would be rather strange.

91. Mr. JIMÉNEZ de ARÉCHAGA said that the text would have to be clearer on the point mentioned by Mr. Ago, but the fact that the rules of an international organization prescribed that its secretariat could become the custodian for the deposit of treaties was not enough, and the treaty itself should also make provision in that sense. A residuary rule was needed lest the matter be overlooked by the parties. The constituent instrument of an international organization could only contain some general provision regarding its competence to function as depositary, but the matter had to be regulated further for each individual treaty, and for that reason he considered that paragraph 1, suitable modified, should be retained.

92. Mr. ROSENNE said that the discussion over the phrase " the competent organ of an international organization ", with its implicit reference to certain multilateral conventions, had led him to conclude that article 28 should be omitted altogether because bilateral treaties could also be deposited with an international

organization. He was convinced that there was no organ of the United Nations that was competent under the Charter to accept such treaties for deposit, though he knew of at least one case where that had been done as a result of negotiations and of a decision by the Secretary-General of the United Nations. He was referring to the Agreement of 1952 between Israel and the Federal Republic of Germany,[9] when the political circumstances had been particularly delicate and it had been agreed to ask the Secretary-General to accept the instruments of ratification and to draw up the *procès verbal* concerning entry into force, in fact, to carry out the process followed in the case of multilateral treaties. There could be a real political value in having such a possibility, so that it would be unwise to maintain a rule based on a rigid interpretation of the word " competent ".

93. He would have no objection to the text of article 28, as it stood or in revised form, being included in the commentary as a proposal which had been considered by the Commission but which it had decided not to place in its draft articles.

94. The CHAIRMAN, speaking as a member of the Commission, said that in the case of the indemnification agreement concluded between Israel and the Federal Republic of Germany, to which Mr. Rosenne had referred, the designation of the depositary had been made on a two-fold basis, the agreement of the countries concerned and the general competence of the Secretary-General of the United Nations. If States could thus give their agreement *in concreto* they could also give it in a multilateral treaty; that was the only legal inference to be drawn from Mr. Rosenne's argument concerning the case of two States which had no diplomatic relations with each other.

95. Mr. ROSENNE said he agreed with the Chairman but pointed out that the competence had derived not from the Charter of the United Nations but from external sources. The sense attributed to the word " competent " during the discussion had been competence in accordance with the rules of an organization. The particular case he had mentioned had not been an isolated one. Some of the Locarno Treaties [10] and their instruments of ratification had been deposited in the archives of the League of Nations though they had not been concluded under the League's auspices. The competence of the depositary in such cases derived from a double agreement, first between the parties and secondly between the parties and the secretariat of the international organization in question. In the context of article 28, the word " competent " was highly ambiguous.

96. The CHAIRMAN, speaking as a member of the Commisssion, said that there was a United Nations regulation under which the Office of Legal Affairs also acted as depositary.

97. Mr. YASSEEN said he believed that, for the purpose of the designation of an organ of an international organization as depositary, it was not enough that the organ should be competent according to its own statute; the treaty itself also had to contain an express provision designating it as depositary. The organ might be competent, but that did not mean that the States concluding the treaty had to entrust it with the functions of depositary.

98. With regard to paragraph 2, he said that while it was not necessary to formulate a residual rule concerning the designation of a depositary, provision had to be made for the case where the depositary failed to perform its functions, as it might no longer exist, or might no longer wish to perform its functions, or ceased to perform them. The case had occurred in practice, and the Commission should formulate a residual rule covering it. He would agree that the rule should lay an obligation on States to consult together concerning the nomination of another depositary, for the role of depositary was indispensable, particularly for multilateral treaties. Moreover, since article 28, paragraph 2, dealt with the functions of the depositary, he saw no objection to including that provision in article 29, which also dealt with those functions.

99. Mr. TSURUOKA said that the problem was whether, for the designation of the depositary, the consent of the interested parties was necessary or whether, if the treaty contained no provisions concerning a depositary, the agreement of the majority was not necessary. In his view, if agreement among the parties was required, article 28 was superfluous. The functions of the depositary were so essential that, even if the treaty was silent on the subject, the States concerned would consult one another *ex post facto* with a view to designating a depositary. The same would be true if for any reason the depositary failed to perform his functions.

100. Mr. EL-ERIAN said he subscribed to Mr. Jiménez de Aréchaga's argument about the desirability of stating a residuary rule in the matter, because one of the important services that the draft could render to the international community was to consolidate certain modern practices which the Commission viewed with approval. During the past ten years, there had been a growing trend towards designating the United Nations as depositary, a trend which should be encouraged. In the absence of a residuary rule of the kind laid down in article 28, States not Members of the United Nations would not be required to recognize the Secretary-General's competence in that domain.

101. The merits of a residuary rule were particularly obvious to anyone with experience of drafting the constituent instrument of an international organization in haste, when there might be little time to prepare the final clauses, as had happened in the case of the Charter of the Organization of African Unity.

102. Mr. AMADO said that paragraph 2 might perhaps be acceptable if amended to read : " the States . . . shall appoint another depositary ". The idea of consultation was superfluous; it was hardly conceivable that States would not consult one another and would forget to settle the question of the depositary in the treaty.

The meeting rose at 1 p.m.

[9] United Nations *Treaty Series*, Vol. 162, p. 206.

[10] League of Nations *Treaty Series*, Vol. LIV, pp. 289-363.