Document:-
A/CN.4/SR.823

Summary record of the 823rd meeting

Topic:
Law of Treaties

Extract from the Yearbook of the International Law Commission:-
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an improvement as to form. He accordingly thought that the order proposed by the Special Rapporteur should be followed. The Special Rapporteur had prepared the redraft in the light of that order and would find it difficult to rearrange the text if the Commission reverted to the former order.

47. Sir Humphrey WALDOCK, Special Rapporteur, said he hoped that the new version of article 47, paragraph 1, would satisfy Mr. Ago and meet his criticism that it would be inelegant to refer to the loss of a right to allege the nullity of a treaty before laying down the conditions of validity.

48. Mr. AGO said it was evident from Mr. Castrén's and the Special Rapporteur's remarks that the order of the articles must inevitably affect the substance of the articles. The text would vary with the Commission's decision regarding the placing of any one article. He therefore maintained his proposal that, for the time being, the Commission retain the earlier order.

49. Mr. YASSEEN said that the Commission customarily took the Special Rapporteur's draft as the basis for its discussion. In his latest report, however, the Special Rapporteur had changed the order, and the change in the order of the articles reflected a change in approach which to some extent affected the scope of certain rules. If the Commission took the Special Rapporteur's report as the basis for its discussion, it should follow the order suggested by the Special Rapporteur, but that course would not necessarily imply its acceptance of the order.

50. In his opinion, the Commission should, for the sake of convenience, follow the order proposed by the Special Rapporteur, without prejudice to its future attitude regarding the substance, and subject to the proviso that it was at liberty to revert to the original order.

51. Mr. AMADO said that the order of the articles should be dealt with later and that, instead of looking at the outside, the Commission should look at the intrinsic foundations of the structure of its draft. What he personally was interested in was the content of the one or other article, in order that he could make up his mind whether the article deserved his approval.

52. Mr. CADIEUX said that the discussion should proceed on the basis of the Special Rapporteur's proposals. The Commission was clearly caught in a vicious circle because the placing of an article would influence its drafting. The Commission should, however, tackle the problem without prejudice to its future decision regarding the order of the articles. The Special Rapporteur's proposals made it possible to deal with the question in the light of new factors and to make progress.

53. Sir Humphrey WALDOCK, Special Rapporteur, said that the decision as to the order in which the articles were to be discussed was perhaps not of such fundamental importance as some members thought. He had tried in his new text not to alter the substance of the articles previously approved, except where that was called for by well-founded observations from governments or where some variation of nuance was needed. The advantage of transferring general provisions to the beginning of part II was a technical one and could appropriately be discussed by the Drafting Committee. He would have thought it might be convenient to follow the order he had chosen in his fifth report primarily for scientific reasons, though he had no wish to impose his views on the Commission.

54. The CHAIRMAN said that opinion was divided and that, since at present the Commission only had a quorum for discussion, not for voting, it could not settle the matter by a vote. He suggested that the discussion be continued the next day, by which time more members would have arrived.

55. Mr. AGO said he supported the Chairman's suggestion.

56. Mr. BRIGGS said he presumed that the Commission would start by discussing article 30 and that he hoped agreement would soon be reached on which articles it would take after that, so as to give members due warning as to which articles they should study first.

57. The CHAIRMAN said that, at the next meeting, the Commission would first consider article 30, and would then decide whether to go on to article 31 or whether to take article 49.

The meeting rose at 5.20 p.m.

823rd MEETING

Tuesday, 4 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/177 and Add.1-2, A/CN.4/183 and Add. 1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 30 Presumption as to the validity, continuance in Force and operation of a treaty)

Article 30
Presumption as to the validity, continuance in force and operation of a treaty

Every treaty concluded and brought into force in accordance with the provisions of part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the application of the present articles. (A/CN.4/L.107, p. 31)

1. The CHAIRMAN welcomed Mr. Caicedo-Castilla, the observer for the Inter-American Juridical Committee, who had arrived to attend the Commission's proceedings.

2. He said he had been informed that, for health reasons, Mr. El-Erian had had to postpone his arrival by a few days, while Mr. Paredes had had to give up entirely the idea of attending the session.

3. He invited the Commission to begin its consideration of article 30, for which the Special Rapporteur, in his fourth report (A/CN.4/177/Add.2, p. 7), had proposed a rewording which read:

> Every treaty concluded and brought into force in accordance with the provisions of part II shall be considered as being valid, in force and in operation with regard to any party to the treaty, unless the invalidity, termination or suspension of the operation of the treaty or the withdrawal of the party in question from the treaty results from the application of articles 31 to 51 inclusive.

4. Mr. CASTRÉN said that he wished first to comment on the title of part II of the draft articles. He agreed with the Special Rapporteur's proposal that the title be expanded by the inclusion of a mention of the suspension of the operation of treaties.

5. He hoped, however, that in that title, and also in that of section 2, the term "validity" would be used instead of the term "invalidity" because, first, the validity of a treaty was the normal and not the exceptional case, a point stressed not only in article 30 but also in article 31. Neither in treatises on international law nor in monographs on international treaties was the negative form used. Secondly, there were cases where a treaty, although not valid *per se*, nevertheless remained in force because no party had invoked its invalidity within a reasonable period. Thirdly, under the heading "validity" it would be possible to deal with exactly the same points as under the head "invalidity", so that the affirmative form offered only advantages.

6. Sir Humphrey WALDOCK, Special Rapporteur, said that the question raised by Mr. Castrén regarding the title of part II was connected with the general problem of the arrangement of the draft articles as a whole. It would therefore be advisable to leave that question to the Drafting Committee.

7. When he had first dealt with the subject matter of part II in his second report, he had used the title "The essential validity, duration and termination of treaties".[1] The present title, "Invalidity and termination of treaties", had resulted from a decision of the Commission at the end of its fifteenth session;[2] it had been felt then that the subject matter of the articles in part II really related to invalidity.

8. The question of the title of part II was also connected with his own general preoccupation with the impact of the articles in part II on the stability of treaties. It was that preoccupation that had led him to place at the beginning of part II a provision laying down the presumption that a treaty was valid until some grounds of invalidity had been established. The Commission had, at its fifteenth session, adopted that provision as the opening article of part II in order to offset the fact that subsequent articles in the same part contained somewhat destructive provisions.

9. With regard to article 30 itself, when the Commission had adopted it, it had not yet dealt with the *pacta sunt servanda* rule; since that time, the Commission, at its sixteenth session, had adopted article 55, which dealt with that rule, so that article 30 might now be less essential. No decision on the retention or otherwise of article 30 should, however, be taken until the Commission had decided on the arrangement of the articles as a whole. If article 55 were finally to appear at the beginning of the series of articles following part I, on the conclusion of treaties, the purpose of article 30 would be largely served. Even so, article 30 might still be useful to meet the concern expressed by governments regarding the effect of the draft articles on the stability of treaties.

10. In his fourth report, he had put forward a rewording of article 30, which took into account the fact that the draft articles now dealt not only with the invalidity and termination, but also with the suspension of the operation of treaties.

11. He asked the Commission to consider whether article 30 should be retained, a question which to some extent depended on the general structure of the draft articles, and if so, whether it wished to change the wording of the article 30 as adopted at its fifteenth session.[3]

12. Mr. YASSEEN, referring to the title of part II, said that the new wording proposed by the Special Rapporteur suffered from the defect, at least in the English text, that it did not sufficiently differentiate between invalidity and termination — which affected the treaty itself — and suspension, which affected not the treaty itself but its operation. The difference was important from the point of view of the effects of the provisions contained in the article.

13. Mr. ROSENNE said that he felt hesitant with regard to the retention of article 30. Its contents represented perhaps the other side of the *pacta sunt servanda* rule, and one possibility might be to combine them with the provisions of article 55.

14. Article 30 had certainly been necessary in 1963, before the Commission had adopted article 55, but the whole question now appeared in a different light. It might be that the thought contained in article 30 should ultimately find a place in the preamble to the future convention on the law of treaties, although it was not, of course, the practice of the Commission to submit a preamble for its draft conventions, and he did not suggest any change in that practice.

15. He made those remarks with all reservations because he did not wish to commit himself on the question of article 30 at the present stage; he agreed with the Special Rapporteur that its retention depended largely on the terms of the other articles and their placing. With those reservations, he wished to make certain suggestions on the rewording now proposed by the Special Rapporteur.

16. The text of article 30 had been drawn up in 1963; since then, at the first part of its seventeenth session, the

[1] *Yearbook of the International Law Commission, 1963*, Vol. II, p. 38.

[2] *Ibid.*, p. 189, para. 11.

[3] *Ibid.*, p. 189.

Commission had adopted a new version of articles 1 to 29. In particular, it had refined its formulation of the various stages through which a transaction proceeded before it became a binding and operative treaty for a given State. In consequence, care would be needed in determining the exact stage in that process at which article 30 itself would start to take effect.

17. Article 30 had been drafted in the form of a presumption. The Commission, however, had been making every effort to avoid drafting its articles in the form of presumptions pure and simple, or mere descriptions, and had worked more in the direction of stating the law in terms of legal rules or statements of legal principle. If article 30 were to be retained merely in the form of a presumption, it might have the effect of detracting from the stability of treaties and of introducing an additional source of uncertainty, confusion and even tension. For those reasons, he felt that article 30 should lay down a clear binding rule of law rather than a presumption.

18. With those considerations in mind, he had two observations to make on the Special Rapporteur's rewording of article 30. The first related to the use in the opening words of both the term " concluded " and the term " brought into force ". Such use was not consistent with the time-structure of the creation of a treaty obligation as it emerged from articles 15 and 23, as adopted at the first part of the present session, and the provisions of article 56, as adopted at the sixteenth session, regarding the validity in time of a treaty. The point of time to which article 30 must be attached should be the moment from which the treaty entered into force for a given State in accordance with the provisions of article 23.

19. His second observation related to the closing words " results from the application of articles 31 to 51 inclusive ". That reference might perhaps be sufficient to cover invalidity, but the termination or the suspension of the operation of a treaty could emerge from other articles as well. Articles on reservations provided one example; other examples were provided by article 63 (Application of treaties having incompatible provisions) and article 64 (The effect of severance of diplomatic relations on the application of treaties); possibly also, the provisions of article 68 (Modification of a treaty by a subsequent treaty, by subsequent practice or by customary law) might in fact lead to some sort of suspension of the operation of the treaty. There could also be cases of suspension, and even of termination, which were not covered by the Commission's draft articles at all; for instance, the important case of obsolescence, although that could perhaps be brought within the scope of the articles on revision or interpretation.

20. He accordingly suggested that article 30 be reworded on some such lines as the following:

> " Every treaty, after its entry into force in accordance with the provisions of section 2 of part I, shall be operative with regard to any party to the treaty unless the invalidity, the termination or the suspension of the operation of the treaty, or the withdrawal of a party from that treaty, results from the application of these articles ".

21. In that form, article 30 would be stating a rule of law and not a presumption, and would also be better co-ordinated with the draft articles adopted by the Commission during the first part of its seventeenth session.

22. With regard to the title of part II, he supported for the time being the position of the Special Rapporteur.

23. Mr. AGO said that, before discussing the actual text of article 30, the Commission should settle the preliminary question asked by the Special Rapporteur as to whether the article should be retained or not. For the moment his personal inclination was to support the Special Rapporteur's proposal that article 30 should stand. He certainly did not share the opinions of those who were reluctant to restate in article 30 what was stated in article 55, or who thought of amalgamating the two articles.

24. The two articles dealt with entirely different questions. Article 55 laid down the rule *pacta sunt servanda* and the obligation of the parties to perform in good faith a treaty which was in force. Article 30, on the other hand, dealt with the question of determining whether a treaty was or was not in force, in other words of determining whether the necessary condition for the application of article 55 was fulfilled. To try to amalgamate article 30 with article 55 would therefore lead to confusion.

25. The question whether the provision was or was not necessary could hardly be answered without examining the subsequent articles which enumerated the grounds that could be invoked for regarding a treaty as invalid.

26. He could see two reasons for retaining article 30. The first, which had been stressed by the Special Rapporteur, was a general political reason; namely, that several governments had expressed the view that the draft gave rather too much prominence to the grounds on which a treaty could be regarded as invalid. A clause to reassure governments with regard to the stability of existing treaties might therefore be useful.

27. The second reason was, as Mr. Rosenne had said, that article 30 did not in fact lay down a presumption but rather a rule of substance. It was indispensable to state clearly that the only grounds for invalidity were those specified in the subsequent articles, and that in all cases other than those expressly specified the treaty was in force. Such a rule would greatly contribute to the stability of treaties.

28. Mr. TUNKIN said that, at the first reading, he had already expressed some doubts regarding the necessity for article 30. Since then, in article 55, the Commission had stated the *pacta sunt servanda* rule, which was the essential rule in the matter.

29. Article 30 seemed rather pointless: it stated the obvious fact that a treaty was valid when it was not invalid, and that it was in force unless, under some provision of the draft articles, it was not in force. At a conference of plenipotentiaries, it would no doubt be felt that article 30 contained an academic statement, and stated a logical presumption rather than a legal rule. Perhaps some of its contents could be incorporated in article 55.

30. Mr. BRIGGS said that, on reflection, he had some doubts regarding the necessity for article 30, and on the whole shared Mr. Tunkin's views.

31. It seemed tautological to speak of a treaty " concluded and brought into force ". As indicated in the 1935 commentary to article 21 of the Harvard Research draft, the word " conclude ", in the case of a treaty, referred to " the sum total of the acts or processes by which a treaty is brought into force with respect to a State ".[4] If the Commission were to decide to retain article 30, he would therefore suggest dropping the words " and brought into force ".

32. He noted that Mr. Rosenne had made an effort to reword the article, placing the emphasis on the concept of bringing a treaty into operation, but such an approach was hardly consistent with the original intention of article 30.

33. Despite the distinction which Mr. Ago had drawn between the purpose of article 30 and that of article 55, he still felt that article 30 served no useful purpose. Moreover, he could not support the suggestion to amalgamate it with article 55, since that would only weaken the statement, in article 55, of the essential *pacta sunt servanda* rule.

34. Mr. AMADO said that his principal concern was that the fundamental rule, *pacta sunt servanda*, should not be diluted to the point of becoming a residuary rule, a risk against which the Special Rapporteur had rightly warned the Commission. Despite the views expressed during the discussion, he did not see any overriding need for keeping article 30.

35. Mr. YASSEEN said that he adhered to the conclusion he had reached at the Commission's fifteenth session in 1963, which was that the article laid down a rule which, while correct, was self-evident, and thus unnecessary.[5]

36. Mr. CADIEUX said he had the impression that the rule laid down in article 30 might have some positive value. Whether it was essential was a different question, the answer to which would depend in part on the contents of the rest of the draft. Consequently, it was perhaps preferable that the Commission should suspend judgment on that point until it had settled the terms of the other articles.

37. When making its final decision on article 30, the Commission should bear in mind the Special Rapporteur's concern, which was that the comments of governments should be taken into account.

38. Mr. AGO said that it was a very delicate question. Unlike Mr. Amado, he did not believe that article 55 would be in any way weakened if article 30 were retained. The duty to apply a treaty existed only if the treaty was in being and was valid. Article 30 was concerned only with the latter question.

39. Nor was it entirely accurate to say, as Mr. Tunkin had done, that article 30 stated the obvious — that any treaty was valid unless it was invalid. The idea expressed in article 30 should be that any treaty was valid unless it was invalid for any of the reasons enumerated. That was the heart of the matter. If the Commission should wish to admit possible grounds for invalidity other than those mentioned in articles 31 and subsequent articles, then it should drop article 30. In his opinion, the Commission ought to limit those possible grounds very strictly. Unless that limitation emerged clearly from the subsequent articles, then article 30 should be retained.

40. Mr. AMADO said that, if Mr. Ago's description of article 30 as a restrictive article was correct, then it should be retained, for it would debar all further grounds of invalidity.

41. Mr. ELIAS said he shared the view that article 30 should be deleted. He would, however, be prepared to see it referred to the Drafting Committee for further consideration before the Commission reached a final decision on whether to retain it or to transfer its contents to the commentary to article 55.

42. When the Commission had considered the *pacta sunt servanda* rule in article 55, attempts had been made to introduce a number of exceptions into that article, but the Commission had reached the conclusion that the *pacta sunt servanda* rule should be stated in absolute terms. It was true that article 30 did not contain an express derogation from the provisions of article 55, but its retention was likely to create confusion in the minds of those who were not aware of the reasoning behind the Commission's decisions.

43. Article 30 did not state any very strong rule. It had been adopted in 1963 in order to introduce some kind of logical completeness at a time when the Commission had not yet considered the *pacta sunt servanda* rule. In 1963, it had seemed appropriate to include article 30 in order to link the contents of part I with those of part II. If, however, the Commission, when it adopted article 55, had re-examined article 30, many members would have doubted the usefulness of retaining it.

44. Mr. CASTRÉN said that article 30 was useful for the reasons given by Mr. Ago. The text was open to criticism in that it stated only the obvious, but several governments wished the article to stand. In any case the article was quite innocuous. He proposed that it be retained at least for the time being.

45. Mr. TUNKIN said that Mr. Ago had raised a valid point; article 30 would serve some purpose if its intention was to state that the only possible exceptions to the validity and full operation of a treaty were those stated in the draft articles.

46. The idea was important but was connected with the contents of article 55, by virtue of which a " treaty in force ", which must of course be a valid treaty, was " binding upon the parties to it and must be performed by them in good faith ". Perhaps the idea could be included in article 55.

47. He was, however, prepared to accept the suggestion that the Drafting Committee be requested to examine whether article 30 should be retained or its contents included in article 55; the Drafting Committee could also consider whether any other course was open.

48. Mr. AMADO said that article 55 contained two distinct ideas: first, the fundamental maxim *pacta sunt servanda* and, secondly, the rule that treaties should be

[4] *Research in International Law*, " III, Law of Treaties "; Supplement to the *American Journal of International Law*, Vol. 29, 1935, p. 992.

[5] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 195, para. 73.

applied in good faith. The second idea did not necessarily flow from the first.

49. Mr. ROSENNE said that he had been impressed by the analysis made by Mr. Ago so far as concerned the limitative function of article 30 regarding invalidity. He would question, however, whether article 30 could perform the same function with regard to the termination of a treaty, the suspension of its operation or the withdrawal of a party from it.

50. He favoured the suggestion to refer the matter to the Drafting Committee, though it would only be able to take a decision in the light of the draft articles as a whole.

51. Mr. YASSEEN said that he had questioned the need for article 30 in so far as it raised a presumption but that, after hearing Mr. Ago's arguments, he realized that the article might have some use as a restrictive rule. But the article as at present drafted stressed the first aspect, the presumption. The Commission should therefore revise the article, if it was intended to lay down a rule of law limiting the grounds for the nullity of treaties. Such a rule would be useful for the certainty and stability of treaties.

52. Without wishing to make a formal proposal, he suggested that, in the light of the concern expressed by Mr. Ago, article 30 be drafted on some such lines as: " A treaty cannot be invalidated or terminated, and its operation cannot be suspended, except by virtue of articles 31 to 51." That wording, however, presupposed that the Commission would have made certain that its draft covered all possible causes of the nullity or the termination of treaties.

53. Mr. AGO, replying to Mr. Rosenne, said that the Commission would no doubt have to redraft article 30, but would not be able to do so until it had looked at and settled the terms of all the articles from 31 to 46.

54. Mr. AMADO said that the discussion had originated from the Special Rapporteur's praiseworthy concern that the comments of governments should be taken into account and that aspect should be given due consideration.

55. The CHAIRMAN, speaking as a member of the Commission, said that article 55 was concerned with validity in the sense of the performance and observance of treaties. The two possible situations were, either that the State had an obligation to perform under the treaty in force, or that it could exercise a right within the limits of a treaty in force. From that point of view, Mr. Ago's analysis was tenable. In his (the Chairman's) view, however, article 30 dealt with an entirely different question, namely, whether a treaty, once in force, remained in force or could be challenged on any grounds.

56. Like Mr. Ago, he thought that article 30 dealt with exceptions, in other words, that it provided that there could be no nullity, withdrawal or suspension except on the grounds specified in the draft articles.

57. He agreed with Mr. Rosenne that other articles might perhaps speak of grounds for invalidity other than those referred to in article 30. He considered, therefore, that the Commission should retain the article, while making it clear that what it stated was not a presumption but a general rule, to which there might be certain exceptions listed in the draft articles.

58. He could not agree with the suggestion that the idea might be dealt with in the commentary. Commentaries either disappeared or lost their usefulness as an indication of what the original authors had had in mind when challenged by those who denied that *travaux préparatoires* were of any value.

59. Sir Humphrey WALDOCK, Special Rapporteur, said that there appeared to be a measure of agreement on the question whether to delete or to retain article 30, though members might wish to reserve final judgment until they had the whole of the draft articles before them. The majority seemed to be in favour of leaving the article to the Drafting Committee for consideration in the light of the discussion.

60. His own position was very close to that of Mr. Ago; article 30 was necessary in order to emphasize that the normal position was that of the validity of the treaty. The provisions of article 30 would provide a useful bulwark for the stability of treaties, by indicating that any party wishing to invoke grounds of invalidity or termination would have to establish those grounds in accordance with the provisions of the draft articles.

61. Another useful purpose served by article 30 was to make it clear that any State wishing to invoke grounds of invalidity or termination would have to establish those grounds in accordance with the orderly procedure laid down in article 51, one of the more important provisions of part II.

62. The Commission would have to be satisfied that it had not omitted any grounds for invalidity. As indicated by Mr. Rosenne, there could well be some other grounds, such as obsolescence or desuetude. That question had so far been treated as covered either by the provisions on tacit agreement to terminate a treaty, or by those on fundamental change of circumstances. His own view was that it was tacit agreement which covered them. He was inclined to agree that unless all the grounds for invalidity and termination were covered, the residuary rule embodied in article 30 could become a danger rather than a safeguard.

63. In his opinion, the provisions of article 30 should not be amalgamated with those of article 55. The two sets of provisions served different purposes. Article 55 dealt with a treaty with respect to which neither validity nor termination was in discussion.

64. He suggested that all the useful drafting suggestions made during the discussion be referred to the Drafting Committee. He favoured, in particular, Mr. Rosenne's suggestion to widen the reference in the concluding words so as to cover all the draft articles. It was essential to ensure that none of the draft articles which contained provisions for suspension or termination was overlooked.

65. The CHAIRMAN said that, if there were no objections, he would consider that the Commission agreed to refer article 30 to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[6]

[6] For resumption of discussion, see 841st meeting, paras. 21-41.

ORDER OF DISCUSSION OF THE DRAFT ARTICLES *(resumed from the previous meeting)*

66. The CHAIRMAN invited the Commission to resume its discussion of the order in which it would take the draft articles.

67. Sir Humphrey WALDOCK, Special Rapporteur, said that it did not matter very much in what order the Commission discussed the articles contained in part II, provided it came to a clear decision on the best way of dealing with the general provisions that were applicable to a number of articles concerning invalidity, termination and suspension. He had transferred those general provisions to the beginning of section I in order to indicate which were the rules regulating the conditions for invoking invalidity and termination, but he was aware that the material could be arranged differently, as had been done in the 1963 draft.

68. He was uncertain whether, at its fifteenth session, the Commission had been right in formulating the provisions concerning separability always in the form of an option, leaving it to the State concerned to decide whether or not to invoke invalidity or termination in respect of only certain clauses in the treaty or of the treaty as a whole.

69. Certainly in cases of fraud, which fundamentally affected confidence between two parties, the defrauded party should have the option to invoke the termination of the whole treaty, or only those parts to which the fraud particularly related. But, in cases of error or *rebus sic stantibus*, it was by no means so clear that it should be a matter of choice. If the conditions for separability existed, it was arguable that the effects should be limited to particular clauses.

70. Although it might be convenient to discuss the articles in the order he had suggested in his fifth report, as Special Rapporteur he would have no objection to taking them in the order of the 1963 draft.

71. Mr. TUNKIN said that to some extent the Commission had already considered the problem of how the material should be arranged, and he doubted whether at the present juncture it was in a position to make any final decision on the matter. The Drafting Committee should be asked to consider first the scheme of the whole draft and to make proposals on the subject to the Commission. In the meantime, the Commission itself should discuss the articles in the order in which they appeared in the 1963 draft.

72. The CHAIRMAN said that he would be inclined to advise the Commission not to take a decision for the time being on the final order of the articles. It had not been disputed that some changes would have to be made in the 1963 order; the Special Rapporteur would be discussing the question of the structure of the articles with the Drafting Committee.

73. Sir Humphrey WALDOCK, Special Rapporteur, said that the Commission could not afford to be too cavalier about the question of the order of the articles, because it would affect their actual drafting and members ought soon to have a fairly clear idea of the general arrangement of the articles. He was particularly concerned at the possibility of the Commission having overlooked the fact that the provisions concerning separability were also applicable to cases when a party lost the right to allege the nullity of a treaty.

74. He would have no objection to the Commission discussing the articles in the order adopted in 1963, though he had not been convinced by Mr. Ago's scientific arguments in favour of that order, because at its fifteenth session the Commission had deliberately decided to deal in part II with the grounds on which invalidity or termination could be invoked and not with conditions of validity.[7] The difference was one of approach.

75. If the Drafting Committee were to decide that it would be preferable, for scientific reasons, to separate conditions of validity from the grounds for terminating a treaty, the drafting of the actual articles might have to be substantially modified.

76. Mr. TUNKIN said that inevitably the final structure of the whole draft would have to be determined during the final stages of the discussion, but until that moment was reached, the Drafting Committee could still usefully consider what rearrangement might be needed in part II.

77. Mr. AGO said he was anxious that the Commission should not, without due reflection, change the order of the articles in a manner which would have the effect of amending the text. The simplest plan was to ask the Drafting Committee to take up the problem at once. While awaiting the Drafting Committee's decision on what would be the best arrangement, the Commission could continue to consider the articles in their 1963 order.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that even if the new order he was proposing for the articles in part II found favour, that would not involve the Commission in taking any final decision. He was personally quite sure that changes in the order of individual articles would have to be made until late in the eighteenth session, but the general problem of order could not be postponed indefinitely. The Commission was reaching a point when it must obtain a fairly clear idea of the general structure, and that would certainly greatly assist him in his task as Special Rapporteur.

79. The CHAIRMAN suggested that the Drafting Committee be asked to examine the provisional order of the articles as soon as possible. Meanwhile, the Commission would continue its consideration of the articles in the order in which they appeared in document A/CN.4/L.107.

It was so agreed.

ARTICLE 31 (Provisions of internal law regarding competence to enter into treaties)

Article 31

Provisions of internal law regarding competence to enter into treaties

When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 5 to be furnished with the necessary

[7] *Yearbook of the International Law Commission, 1963*, Vol. II, pp. 188-9, para. 11.

authority, the fact that a provision of the internal law of the State regarding competence to enter into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree. (A/CN.4/L.107, p. 31)

80. The CHAIRMAN invited the Commission to consider article 31, for which the Special Rapporteur had proposed a new title and text reading:

Violation of internal law

The fact that a treaty has been concluded in violation of its internal law may be invoked by a State as invalidating its consent to be bound by the treaty only if the violation of its internal law was known to the other States concerned or was so evident that they must be considered as having notice of it. (A/CN.4/177/Add.2, p. 18)

81. Sir Humphrey WALDOCK, Special Rapporteur, said that a number of governments had commented on article 31 and most of them had accepted, as the best compromise possible on a difficult problem, the fundamental thesis that any failure to comply with the provisions of internal law did not in principle affect the validity of the treaty, and that its invalidity could only be invoked when that failure had been manifest.

82. He had proposed a new and shorter version of the article. One important change was the omission of the cross-reference to article 4 which dealt with evidence of authority to represent the State in the conclusion of a treaty. During the first part of the seventeenth session, article 4 had been extensively revised and he had come to the conclusion that it was relevant to article 32, but not to article 31.

83. Governments had criticised the proviso " unless the violation of its internal law was manifest " in the Commission's text of article 31, on the grounds that it was obscure and that it was not clear to whom the violation should be manifest. He had taken that objection into account and had redrafted the clause on the lines proposed by the Netherlands Government.

84. Mr. ELIAS said that, in general, the Special Rapporteur's new text for article 31 was an improvement and was acceptable. At the fifteenth session his main objection to the earlier version had been to the use of the word " manifest ", particularly when qualified by the word " absolutely ".[8]

85. He agreed that the cross-reference to article 4 should be dropped as it had no particular relevance to article 31, in which it was important to stress that consent, when not properly expressed, could be a ground for invalidity.

86. Mr. BRIGGS said that, at the fifteenth session, he had abstained from voting on article 31 for the only reason that he objected to the exception stated at the end of the article.

87. The new text was in certain respects an improvement. The word " known " was certainly preferable to the word " manifest ", but it would be better to refer to " the other parties " rather than to " the other States concerned ".

88. Possibly the Special Rapporteur had gone a little too far in accepting the drafting suggestions of certain governments and he considered that the words " or was so evident that they must be considered as having notice of it ", which unduly broadened the provision, should be dropped. He did not favour the change to the permissive form: the original text had laid down a prohibition according to which a party could not invoke the violation of internal law as invalidating its consent to be bound.

89. He doubted whether the Special Rapporteur was right to speak of " the fact " that a treaty had been concluded in violation of internal law, when what was meant was a claim, or an allegation, that that had occurred. Reference should be made to the " ground for invalidating, terminating, withdrawing from or suspending " or to the " ground of invalidity, termination, withdrawal from or suspension ", as had been done in the Special Rapporteur's new texts of articles 46, 47 and 49, paragraph 1. Similar wording had been used in articles 34, 42, 43, 44 and 51 of the 1963 draft.

90. He was uncertain whether the reference to internal law was sufficiently precise. In reality the article was concerned with the competence to conclude treaties under internal law, and perhaps that ought to be made clearer so as to remove the objections raised by the Governments of Luxembourg and Panama (A/CN.4/177/Add.2, pp. 9 and 12).

91. He was not in favour of referring in the article to a " violation " of internal law, because a claim that internal law had not been complied with was not necessarily a claim that it had been violated.

92. He proposed that the article be redrafted to read:

" *Non-compliance with internal law*

" Non-compliance with a provision of its internal law regarding competence to conclude treaties may not be invoked by a State as a ground for invalidating its consent to be bound by a treaty when that consent has been expressed by a person considered as representing that State within the meaning of article 4 of these articles, unless the non-compliance with its internal law was known by the other parties to the treaty."

93. He had reinserted the reference to article 4, which was perhaps not strictly necessary, in order to strengthen the article.

94. Mr. ROSENNE said that, in general, the Special Rapporteur's new text was acceptable, particularly with the omisson of the cross-reference to article 4 which more properly belonged to article 32.

95. He agreed with Mr. Briggs that mention of " violation " should be avoided because it was ambiguous, tendentious, pejorative and open to misinterpretation.

96. The CHAIRMAN, speaking as a member of the Commission, said that he preferred the new text which, while more elegant and more concise, did not omit any of the ideas contained in the earlier draft.

[8] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 207, para. 62.

97. Sir Humphrey WALDOCK, Special Rapporteur, said that the reservations expressed by Mr. Briggs were understandable, as his standpoint was quite different from that adopted by the Special Rapporteur and, indeed, by the Commission itself at its fifteenth session.

98. He agreed that the word " violation " was not particularly well-chosen but considered that in other respects the new version of the article proposed in his fifth report was both more elegant and more faithfully reflected the Commission's decision at its fifteenth session.

99. Mr. AMADO pointed out that article 31 as reformulated did not contain the notion of the consent of a State expressed by its representative, which appeared in articles 32, 34 and 35. Could that notion be dropped from one article and retained in others? It had also appeared in the former version of article 31, the last sentence of which read " Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree ".

100. Mr. CASTRÉN said that, in principle, he approved the substance of the article, and its form had been greatly improved in the new version. Nevertheless, the reference to " its " internal law was not very clear, and he therefore suggested that the opening words of the article read " A State may not invoke the fact that a treaty has been concluded in violation of its internal law as invalidating its consent . . .".

101. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee would have to bear in mind the comment made by some governments that the Commission had failed to make clear that the provisions concerning separability also applied to article 31. One possibility would be to specify in article 47 the articles to which the provisions about separability were applicable.

102. In his opinion, article 31 could now be referred to the Drafting Committee in the light of the discussion.

103. The CHAIRMAN, speaking as a member of the Commission, said that from the point of view of the violation of internal law, the question of separability was very complex. It was a delicate matter to distinguish between a rule which a negotiator could accept because it did not violate his State's internal law, and a rule which did violate that law, and he doubted whether the Drafting Committee would be able to find a satisfactory solution.

104. Speaking as Chairman, he suggested that article 31 be referred to the Drafting Committee.

It was so agreed.[9]

105. The CHAIRMAN, noting that both Vice-Chairmen were absent, suggested that Mr. Elias, the General Rapporteur, be asked to take the Chair in the Drafting Committee, and that Mr. Cadieux be appointed a member of that Committee, pending the arrival of Mr. Reuter.

It was so agreed.

The meeting rose at 1 p.m.

[9] For resumption of discussion, see 841st meeting, paras. 42-56.

824th MEETING

Wednesday, 5 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Cadieux, Mr. Castrén, Mr. Elias, Mr. Pessou, Mr. Rosenne, Mr. Tunkin, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

(A/CN.4/177 and Add.1-2, A/CN.4/183 and Add.1-2, A/CN.4/L.107)

[Item 2 of the agenda]

(continued)

ARTICLE 32 (Lack of authority to bind the State)

Article 32

Lack of authority to bind the State

1. If the representative of a State, who cannot be considered under the provisions of article 4 as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States. (A/CN.4/L.107, p. 32)

1. The CHAIRMAN invited the Commission to consider article 32, for which the Special Rapporteur, in his fourth report (A/CN.4/177/Add.2, p. 21), had proposed a new title and text which read:

Unauthorized act of a representative

1. Where a representative, who is not considered under article 4 as representing his State for the purpose or as furnished with the necessary authority, purports to express the consent of his State to be bound by a treaty, his lack of authority may be invoked as invalidating such consent unless this has afterwards been confirmed, expressly or impliedly, by his State.

2. Where the authority of a representative to express the consent of his State to be bound by a treaty has been made subject to a particular restriction, his omission to observe that restriction may be invoked as invalidating the consent only after the restriction was brought to the notice of the other contracting States prior to his expressing such consent.

2. Sir Humphrey WALDOCK, Special Rapporteur, said that article 32 dealt with the lack of authority to