Document:-

A/CN.4/SR.836

Summary record of the 836th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1966, vol. I(1)

Downloaded from the web site of the International Law Commission (http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

and to define in article 45 the rule of *jus cogens* in exactly the same terms as in article 37.

75. He had never argued that nullity always operated *ex tunc*. There were two kinds of nullity—absolute and relative; there was the nullity which could be declared *de officio*, and there was the nullity which could only be declared on the application of a party and which consequently never operated *ex tunc*, but always *ex nunc*. The formula which the Commission should choose was therefore clear, and the article should be referred to the Drafting Committee.

76. Mr. TUNKIN said that the wording suggested by Mr. Ago had certain obvious drawbacks. First, it departed considerably from the general structure of article 37. Secondly, it made no reference to article 37. During the discussion of that article there had been general agreement in the Commission that it should be read in conjunction with article 45 so as to obviate any possibility of misunderstanding and therefore a cross-reference from one to the other was necessary.

77. Sir Humphrey WALDOCK, Special Rapporteur, said that the discussion had been a useful one on an article which was perhaps more intricate than had at first been realized. Provided articles 37 and 45 were read together, there should be no room for misunderstanding as to their meaning. Some governments had complained that the Commission, after drawing a distinction between nullity and termination, had then confused the two concepts in articles 52 and 53, but that was a defect that could be remedied by better drafting. Perhaps in places elegance might have to be sacrificed in the interests of clarity so as to bring out the connexion between articles 37, 45, 52 and 53. The word "peremptory" was not indispensable in article 45, but it did catch the attention of the reader. Perhaps the Drafting Committee could be asked to consider whether or not it should be retained. The reference to article 37 was, of course, necessary because it linked the two articles.

78. The Drafting Committee should also be asked to consider the point made by the Chairman about the need to cover transitional arrangements that might be necessary with the emergence of a new norm of general international law, as there was perhaps some force in the contention that the statement of the rule was rather too abrupt. The new text suggested by Mr. Ago seemed to be designed to soften the draft in that regard, and to reassure those States that had expressed concern about the rule being too indefinite on account of the difficulty of knowing when a peremptory norm had become established.

79. As far as merging articles 37 and 45 was concerned, Mr. Castrén would have noted that most members were in favour of keeping them separate—and that was his own firm opinion—for otherwise serious confusion might result.

80. The CHAIRMAN suggested that article 45, together with the various proposals made concerning the article, be referred to the Drafting Committee.

It was so agreed.[5]

[5] For resumption of discussion, see 842nd meeting, paras. 58-70.

Arrangements for the Eighteenth Session

81. The CHAIRMAN said that Mr. Rosenne had proposed that, in conformity with a proposal submitted to and adopted by the General Assembly, the Commission decide forthwith that its summer session would last for twelve weeks, on the understanding that it would be free to meet for a shorter period if such a long session proved not to be necessary.

82. Mr. VERDROSS said that he would not object to a summer session of twelve weeks if the Commission had the necessary funds at its disposal, though personally he might not be able to attend for the whole of the session.

83. The CHAIRMAN proposed that the Commission decide that its summer session should last until 22 July 1966.

It was so decided.

The meeting rose at 12.30 p.m.

836th MEETING

Friday, 21 January 1966, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Organization of Work

1. The CHAIRMAN said that the Officers of the Commission had met that morning and submitted the following recommendations:

(a) it is noted that it is impossible for the Commission to complete at the present session its examination of all the articles in part II of the draft and it is accordingly recommended that the Commission should not go beyond article 51;

(b) it is recommended that the Drafting Committee speed up its work and meet more frequently and that the Commission hold shorter meetings in order to allow the Drafting Committee the time it needs;

(c) it is recommended that the second Vice-Chairman, Mr. Paul Reuter, be asked to replace the General Rapporteur, Mr. Elias, now absent, and undertake the drafting of the Commission's report on its present session;

(d) it is recommended that the articles adopted at the present session be included in the report without any commentary and that the commentaries be added when the Commission's final report on the draft articles on the law of treaties is prepared;

(e) it is proposed that the Commission express its thanks to the Government of Monaco for its invitation and hospitality.

The recommendations of the Officers of the Commission were unanimously adopted.

Law of Treaties

(A/CN.4/183 and Add.1-4, A/CN.4/L.107, A/CN.4/L.108)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 46 (Separability of treaty provisions for the purposes of the operation of the present articles)

Article 46

Separability of treaty provisions for the purposes of the operation of the present articles

1. Except as provided in the treaty itself or in articles 33 to 35 and 42 to 45, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

2. The provisions of articles 33 to 35 and 42 to 45 regarding the partial nullity, termination or suspension of the operation of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

(*a*) The clauses in question are clearly severable from the remainder of the treaty with regard to their application; and

(*b*) It does not appear either from the treaty or from statements during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treaty as a whole. (A/CN.4/L.107, p. 41)

2. The CHAIRMAN invited the Commission to consider article 46, for which the Special Rapporteur had proposed a new title and text which read:

Grounds for invalidating, terminating, withdrawing from or suspending the operation only of particular clauses of a treaty

1. A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty which relates to particular clauses of the treaty may be invoked only with respect to those clauses when:

(*a*) the said clauses are clearly separable from the remainder of the treaty with regard to their application; and

(*b*) it does not appear from the treaty or from the circumstances of its conclusion that acceptance of those clauses was an essential basis of the consent of the other party or parties to the treaty as a whole.

2. However, in cases falling under articles 33 and 35 the State entitled to invoke the fraud or the personal coercion of its representative may do so with respect either to the whole treaty or only to the particular clauses as it may think fit.

3. Paragraph 1 does not apply in cases falling under articles 36 and 37. (A/CN.4/183, p. 24)

3. Mr. YASSEEN said that article 46 laid down a general principle governing nearly all cases of the termination or nullity of treaties. It would be better to allow members of the Commission time over the week-end to consider how the article should be redrafted.

4. Mr. JIMÉNEZ de ARÉCHAGA said that some members had prepared their statements on article 46 and would be seriously inconvenienced if the Commission took up another article instead.

5. Mr. ROSENNE said that article 46 raised three distinct problems, its substance, its place and its application to other articles in the draft. The first two could be discussed forthwith, but the third would have to be left until the eighteenth session when the Commission had before it all the other articles in their final form.

6. Mr. TUNKIN said that the discussion could at least be opened on articles 46 and 47 and resumed if necessary at the following meeting.

7. Mr. CASTRÉN said that the Special Rapporteur had expressed a wish that the Drafting Committee should consider the order of the articles as soon as possible. He asked what action had been taken to comply with that request.

8. The CHAIRMAN said that the Drafting Committee had decided to deal with the question of the order of the articles after settling the text of the articles which had been referred to it. He proposed that the Commission begin its consideration of articles 46, 47 and 49 and continue in the following week.

It was so agreed.

9. Sir Humphrey WALDOCK, Special Rapporteur, said that in paragraphs 6 and 7 of his observations he had explained why he was suggesting that articles 46, 47 and 49 be transferred to section 1 of part II. If that change were made, the reader would first be confronted with the restrictions on the operation of the detailed articles laying down the grounds for invoking the invalidity, termination or suspension of treaties; that might help to diminish the impression that the provisions of that part of the draft would endanger the stability of treaties.

10. The arrangement adopted in the 1963 text, whereby article 46 dealt in general terms with the problem of separability and then separate provisions on the subject were included in various succeeding articles, was heavy and repetitive.

11. In re-examining the problem, the Commission must be quite clear as to which articles were subject to the operation of the separability rule, and whether it applied automatically or at the discretion of the State invoking termination or nullity. At its fifteenth session it had been decided that, in cases of fraud, the injured State had the option of applying the rule, but the Commission had not really tackled the problem of how the rule operated in cases of error.

12. Mr. JIMÉNEZ de ARÉCHAGA said that the Special Rapporteur's new draft for article 46 was a considerable improvement on the 1963 text.

13. At its fifteenth session, the Commission had adopted a mixed system of a general article on separability, with individual provisions on the subject in the various articles to which the rule applied. Now that it had obtained a clearer idea of how the principle applied in different cases, the Commission could consider a single

provision concerning the separability of treaties. He welcomed the proposal by the Special Rapporteur that the article should be transferred to part II, section 1 (General rules), as that would enable the Commission to dispense with the individual clauses on separability in various articles.

14. For purposes of separability, the Special Rapporteur had grouped grounds for invalidity or termination into three categories. The first were those in which separability could be admitted, provided certain clauses be separated from others and the parties had not expressed any intention of prohibiting such separation when the treaty had entered into force. The second group comprised certain grounds in which a State had been guilty of fraud or coercion, and therefore, as an additional sanction, an option was given to the injured State to terminate or suspend the operation of the whole or only some part of the treaty. Thirdly, there was the category of grounds which constituted such serious violations that the separability of any one of their provisions was unthinkable. He fully endorsed the approach adopted by the Special Rapporteur in his new text, but pointed out a possible interpretation, which certainly had not been intended by the Special Rapporteur, that denunciation in accordance with the terms of article 38 could apply to only parts of a treaty. That would obviously not be the case unless there was some express provision to that effect in the treaty itself. Thus, if article 38 were to be retained, a reference to it would need to be included in paragraph 3 of the Special Rapporteur's new text.

15. It was also necessary to emphasize that article 46 did not apply to the cases contemplated in article 42, which would be regulated by a different system.

16. In his opinion, and as suggested by certain governments, treaties violating *jus cogens* should be included in paragraph 1 and not in paragraph 3.

17. The complete nullity of a treaty as a whole should be the rule in cases where the offending clauses formed its object, but if the clauses in question were accessory stipulations, separability could be allowed; in that regard the Commission might follow private law where a contract was void if its object were found to be illegal but where an accessory clause contrary to public order would be regarded, to use the French expression, as " *réputée non écrite* " and would not render the contract as a whole void.

18. Mr. ROSENNE said that in general the Special Rapporteur's proposal had merit, and that he shared many of the views expressed by Mr. Jiménez de Aréchaga. However, the Commission should adhere to its position that the fundamental principle was that treaties were indivisible and make it clear that the separability of treaty provisions was an exception. That principle had been stated twice in the Special Rapporteur's original text and was retained in the 1963 text of article 46, paragraph 1. It would then be easier to combine the objective and subjective elements involved in the rule.

19. He agreed with Mr. Jiménez de Aréchaga that article 46 would not apply to the cases contemplated in article 42 (breach), but did not think that the application of paragraph 3 should be extended to cover cases of conflict with *jus cogens* (article 37), though it was otherwise as regards article 45. The Drafting Committee should be asked to consider which articles were subject to the application of the rule in article 46, so as to ensure that the categories set out in the new article were comprehensive.

20. The CHAIRMAN suggested that further consideration of article 46 be postponed until the next meeting.

It was so agreed.[1]

ARTICLE 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty)

Article 47

Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty

A right to allege the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under articles 32 to 35 and 42 and 44 shall no longer be exercisable if, after becoming aware of the facts giving rise to such right, the State concerned shall have:

(*a*) Waived the right; or

(*b*) So conducted itself as to be debarred from denying that it has elected in the case of articles 32 to 35 to consider itself bound by the treaty, or in the case of articles 42 and 44 to consider the treaty as unaffected by the material breach, or by the fundamental change of circumstances, which has occurred. (A/CN.4/L.107, p. 42)

21. The CHAIRMAN invited the Commission to consider article 47, for which the Special Rapporteur had proposed a new title and text which read:

Relinquishment of the right to invoke a ground of invalidity, termination, withdrawal or suspension

A State may not invoke any ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 31 to 35 inclusive or articles 42 to 44 inclusive if, after becoming aware of the facts giving rise to such ground, the state:

(*a*) shall have agreed to regard the treaty as valid or, as the case may be, as remaining in force; or

(*b*) must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid or, as the case may be, as remaining in force. (A/CN.4/183, p. 17)

22. Sir Humphrey WALDOCK, Special Rapporteur, said that he had analysed the comments of governments on article 47 in his report. Some had objected to the way in which the rule had been expressed, and more particularly to the use of the words " waived " and " so conducted itself as to be debarred ". The text adopted in 1963 was the result of a compromise and the Commission's inability to find better language. In order to take account of some of the comments made, he had suggested that the rule should be stated in more affirmative terms, though he was by no means certain that that particular form was the right one. In subparagraph (*b*) of his redraft, he had introduced the concept of implied agreement and perhaps it would be preferable to substitute the word " accepted " for

[1] For continuation of discussion, see 837th meeting, paras. 1-79.

the words " agreed to regard ". If objection were made to his proposal, it would not be difficult to express the idea in sub-paragraph (*b*) in negative form.

23. Some governments had proposed that a time-limit should be laid down within which a ground of invalidity would have to be invoked, if at all, but he did not think that such a stipulation would be practicable in the situation covered in article 47, because circumstances varied widely.

24. He had changed the title of the article and used the word " relinquishment " as the word " loss " seemed inappropriate.

25. Mr. BRIGGS said that there was a major shift of emphasis in the Special Rapporteur's new text for article 47, which made most of the commentary drawn up at the fifteenth session irrelevant. The shift was from preclusion to implied consent to accept a treaty or part of a treaty which, but for the implied consent, might not be binding by reason of a ground of invalidity, termination or suspension. Personally, he questioned whether a treaty ceased to be binding merely because of the existence of a " ground " of invalidity, termination or suspension.

26. The implied consent to accept a treaty referred to by the Special Rapporteur in paragraph 3 of his observations (A/CN.4/183, p. 15) was in reality a second consent to a previously accepted treaty, and the State's failure to invoke a ground of invalidity or termination was less a new consent or implied agreement to remain bound than a bar to the possibility of invoking the ground later. The Commission's draft should stress that inconsistent conduct by States was barred.

27. The Israel Government had urged the Commission to distinguish carefully between the principle of preclusion and tacit consent, but the new draft seemed to confuse them more than the 1963 text.

28. He suggested that the introductory paragraph of the Special Rapporteur's new text be retained up to the words " the State ", and that sub-paragraphs (*a*) and (*b*) be combined and replaced by the following text:

> " . . . [the State] shall by its acts or omissions (including undue delay) have precluded itself from claiming that the treaty has become invalid or has ceased to be binding on it ".

29. Such a text would retain the principle of preclusion and the idea of waiver would be implicit in it.

30. The new title could be accepted provided that the word " relinquishment " was dropped and the word " loss " restored.

31. Undue delay was not the only factor involved in an omission to act; rather it was failure to act when action was required that was important. He could accept the Special Rapporteur's proposal that article 47 should be transferred to a new section 1 (General rules) of part II of the draft.

32. Mr. JIMÉNEZ de ARÉCHAGA, referring to the Special Rapporteur's statement in paragraph 1 of his observations (A/CN.4/183, p. 14) that, if article 47 did not affect cases of *jus cogens* falling under articles 36, 37 and 45, that was only because those articles provided for the automatic avoidance of the treaty, said he thought that the use of the word " automatic " might create difficulties when article 51 came to be interpreted. He would be interested to hear an explanation on that point from the Special Rapporteur.

33. Mr. CASTRÉN said that in his opinion the question of the placing of the article should be left open, for there were as many reasons for keeping it in its present place as for transferring it, as proposed by the Special Rapporteur. As Mr. Ago had said earlier in the session, the article should logically follow the articles to which it referred. On the other hand, those articles would be easier to draft if the provisions at present in article 47 formed part of a section 1 containing general rules.

34. So far as substance was concerned, he approved the changes made by the Special Rapporteur in the 1963 text in the light of government comments. The scope of the article should accordingly be enlarged in the manner proposed by the Special Rapporteur.

35. So far as the drafting was concerned, in order to avoid repetition, sub-paragraphs (*a*) and (*b*) could be amalgamated. Accordingly he proposed the following redraft, which, he thought, would not affect the substance of the article:

> " . . . shall have agreed or must be considered, by reason of its acts or its undue delay in invoking such ground, as having agreed to regard the treaty as valid or, as the case may be, as remaining in force ".

36. Mr. AGO said he supported the Special Rapporteur's proposals concerning the substance of the article, and his (Mr. Ago's) comments, which were intended for the Drafting Committee, related principally to the French text.

37. The word " ground ", which was not perhaps the right word in English, was admittedly not easy to translate into French, but it was surely wrong to say " *Un Etat ne peut invoquer un motif permettant de rendre un traité non valide.* " One could speak of a " *motif* " for nullity, but not of a " *motif* " for invalidating a treaty; that would mean something different. Besides, what was meant by the expression " *permettant de rendre non valide* " ? It was an attempt to render the English word " invalidating ", but what that really meant was " invoking the nullity of the treaty ".

38. Nor was it clear what was meant by the expression " *ce droit* ". There had been no mention of any right. If the provision read " a State may not exercise the right *(le droit)* to invoke the nullity of a treaty . . . " the words " *ce droit* " would be understandable.

39. Furthermore, he was not satisfied with the passage " *comme ayant accepté de considérer le traité comme valide* " (" as having agreed to regard the treaty as valid ") in sub-paragraph (*b*). In the same sub-paragraph, the correct translation of the expression " undue delay " was " *retard injustifié* ", not " *retard indu.* "

40. He would not oppose Mr. Briggs's proposal for amalgamating sub-paragraphs (*a*) and (*b*) if, as a consequence, the article became less clumsy.

41. The article should contain a cross-reference to articles 31 to 34, instead of to articles 31 to 35, since the Commission had decided that coercion would be a ground for invoking the absolute nullity of a treaty.

42. Mr. VERDROSS said that the distinction drawn in the 1963 text between an express waiver, in sub-paragraph (*a*), and a tacit waiver, in sub-paragraph (*b*), had been clearer than it was in the Special Rapporteur's latest redraft, where the distinction between the two situations seemed to be blurred. He therefore supported Mr. Briggs's proposal.

43. Mr. ROSENNE said that the shift of emphasis in the Special Rapporteur's new draft for article 47 was essentially a matter of legal theory. Its practical effect would be the same as that of the 1963 text, and it was adequate. He supported the proposal for its transfer to section 1 of part II.

44. Mr. de LUNA said that in his opinion the Special Rapporteur's latest redraft was clearer and simpler than the 1963 text. Referring for the moment to general considerations only, he said that whereas the word " invalidity " was current in the legal systems following the English common law, the corresponding Spanish term " *invalidez* ", although grammatically correct, was not used in Spanish law. While Spanish law spoke of the " validity " of a legal act, it employed the term " *nulidad* ", not " *invalidez* ", to describe an act which was not valid. While, therefore, the comments by the Government of Israel were pertinent from the point of view of common law, he did not think that they were universally valid.

45. Furthermore, he did not think that a positive formulation should be used to convey the idea of tacit agreement, an opinion apparently shared, to judge by his written and oral comments, by the Special Rapporteur. The legislative history of the article was essentially that of the idea of estoppel *(preclusión)* in the draft. Estoppel *(preclusión)* could of course be interpreted as implying tacit consent, but perhaps the idea was being somewhat overworked, though he had no fixed opinion on the subject. It seemed to him that, whenever tacit consent had been pleaded in international practice, it had been pleaded in pursuance of the principle of estoppel, because for the purpose of interpreting the consent it had to be assumed that the State concerned had a clear notion of what it wanted, even if it was not expressed and communicated to the outside world. After all, it happened quite frequently that a State wished to have the best of both worlds. He remembered a case where a State, after having accepted a sum of $1 million which had been offered to it, had made a claim 20 years later—for reasons of internal law—invoking the nullity of the transaction. Patently, the fact of having accepted the money immediately had deprived that State, in conformity with the principle *nemo contra factum suum proprium venire potest*, of whatever right it might have had to claim that the transaction was void. Third parties could not be expected to know the innermost intentions of a State; they simply noted that a State had conducted itself in a certain manner. The principle of estoppel was superior even to the rule *pacta sunt servanda*, which flowed from the same paramount principle—good faith.

46. Without wishing to express a final opinion before hearing the other members of the Commission, he was at present inclined to support Mr. Briggs's proposal.

47. Mr. RUDA, with regard to the placing of the article in the draft, said that the Special Rapporteur had given as a reason for transferring the article to section 1 the fact that the article affected the operation of all the articles which recognized rights to invoke particular grounds of invalidity or termination. Precisely for the same reason he (Mr. Ruda) considered that the article should form part of part II (" Invalidity, termination and suspension of the operation of treaties ") of the draft.

48. So far as form was concerned, he entirely agreed with Mr. Verdross. Much the same idea was expressed in each of the two sub-paragraphs (*a*) and (*b*) of the redraft. The Special Rapporteur's intention had evidently been to cover express consent in sub-paragraph (*a*) and tacit consent in sub-paragraph (*b*), but that intention was not reflected in the new text. Consequently, it would be better to retain the text of sub-paragraph (*a*) as adopted in 1963. The idea inherent in the Spanish word " *renuncia* " was definitely that of express consent.

49. The CHAIRMAN, speaking as a member of the Commission, said he reserved the right to speak more fully on the article after a text had been prepared by the Drafting Committee.

50. He wished, however, forthwith to express his disagreement with the remarks of Mr. de Luna in which he had equated "*forclusion*" with estoppel. For the purpose of "*forclusion*", it was not essential that the State should have manifested the will to act in a manner different from that in which it was entitled to act. In the case of estoppel, however, according to the most recent decisions of courts following the English common law, the State had deliberately acted in such a manner as to lead others to believe that it was acting at variance with its rights and that it was in good faith, in other words, that it was not making any mistake as to the substance of its rights. In order that "*forclusion*" should operate, there must have been a pre-established time-limit after the expiry of which the State would no longer be able to invoke the invalidity of the transaction in question.

51. Speaking as Chairman, he suggested that, as with article 46, further consideration of article 47 be postponed until the next meeting.

It was so agreed.[2]

ARTICLE 50 (Procedure under a right provided for in the treaty)

Article 50

Procedure under a right provided for in the treaty

1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

[2] For continuation of discussion, see 837th meeting, paras. 80-95 and 838th meeting, paras. 1-38.

2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect. (A/CN.4/L.107, p. 43).

52. The CHAIRMAN invited the Commission to consider article 50, for which the Special Rapporteur had proposed a new text which read:

Unles the treaty otherwise provides:

(*a*) a notice to terminate, withdraw from or suspend the operation of a treaty given in pursuance of a right provided for in the treaty, becomes operative by its communication to the other parties;

(*b*) after such communication, the notice may be revoked only with the consent of the other parties. (A/CN.4/183/Add.4, p. 4)

53. Sir Humphrey WALDOCK, Special Rapporteur, said that at the end of the 828th meeting, the Commission, after its discussion of the 1963 text of article 38, on termination of treaties through the operation of their own provisions, and of his own shorter redraft, had referred that article to the Drafting Committee. The Drafting Committee had arrived at the conclusion that article 38 should be deleted but that any points of substance in it should be incorporated in other articles. One such point was the provision in paragraph 3 (*a*) concerning the date on which a notice of termination took effect: the Drafting Committee had found that that provision overlapped with the corresponding provision in paragraph 1 of article 50.

54. He therefore proposed that paragraph 1 of article 50 be referred to the Drafting Committee, together with sub-paragraph (*a*) of his redraft. In that sub-paragraph, he had used the expression " becomes operative " instead of " takes effect ", thus maintaining the distinction which the Commission had made in part I between the concept of an instrument which became operative as an instrument, as in article 15, and that of an instrument which took full effect.

55. It would obviously be necessary to deal in sub-paragraph (*b*) with the question of the date on which a notification took effect, a matter formerly dealt with in paragraph 3 (*a*) of article 38. The Drafting Committee would also consider a number of drafting points affecting the same provision.

56. Paragraph 2 of article 50, which in his redraft became sub-paragraph (*b*), involved a question of substance on which the Commission should take a decision before referring the whole article to the Drafting Committee. The 1963 text specified that a notice of termination could be revoked at any time before the date on which it took effect. Some governments, in their comments, had pointed out that such a wide provision would largely defeat the object of the notice of termination. The very purpose of the notice was to enable the States receiving it to adopt the necessary measures to take into account the new situation which would be created when the notice took effect. In particular, those States might have to consider in what way their municipal law should be amended in the light of the changed situation.

57. It had therefore been suggested that the absolute discretion to revoke a notice of termination, embodied in the former paragraph 2, should be qualified in some way. In that connexion, the United States Government's proposal was much too complex and was based on a hypothetical example unlikely to occur often in practice. He had therefore proposed as sub-paragraph (*b*) a text, based on a proposal by the Polish Government, that would make revocation dependent on consent.

58. Mr. YASSEEN said he could agree with the Special Rapporteur's proposal that sub-paragraph (*a*) of the new text be referred to the Drafting Committee, since it was logical that the point with which it dealt should be considered in conjunction with article 38.

59. Sub-paragraph (*b*) raised a question of substance. In their comments, certain governments had probably somewhat exaggerated the risks which might be created by the revocation of a notice to terminate, withdraw from or suspend the operation of a treaty. At the same time, some allowance should certainly be made for the difficulties which other parties might experience in adapting themselves to the new situation brought about by the revocation of such a notice. It was right that a party which had wished to withdraw should be able to revoke that decision, but the other parties should not be left to the mercy of the whims of one State. It would therefore be better to say that the notice could be revoked only with the consent of the other parties.

60. Mr. AGO said that he agreed that article 50 should be referred to the Drafting Committee, but it must be particularly careful in reviewing it, especially the French version.

61. Sub-paragraph (*a*) gave the impression that the right in question was the right to communicate the notice, whereas in fact it was the right to terminate, withdraw from or suspend the operation of a treaty which was referred to.

62. Sub-paragraph (*a*) also raised once again the difficult problem of the French translation of the English expression " becomes operative ". The French expression "*prend effet* " suggested that what was referred to was the effect of terminating the treaty; but it might be that the purpose of the notice was to indicate that the treaty would be terminated later, at some particular date or within a given period. What was intended to be referred to was simply the completion of the notice itself. It was important to remove that ambiguity which might have serious consequences.

63. Mr. ROSENNE said that he was prepared to accept the Special Rapporteur's proposal for the first paragraph and the revised text of the second paragraph submitted as sub-paragraph (*b*). However, he was increasingly concerned at the difficult problems of substance and of co-ordination which arose with respect to the various articles containing provisions on communication or notification.

64. At the first part of its seventeenth session, the Commission had adopted an article 29 (*bis*)[8] dealing with the manner in which communications and notifications to contracting States should be made. On the question of substance, however, there was a real need to formulate accurately throughout the text of the draft articles the distinction between the binding char-

[8] *Yearbook of the International Law Commission, 1965*, Vol. I, 815th meeting.

acter of an instrument for the State from which it emanated, and its effect *vis-à-vis* the State or States receiving the instrument, and to define clearly the time from which that instrument produced legal effects both for the State making the communication and for the State or States receiving it.

65. In 1965, on the basis of certain government comments, he had put forward a proposal (A/CN.4/L.108) to the effect that, unless the treaty provided otherwise, any notice communicated by the depositary became operative 90 days after the receipt by the depositary of the instrument to which the communication related. That proposal, although it did not cover the whole question, could provide a basis for the consideration of the problem to which he had referred; and as would be seen from paragraph 60 of the summary record of the 815th meeting, it had been agreed to defer consideration of that proposal. He therefore hoped that that delicate point of substance would in due course be considered in connexion with all the articles which contained provisions on communication or notification.

66. Mr. CASTRÉN said he accepted the Special Rapporteur's proposal that sub-paragraph (*a*) of the redraft of article 50 be referred to the Drafting Committee for consideration in conjunction with article 38.

67. The rule stated in sub-paragraph (*b*) was almost the opposite of that stated in paragraph 2 of the 1963 text. It was very difficult to make a choice between the two extremes. In paragraph (3) of its commentary on article 50, the Commission had argued strongly in favour of a rule that would permit, until a certain date, the revocation of a notice to terminate a treaty. The governments which had criticized that provision had put forward contrary arguments which could not be disregarded. Already at the fifteenth session Mr. Tsuruoka had raised the question of the consent of the other parties.[4] Although the problem was not one of great importance in practice, the Commission should endeavour to draft a provision acceptable to all States. If it was decided to make revocation more difficult, the Polish Government's formulation, which provided the basis for sub-paragraph (*b*) of the new text, was simpler and thus preferable to that of the United States Government.

68. Mr. de LUNA said that he accepted the Special Rapporteur's proposals for article 50, though so far as the drafting was concerned, the reference to the "communication" of the notice was unsatisfactory. In Spanish at least, the term corresponding to "communication" had the same meaning as that corresponding to "notification"; the latter, more erudite, term was used in legal contexts. Perhaps the intention was to state that a notification did not become operative until received (*Una notificación no produce efecto hasta su recepción*).

69. Mr. TUNKIN said that the Special Rapporteur's redraft was an improvement on the 1963 text, particularly in that in the new text the phrase "Unless the treaty otherwise provides" qualified the provisions which followed.

[4] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 164, paras. 25 and 26, and p. 277, para. 12.

70. With regard to the revocation of a notice, he sympathized with the views expressed by some governments and, in general, favoured the idea that such revocation should be subject to the consent of the other parties. However, he would hesitate to go too far in that direction: a government might revoke a notice of termination only a few days after making it; that revocation would cause no harm to any other party and would, in fact, be beneficial.

71. So far as the terminology was concerned, he preferred "notification" to "communication". The former was the more strict legal term.

72. He agreed with the Special Rapporteur that the first sub-paragraph of article 50 overlapped with the provisions of article 38 and supported the proposal that it be referred to the Drafting Committee for consideration in conjunction with the provisions of article 38.

73. Mr. BRIGGS said he accepted the Special Rapporteur's proposal that sub-paragraph (*a*) be referred to the Drafting Committee. The expression "becomes operative" struck him as ambiguous and probably inaccurate and he therefore suggested that the Drafting Committee should examine it carefully.

74. With regard to sub-paragraph (*b*), like Mr. Castrén he doubted the wisdom of regarding the problem as one of a choice between two extremes of either providing that the notice could be revoked at any time, or providing that the revocation needed the consent of all the other parties. On the whole, it was desirable to encourage a State to revoke a notice of termination if, on reflexion, it wished to do so. The League of Nations Covenant made provision in Article 1, paragraph 3, for a two-year notice for the purpose of withdrawal from the League, and in some cases a State which had given such notice had changed its mind before the expiry of the two years. Another example was provided by an extradition treaty between the United States and Greece[5] which the United States had recently denounced; within a few months of that denunciation, an additional protocol had been signed and the notice of termination had been withdrawn.

75. It was hardly desirable to express the rule that a denunciation could not be revoked in terms as absolute as in sub-paragraph (*b*). He was prepared to agree that the point should be referred to the Drafting Committee, but since it was one of substance, he had thought it necessary to give his views on it.

76. Mr. VERDROSS said that, in his view, the notice could not become operative until received by the addressee. That idea was not clearly expressed by the term "communication". In sub-paragraph (*b*) at any rate, the words "after such communication" should be replaced by the words "after such communication has been received".

77. Mr. REUTER said that the article would set many problems to the Drafting Committee. As Mr. Ago had pointed out, the expressions "becomes operative" and "*prend effet*" did not have quite the same meaning. In French, it would be sufficient to say that the notice "*devient opposable*", an expression which did not entail

[5] League of Nations, *Treaty Series*, Vol. CXXXVIII, p. 294.

very precise consequences. What the provision was really concerned with was the fact that, upon being communicated, the notice could be pleaded against the notifying State. The provision was not concerned with other effects which might be produced later.

78. As to sub-paragraph (*b*), he agreed with Mr. Briggs that it was going too far to require the consent of all the other parties. The Drafting Committee might consider drafting the rule in a negative form, stating that the revocation would be without effect if any one of the other parties objected to it. It might also be provided that the revocation must take place within a stated period, which should be very short. The rule would thus make it easier to revoke the notice of denunciation, provided that action was taken promptly to revoke the notice.

79. Mr. JIMÉNEZ de ARÉCHAGA said that he was in general agreement with the text proposed by the Special Rapporteur. It would be difficult to adopt a negative formulation for sub-paragraph (*a*) because an " objection " could not be made by one party to another's exercise of a right provided for in the treaty itself.

80. Mr. TSURUOKA said that, as he had taken up a definite position on article 50, then article 24, at the fifteenth session,[6] he felt obliged to express an opinion on the redraft of the article. He could accept the new formulation in sub-paragraph (*b*), which in his view would be conducive to the stability of treaties. If a State knew that it could not reverse its decision without the consent of the other parties, it would not lightly give notice of its wish to terminate, withdraw from or suspend the operation of a treaty. A psychological effect of that kind was important in the conduct of international relations. Since the Commission desired to safeguard the existence of treaties as much as possible, it should prefer the new formulation to the old.

81. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the question dealt with in sub-paragraph (*a*) could be settled in another article. Nevertheless, as the question was very important, the Drafting Committee would have to take great care to ensure that the provision said whatever needed to be said, after taking article 29 (*bis*) into account.

82. In a sense, Mr. Verdross had been right in his comments on sub-paragraph (*b*): the notice became operative at the time when the addressee was in a position to take cognizance of it. Nevertheless, he did not think that the provision should go so far as to state that the date of the communication was the date of its receipt. Some intergovernmental organizations published notifications of that kind as a matter of routine, and in such cases the date of communication was the date of publication.

83. So far as the substance was concerned, it could hardly be laid down that revocation of a notice required the express consent of all the parties. It would be better if the provision allowed tacit consent to be inferred from the absence of objection; it might perhaps be added that such objection should be expressed within a certain period. There were instances in diplomatic history where some States had notified their intention of ceasing to be parties to a treaty because they had wished to evade their obligations at a given moment; once that moment had passed, they had expressed the wish to re-assume their obligations. On the whole, he thought the article should make it possible for States to resume their contractual relationships; on the other hand, the Drafting Committee should be careful to draft a provision which would forestall any abuse.

84. Mr. YASSEEN said that he would have no objection if the rule in sub-paragraph (*b*) were formulated in negative terms. On the other hand, it should be noted that the Special Rapporteur's proposal was more moderate than the Polish delegation's proposal, under which the express consent of the other party would be required. The expression " with the consent of the parties " in sub-paragraph (*b*) did not exclude tacit consent.

85. Mr. ROSENNE said that it was desirable to retain the requirement that the notification should be made through the " diplomatic or other official channel ", as in the 1963 text. Though the point was perhaps covered by the new article 29 (*bis*) adopted in 1965, the Drafting Committee should consider it. In that connexion, he drew attention to the explanatory passage in paragraph (2) of the commentary to article 50 in the 1963 report, which read:

> " It sometimes happens that in moments of tension the termination of a treaty or a threat of its termination may be made the subject of a public utterance not addressed to the State concerned. But it is clearly essential that such statements, at whatever level they are made, should not be regarded as a substitute for the formal act which diplomatic propriety and legal regularity require."[7]

86. The CHAIRMAN said that the Third Reich had contended that anything announced by Radio Berlin constituted notice *erga omnes*. During the Nuremberg trials, for example, the question had arisen whether there had in fact been a declaration of war. The Commission could hardly condone such practices. Radio broadcasting could be used in emergencies, but it was not a normal official channel.

87. Mr. AGO said that Mr. Verdross was right in saying that the phrase " after such communication has been received " would be clearer; but the idea of " receipt " could not very well be introduced into the text. The notice might, for instance, state that " the treaty will be terminated six months after the present notice ", in which case the six-month period would begin to run as from the date of the notice and not from the date of its receipt. The Drafting Committee should do its utmost to avoid any ambiguity on that point.

88. Sir Humphrey WALDOCK, Special Rapporteur, said that most of the matters raised in the discussion would have to be considered by the Drafting Committee.

89. With regard to sub-paragraph (*b*), he thought that the Commission had gone too far in the 1963 text in giving complete discretion to revoke a notice. His own proposal did not go as far as that of the Polish

[6] *Yearbook of the International Law Commission, 1963*, Vol. I, p. 164, paras. 25 and 26, and p. 277, para. 12.

[7] *Ibid., 1963*, Vol. II, p. 214.

delegation's—that the right to revoke a notice should be linked to the " clear consent " of the other party—for it spoke merely of " consent ", a term which did not necessarily mean express agreement. He agreed with Mr. Yasseen's interpretation of " consent " as meaning also tacit consent. In substance, therefore, his own proposal was not very different from the negative formula suggested by Mr. Reuter, but he would not object if the Drafting Committee were asked to consider the possibility of a less drastic formulation. He realized that Mr. Briggs and Mr. Castrén were not yet wholly convinced, but he hoped the Drafting Committee would be able to produce a generally acceptable text.

90. On the subject of the terms " communication " and " notification ", he said that he had followed the terminology of article 29 (*bis*). He had had in mind a formal notice, but the point deserved the attention of the Drafting Committee, in connexion not only with article 50 but with other articles as well.

91. He suggested that article 50 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[8]

The meeting rose at 12.55 p.m.

[8] For the decision with regard to further consideration of article 50, see 842nd meeting, para. 107.

837th MEETING

Monday, 24 January 1966, at 3 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Law of Treaties

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

[Item 2 of the agenda]

(continued)

ARTICLE 46 (Separability of treaty provisions for the purposes of the operation of the present articles) *(resumed from the previous meeting)*[1]

1. The CHAIRMAN invited the Commission to resume its consideration of article 46.

2. Mr. YASSEEN said that the Special Rapporteur's excellent redraft of article 46 took into account the importance of the rule and the possibilities of its general application. It was preferable to set forth once and for all the principle of the separability of treaty provisions and the criteria governing its application.

3. The arguments in support of the rule had been discussed thoroughly in 1963, and the essential point then made was that whatever could be saved of the treaty should be saved. If there was a reason for the nullity or termination of part of the treaty only, it should affect that part only, and the rest of the treaty should remain in force as far as possible.

4. The next problem was that of the general scope of the principle of the separability of treaties. Should the principle be accepted in all cases? It could be admitted without difficulty in all cases involving the termination of a treaty. But where the question was that of the nullity of a treaty, greater caution was needed, for in some cases the nullity of a treaty was the result of events which constituted a challenge to the international legal order, or which seriously jeopardized the climate of trust necessary for good international relations. The sanction for such cases of international brigandage should be commensurate with the seriousness of the act; the sanction should be the disappearance of the entire treaty, though the parties wishing to salve the treaty would be at liberty to make a fresh treaty which would avoid causes of nullity.

5. It seemed to him that, in the application of that criterion, the rule concerning the separability of treaty provisions should apply in the case of fraud only, but should not apply in cases of coercion, even if directed against the representative of the State. That conclusion would be consistent with the unequivocal attitude adopted by the Commission with regard to coercion, the effect of which was to render the treaty void *ab initio.*

6. He had no criticism to make concerning the redraft of article 46; it was not really indispensable to introduce the notion of good faith into the article, for that notion permeated the entire law of treaties. Finally, he considered that not only article 37, on conflict with a rule of *jus cogens,* and article 36, on coercion of a State, but also article 35, on coercion of the representative of a State, should be covered by the exception in paragraph 3 of the new article 46.

7. Mr. TUNKIN said he could in general accept the Special Rapporteur's new text for article 46. In 1963 the Commission had dealt with the separability of treaty provisions in somewhat piecemeal fashion and, having had no time for detailed study, had reached no firm conclusion about the scope of the article's application. The Special Rapporteur had shown how a general rule could be framed which made it possible to dispense with repetitive provisions in each of the articles dealing with cases in which the principle might operate.

8. He agreed that the rule of the separability of treaty provisions should apply to the cases covered by articles 31, 32, 39, 40 and 41, but he was unable to support the Special Rapporteur's proposal that it should apply to treaties entered into under personal coercion (article 35). On that point he was largely of the same opinion as Mr. Yasseen.

9. It was clearly the majority view in the Commission that a treaty obtained by the personal coercion of the representative of a State was void. The use of force or

[1] See 836th meeting, after para. 1, and para. 2.