Document:-

A/CN.4/SR.838

Summary record of the 838th meeting

Topic:

Law of Treaties

Extranct from the Yearbook of the International Law Commission:-

1966, vol. I(1)

had resulted from a long history of judicial decisions. On the continent, the subject was governed by rules which had their origin in the Roman law maxims *nemo contra factum suum proprium venire potest* and *allegans contraria non audiendus est*. The rules which derived from those maxims in the laws of the various European countries were not identical with the common law rules of estoppel.

94. With regard to the redraft proposed by the Special Rapporteur, he said he could not accept the introduction of a provision referring to consent or agreement if the provision could be construed to imply a reference to bilateral agreement. In international law, the typical minimum effect of a unilateral act was to create an estoppel: that was true not only of acts but also of omissions. In the *Oscar Chinn* case, for example, the Permanent Court had not declared invalid the Convention of St. Germain of 1919 in relation to the General Act of Berlin of 1885, which it purported to modify; the reason was the omission to protest on the part of those parties to the General Act which were not parties to the Convention of St. Germain.[13] In that connexion, it was also appropriate to recall Max Huber's award in the *Island of Palmas* case in 1928;[14] in that award, the failure by the Netherlands to protest when notified of the Treaty of Paris between Spain and the United States of America had been construed as an acceptance.

95. For those reasons, he urged that the Drafting Committee should make it clear in article 47 that the intention was to cover also the case of recognition resulting from the failure to protest.

The meeting rose at 6.5 p.m.

[13] *P.C.I.J.* Series A/B, No. 63.

[14] *Reports of International Arbitral Awards*, Vol. 2.

838th MEETING

Tuesday, 25 January 1966, at 11.30 a.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 47 (Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty) *(continued)*[1]

[1] See 836th meeting, preceding para. 21, and para. 21.

1. The CHAIRMAN invited the Commission to continue its consideration of article 47.

2. Mr. YASSEEN said that, in adopting article 47 in 1963, the Commission had shown that to some extent it recognized the doctrine of " estoppel ". The principle underlying the rule was unquestioned, and governments had not challenged it in their comments. But now that the Commission had defined its attitude towards certain cases of nullity, it seemed that the scope of article 47 should be slightly different. In its new form it was based, not on the idea of tacit consent, but on that of tacit confirmation, and it was only applicable to cases where confirmation was possible.

3. Since the Commission had provided in article 35 that the effect of the personal coercion of representatives of States was to render the treaty in question absolutely void *ab initio*, a treaty obtained through coercion was incapable of being confirmed. Consequently, article 35 should be excluded from the scope of article 47.

4. The Special Rapporteur's new text for article 47 was an improvement, because it placed the rule on a much more acceptable basis, namely, the explicit or tacit confirmation of a voidable act.

5. Mr. TUNKIN said that he too preferred the Special Rapporteur's new text for article 47. It had been criticized on the ground that the clause " the State ... must be considered ... as having agreed to regard the treaty as valid or ... as remaining in force " would involve difficulties of interpretation. In his opinion, the 1963 text might prove even more difficult to interpret, particularly because no criterion was laid down to determine what was meant by the phrase " so conducted itself as to be debarred from denying that it has elected ... ". At least the new text did contain some kind of criterion in sub-paragraph (*a*), even though it was rather general in character. Under its terms, only such acts as implied consent to the treaty as being valid or remaining in force would be taken into consideration, so that some limitation was imposed on the application of the rule.

6. He agreed with the proposal to insert the word " omissions " after the word " acts " in sub-paragraph (*b*).

7. The kind of case that would be covered by article 47 would be one where, despite the manifest violation of the provisions of internal law regarding competence to enter into treaties by a representative, the legislature of his country subsequently ratified or authorized the ratification of the treaty and the instruments of ratification were deposited. But for the same reasons as for articles 36 or 37, he was strongly opposed to including article 35 amongst those to which article 47 would apply.

8. Mr. VERDROSS said that he supported the Special Rapporteur's idea that the article should be based not on the theory of estoppel or " *forclusion* ", but on a more general rule. Estoppel was a rule of procedure, whereas in international law the issue was not whether a right could no longer be invoked: the right ceased to exist if there was tacit recognition or implied agreement. That important distinction had been pointed out in an article by an Italian writer, published in *Diritto Internazionale* some years previously, in which he had clearly demonstrated that, in international law, it was unnecessary to rely on estoppel or " *forclusion* ":

the whole matter could be solved by reference to tacit recognition or, as Mr. Yasseen had put it, tacit confirmation, or to other general principles.

9. Mr. AGO said he had some doubts concerning sub-paragraph (*b*) as at present worded. He had no objection to the idea that the fact that the parties tacitly agreed to recognize that a treaty remained in force would mean that its invalidity could not be invoked. He must, however, point out that, in 1963, the Commission had evolved a wider concept which it was now engaged in whittling down in a very special way.

10. Tacit agreement could be a convenient fiction for covering any kind of situation; but it was questionable whether the idea of tacit agreement gained anything from an attempt to apply it to particular cases. When the *Arbitral Award by the King of Spain* case had been before the International Court of Justice, reference had been made to " acquiescence "[2] rather than to tacit agreement. It was possible to imagine other cases. For instance, a State might wish to invoke a particular fact as a reason for terminating a treaty. It had had no intention of agreeing tacitly to the continuance in force of the treaty. It might then be met by the argument that, in the case of another treaty with a different country, it had not invoked the same fact or had even admitted that the particular fact was not a reason for terminating the treaty. In such a case there was certainly no tacit agreement, but the State had previously, in a like situation, so conducted itself that it could not follow a different course in the case in point.

11. For that reason, and although no particular supporter of the doctrine of estoppel, he had some doubts about the Commission's idea of limiting considerably the operation of the principle and of the rule. If the word " acquiescence " were used, the scope would be broader, even if not as broad as the Commission had intended in 1963.

12. Mr. JIMÉNEZ de ARÉCHAGA said he fully endorsed Mr. Ago's views. The introduction into the article of the requirement that there must have been agreement between the States or tacit consent, which many authorities regarded as the foundation of customary law, would restrict the scope of a doctrine which had already found acceptance in international law, and would cause great difficulties in application. Hitherto, in cases covered by article 47, the courts had confined themselves to examining the conduct of States in order to determine whether or not they were precluded from invoking the nullity of a treaty. If the new text of article 47 were adopted they would, in addition, have to draw inferences about whether or not some element of agreement existed, and that would be a highly subjective factor to establish.

13. He could accept the Special Rapporteur's proposal to extend the application of article 47 to article 31. In the example given by Mr. Tunkin, the act of ratifying a treaty would clearly preclude the State concerned from invoking nullity, since the act of ratification expressed explicitly its intention to apply the treaty. What, however, would be the situation when a State entered into a treaty in violation of its own constitutional law, applied it for many years and then discovered that a manifest violation had taken place? It would be inadmissible from the point of view of constitutional law to invoke the concept of tacit ratification, an issue that had arisen during the arbitration case between Costa Rica and Nicaragua in connexion with the question whether acceptance of the treaty had been valid.[3] That had been done by one of the parties, but the arbitrator had only taken account of the conduct of one of them which had debarred it from invoking a ground of invalidity.

14. The provision on the lines now being suggested by the Special Rapporteur would be at variance with international precedents. However, he could accept a provision based on the criterion of acquiescence, which would be in accordance with the theory of estoppel and in line with the judgments of the International Court of Justice.

15. Mr. Reuter said that if, from the point of view of drafting, the use of the word " acts " in sub-paragraph (*b*) was to be questioned, he would be inclined to favour an even broader term such as " conduct " or " comportment ", which would imply that the undue delay was only a particular instance of the comportment.

16. It seemed that, for reasons that were in themselves honourable and correct, the Commission was limiting the scope of the procedures for stabilizing in law situations of irregular origin. He would give an example of such a situation, where the Commission's attitude would produce consequences which—though he would not regard them as unacceptable—should be considered with care. The case he had in mind—which unfortunately was not of purely academic interest—was where a colonial power, State A, having colonized a territory that it regarded as its own, was confronted by State B, which was to some extent under the influence of State A but whose territory was not regarded as belonging to it. When the time came to delimit the frontier between the State B, which might exist only in name but nevertheless in law, and the colonial power, State A, events occurred which certainly came within the meaning of what several members of the Commission regarded as causes of absolute nullity. Subsequently, the colonized territory became fully independent, as did the neighbouring State B, but the agreement delimiting the frontier between them had certainly been made by irregular means. In the event, those two States agreed to regard the frontier, though drawn in dubious circumstances, as regular. Thus a situation was created by tacit agreement because it contributed to the maintenance of peace.

17. The Commission's text, however, was hardly conducive to the legal stabilization of a situation which in every respect bore the marks of colonization, but which nevertheless was of value for the maintenance of peace. Of course, it might be that those who, like himself, were in favour of anything that helped to stabilize a given situation in the interests of peace were wrong. Since the Commission wished to delete the reference to article 35, he would not oppose such a change, but he could not help thinking of painful situations like that he had described, parallels to which were to be

[2] *I.C.J. Reports 1960*, pp. 198 and 218.

[3] H. La Fontaine, *Pasicrisie internationale, Histoire documentaire des arbitrages internationaux*, p. 332.

found in several continents. So far as those situations were concerned, the Commission was perhaps taking steps which were not quite what it intended. He had noted on several occasions that members of the Commission, for reasons with which he naturally sympathized, were adopting an attitude of reserve that would have the result of preventing, in certain cases, the stabilization of situations which, whatever their initial defects, were connected with the maintenance of peace.

18. Mr. BEDJAOUI said that the latest redraft of article 47 was an improvement on the 1963 text. A certain vagueness in the terminology was unfortunately unavoidable. He would not object to the use of the word " acquiescence ".

19. For the same reasons as those given at the previous meeting by Mr. Yasseen, Mr. Tunkin, Mr. de Luna and the Chairman in connexion with article 46, article 47 should not apply to article 35, because the ethical content of international relations should be enhanced. The situations to which Mr. Reuter had referred were vestiges of the past; to maintain such situations in being would be an incentive for the State which had coerced the person of the representative of another State.

20. If the reference to article 35 were deleted, he could accept the Special Rapporteur's redraft of article 47.

21. Mr. AMADO said he hoped the Drafting Committee would endeavour to achieve a closer concordance between the English and French texts; in paragraph 1 of the new redraft, for example, the French word " *droit* " was used to translate the English word " ground ", which seemed to him dangerous.

22. The term " acquiescence " was fully in keeping with the case-law and so was acceptable to him.

23. The effects which the article might have on historical situations like those referred to by Mr. Reuter were inevitable. The reality of the law was a living reality, and the creative impulse of life could not be halted by logic. Besides, it was impossible to draft a perfectly accurate and perfectly clear text.

24. The CHAIRMAN, speaking as a member of the Commission, said that for the reasons he had given during the earlier debate on article 46, he could not admit the proposition that situations created by coercion could be cured by some legal device. Consequently, he agreed with Mr. Bedjaoui concerning article 47.

25. Mr. Amado had, he thought, been right to draw the Drafting Committee's attention once again to the problem of the French translation of the word " ground ".

26. Sir Humphrey WALDOCK, Special Rapporteur, said that the main problem in article 47 was how to formulate sub-paragraph (*b*). The general structure of the new text seemed to have found favour and he could not agree with the contention that it was the outcome of a fundamental change of approach. As he understood it, the application of the principle of estoppel in the present context raised essentially the question of good faith; what it meant, in other words, was that a State was not entitled to conduct itself in such a way that the other party believed the treaty to be in force, and subsequently to go back on its position and invoke a ground of invalidity. At its fifteenth session, the Commission had tried to formulate the article in a negative form and the text that had emerged was somewhat clumsy. Even if that form were adopted, it would still be necessary to explain what kind of conduct would prevent a State from invoking a ground of invalidity, and there would be no escaping some reference to its having elected to consider itself bound by the treaty.

27. The new text had given rise to some misunderstanding, which perhaps indicated that it was not entirely satisfactory. He had tried to express the same idea as that of the original version, but in positive form. The phrase " having agreed to regard the treaty " designated something very like acquiescence. The real difficulty was a drafting one and there were good reasons for trying to achieve a text in positive form.

28. He could not subscribe to the view that the new text deviated from the jurisprudence of the International Court of Justice, which usually dealt with relinquishment of the right to invoke a ground of invalidity, both from the negative and the positive point of view, in other words, by examining it both from the angle of estoppel and from that of implied consent.

29. If the Commission finally decided that, in cases of personal coercion of representatives of States, a treaty would have no legal effect, article 47 would no longer apply to article 35.

30. In his opinion, article 47 could now be referred to the Drafting Committee.

31. Mr. BRIGGS said he agreed with the Special Rapporteur that in essence estoppel raised the issue of good faith. However, the new text did differ from that adopted at the fifteenth session in that it shifted the focus to implied agreement.

32. It was more important to bar States from inconsistent conduct than to provide for a second implicit consent to a treaty.

33. He was in favour of including the concept of acquiescence and thought the article could now be referred to the Drafting Committee.

34. Mr. JIMÉNEZ de ARÉCHAGA asked if he could have an answer to the question he had put at the 836th meeting,[4] as to what the Special Rapporteur meant by " automatic avoidance " in paragraph 1 of his observations.

35. Sir Humphrey WALDOCK, Special Rapporteur, said that the point was an important one. In the sentence in question he had not wished to prejudge the application of article 51, but to indicate that, where estoppel was concerned, in cases when a treaty conflicted with a rule of *jus cogens* or had been obtained by the coercion of a State, once the fact had been established, nullity followed automatically and there was no option open to the parties to maintain the treaty in force.

36. He appreciated Mr. Briggs's point of view, but must ask by what criterion it was possible to determine when a State was precluded from invoking a ground of nullity. In his opinion the answer was—and it was

[4] Para. 32.

rather more definite than the answer given by some other members of the Commission—that a State was precluded from invoking a ground when the other Party must reasonably be allowed to have assumed that the treaty was valid and that the first State had consented to waive whatever objections it might have had to the validity of the treaty.

37. Whatever wording were chosen, it would be impossible to dispense altogether with the element of a presumption of consent. Perhaps the solution lay in using the term " acquiescence ", but that was a matter for the Drafting Committee.

38. The CHAIRMAN suggested that article 47 be referred to the Drafting Committee.

It was so agreed.[5]

ARTICLE 49 (Authority to denounce, terminate or withdraw from a treaty or suspend its operation)

Article 49

Authority to denounce, terminate or withdraw from a treaty or suspend its operation

The rules contained in article 4 relating to evidence of authority to conclude a treaty also apply, *mutatis mutandis*, to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation. (A/CN.4/L.107, p. 43)

39. The CHAIRMAN said that since article 48 had been dealt with at the first part of the session, where it had become article 3 (*bis*),[6] he now invited the Commission to consider article 49, for which the Special Rapporteur had proposed a new title and text which read:

Evidence of authority to invoke or to declare the invalidity, termination or suspension of the operation of a treaty

1. The rules laid down in article 4 regarding evidence of authority to represent a State for the purpose of negotiating a treaty apply also to representation for the purpose of invoking a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty.

2. The rules laid down in article 4 regarding evidence of authority to represent a State for the purpose of expressing its consent to be bound by a treaty apply also to representation for the purpose of expressing the will of a State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty. (A/CN.4/183, p. 11)

40. Sir Humphrey WALDOCK, Special Rapporteur, said that in order to bring the redraft of article 49 into line with article 4 as adopted by the Commission in 1965, the words " evidence of authority to represent a State ", in the opening phrase of both paragraph 1 and paragraph 2, should be replaced by the words " the representation of a State ".

41. The purpose of article 49 was to deal, in connexion with the right to invoke the invalidity or to terminate or suspend the operation of a treaty, with the question of the authority to represent the State, which was dealt with in article 4 in connexion with the conclusion of treaties.

42. Government comments on the 1963 text had indicated the need to draw a distinction between representation of a State for discussing grounds of invalidity, and representation for the definitive act of termination. To take those comments into account, he had redrafted the article in the form of two paragraphs: paragraph 1 now dealt with the representation of a State for the purpose of invoking a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty; paragraph 2 dealt with representation for the purpose of expressing the will of a State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty.

43. Mr. JIMÉNEZ de ARÉCHAGA said that he could not see exactly how the terms of article 4 could justify the system now proposed by the Special Rapporteur.

44. Paragraph 1 dealt with the question of the persons authorized to carry communications from one State to another and belonged more properly to the law of diplomatic relations than to the law of treaties; it had therefore no place in the present draft.

45. With regard to paragraph 2, there were two possibilities. Either the expression of the will of the State in the matter would lead to the negotiation of a new agreement, in which case it was hardly necessary to say that the rules laid down in article 4 for the representation of the State would apply; or the treaty was extinguished or terminated because there was no objection or no reply, as indicated in paragraph 2 of article 51, or because of a decision by a court, arbitral tribunal or other competent body, in which case he saw no need to refer to the expression of the will of the State.

46. He was therefore forced to conclude that article 49 should be deleted.

47. Mr. ROSENNE, speaking on a point of order, said that at the first part of the session the Commission had decided to accept the Special Rapporteur's proposal to generalize the provisions in the former article 48 in the form of article 3 (*bis*).[7] That decision had been taken to facilitate the discussion of the subsequent articles. However, there were still some significant government comments on the substance of article 48 itself, and he hoped that the Commission would deal with those comments at its forthcoming summer session.

48. The CHAIRMAN said that, in conformity with its decisions at the first part of the session, the Commission would review the whole draft at its eighteenth session. When reviewing article 3 (*bis*), it might deal with the problems raised in the debate on the former article 48.

49. Mr. ROSENNE said that the text of article 49 did not fully accord with the substance of many articles adopted by the Commission, especially those on termination; it was perhaps too formal and seemed to exclude informal agreements to terminate a treaty or to suspend its operation.

[5] For resumption of discussion, see 842nd meeting, paras. 98-106.

[6] *Yearbook of the International Law Commission, 1965*, Vol. I, 780th and 820th meetings.

[7] *Ibid., 1965*, Vol. I, 780th meeting, para. 18.

50. He had been impressed by the remark by Mr. Jiménez de Aréchaga that paragraph 1 belonged to the general law on diplomatic relations, but he would not go so far as to advocate the deletion of the whole article.

51. Perhaps the best solution would be to adopt a short provision on some such lines as:

> " The rules laid down in articles 4 and 4 (*bis*) also apply to the representation of a State for the purpose of articles 50 and 51. "

That might have to be extended to cover such articles as 65 and 66, if the matter was not dealt with by implication by the reference in those articles to part I.

52. Care should be taken to avoid introducing by implication, through the provisions of article 49, the theory of the *acte contraire* which the Commission had so far consistently avoided.

53. Mr. de Luna had remarked that it was extremely rare to find in national constitutions provisions on treaty termination as such. In 1963, there had been a short discussion[8] relating to that point and to the connexion between article 49 and article 5 of the Special Rapporteur's second report,[9] which had now become article 31 on provisions of internal law regarding competence to enter into treaties. The Special Rapporteur had been right on that occasion in taking the view that there was no real connexion between articles 49 and 31, and consequently he (Mr. Rosenne) had doubts about the parallel with article 4.

54. Mr. de LUNA said that he too had doubts about the parallel. A study of national constitutions showed that most of them were silent on the question of who was authorized to express the will of the State in its external relations in the matter of invoking grounds of invalidity, termination or withdrawal from or suspension of the operation of a treaty.

55. The new division into two paragraphs seemed of doubtful merit. First, because authority to invoke a ground of invalidity or termination was usually combined with authority to negotiate a new agreement or to declare the old one terminated. And secondly, because paragraph 2 seemed to encourage States to denounce or to terminate the treaty without any prior negotiations.

56. The danger was all the more real seeing that no criterion had been laid down to determine in which cases the representative was authorized to negotiate and in which cases he was only empowered to express the will of the State to terminate the treaty.

57. Article 49 involved more dangers than advantages but with a more carefully worded text, it might be acceptable.

58. Mr. BRIGGS said that he could see no case provided for in the draft in which the action described in paragraph 2 could be taken, since the draft provided no right to denounce or withdraw but only a right to invoke certain grounds for denunciation or withdrawal. Certainly, paragraph 3 of article 51 did not contain any provision for the expression of the will of a State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty. Paragraph 2, therefore, did not belong to the draft of the law of treaties.

59. Paragraph 1 could perhaps be kept, but with a different approach. An examination of article 4 showed that the rules on the representation of the State in the negotiation of treaties and the rules on representation in the conclusion of treaties were practically the same, except for the list of the persons who, " in virtue of their functions and without having to produce an instrument of full powers ", were considered as representing their State. For the purposes of negotiation of a treaty, all six categories of persons listed in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 2 of article 4 were deemed *ex officio* not to need full powers. For the purposes of the conclusion of a treaty, however, only the three categories indicated in sub-paragraph (*a*), Heads of State, Heads of Government and Ministers for Foreign Affairs, were regarded as so authorized. No such *ex officio* powers were recognized to the three other categories: Heads of diplomatic missions, representatives accredited by States to an international conference and representatives accredited to an organ of an international organization.

60. It was difficult to see why a head of diplomatic mission, or a representative to an international conference or to an organ of an international organization, should be regarded as entitled *ex officio* to invoke a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty, as was done in paragraph 2. Such representatives would be the persons least likely to have such powers.

61. The 1963 approach was more appropriate and he therefore suggested a formulation on the following lines:

> " The rules laid down in article 4 regarding the representation of a State for the purpose of concluding a treaty shall apply to the representation for the purposes of invoking a ground of invalidity, termination, withdrawal from or suspension of the operation of a treaty. "

A formulation on those lines would exclude the categories of persons listed in sub-paragraphs (*b*) and (*c*) as having any *ex officio* powers to invoke grounds of invalidity or termination.

62. Mr. Rosenne had suggested that the terms of the article were perhaps too formal, but, personally, he was in favour of a measure of strictness in the matter; there would be no great harm in working on the lines of article 4.

63. Mr. AGO said he agreed with Mr. de Luna that it would be inadvisable to divide article 49 into two paragraphs. Since article 4, to which article 49 referred, dealt in one single paragraph with matters as diverse as the negotiation, adoption and authentication of the text of the treaty and the expression of the State's consent to be bound by a treaty, article 49 should likewise be unified. Besides, the two paragraphs of the redraft were not easy to read and could well give rise to doubt and ambiguity. What, for example, was the difference between " invoking a ground of invalidity . . . of a treaty " and the expression of " the will of the State to denounce as invalid, terminate, withdraw from or suspend the operation of a treaty "?

[8] *Ibid.*, *1963*, Vol. I, p. 164, paras. 15-17.

[9] *Ibid.*, Vol. II, p. 41.

64. As Mr. Briggs had said, the provisions of paragraph 2 of article 4 could not apply as they stood to the situation dealt with in article 49. The expression *mutatis mutandis* was generally not really satisfactory, but it would no doubt be necessary to add a proviso in some form or other in article 49, notably regarding the representatives of States at international conferences or to international organizations. For example, while it was normal for the representative to an international organization to negotiate a treaty, it did not automatically follow that he was authorized to raise a question of nullity affecting a treaty which had not only been signed but ratified by the State he represented.

65. The language should be as strict as possible. Since article 4 described the conditions under which a person could be regarded as representing a State, article 49 could use that language and provide, for example, that the rules laid down in article 4 would likewise apply—subject to differences to be specified—to the circumstances in which a person could be regarded as representing a State for the purpose of invoking a ground of invalidity etc., of a treaty. The expression " invoking the invalidity " had been adopted by the Drafting Committee in all the articles dealing with the invalidity of treaties. The terminology should be standardized, for any difference in language might be interpreted as connoting a difference of substance.

66. The CHAIRMAN, speaking as a member of the Commission, said that from the point of view of theory, he had no criticism of the formula proposed by the Special Rapporteur. Experience showed, however, that in practice States were not so formalistic. In most cases, the expression of the will of the State, for the purposes contemplated in article 49, took the form of *notes verbales*, either from the Ministry of Foreign Affairs or from diplomatic missions, in which the writer stated that he was acting on instructions from the Minister for Foreign Affairs. Consequently, it was hardly ever necessary in practice to determine who had the authority to express the will of the State; in reality the decision was always taken by the authority competent to take it.

67. The Drafting Committee would therefore have to choose between two approaches: either it could follow the general practice, or else it could formulate a rule, on the lines proposed by the Special Rapporteur, modifying the practice in the interests of the stability and security of international relations.

The meeting rose at 1.5. p.m.

839th MEETING

Wednesday, 26 January 1966, at 11.30 a.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 49 (Authority to denounce, terminate or withdraw from a treaty or suspend its operation) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 49.

2. Mr. YASSEEN said he had been struck by some of the remarks made during the discussion, notably those of Mr. Jiménez de Aréchaga, the Chairman and Mr. Briggs.

3. It was true, as Mr. Jiménez de Aréchaga had said, that article 49 touched on the law of diplomatic relations. But, after all, the law of diplomatic relations operated in all relations between States, whether in the matter of treaties or in other matters.

4. The Commission should certainly take notice of current practice in the matter, a point to which the Chairman had very properly drawn attention.

5. The article raised one very important issue, the validity and maintenance in force of treaties and, consequently, the stability of international relations. All the moves involved in action to declare a treaty void, suspended or terminated were even more important than those involved in the conclusion of treaties, and should be surrounded by even more safeguards. The processes used for terminating a treaty might precipitate a crisis between States and so jeopardize international relations. Accordingly, it was not excessive to say that a certain formality was needed for the purpose of the production of evidence showing that the representative of a State had the necessary authority to perform the acts mentioned in article 49; it would be correct to stipulate in that article that the representative must possess clear, and sometimes even formal, authority.

6. Like Mr. Briggs, he considered that the provisions of article 4 should not operate automatically in the cases dealt with in article 49, so far as certain representatives were concerned. Whereas an ambassador in the normal course of events had authority *ex officio* to negotiate with the State to which he was accredited, greater caution was needed in any case where it was intended to invoke a ground for annulling or terminating a treaty; in such a case the ambassador should possess express authority.

7. Without wishing to make a formal proposal, he thought that the Commission should look into all those questions more closely, for there was no more than an apparent parallel between the acts involved in the conclusion of a treaty and the steps leading to a declaration annulling or terminating or suspending the operation of a treaty.

8. Subject to those remarks, he considered that the Special Rapporteur's redraft was correct in that it drew a distinction between authority to invoke a ground for annulling or terminating a treaty or withdrawing from or suspending the operation of a treaty, and authority to express the State's will to declare a treaty void, to

[1] See 838th meeting, after para. 38, and para. 39.