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Summary record of the 839th meeting

Topic:

Law of Treaties

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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.

terminate it, to cease to be a party to it, or to suspend its operation. While it should contain a cross-reference to article 4, article 49 should be so drafted as to make allowance for the difference between the two situations covered in the two articles.

9. Mr. RUDA said that the retention of article 49 was justified on both logical and practical grounds. From the logical point of view, the existence in the draft of article 4, which set out the categories of representatives from whom full powers were not required for the purpose of expressing the will of the State in the conclusion of a treaty, made it appropriate to have a corresponding article setting out the categories of representatives from whom full powers were required for the purpose of terminating the obligations of the State.

10. From the practical point of view, the provisions of article 49 would be of great assistance to Ministries of Foreign Affairs by laying down clear rules on the requirements for representing a State for the purposes of expressing the will of the State at the international level. The article related only to international effects and concerned the question whether a representative was required to produce full powers or not.

11. With regard to the contents of the article, he supported the approach adopted by the Special Rapporteur. Just as in article 4 a distinction was drawn between representation of the State for the purposes of, on the one hand, negotiating and adopting the text, and on the other hand, expressing the consent of the State to be bound, so it was proper to draw a distinction in article 49 between representation of the State for the purposes of, on the one hand, invoking a ground of invalidity or termination and, on the other hand, expressing the will of the State to denounce or terminate the treaty.

12. Article 49 presupposed the existence of a general rule to the effect that, both for the purpose of invoking a ground of validity and for the purpose of denouncing a treaty, all representatives were required to produce full powers. The article stated the exceptions to that general rule. A first group of exceptions related to those persons who were not required to produce full powers in any case: Heads of State, Heads of Government and Foreign Ministers. It was useful to make clear provision for that group because, in State practice, there had been some discussion on the question whether a Foreign Minister was required to produce full powers for the purpose of denouncing or terminating a treaty.

13. The second group of exceptions related to those persons who were not required to produce full powers for the purpose of invoking a ground of invalidity or termination, but were required to produce such powers for the purpose of expressing the will of the State to denounce or terminate a treaty.

14. Unlike Mr. Yasseen, he thought that there was a parallel with article 4 and that it was logical, in view of the functions performed by them as representatives, that heads of diplomatic missions and representatives accredited by States to an organ of an international organization should be deemed to have full powers to invoke grounds of nullity or termination. Representatives accredited by States to an international conference, however, should be required to produce full powers, even for the purpose of invoking a ground of nullity or termination.

15. With regard to presentation, he would have no objection to the fusion of the two paragraphs of the Special Rapporteur's new draft.

16. Mr. TUNKIN said that the Commission did not have sufficient information on current practice with regard to the subject-matter of article 49; its position was therefore more difficult than over article 4. He was prepared to accept the Special Rapporteur's redraft in principle, although the simpler formulation of 1963 might have been preferable.

17. He agreed with Mr. Jiménez de Aréchaga that article 4 did not establish as clear-cut a separation between the negotiation and adoption of the text of a treaty on the one hand, and the expression of the final consent to be bound on the other. In article 49, a more definite line of demarcation had been drawn and that contrast with article 4 could give rise to some difficulties, a point which the Drafting Committee should take into account.

18. The difference in wording between paragraphs 1 and 2 would have to be adjusted. In the context of the denunciation or termination of a treaty, paragraph 2 referred to the " will of a State ", but invoking a ground of invalidity or termination, to which paragraph 1 referred, also constituted an expression of the will of the State.

19. Mr. de LUNA said that life did not always abide by the rules of logic. Twenty-two years' experience as legal adviser to a Ministry of Foreign Affairs and four years' experience as ambassador had taught him that the practice of States was as described by the Chairman, and that very informal methods were used to express the will of the State to denounce or terminate a treaty. A mere *note verbale* from a Head of mission or from the Foreign Minister was sufficient to communicate the will to denounce, particularly in cases where the termination of the treaty was based on its own provisions.

20. In United States practice, it had been held by the legal advisers of the State Department that the President did not require the consent of the Senate to denounce a treaty[2] and that the foreign State to which the notification was made was not called upon to investigate whether the act thus performed by the President was constitutional or not.[3] The United States had a rigid constitution, which contained provisions on the treaty-making power which specified that the President required the consent of a two-thirds majority of the Senate for the purpose of concluding treaties,[4] but there was no parallel between the conclusion and the termination of treaties.

21. The fact that practice did not point to any parallel between the cases covered by article 4 and those covered by article 49 did not mean that the Commission could not adopt provisions which would have the effect of

[2] G. H. Hackworth, *Digest of International Law*, Vol. V, p. 319.

[3] J. B. Moore, *Digest of International Law*, Vol. V, pp. 169 and 170.

[4] Article II, Section 2, Clause 2: "... He [the President] shall have Power by and with the Advice and Consent of the Senate, to make treaties, provided two-thirds of the Senators present concur...."

changing the present practice, but, before doing that, it would have to examine the whole question thoroughly.

22. Personally, he did not think there was any real parallel between the situation where a State became bound by certain obligations, and the situation where those obligations came to an end. An extreme instance was provided by the minorities treaties concluded at the end of the First World War; the countries which then undertook the obligations for the protection of the minorities could not denounce those treaties without the consent of the Council of the League of Nations. It was true, of course, that those provisions on the protection of minorities had more the character of objective rules of law than of ordinary treaty provisions.

23. On the whole he preferred the 1963 text, with its saving qualification " *mutatis mutandis* ". And, as he had already pointed out at the previous meeting, he did not favour the division of the article into two paragraphs because, although the distinction between negotiation and termination was not erroneous, it made the article cumbersome and could involve dangers.

24. Mr. AGO said that, the more he considered the matter, the more he thought it wrong to draw a parallel between the situations contemplated in article 4 and in article 49. Even if the Commission reverted to the 1963 formulation, there was always a danger that it might introduce an erroneous statement into the draft.

25. For example, article 4, paragraph 1 (*a*), stipulated that the person concerned must produce " an appropriate instrument of full powers "; but that provision did not appear to him to suit the circumstances of the termination of a treaty. Paragraph 2 (*a*) of that article, which dealt with Heads of State, Heads of Government and Ministers for Foreign Affairs, could at a pinch apply in the situation envisaged in article 49, but the same could not be said of paragraph 2 (*b*), since an ambassador, although authorized to negotiate with the State to which he was accredited, was certainly not empowered to raise so serious a matter as grounds for the invalidity, suspension or termination of a treaty. Even less could the rule in paragraph 2 (*c*), concerning representatives to an international conference or to an international organization, be transferred to article 49.

26. In his view, it was essential that the Commission should give further consideration to all those questions, and he therefore proposed that a decision on the substance of article 49 be postponed until the eighteenth session.

27. Mr. LACHS said that article 49 dealt with an important stage, albeit the last in the treaty-making process, and had its place in the draft.

28. There were similarities, but also differences, between the negotiation and the termination of a treaty. In the case of a multilateral treaty, some kind of negotiation might be necessary to bring it to an end, and questions of interpretation could then arise as to whether the right to invoke invalidity, termination or suspension had been properly understood. A case in point was that of the 1849 Treaty of Peace, Friendship, Commerce and Navigation between Guatemala and the United States,[5] under which the clauses concerning commerce and navigation could be terminated at one year's notice but all those relating to peace and friendship between the two parties were intended to last in perpetuity. In 1888, some of the clauses had been denounced and a dispute had arisen as to which group of articles they belonged to.

29. He shared the doubts expressed about paragraph 2 in the Special Rapporteur's new text. The Commission should re-examine the issues raised in the article. The provision ought to be simple and need not be divided into two paragraphs. Possibly the original text was clearer, but the United Kingdom Government's criticism of the use of the word " conclude " was justified.

30. Mr. CASTRÉN said that, despite the misgivings voiced by certain members, article 49 was of some value and should therefore be retained.

31. There was undoubtedly a close analogy between the situations dealt with in articles 4 and 49, even though they were not quite parallel. It was therefore arguable that those problems should be solved according to the same legal principles.

32. It could be contended that a person who possessed authority to conclude a treaty or to express the will of the State for the purpose of negotiating a treaty or adopting or authenticating its text generally also possessed the right to represent the State in a corresponding act whereby a treaty was to be terminated or in invoking grounds which would lead to the same result. In general, the conclusion of a treaty was a more important act than denunciation or the other acts necessary for terminating a treaty. Under the constitutions of several countries including Finland, the assent of Parliament was required for the conclusion or ratification but not for the denunciation of certain treaties; denunciation was usually a matter for the Executive. He was therefore prepared to accept the idea expressed in paragraph 2 of the Special Rapporteur's redraft.

33. So far as drafting was concerned, he preferred the new version to the 1963 text but, like several other members, he thought that the new draft could be still further improved, for example by amalgamating its two paragraphs, which were repetitive.

34. Article 49 should be placed at the beginning of part II of the draft, dealing with the termination of treaties.

35. Mr. BRIGGS said he was against postponing discussion of article 49 until the next session, as it was no more difficult than some others that the Commission had dealt with. A text could be formulated now and could always be modified subsequently, should new information on practice come to light or should that be required by the observations of governments.

36. The analogies between the process of terminating and of concluding a treaty should not be pressed too far, but there was clearly a need to stipulate that a person invoking the nullity, termination or suspension of a treaty was properly authorized, unless, where full powers were dispensed with, he was so empowered by virtue of his office.

37. Mr. AMADO said that strong arguments had been put forward by those members of the Commission who

[5] W. M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers*, Vol. I, p. 870.

took the view that the rule proposed in article 49 found no support in practice.

38. Several members of the Commission had said that the practice should be improved and that the Commission should help Foreign Ministries by providing them with guidelines which they could follow in cases of doubt.

39. That being so, the Commission would do well to adopt Mr. Ago's proposal that the formulation of article 49 should be postponed in order that the practice could be studied more thoroughly.

40. The CHAIRMAN, speaking as a member of the Commission, said he agreed with Mr. Ago that further consideration of article 49 should be postponed. On the other hand, he shared Mr. Lachs's view that all the questions arising out of the article should first be settled.

41. Mr. TSURUOKA said that the Commission was faced with two requirements which in a sense were contradictory: it had to meet the wishes of those who were anxious about the stability of treaty relationships, and at the same time to provide for some flexibility in practice. If the Commission decided in favour of stability, it would need to formulate certain rules, which would have to be hedged about with precautions, lest a representative's authority to terminate a treaty be liberalized too much. Such a course would be in the interests of a State which, for whatever reason, wished to terminate the treaty, and also of the State receiving the notice of denunciation. Nevertheless, the Commission should not be too solicitous on that point. On the other hand, flexibility in the manner of action in diplomatic and international life in general should not be hampered and the Commission should avoid departing too much from State practice.

42. Current practice required further elucidation and the need for clear wording was perhaps even more important in article 49 than in others. The Commission should, therefore, endeavour to obtain the necessary data before the next session, when it would resume its consideration of the article.

43. Mr. BEDJAOUI said that he supported Mr. Tsuruoka's views; he too had been bothered by article 49. Many States considered that the conclusion of a treaty was more important to them than its termination. That was a fact which could be illustrated by many examples. For instance, he had known a case where a treaty had been terminated by a telephone call from an ambassador who himself had received his instructions by telephone. In other words, where denunciation and suspension were concerned, there was no question of undue ceremony.

44. He appreciated that some members thought that such a situation should be covered by stricter—though realistic—rules. The supporters of both the proposed solutions were agreed that there was no real analogy between article 4 and article 49. Mr. Ago's proposal should, therefore, be adopted.

45. Mr. YASSEEN, referring to Mr. Castrén's remark that the conclusion of a treaty was usually more important to States than its negotiation, said that, from the national point of view, both phases were usually of equal importance.

46. From the international point of view, however, and because it could lead to tension and even to disputes, denunciation was an operation which raised more problems than the conclusion of treaties; it was also more important in that it was more dangerous, since it might affect relations between States. Certain precautions were therefore necessary. Although the rule should not be unreasonably strict, it could nevertheless require that the will of the State should be expressed by its representative in due form, if only to avoid the recurrence of situations such as that mentioned by the Chairman, where the *note verbale* denouncing a treaty had subsequently been withdrawn.

47. Sir Humphrey WALDOCK, Special Rapporteur, said he was surprised that some members should regard article 49, which had already been discussed at the fifteenth session, as particularly difficult. He felt that some of the criticisms were misdirected, as they seemed to interpret the article as relating to matters with which it did not deal at all.

48. In 1963 the Commission had decided that such an article was highly desirable so as to achieve some kind of order in the process of bringing about the invalidity, termination or suspension of a treaty. The article did not deal with the form of the instrument to be used, the only provision regarding which was that in article 50, concerning notices of termination; and he could not therefore agree that it involved any risk of bringing in the theory of the " *acte contraire* " by the back door.

49. The Commission had been of the opinion, owing to the possibility of ministers purporting to proclaim the termination or invalidity of a treaty without proper authority or in an irregular way, that some provision was necessary concerning the evidence of the authority of the person from which the instrument of termination etc. emanated.

50. Article 49 had not provoked a single objection, apart from the justifiable criticism by the United Kingdom Government of the possible ambiguity of the word " conclude ", which had not in fact been used in article 4.

51. In view of what seemed the general agreement that an article on the subject was needed, he would not have thought the difficulties of drawing it up very great, even if there were one or two drafting problems. It was not intended to deal with internal constitutional law, or with the form of the instrument, but only with the international representation of a State for purposes of invoking or declaring the invalidity, termination or suspension of a treaty.

52. He did not agree that the Commission had failed to draw a distinction in article 4 between international representation of a State for negotiating a treaty and representation for expressing its final consent to be bound. Close examination of the provisions of the article would show that it had done so.

53. It might prove unnecessary to specify who could invoke the invalidity of a treaty on behalf of a State. Perhaps paragraph 1 in his new draft went into too much detail, but he continued to think that it would be logical to separate the procedure from the power to invoke termination.

54. He was prepared to consider the suggestions made during the discussion for the amendment of the text, though he had been surprised at the enthusiasm shown for re-inserting the phrase *mutatis mutandis*, which the Commission was usually anxious to drop, and he questioned whether it was strictly necessary.

55. Mr. Tunkin's suggestion concerning paragraph 2 was acceptable.

56. As the article had been discussed at considerable length, it would be a pity to postpone its drafting until the eighteenth session. He was now in a position to put forward a new text to the Drafting Committee, which might be able to work out something acceptable, so that the results of the discussion would not be lost. He hoped, therefore, that the article could be referred to the Drafting Committee, whether its reconsideration by the Commission took place at the present session or was left over until the eighteenth session.

57. Mr. AGO said it was unfortunate that his proposal, intended to cut short the discussion, had in fact prolonged it. He was convinced that it was absolutely necessary that the draft should contain an article on the lines of article 49 and that it was a subject into which the Commission might well be able to introduce some order. He did not believe, however, that the difficulty could be overcome merely by inserting a reference to article 4. He proposed, therefore, that the Commission postpone further consideration of article 49 and refer the article to the Drafting Committee; the Committee would not have time to consider it forthwith but would do so in May.

58. The CHAIRMAN suggested that article 49 be referred to the Drafting Committee in accordance with Mr. Ago's proposal.[6]

It was so agreed.

ARTICLE 51 (Procedure in other cases)

59. Mr. JIMÉNEZ de ARÉCHAGA said that article 51 was an important one to which the Commission should do full justice, and as little time remained, he proposed that its consideration be deferred until the eighteenth session.

It was so agreed.

The meeting rose at 1.15 p.m.

[6] For the decision with regard to further consideration of article 49, see 842nd meeting, para. 107.

840th MEETING

Wednesday, 26 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

[Item 2 of the agenda]

(continued)

ARTICLES SUBMITTED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 4 (*bis*) [formerly paragraph 1 of article 32] (Subsequent confirmation of an act performed without authority)

2. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee, following the Commission's decision to divide the former article 32[1] into two parts and to transfer the content of what had been paragraph 1 to a provision which would follow article 4 (concerning full powers), had prepared the following text for the new article 4 (*bis*):

Article 4 (bis)

Subsequent confirmation of an act performed without authority

An act relating to the conclusion of a treaty performed by a person who cannot be considered under article 4 as representing his State for that purpose is without legal effect unless afterwards confirmed by the competent authority of the State.

3. The Commission had taken that decision because the case of an act by a person who could not be regarded as representing a State within the meaning of article 4 should logically be dealt with immediately after that article. The right place for a provision stating that, although such an act had no legal effect it could be subsequently confirmed, was not the section concerning the invalidity of treaties but that concerning the representation of a State for purposes of concluding a treaty.

4. The CHAIRMAN put article 4 (*bis*) to the vote.

Article 4 (bis) *was adopted by 17 votes to none.*

ARTICLE 32 (Specific restriction on authority to express the consent of the State)

5. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee proposed the following text for what had formerly constituted the second paragraph of article 32:[1]

Article 32

Specific restriction on authority to express the consent of the State

If the authority of a representative to express the consent of his State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating a consent expressed by him unless the restriction was brought to the notice of the other contracting States prior to his expressing such consent.

6. The main change was the greater emphasis on the point that the authority of a representative related to

[1] For earlier discussion on article 32, see 824th meeting, paras. 1-51.