Document:-
A/CN.4/SR.849

Summary record of the 849th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1966, vol. I(2)

67. He accordingly suggested that paragraph 1 be redrafted to open:

" 1. Subject to the provisions of the treaty, the lawful suspension of the operation of a treaty between all or certain of the parties only:

(*a*) Shall relieve the parties in question from the obligation . . . ".

68. The points raised by Mr. Rosenne would require some further reflection and he would rather not commit himself on them at that stage. However, he was inclined to believe that article 46 on the separability of treaty provisions, adopted by the Commission at its last session, covered the question of partial suspension sufficiently, when combined with article 54 as it now stood and the provisions of the various substantive articles.

69. He did not favour introducing any reference to territorial questions into article 54; that would make the article unduly long, which was undesirable for a general provision of that kind.

70. As for the temporal element, it was sufficiently covered by the statement in paragraph 1 (*a*) that the suspension relieved the parties from the obligation to apply the treaty " during the period of the suspension ". The Drafting Committee might consider whether it was necessary to introduce into the draft articles a provision to the effect that suspension came to an end when the cause of suspension ceased, though that seemed to him self-evident. If it was considered necessary to cover the point by means of an express provision, it should be placed elsewhere than in article 54.

71. He suggested that article 54 be referred to the Drafting Committee for consideration in the light of the discussion.

72. Mr. de LUNA said that his views were the same as those of Mr. Tunkin and Mr. Ago. The only difference between his proposal and Mr. Tunkin's was the inclusion of the word " specially " before the word " affected ", and he would not press for that. The reason why he had suggested the use of the expression " specially affected " was that it had been used by the Commission in paragraph 2 (*b*) of article 42. If a different expression were used in article 54, difficulties of interpretation might arise.

73. He fully agreed that article 54 did not deal with the causes of suspension and that the first group of examples he had given did not come within the scope of the article; as to the last group, he was firmly convinced that the prohibition of nuclear tests would soon become a rule of *jus cogens* outlawing such tests as offences against humanity.

74. Sir Humphrey WALDOCK, Special Rapporteur, said that the term " affected " was used in article 42 in a different context. To refer in article 54 to the " parties affected " would be unsatisfactory as the term was too vague; there could well be parties affected other than those directly in question.

75. Mr. BARTOŠ said he had already had occasion to raise objections to the institution of suspension. It was true that to suspend the operation of a treaty was less serious than to derogate from it, but as a result of the suspension certain States might find themselves excluded from the benefits of treaties of a humanitarian character. To allege that a State had violated or failed to observe the provisions of a treaty amounted to saying that it did not deserve to have those provisions observed in relation to itself, and the operation of the treaty was suspended where it was concerned. Moreover, suspension of the operation of a treaty might be an expedient to avoid applying the most-favoured-nation clause to a State. For reasons of principle, and out of a desire to safeguard objective treaties and the treaties which shaped the international public order, he warned the Commission against the danger of the institution of suspension, which could be used by a State to disrupt public order by a unilateral decision.

76. The CHAIRMAN, speaking as a member of the Commission, said that the position taken by the Commission on article 54 in no way prejudged the position it would take with respect to the grounds and procedures for suspension. In particular, the Commission had not yet taken a decision on the possibility of suspending the operation of any treaty whatsoever, including treaties of a humanitarian character, to the detriment of certain States. Subject to that reservation, he accepted article 54.

77. Mr. ROSENNE asked whether the Special Rapporteur had any comments to make on the question, raised by Mr. Jiménez de Aréchaga and himself, of strengthening the guarantees to ensure that suspension did not become a concealed means of *de facto* termination of a treaty, especially in the case covered by article 39.

78. Sir Humphrey WALDOCK, Special Rapporteur, said that the point could be dealt with by including in the draft articles a provision to the effect that suspension must terminate when the causes of suspension ceased to exist. Personally, he thought that that went without saying, since the interpretation and the application of the draft articles were governed by good faith. He would give the matter some further thought, however, to decide whether such a provision was necessary.

79. Mr. ROSENNE said he was satisfied with that explanation for the time being.

80. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to refer article 54 to the Drafting Committee, as suggested by the Special Rapporteur.

It was so agreed.[8]

The meeting rose at 5.45 p.m.

[8] For resumption of discussion, see 865th meeting, para. 87–99.

849th MEETING

Wednesday, 11 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Co-operation with Other Bodies

[Item 5 of the agenda]

1. The CHAIRMAN said he had received a letter from Mr. Golsong, the observer for the European Committee on Legal Co-operation, transmitting the memorandum concerning the law of treaties which the Commission, at its last session, had asked him to be good enough to supply.[1] Mr. Golsong said that he had drafted the memorandum on his personal responsibility and that he expected to attend the Commission as an observer from 8 to 11 June.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 55 *(Pacta sunt servanda)* [23]

[23]

Article 55

Pacta sunt servanda

A treaty in force is binding upon the parties to it and must be performed by them in good faith.

2. The CHAIRMAN invited the Commission to consider article 55.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that article 55 was the core of the whole draft. In his third report, he had put forward a more complicated text,[2] but the Commission had decided to formulate the rule *pacta sunt servanda* in as simple terms as possible and the outcome of its discussions had been a short and forceful statement. In preparing his sixth report he had therefore taken as his premise that the Commission's wish to keep the article simple must be respected, though he had naturally taken into account any comments by governments and delegations that compelled attention for reasons of law or logical presentation.

4. After carefully analysing the comments he had come to the conclusion that most of them could be regarded as already met, either in article 55 or in other articles of the draft, and that the rest were not quite pertinent to article 55. It was unnecessary to summarize his observations on those comments, since they had been set out fairly fully—and he hoped lucidly—in his report (A/CN.4/186/Add.1).

5. The one amendment he had proposed applied to the English text only; it was intended to meet the point made by the Government of Israel that the English words " A treaty " did not exactly correspond with the French and Spanish versions, which spoke of " Every treaty ".

6. Mr. VERDROSS said that article 55 was very important and stated a fundamental principle.

7. He approved of the Special Rapporteur's proposal to replace the opening words " A treaty " by the words " Every treaty " in the English text, but he was not very satisfied with the expression " in force ", which did not mean much. What was meant was that the treaty had been concluded in conformity with the procedural and substantive rules laid down in the convention, and it would be better to replace the words " in force " by some wording on those lines.

8. Mr. RUDA said he agreed that article 55 stated a fundamental principle of public international law.

9. With regard to the position of the article, the Special Rapporteur spoke of placing it immediately after part I, or even before it, right at the head of the draft—though that would be rather too abrupt—or else mentioning it in a future preamble. Personally, he thought it a little premature to speak of a preamble; unless it was a simple text, easy to accept, he would be opposed to the idea, because he thought a preamble generally had a certain political import, which a conference of plenipotentiaries was better qualified to formulate than was the Commission.

10. It would be logical to place article 55 after part I, but in the interests of greater harmony the Commission might consider making a radical rearrangement of the draft articles and adopting the following presentation: first, the birth of a treaty, that was to say the present part I (" Conclusion, entry into force and registration of treaties "); then the life of a treaty, the present part III (" Application, effects, modification and interpretation of treaties "); and lastly, the death of a treaty, in other words the present part II (" Invalidity and termination of treaties ").

11. With regard to the wording of article 55, the Commission had arrived at a categorical, clear and precise text which should be kept as it stood. He thought the Special Rapporteur had given satisfactory answers to the various comments by governments.

12. Sir Humphrey WALDOCK, Special Rapporteur, said he was not certain whether members of the Commission were aware of his ideas—still tentative—about the rearrangement of the articles, to which he had referred at various stages in the preparation of the draft. The general scheme he had put forward in a small working paper he had submitted to the Drafting Committee at the second part of the seventeenth session was to transfer the provisions concerning interpretation and application nearer to the beginning of part I, and his suggestion that article 55 should follow part I was an element in that scheme.

13. Mr. LACHS said that article 55 was obviously crucial, but a fundamental principle could nevertheless be stated succinctly.

14. He agreed with the Special Rapporteur that the article should be placed immediately after part I—a point that could be dealt with when the Commission was discussing the final rearrangement of the articles. If the Commission decided to include a preamble to the draft articles—which he did not think it was called upon to do—the preamble would have to cover the much wider field of the role and function of treaties as a fundamental feature of relations between States, of

[1] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 830th meeting, paras. 18–21.

[2] *Ibid., 1964*, vol. II, p. 7.

which the principle *pacta sunt servanda* was a basic element; it could certainly not be confined to a statement of the principle.

15. The criticism of the words " in force " was not particularly convincing and he disagreed with Mr. Verdross's argument. The words must be maintained for precisely the reasons Mr. Verdross had given, because unless a treaty came into operation the principle *pacta sunt servanda* did not apply. Articles 17 and 23 covered the situations assimilated to entry into force which Mr. Verdross had in mind, because of their provisions concerning rights and obligations prior to, and requirements for, entry into force. Hence the qualification " in force " in article 55 could not be omitted.

16. He would not examine the article at length, since it had been discussed in detail in the Commission. Any further elaboration of the text would require a close examination of theory and practice concerning a principle that had been discussed from Cicero's day to our own. Vattel had devoted a whole chapter to it in his *Droit des Gens*, and it had also been discussed by Macchiavelli and those who had followed him up to the present time.

17. What was essential was clarity in the rule. The principle of good faith stood on its own feet and needed no explanation: any attempt to provide one would lead to casuistry. It meant fidelity and the conscientious fulfilment of promises by acts, or by refraining from acts that could frustrate the purpose of the contract. It meant honesty, not evasion—the obligation not to do anything that might prevent the execution of the treaty. Any enumeration might be deceptive for lack of completeness. If the Commission attempted to go further, it would find itself discussing such issues as those raised by article 12 of the Treaty of Utrecht, which had led to the well-known conflict of interpretation between France and England, so tellingly described by Vattel and Voltaire, the one claiming that the parties had deliberately left the text unclear in order to leave the way open for non-performance,[3] the other that they were obviously negligent.[4] The present meaning of article 55 would be plain to both lawyers and laymen, and he was strongly in favour of its being left untouched.

18. The drafting change in the English text proposed by the Special Rapporteur was acceptable, but of little significance, as there was no important difference between the two alternatives.

19. Mr. EL-ERIAN said that at the sixteenth session he had found himself in a minority and had been unable to concur in the approach adopted by the Commission to an article containing a fundamental rule, which the United States Government described as " the keystone that supports the towering arch of confidence among States " (A/CN.4/186/Add.1). The second reading of the articles provided an opportunity for second thoughts and the Special Rapporteur's lucid observations had been most helpful; but they still had not convinced him that he ought to fall in with the Commission's general line.

20. The question of the position of article 55 was a matter not only of logic, but also of substance because, to be binding, a treaty must possess not only formal, but also substantive validity. For that reason the article ought to follow the provisions on the conclusion of treaties, substantive validity and continuance in force. Only if that order were followed would it be appropriate to have a provision on the sanctity of treaties and the obligation to comply with them.

21. For the first time, the Commission was considering the possibility of attaching a preamble to one of its drafts. At the United Nations Conference on Diplomatic Intercourse and Immunities, certain delegations had attached much importance to the inclusion in the preamble to the Convention of a list of traditional diplomatic functions, including that of fostering friendly relations between States, and some had pressed in particular for the clause stipulating that customary international law should continue to govern questions not expressly regulated by the Convention on Diplomatic Relations. He agreed with Mr. Lachs that, if a preamble were to be attached to the draft articles, it could not consist solely of the rule *pacta sunt servanda*; something would have to be added about the codification being intended to place the law of treaties on the " widest and most secure foundations ", to borrow the language of General Assembly resolution 1902 (XVIII).

22. Mr. Verdross had contended that the words " in force " did not mean very much, but in fact they meant that the treaty had been freely consented to, did not derogate from fundamental principles of international law and had not been secured by fraud or coercion. Thus the words conveyed that the instrument met the requirements for essential validity laid down in the draft, so they were important and must be retained.

23. He still considered that the article required further elaboration. Such points as that raised by the Finnish Government—that the article might usefully state that a party must abstain from acts calculated to frustrate the objects and purposes of the treaty—deserved consideration, as did the points he himself had mentioned in the discussion at the sixteenth session[5]—points which were covered in the Harvard draft.[6] The article could be expanded without losing its forceful character, particularly as there was general agreement on what should be its fundamental content.

24. Mr. CASTRÉN observed that the Special Rapporteur, after a full analysis of the comments by governments, had proposed that the 1964 text be retained subject to a slight change in the English version, which seemed acceptable. The Finnish and Turkish Governments wished article 55 to include a provision requiring the parties to refrain from acts calculated to frustrate the object and purpose of the treaty; that had been part of the Special Rapporteur's original intention, and two delegations to the General Assembly, those of Greece and the United Arab Republic, had proposed an amendment to that effect. The Government of Israel also seemed favourable to the idea, though it had stated that it would be satisfied if the matter were dealt with

[3] Vattel, *Droit des Gens*, Livre II, chap. VII, § 92.

[4] Voltaire, *Le Siècle de Louis XIV*, chap. XXIII.

[5] *Yearbook of the International Law Commission, 1964*, vol. I, p. 30.

[6] *Research in International Law*, "III, Law of Treaties"; Supplement to the American Journal of International Law, vol. 29, 1935.

in the commentary. Since the Commission had reached the conclusion, after long discussion in 1964, that the obligation which the governments in question wished to emphasize was implicit in the existing text and since there were strong reasons in favour of that concise and simple formulation, he was willing to accept it.

25. He agreed with the Special Rapporteur that it would be premature to take a final decision on the position of article 55.

26. Mr. ROSENNE, after paying a tribute to the Special Rapporteur's analysis of the comments made by governments and by delegations in the Sixth Committee, said he had considerable sympathy with the desire expressed by one member of the Commission to elaborate on the content of the article; but on balance he considered that the Special Rapporteur's conclusions were correct and that the article ought to be kept in the form arrived at after detailed discussion during the sixteenth session.

27. The words " in force " should be retained for reasons already given, more especially those put forward by Mr. Lachs. He hoped that some of the firm, and indeed noble, views expressed in the Special Rapporteur's observations would find a place in the commentary or in the introduction to the Commission's report, especially those concerning the application of the *pacta sunt servanda* rule to the draft articles.

28. For the time being, he reserved his position on the placing of the article, which was not a mere problem of drafting or good presentation, because the rule was applicable to the whole draft. It would seem that the article should precede section II of part I of the text as approved at the seventeenth session (A/CN.4/L.115).

29. It was not the Commission's function or custom to prepare a preamble to the draft conventions it drew up and he would not advocate any departure from precedent in that regard, because of the political and ideological considerations which were apt to arise when a diplomatic conference discussed a preamble. Nevertheless, since in article 69 the Commission had recognized the legal significance of a preamble, it could indicate what fundamental legal principles it considered ought to find a place in the preamble to a convention on the law of treaties; among them should be the obligation to apply treaties in good faith.

30. Mr. de LUNA, after congratulating the Special Rapporteur on his admirable defence of the text of the article, said he must admit that he found the idea of a preamble attractive. If that idea was not accepted, he would support Mr. Ruda's suggestion that article 55 should be placed immediately after part I and that the draft should be subdivided into three stages: the birth, life and death of a treaty.

31. It was true that it was not the Commission's practice to draft preambles and it was also certain that, if it adopted that course, the more universal and abstract it tried to be, the more obstacles it would encounter; but the undertaking was worth while. Experience had shown that the members of the Commission, even though they started from different conceptions of the world, succeeded in reaching agreement on concrete results.

32. At first sight, it might be tempting to regard mere declarations of principle as of no importance compared with legal texts drafted in imperative terms which created rights, obligations, faculties and powers; but experience of constitutions, of international law and of the Charter had shown that that was not so. For example, the opening declaration of the Charter had proved to be much more important than the detailed rules embodied in the instrument itself.

33. It was also true that, even when ideological differences had been overcome, the drafting of a preamble would be a complicated matter. The preamble should first state the principle of good faith, because that was the keystone of the edifice and because it would reassure certain governments. Then it should deal with the relationship and balance between the principle *pacta sunt servanda* and the no less important principle *pax est servanda*. Lastly, and perhaps most difficult of all, it should define the function of treaties in the ineluctable relationship between international politics and law, since the maxim *fiat justitia pereat mundus* was pernicious and justice could be compatible with stability, as the Commission had shown by the *rebus sic stantibus* clause it had drafted.

34. Mr. AGO said that article 55 was one of the small number of key articles in the draft, which were recognizable by the fact that they were laconic and lapidary. He fully supported the Special Rapporteur in his resistance to any attempt to lengthen the article, to add to it anything that was not essential or to modify it in any way which might detract from its clarity or impact.

35. The question of the position of the article would no doubt arise again later, but like the Special Rapporteur he had already formed the opinion that it should be placed immediately after part I.

36. As to the words " in force ", he thought they could not be changed and were essential to the text; a treaty which was not in force could not be the subject of the provision in article 55. Mr. El-Erian had rightly pointed out that the expression " in force " meant not only that the treaty had been concluded in accordance with the provisions of the articles and had accordingly come into force, but also that it had remained in force and had not become void. It would be dangerous to invoke subsequent articles to restrict the scope of the expression. At the beginning of the draft the Commission had stated that the treaties referred to were treaties in written form. Thus the principle *pacta sunt servanda* was of wider scope than the draft, for every treaty, in whatever form it was concluded, must bind the parties and be performed in good faith. Consequently, to restrict the meaning of the expression " treaty in force " in any way might call in question the existence of treaties other than those to which the Commission was referring. All things considered, therefore, the expression " in force " was the best.

37. With regard to the principle of good faith, like the Special Rapporteur, he did not see why the fact of stating that the treaty must be performed in good faith should give the impression that the rule of good faith was confined to the application of treaties.

38. As to the Turkish Government's proposed addition of a clause stipulating that the parties to a treaty must

refrain from acts calculated to prevent the application of the treaty, he pointed out that the Commission had already included in its draft a very specific rule requiring States to refrain from any acts calculated to frustrate the objects of the treaty, but referring to a period before the treaty entered into force. When a treaty was in force, it must be performed in good faith, and States parties were obliged not only to refrain from acts that might prevent its application, but also to apply it in full. The proposed addition was therefore superfluous, and apart from the fact that it might give rise to misunderstanding, it would make the text less concise and less forceful than the Commission had intended.

39. Mr. REUTER said he agreed with the Special Rapporteur's observations and Mr. Ago's comments; he earnestly hoped that article 55 would not be referred to the Drafting Committee again.

40. Mr. TUNKIN said he agreed with most of what had been said and with the Special Rapporteur's conclusion that the text adopted at the sixteenth session was satisfactory.

41. He fully subscribed to Mr. El-Erian's interpretation of the meaning of the words " in force " and believed that it would still be advisable for the Drafting Committee to consider the advisability of redrafting the beginning of the article to read " Every treaty which is valid and in force . . . ". His reason was that many treaties which were legally invalid were still being performed and on the face of it, article 55 might be construed, though without sufficient ground, to mean that any treaty, simply by virtue of being performed, was binding even though legally it was totally invalid. Admittedly, not many international lawyers would take seriously the thesis developed in a recently published book that any treaty which was effective was valid, but nevertheless every effort should be made by the Drafting Committee to dissipate any possible doubts.

42. The Commission should not attempt to draft a preamble; that was a matter which ought to be left to a diplomatic conference, for reasons familiar to all members. It could, however, indicate in its report to the General Assembly that the principle *pacta sunt servanda* ought to be stressed in a preamble to any convention adopted.

43. With regard to the position of article 55, the Special Rapporteur's suggestion that it should follow part I was acceptable.

44. Mr. BRIGGS said that at the sixteenth session seven members had spoken in favour of including the words " in force " and seven against.[7] He had been among those who had opposed their inclusion on the ground that they would be tautological, seeing that in article 1, paragraph 1, a treaty had already been defined as an international agreement concluded between two or more States and governed by international law; in his view, a treaty that was not in force was a draft treaty and not a binding instrument. So much had been read into the words " in force ", including the concept of validity, that the discussion had only reinforced his conviction that those words were undesirable. In order to avoid additional amendment, however, he would agree that the text should be retained exactly as it stood.

45. It was too early to decide on the proper place for article 55 and he hoped that the working paper on the possible rearrangement of the draft articles which had been prepared by the Special Rapporteur for the Drafting Committee at the second part of the seventeenth session, but never discussed, would be reissued so that the Drafting Committee could put forward recommendations on the subject to the Commission.

46. The drafting change proposed by the Special Rapporteur was unobjectionable, but he personally considered that " A treaty " was an exact rendering of the expression " *Tout traité* ".

47. Mr. AGO said that, on the substance, he agreed with Mr. Tunkin; there was no doubt that, for a treaty to be binding on the parties and to be capable of being performed, it must be valid and must be in force. But while he would acknowledge that a treaty might be valid and yet not be in force, he doubted whether the converse was true, and wondered if there was not some misunderstanding on that point. He would not take a definite position, because Mr. Tunkin's comment related to the English text, and it might be that the English expression " in force " differed slightly in meaning from the French " *en vigueur* ". In his view, there was a very clear difference between a " treaty in force " and a " treaty effectively applied ". A treaty might be applied *de facto*, yet not be in force, and vice versa. According to French terminology, if a treaty was " *en vigueur* ", it must be " *valide* "; if it was not " *valide*", it was not " *en vigueur* ", thus it would be a pleonasm to use the terms " *valide* " and " *en vigueur* " side by side.

48. Mr. VERDROSS explained that he had merely suggested replacing the expression " in force ", by some more specific phrase such as " concluded in conformity with the rules of this convention "—an idea very similar to that advanced by Mr. Tunkin—and perhaps adding the words " and still in force " to meet the point raised by Mr. El-Erian. He would have no objection, however, to that clarification being given in the commentary.

49. Mr. AMADO said he must congratulate the Special Rapporteur on the lucidity of his analysis and the rigour of his arguments. He accepted the text as it had been adopted by the Commission.

50. He understood Mr. Tunkin's point of view, but to him the idea of performance of a treaty was inseparable from the principle of good faith. That principle, to which he attached great importance, conditioned the performance of a treaty, so that a suggestion such as that made by the Turkish Government was surprising. A valid treaty which was not in force did not bring into play the good faith which ensured performance. Even if Mr. El-Erian's point of view were accepted, how was it conceivable that good faith was involved if the treaty was not in force?

51. The idea of enunciating the *pacta sunt servanda* rule in a preamble was not without merit, but a preamble was always a declaration of intention, an indication of the purpose to be achieved. The Commission's

[7] *Yearbook of the International Law Commission, 1964*, vol. I, 726th and 727th meetings.

intention in its draft was to set out the rules which already existed in the practice of States and to go on from there to develop international law in the interests of justice and for the benefit of mankind. That was what the Commission should say in the preamble, if it decided to put one at the beginning of its draft, but to do so would be presumptuous and outside its proper role.

52. Although he made no claim to being an expert on the English language, he agreed with Mr. Briggs that the expression " A treaty " should be retained in the English text; it faithfully reflected the French " *Tout traité* ".

53. As to the position of the article, the Commission could have confidence in the Special Rapporteur, who could be relied upon to explore all the possibilities.

54. He agreed with Mr. Reuter that the article should not be referred back to the Drafting Committee.

55. Mr. JIMÉNEZ de ARÉCHAGA said that he welcomed the Special Rapporteur's drafting amendment to article 55, which would bring the English text closer into line with the French and Spanish and would give dignity and force to the statement of the rule.

56. The words " in force " should be kept without any qualification or addition, which might weaken the article, and he subscribed to Mr. El-Erian's interpretation of those words, which was not that the treaty had entered into force under the provisions of articles 23 and 24, but that it was valid and had not terminated. However, to insert a reference to its being valid might have a restrictive effect and require further qualification by some such wording as " valid and not terminated ".

57. Any such change was unnecessary because the intention was to designate treaties in force in accordance with all the articles of the draft, including article 51 on procedure. In other words, article 55 could not be invoked unilaterally by a State alleging that the treaty could not be executed because it was not in force, unless all the procedures laid down in article 51 had been complied with. Only then could the invoking State cease to execute the treaty any further. Furthermore, any suggestion that the article be amplified, by setting out in greater detail how the rule would apply, might involve serious risks. Experience with Article 2, paragraph 4, of the Charter, concerning the use of force, demonstrated the danger of going into too much detail and he therefore preferred article 55 in its present absolute form.

58. Mr. TSURUOKA said that the Commission was in unanimous agreement on the idea to be expressed in article 55. The article raised only two questions; the best way of expressing the idea and the position it should occupy in the draft.

59. With regard to the drafting, he was prepared to accept the article as it stood, but in view of the importance he attached to the moral value of the principle which governed the whole of the law of treaties, he urged the necessity of stating the rule as simply and, hence, as forcibly as possible.

60. If the majority preferred to retain the words " in force " and to add the word " valid ", he would not object, although personally he would be inclined to eliminate any qualification, since the questions of entry into force and validity were dealt with in other articles of the draft and it was unnecessary to repeat those ideas in article 55. The addition of the word " valid " would be rather ill-advised and might alter the meaning of the article, which should be that, as long as a treaty was in force and its invalidity had not been established, it must be performed by the parties in good faith.

61. With regard to the position of the article, he agreed with several of the previous speakers that it could be settled later, when the Commission came to review the arrangement of the draft as a whole.

62. The CHAIRMAN, speaking as a member of the Commission, said that all members were in agreement on the substance: a valid treaty which had entered into force was binding and must be performed. The only question that arose, therefore, was whether the wording of the article accurately expressed what the Commission wished to say. He himself believed it was implicit in the text that the treaty was valid, but if that seemed doubtful to some members, the Commission must consider the point carefully and endeavour to dispel the doubt, especially as article 55 was a key article of the draft.

63. With regard to position, since a treaty was only performed after it had been concluded and if it was considered valid, it would seem logical to place article 55 immediately after the articles on the conclusion and validity of treaties. But that question would be examined by the Drafting Committee when it reviewed the order of the articles in the draft as a whole.

64. Mr. BARTOŠ said he wished to reaffirm his conviction that the principle *pacta sunt servanda*, which was one of the foundation stones of the law of treaties, should be expressly stated in the draft and, in view of its importance, preferably in a separate article. Article 55 was probably in its right place, but he would leave that question aside for the time being.

65. It would be important to explain in the commentary what were the links between that essential principle and the basic general rules of public international law, whether those rules were incorporated in the United Nations Charter or in other instruments containing *jus cogens*. The principle *pacta sunt servanda* was essential, not only from the standpoint of the free will of the parties and the sanctity of treaties, but also from that of the stability of everyday relations between States. The higher principles of *jus cogens*, however, were an even more reliable foundation for those relations. The application of the principle *pacta sunt servanda* could not be pushed to the point of absurdity; there were exactions like those of Shylock which went beyond the juridical order. The purpose of treaties was to strengthen public order, not to destroy it. Consequently, treaties must be performed within the framework of the international public order constituted by *jus cogens* and of the general principles of international law. The Special Rapporteur would certainly be able to put into the commentary the few sentences needed on that subject, so that the Commission could not be reproached for having said more than it intended.

66. As to the question whether to retain the words " in force ", he considered that only treaties in force were treaties in the technical sense, that was to say, sources of law. The principle *pacta sunt servanda* applied only to such treaties. However, some treaties which had ceased to be in force left juridical vestiges which were still applicable to certain situations provided for by those treaties. The Commission had already considered such situations. It should avoid using in the article terms open to an unduly narrow interpretation which might exclude the regular application, in good faith, of certain provisions of such treaties. In his view, so long as a treaty was applied, it was in force.

67. The question of the responsibility resulting from non-observance of the rule *pacta sunt servanda* should not be dealt with in article 55, since the Commission had decided in principle to leave aside all matters relating to the responsibility of States—a subject which it would be called upon to codify at a later stage. It would be doubly wrong if it tried to deal with the question of responsibility in article 55, where the offence would be the non-observance of a treaty, when it had not done so in the article on the direct violation of a treaty.

68. Mr. REUTER said that the division in the Commission was not on the substance of the article, on which they were all agreed, but on the " colour " to be given to it. Those who were in favour of revising the text apparently wished the expression of the principle also to reflect other articles in the draft. At the first reading, in 1964, opinions had been divided on the inclusion of the words " in force "; they were still divided on the retention of those words and on the addition of the word " valid ". To be logical, it would be necessary to go even farther and introduce the rule with the proviso " Subject to the articles of this draft ". But that would give the completely false impression that the main purpose of the articles proposed by the Commission was to attenuate the binding force of treaties.

69. He therefore maintained his position and agreed with Mr. Ago, particularly after listening to Mr. Bartoš, but thought it essential that the questions raised should be clarified fully. In particular, the commentary must explain the meaning of the words " in force " with respect to the principle, upheld by some members, that a supervening new rule of *jus cogens* automatically deprived of all force a treaty in conflict with that rule.

70. Sir Humphrey WALDOCK, Special Rapporteur, summing up, said that the situation was not very different from what it had been at the end of the 1964 discussion.

71. He wished to make it clear that he had had no intention of suggesting that the Commission should undertake the drafting of a preamble, thus departing from the wise practice it had followed hitherto. His suggestion was merely that the final report might indicate that the *pacta sunt servanda* rule was one of the points that could appropriately be stressed in a preamble to the future convention. It would, of course, be for governments to formulate a preamble in due course.

72. The question of the position of article 55 was one to which close attention would have to be given, both by the Drafting Committee and by the Commission itself. It would be premature to deal with that question at the present stage, but in any event it was not desirable that so important a rule as that embodied in article 55 should be placed so late in the draft.

73. The main point of the discussion had been the same as in 1964, namely, whether the opening words " Every treaty " or " A treaty " should be used without qualification, or whether the words " in force " and possibly " valid " should be added. For the reasons so well explained by Mr. Reuter, his personal inclination would be to use the words " Every treaty " without any qualification. Any addition might upset the carefully adjusted balance of the relation between the substantive provisions on nullity and termination and the procedures for establishing nullity and termination. The Commission had taken the utmost care, when drafting the various provisions on nullity and termination, not to open the way for violation of treaties on the pretext of applying some of the articles. For those reasons, and also in order not to spoil the simplicity and force of the statement of the rule, he was opposed to the insertion of the adjective " valid ".

74. On the other hand, for the reasons set out in paragraph 2 of his observations on article 55 (A/CN.4/186/Add.1), it was necessary to retain the words " in force ". The Commission had made a distinction in the draft articles between the conclusion of a treaty and its entry into force, and he could not agree with Mr. Briggs that the fact that a treaty had been concluded implied that it was in force; such a proposition would be inconsistent with the provisions of the various draft articles so far adopted by the Commission, and also with usage in international law. The expression " treaty in force " automatically ruled out any invalid treaties. Such treaties were plainly not " in force ". That being so, he urged that the rule embodied in article 55, which was a bulwark of the maintenance of treaties, should not be weakened by the introduction of any additional words.

75. As to his suggestion that the opening words " A treaty " should be replaced by " Every treaty ", that point could be left to the Drafting Committee. Although he was inclined to agree with Mr. Briggs that " A treaty " was the English equivalent of the French expression " *Tout traité* ", the use of the word " every " would perhaps give greater emphasis to the rule. In the opening words of article 3 as adopted on second reading in 1965 (A/CN.4/L.115), precisely for the purpose of emphasis, the expression " Every State " had been used in English, " *Tout Etat* " in French and " *Todo Estado* " in Spanish.

76. He had taken note of the remarks of various members on the subject of good faith and, in particular, of the desire expressed by Mr. Bartoš for the inclusion of a passage on the subject in the commentary.

77. He suggested that article 55 should be referred to the Drafting Committee for consideration in the light of the discussion.

78. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed

to refer article 55 to the Drafting Committee, as suggested by the Special Rapporteur.

It was so agreed.[8]

ARTICLE 56 (Application of a treaty in point of time) [24]

[24]

Article 56

Application of a treaty in point of time

1. The provisions of a treaty do not apply to a party in relation to any fact or act which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party, unless the contrary appears from the treaty.

2. Subject to article 53, the provisions of a treaty do not apply to a party in relation to any fact or act which takes place or any situation which exists after the treaty has ceased to be in force with respect to that party, unless the treaty otherwise provides.

79. The CHAIRMAN invited the Commission to consider article 56. The Special Rapporteur had suggested that it might be desirable to add a third paragraph reading:

" 3. In the case of a treaty which has first entered into force provisionally under article 24 and afterwards definitively under article 23, the date of the entry into force of the treaty for the purpose of paragraph 1 shall be the date when the treaty entered into force provisionally. "

80. Sir Humphrey WALDOCK, Special Rapporteur, said that his examination of governments' comments had not led him to make any new proposal, although the provisions of article 56, especially paragraph 2, were extremely difficult to formulate in any language.

81. He had dealt in paragraph 2 of his observations (A/CN.4/186/Add.1) with the point raised by the Government of Israel concerning the relationship between article 56 and article 24, which concerned provisional entry into force. As a general rule, provisional entry into force was used as a technique for accomplishing the purposes of a treaty regardless of whether it ever entered into full force. However, the occasional case could also occur of a double entry into force—first provisional and then definitive. The question could then arise which date should be considered as the date of entry into force. He was not certain that it was necessary to deal with that case, but he had suggested a text that could be added to article 56 as a new paragraph if the Commission wished to introduce such a provision.

82. The Greek delegation had proposed that article 56 should state whether the provisions of a treaty applied to facts, acts or situations which fell partly within the period when it was in force. He had explained in paragraph 3 of his observations that that comment seemed to proceed from a misconception. It was only in appearance that a treaty could seem to apply to situations which fell partly within the period when it was in force. In law, the true situation was that the treaty only applied to facts and situations insofar as they fell within the period when it was in force.

83. The Turkish Government had suggested that the final words of paragraph 1 " unless the contrary appears from the treaty " should be replaced by the words " unless the treaty stipulates otherwise ". That suggestion was based on the argument that exceptions to the non-retroactivity rule should be limited to specific cases. The question was one which the Commission had examined carefully in 1964; it had decided, however, that the expression " unless the treaty otherwise provides" would be too narrow[9] and that decision, in his opinion, was correct. Consequently, he did not suggest any change in the wording of paragraph 1.

84. He had dealt in paragraph 7 of his observations with the proposal by the Netherlands and the United States Governments to replace the final words of paragraph 2 " unless the treaty otherwise provides " by the words " unless the contrary appears from the treaty ". It was very easy to confuse the question of the legal consequences of termination with the problem dealt with in paragraph 2—that of the application of treaty provisions in relation to acts, facts or situations taking place or existing after the treaty had ceased to be in force. The Commission had drawn a subtle distinction—and one which he believed was legally valid—between legal consequences and subsequent application. Hence he did not suggest any change in the wording of paragraph 2, although he was not at all certain that the best language had been found to express the Commission's intentions. He would be glad to hear the views of other members on that question.

85. Mr. REUTER warmly congratulated the Special Rapporteur on his efforts to throw some light on such a difficult matter. He too would try to explain his understanding of the question; if he was found to be mistaken on any point, that would at least help to show how the article could be improved.

86. On the whole, he supported the Special Rapporteur's position. Article 56 dealt with two sets of problems: paragraph 1 was concerned with problems relating to the period preceding the treaty and paragraph 2 with problems relating to the period following the treaty. Those two sets of problems could no doubt be dealt with in a single article entitled " Application of a treaty in point of time ", but they could also be dealt with separately, the first in an article on the entry into force of treaties and the second in an article on the termination of treaties.

87. If the draft was examined as a whole, it would be seen that in the articles on entry into force—for instance, in article 17—the Commission had not dealt with the problem of the effects of a treaty in point of time, whereas it had done so in the articles on termination. That was a perfectly rational approach, but it meant that there could not be complete symmetry between the two paragraphs of article 56. The Commission should consider whether paragraph 1 was sufficient to cover all the problems, bearing in mind that they were being dealt with for the first time, and

[8] For resumption of discussion, see 867th meeting, paras. 2 and 3.

[9] *Yearbook of the International Law Commission, 1964*, vol. II, p. 178, para. (5).

it should ask itself the same question about paragraph 2, in which the problems were being dealt with for the second time.

88. Paragraph 1, which was in negative form, overlooked one problem: that of a previous situation which had not ceased to exist. The Commission had already discussed that problem in connexion with *jus cogens*, but had not dealt with it in any article. He did not wish to take a position on whether the Special Rapporteur had been right to leave it aside; he was willing to accept the text as it stood. But if the Special Rapporteur were to reconsider his views, he (Mr. Reuter) would support him.

89. With regard to paragraph 2, the Special Rapporteur had explained that he had wished to keep the question of the continued application of the provisions of a treaty, as such, quite separate from that of the legal consequences which might continue after the termination of the treaty. He (Mr. Reuter) was prepared to accept that rather subtle distinction, but would ask the Special Rapporteur whether it would not be better to replace the word "exists" by the words "is established" or "is created"; as it stood, paragraph 2 also ignored the question of the effects of a situation previously created under a given legal régime when a new régime subsequently came into force. It was true that the case of existing situations that were maintained was dealt with in article 53, but the amendment he had proposed would make article 56, paragraph 2, clearer.

90. Mr. de LUNA said that at that stage he would deal only with the Special Rapporteur's additional paragraph 3. The suggested text referred to only two possibilities: first, the case of a treaty which had entered into force provisionally but had never been brought into force definitively; secondly, the case of provisional entry into force followed by definitive entry into force. It did not deal with a third possibility—which was not a purely hypothetical one since he knew of a number of examples in practice—the case of a treaty which entered into force provisionally for a definite period, then ceased to be in force, and was subsequently brought into force definitively. In that case, there were two dates of entry into force and also an interval during which the treaty was not in force at all.

91. However, he saw no need for the additional paragraph. Article 56 referred simply to "entry into force" and made no distinction between provisional and definitive entry into force. The point raised by the Government of Israel could therefore be safely left to be dealt with by interpretation of the provisions of article 56 as it stood.

The meeting rose at 12.55 p.m.

850th MEETING

Thursday, 12 May 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/186 and Addenda; A/CN.4/L.107 and L.115)

(continued)

[Item 1 of the agenda]

ARTICLE 56 (Application of a treaty in point of time) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue consideration of article 56.

2. Mr. ROSENNE said he wished first of all to express his regret if the comment by the Government of Israel had caused any misunderstanding. The purpose of that comment had simply been to draw attention to the fact that, in principle, the scope of a treaty *ratione temporis* extended to the period during which it was in force provisionally in accordance with article 24. That point had not been mentioned in the 1964 commentary, though it had been dealt with in paragraphs (1) and (2) of the Special Rapporteur's commentary on article 57 in his third report.[2] The only purpose of the comment by the Government of Israel had been to call attention to that point, as had been done with regard to article 55.

3. He appreciated the efforts of the Special Rapporteur to deal with the matter in paragraph 2 of his observations (A/CN.4/186/Add.1). Personally, he thought that a specific provision was not necessary in the article and that, if the Special Rapporteur and the Commission were agreeable, the point could be covered adequately in the commentary.

4. Mr. CASTRÉN observed that most of the comments by governments or delegations related to the saving clauses at the end of each of the two paragraphs of article 56. Several governments thought that the same formula should be used in both paragraphs, though some preferred the wording used in paragraph 1, others that used in paragraph 2. For the reasons given by the Special Rapporteur, he considered that the difference between the two paragraphs should be maintained.

5. As to the additional paragraph which the Special Rapporteur had suggested to meet the comment by the Government of Israel, he thought it superfluous and liable to make the article unnecessarily complicated, as Mr. de Luna had pointed out at the previous meeting.[3] The draft could not cover every detail. The rule stated in the new paragraph seemed self-evident; if the Commission thought fit, it could be mentioned in the commentary, as Mr. Rosenne had just suggested.

6. Unlike Mr. Reuter, he did not consider that paragraph 1 was incomplete because it failed to cover situations which had not ceased to exist when the

[1] See 849th meeting, preceding para. 79.

[2] *Yearbook of the International Law Commission, 1964*, vol. II, p. 10.

[3] Para. 91.