Document:-
A/CN.4/SR.858

Summary record of the 858th meeting

Topic:
Law of Treaties

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

was not the problem of nullity, but that of responsibility and of priority as between treaties.

87. In reply to the Netherlands Government, which had commented that the problem was not yet ripe for codification, the Special Rapporteur had stated that his proposals were founded upon fundamental principles of treaty law—the *pacta tertiis non nocent* principle and the principle that States entering into a new agreement were presumed to intend that its provisions should apply between them. Those principles could undoubtedly be applied without difficulty in the case of treaties concluded between the same parties, but not in the case of successive treaties concluded by different parties.

88. He himself could not understand why priority should be given to the first treaty rather than the second, except on the basis of responsibility. Accordingly, the solution should be sought elsewhere, namely in the principles governing responsibility. He therefore believed that paragraph 5 was indispensable, as the question of responsibility should be reserved.

89. The proposal of Mr. Jiménez de Aréchaga was undoubtedly based on very praiseworthy principles. International agreements must be observed, and States should not be encouraged to try to violate treaties already concluded between them. On the other hand, the Commission would be going a little too far if it introduced that idea into the text; it would be entering into the details of the problem of responsibility, which it was inappropriate to discuss in connexion with conflict between different treaties. Wrongful conduct should undoubtedly be subject to sanctions, but the issue in question fell within the topic of responsibility and it would be better to consider it when the Commission came to deal with that topic.

90. Mr. AGO said he entirely agreed with the Chairman. When a State concluded with different parties and at different times two treaties so drafted that the performance of one excluded the performance of the other, he could not understand why preference or priority should be given to the first treaty rather than the second. Nor could he understand why it should be more important to safeguard the rights of the States which had concluded the first treaty, rather than those of the States which had concluded the second.

91. It was obvious that in international practice all kinds of possibilities had to be envisaged. Mr. Tunkin had mentioned one example in which the second treaty was less general, and less favourable to the cause of peace, than the first. But the converse was equally likely. It could easily happen that one State first concluded with another State a treaty in which it undertook to supply that State with arms, then later concluded with other States a treaty in which it undertook not to supply arms to the State which was the beneficiary under the first treaty. Which of those two treaties was the more general in scope, and which was the more important for peace? It was impossible to give an *a priori* answer to that question or to decide which course of action was more favourable to the advancement of international law. The Commission should be on its guard against any over-simplified idea of what was meant by contributing to the progressive development of international law. Such an idea might in the end lead to confusion rather than progressive development.

92. He therefore saw no reason for departing from the principles previously adopted. Apart from a proviso on the question of responsibility, drafted in the most general terms, the Commission should avoid introducing any idea of priority or preference between treaties concluded successively by the same party with different parties.

93. Mr. de LUNA said he must make it clear that he was far from advocating the non-fulfilment of contractual international obligations. Such obligations should be strengthened by every possible means, since the peace of the world depended on them, but not by the means which certain members of the Commission had suggested.

94. The attitude adopted by those members was not in keeping with their position on other articles. While the Commission had been divided on the question whether a treaty did or did not create rights for third States, it had agreed unanimously that obligations could not be imposed on third parties without their assent. But now, through the medium of an incompatibility clause, it was considering imposing on all third States which might be parties to a second treaty an obligation never to make any stipulation which was inconsistent with an earlier treaty. Such an obligation represented an undue limitation on the sovereignty and independence of States; and, what was more, it was to be imposed on third States in the name of the sacred principle of *pacta sunt servanda*. That applied, of course, to the first treaty but not to the second. He was opposed to the inclusion of a rule to that effect in the draft. He could understand the concern expressed by Mr. Tunkin, but he questioned whether a State which wished to violate an international obligation had no other means of doing so than by concluding another treaty.

95. Furthermore, if the Commission laid down the rule that the first treaty had priority over the second, even vis-à-vis a third State which had not been a party to the first treaty, what guarantee was there that the rule would be observed? Only the same as that imposed with respect to the first treaty, the knowledge that a violation would involve international responsibility—though not for having violated the provisions of the first treaty but for having violated the rule in the Commission's draft.

The meeting rose at 1 p.m.

858th MEETING

Wednesday, 25 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. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, 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 63 (Application of treaties having incompatible provisions) *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 63.

2. Mr. TUNKIN said that several members shared his uneasiness about article 63 which, as formulated, might give the impression that the Commission regarded the conclusion of a later treaty in violation of an earlier one as a normal event. He would like to make two suggestions, without being sure that he was right, just to help the discussion.

3. It seemed to him that the Commission was considering the situation in which no breach of an earlier treaty was involved. But was the rule stated in paragraph 4 (*b*) correct for the case where the second treaty was a violation of an earlier treaty? It was not, because article 42 (A/CN.4/L.115) conferred upon the injured State the right to terminate or suspend the operation of the earlier treaty in case of breach. If paragraph 1 were revised so as to make clear that what was envisaged was only those cases where no violation of the previous treaty was involved, then that would certainly cover the preoccupation that paragraph 4 (*b*) sanctioned any new treaties whatsoever, even those concluded in violation of the international obligations of the previous treaty.

4. His second suggestion was that the Commission should speak in article 63 simply of the relationship in time between treaties, but not of their incompatibility, because a new treaty could develop an earlier one without that necessarily leading to incompatibility of obligations.

5. Mr. JIMÉNEZ de ARÉCHAGA said that Mr. Tunkin's suggestions would be very useful to the Drafting Committee in its task of preparing a new and clearer text. Some members had been more concerned with the problem of successive treaties when the later treaty involved a breach of the earlier treaty, and others with the problem of the relationship between successive treaties concluded between different parties.

6. The CHAIRMAN, speaking as a member of the Commission, pointed out that the temporal element was quite clearly indicated in the article by the use of the words " an earlier or a later ".

7. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that the text of article 63 was not as wide of the mark as some members seemed to think. It represented an attempt to deal with a problem resulting from the fact that a State might not be able to apply provisions on the same subject in successive treaties at the same time. Perhaps the scope of paragraph 1 ought to be confined to that matter.

8. Mr. Tunkin's suggestion had been inspired by the desire to produce a text which did not appear to condone possible cases of breach. He himself shared that desire, and believed that it had led the Commission to frame paragraph 5 in the form of a comprehensive reservation to the effect that the rules set out in the preceding paragraphs concerning the relative priority of treaty obligations as between the parties involved in any given case, would not affect the responsibility that might be incurred as a result of acts by the parties.

9. At the sixteenth session he had repeatedly emphasized that the problem was not merely academic and that the situations which paragraph 4 sought to cover constantly arose in practice over the amendment or revision of treaties. The provisions of two successive treaties dealing with the same or similar subjects might not be entirely compatible because the second was usually intended to modify the first, and an exact identity of parties was rare owing to the familiar phenomenon of political inertia or a change of mind on the part of a State that had contemplated ratifying the later treaty but failed to do so for one reason or another. In the present state of international relations and treaty law, regrettable though it might be, the statement of the law set out in paragraph 4 was correct. As he had explained before, the later treaty must be binding between the parties because it was the most recent expression of their will; otherwise, if they were also parties to the earlier treaty containing provisions on the same subject, they would be in the difficult position of having to discharge two differing sets of obligations that could not be performed simultaneously.

10. The legal problem was usually resolved by reference to the circumstances of the case and by the application of the principle of relativity of treaties. If there were an exact identity of parties, the later treaty applied, but the situation was different if they were not identical and parties to the second treaty, but not to the first, lodged a complaint about an inconsistency between the provisions of the two instruments. Any dispute arising from such a situation had to be settled by rules that fell partly within treaty law and the relativity of treaty obligations and partly within the law of State responsibility. It was extremely difficult in a provision such as article 63 to cover comprehensively all the legal facets of the problems involved.

11. The drafting could certainly be improved but the Commission must be clear about what it was trying to accomplish. In view of the importance of the subject, surprisingly few objections to the article had been raised by governments. The Netherlands Government was the author of the main criticism that the text did not make clear whether the rules set out in the article were valid for all types of treaties, but it had not contested the fundamental principles set out in the article.

12. Most members, and he shared their view, seemed opposed to introducing any idea of a hierarchy of treaties in article 63. In a sense the Commission had accepted that idea by including an article on *jus cogens*, but if it went further and provided for a special category of treaties that prevailed over others simply by reason of their character, that would be an entirely new approach and might confer upon such treaties something in the

[1] See 857th meeting, preceding para. 1.

nature of *jus cogens* force. For the reasons he had expounded at length in his third report,[2] the Commission could hardly pursue such a course at the present stage in the development of international law.

13. His main objection to the amendment proposed by Mr. Jiménez de Aréchaga[3] was for the same reason. He had always been sympathetic to the idea underlying the amendment but his own proposal on the subject had been definitely rejected at the sixteenth session. Mr. Jiménez de Aréchaga had reintroduced it, but in connexion only with a special category of treaties, and that was quite unacceptable. The Commission must avoid formulating a rule that could be construed to mean that States were bound to respect certain kinds of treaty obligations but were not bound to respect others. No lawyer could accept a rule framed on that basis.

14. With regard to the actual text of the article, paragraph 1 had been intended as an introduction and to safeguard the interpretation of Article 103 of the Charter. He had not been greatly impressed by the criticism of the phrase " the provisions of which are incompatible ", which was meant to convey the idea that the application of two sets of treaty provisions relating to the same subject matter would not be possible simultaneously.

15. Paragraph 2 was straightforward and reflected the existence in many treaties of clauses dealing with their relationship to other treaties, and indicated which provisions would prevail.

16. There seemed to be general agreement that paragraph 3 should be brought into line with article 41 and that it should refer to the question of suspension.

17. While he was not opposed to Mr. Ago's suggestion for making the rule in paragraph 4 (*a*) applicable to the situation covered in paragraph 3, he was inclined to think the two provisions should be kept separate because the situations covered in paragraph 4 (*a*) belonged to the complicated subject of *inter se* agreements and might involve questions of State responsibility, whereas paragraph 3 was designed to deal with cases in which the normal rules about the intention of the parties applied.

18. It was important to bear in mind that the general reservation laid down in paragraph 5 was applicable to all three sub-paragraphs of paragraph 4, so that the problems raised by Mr. Ago's suggestion were perhaps more intricate than might appear at first sight; it would, however, be examined by the Drafting Committee.

19. In sub-paragraphs (*b*) and (*c*) of paragraph 4, the Commission had tried to set out the principle of the relativity of treaties, and all the necessary weight must be given to the words " as between ", the purpose of which was to limit the application of the rule in the way that the Commission had decided would be appropriate in the context. There was always a possibility of a new treaty violating the rights of States not parties to it, but parties to an earlier treaty. Probably all members shared the concern of Mr. Tunkin and Mr. Jiménez de Aréchaga lest the Commission's text might be construed as in some way condoning such violations. The difficulty was possibly one of presentation and had resulted from paragraph 5 not being sufficiently explicit. The Drafting Committee could consider moving up paragraph 5 to the beginning but that too would create drafting problems.

20. His conclusion remained that in its present form, the article was more or less correct. Existing rules about the relativity of treaty obligations might not be to the taste of some members, but they were the law. The article could now be referred to the Drafting Committee for consideration in the light of the discussion and he hoped it would be possible to devise a generally acceptable text.

21. Mr. AGO said that the Commission should refer the article to the Drafting Committee and give it a free hand to decide in favour of whichever formula it preferred, since it was clear that many members were still unable to make up their minds regarding alternative wordings for the various paragraphs and even for the title. He was attracted by Mr. Tunkin's suggestion that the reference to incompatibility should be dropped from the title and that the scope of the article should be extended by referring to relationship in time.

22. If one looked closely at the various possibilities envisaged, including the one just mentioned by the Special Rapporteur—the case of a general treaty followed by a new treaty on the same subject which was not ratified by all the parties to the general treaty—what was in fact the position? There was no suggestion whatever that the later treaty must be incompatible with the earlier or in any way constitute a violation of the earlier treaty: it might be different, but still perfectly compatible. In that case, there was no disagreement among the members of the Commission. If the later treaty had been concluded by all the parties to the earlier treaty and had completely replaced it, the earlier treaty disappeared and the later treaty was applicable. But if that were not the case and if only some of the parties to the earlier treaty were parties to the second treaty, the earlier treaty applied between the parties which were not parties to the later treaty and those which were, while the later treaty applied between those which were parties to both treaties, though the earlier treaty might continue to exist in respect of the articles which had not been replaced or which were compatible with the provisions of the later treaty. In substance, then, the whole matter was a problem of relationship in time.

23. Perhaps the Commission ought to leave the matter there and refrain from introducing into the article, either directly or indirectly, the question of the possible violation of an earlier treaty by the conclusion of a new treaty. If it did raise that question, it might go too far and broach the whole problem of responsibility and the possible priority of obligations. It would be better to deal only with the problem of relationship in time, having regard to any possible incompatibility in which it might result. In that case, it could very probably dispense with paragraph 5, which seemed to be more or less self-evident.

24. Sir Humphrey WALDOCK, Special Rapporteur, replying to Mr. Ago, said that at its sixteenth session the Commission had discussed the relationship between two

[2] *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/167.

[3] See 857th meeting, para. 15.

treaties on the same subject and between treaties and customary law, but had decided not to cover the first matter from the standpoint of the temporal element. Certain problems connected with the temporal element had been dealt with in some other articles, but possibly not in a very comprehensive or adequate manner.

25. If article 63 were amplified in the manner suggested by Mr. Ago, its very nature would be changed radically and the Commission would be confronted with even greater difficulties. His reason for saying so was that if article 63 dealt with the question of the relationship between treaties in point of time instead of with the question of incompatible treaties, the Commission would find itself trying to state the law in an even more absolute fashion than had been done in the 1964 text, where the question of responsibility had been reserved and an express reference had been made to incompatibility. If the whole of article 63 were refashioned so as to state that, in cases of conflicting treaty provisions those of the later treaty prevailed, the whole problem of incompatibility, which was the real point of interest, would remain unsolved.

26. Mr. JIMÉNEZ de ARÉCHAGA said that article 63 could be sent to the Drafting Committee with a broad directive to devise a solution either by discarding those elements in the article that could be interpreted as condoning the conclusion of treaties with provisions that were incompatible with earlier treaties, or by making provision for the contingency that *inter se* agreements might be incompatible with earlier treaties. If the latter alternative were chosen, a strong safeguarding clause in regard to both responsibility and breach would be needed.

27. Replying to the comments made by the Special Rapporteur on his amendment to article 63, he said that its purpose had been not to establish a hierarchy between treaties but to give priority to a previous treaty over a violation of a treaty in the guise of a later treaty. Surely the Commission would endorse that approach. He had not been trying to single out a certain category of treaties with the idea of implying a condonation of the violation of other treaties not in that category; he had based his proposal on the fact that, at the Special Rapporteur's own suggestion, the Commission had dealt differently with a category of treaties which Sir Gerald Fitzmaurice had described as " integral " or " interdependent ". By the terms of article 42, paragraph 2, entry into a subsequent treaty incompatible with one of that type was presumed to constitute a material breach.

28. Mr. BRIGGS said that he agreed with much of what had just been said by the Special Rapporteur. If Mr. Ago's later suggestion were taken up, the Commission would find itself involved in problems of State succession which it had wished to leave aside, and the result would be to bypass the real point at issue, which was not the incompatibility of provisions of successive treaties when the parties were not identical, but the incompatibility of obligations assumed by a particular State in successive treaties. It was not merely a temporal problem.

29. The Drafting Committee might examine article 22(*c*) in the 1935 Harvard Research Draft[4] to see whether the wording used there might not offer some way out of the difficulty and a means of avoiding the word " incompatible ", though admittedly even drafting changes would not fully resolve the problem.

30. The Drafting Committee could also consider whether the question of breach, which had been raised during the discussion, called for changes in the text.

31. The CHAIRMAN said it was his understanding that the Special Rapporteur had suggested that article 63 be referred to the Drafting Committee, and that Mr. Jiménez de Aréchaga and Mr. Ago wished it to be so referred without any specific instructions.

32. Mr. TSURUOKA said he thought that the article should be referred to the Drafting Committee in accordance with the Commission's usual practice.

33. Mr. REUTER pointed out that a decision to refer article 63 to the Drafting Committee with a request that all the various observations that had been made should be taken into account might result in the complete deletion of the article, since the case of the relationship of multilateral treaties in time was dealt with in article 66, paragraph 2.

34. Mr. AMADO said he hoped that the Drafting Committee would give careful consideration to the wording of paragraph 5 since, if the idea underlying the paragraph were clearly expressed, it might perhaps be possible to drop the reference to responsibility, which was in fact involved in all international law.

35. The CHAIRMAN said that some members wished the article to be referred to the Drafting Committee according to the usual practice—which was not very clearly defined and varied from article to article—while others wished it to be referred without any instructions apart from the comments which had been made during the discussion, leaving the Drafting Committee to decide what the trend of opinion was. It seemed to him that the two approaches, in fact, coincided, and he proposed that the article be referred to the Drafting Committee on those terms.

It was so decided.[5]

ARTICLE 64 (The effect of severance of diplomatic relations on the application of treaties) [60]

[60]

Article 64

The effect of severance of diplomatic relations on the application of treaties

1. The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty.

2. However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty if it results in the disappearance of the means necessary for the application of the treaty.

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

[5] For resumption of discussion, see 875th meeting, paras. 2-8.

3. Under the conditions specified in article 46, if the disappearance of such means relates to particular clauses of the treaty, the severance of diplomatic relations may be invoked as a ground for suspending the operation of those clauses only.

36. The CHAIRMAN invited the Commission to consider article 64. The Special Rapporteur in paragraphs 4 and 7 of his observations had proposed revised wording for paragraph 2, and a possible additional paragraph to meet the United Kingdom Government's point (A/CN.4/186).

37. Sir Humphrey WALDOCK, Special Rapporteur, said that the comments of governments and delegations would need careful examination. As the Drafting Committee would be considering the whole scheme of the draft, the point raised by the Israel Government about the place of the article could be left aside for the time being, though he agreed that the article would need to be moved.

38. The general view of governments seemed to be that paragraph 2 should be more stringent and expressed in terms of the temporary impossibility of performance due to severance of diplomatic relations whenever such severance had any effect at all. It was, of course, important to remember that the text of article 43 had been revised during the second part of the seventeenth session (A/CN.4/L.115) and was no longer the same as that which governments had had before them when preparing their comments on article 64.

39. There was force in the argument that cases in which severance of diplomatic relations could have any effect on treaty obligations ought to be few and to be regarded as exceptional; the touchstone of impossibility of performance might be the right one. There were different categories of treaties liable to be affected by the severance of diplomatic relations; one example was treaties of alliance, but whether or not they should be provided for was a separate issue. Personally he was inclined to favour revising paragraph 2 to read:

"If the severance of diplomatic relations should result in a temporary impossibility of performing the treaty in consequence of the disappearance of a means indispensable for its execution, article 43 applies" (A/CN.4/186).

40. The Netherlands Government's suggestion to drop paragraph 3 could be followed now that article 46, the special article on the separability of treaty provisions, had been revised (A/CN.4/L.115).

41. The Israel Government had emphasized that the severance of diplomatic relations ought not to be allowed to serve as an excuse for the temporary suspension of the operation of a treaty when that was the very contingency for which the treaty was intended to provide, and had cited the 1949 Geneva Conventions as an example. If the criterion of impossibility of performance were laid down in a clear manner, that point would be met.

42. He doubted whether the United Kingdom Government's point, that treaty obligations in respect of the pacific settlement of disputes ought not to be capable of being suspended by mere severance of diplomatic relations, needed to be covered in article 64; but if the Commission wished to do so, an appropriate provision might read:

"In no circumstances may the severance of diplomatic relations between parties to a treaty be considered as resulting in an impossibility of performing any obligation undertaken by them in the treaty with respect to the peaceful settlement of disputes" (A/CN.4/186).

43. The United States Government had suggested the addition of a new paragraph stipulating that any suspension of the operation of a treaty resulting from the severance of diplomatic relations could only be invoked for the period of time during which the application of the treaty was impossible. That idea was comprised in the notion of impossibility of performance and need not be covered in article 64. However, that suggestion had prompted him to consider whether greater stress ought not to be placed in article 43 on the fact that suspension must come to an end the moment that the reason for impossibility of performance ceased to exist.

44. The Hungarian Government had raised an interesting but difficult point in suggesting that article 64 ought to apply also to cases of severance of consular relations. Instances of impossibility of performance could arise, particularly over establishment treaties, but when such treaties contemplated the use of consuls for purposes of applying the treaty it seemed doubtful whether it would be admissible to terminate consular relations, thereby defeating the purpose of the treaty. The existence of a large number of conventions specifically dealing with consular relations would also have to be borne in mind if that point were to be covered in article 64. The main purpose of article 64 was to refute the idea that the severance of diplomatic relations implied the severance of all relations between the States concerned. As treaties were a product of diplomacy, there might be a disposition in some quarters to suppose that they lapsed with the severance of diplomatic relations. The severance of consular relations did not have the same general relevance to treaty law and he would therefore hesitate to follow the Hungarian Government's suggestion, though it would need to be given careful thought.

45. Mr. ROSENNE said that article 64 had been inserted rather at his insistence. When, at the sixteenth session, the Special Rapporteur had introduced an article on the effect of breach of diplomatic relations on the application of treaties[6] he had been in favour of a short statement of principle of the kind proposed by Sir Humphrey Waldock.[7] Now that article 43 had been revised (A/CN.4/L.115)—though he was inclined to favour the Special Rapporteur's suggestion for its further revision—such a short statement of principle would seem to him to be adequate and any amplification would only complicate the article unnecessarily.

46. The text of article 54, however, should be made more precise in regard to the point at which suspension must come to an end, for the reasons he had given at the 848th[8] meeting and which the Special Rapporteur

[6] *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/167, article 65A.

[7] *Op. cit.*, vol. I, 747th meeting, paras. 60-62.

[8] Paras. 42-48.

seemed to have accepted. He hoped that the Drafting Committee and the Commission itself would agree to put stress on the essentially temporary character of suspension in general. In that way, the concern of a number of governments including that of the United States would be allayed. He therefore agreed with the Special Rapporteur's suggestion for the revision of paragraph 2 of article 64 and with his conclusions in paragraphs 5 and 6 of his observations.

47. He did not agree with paragraph 7 of those observations and saw little reason to single out for special treatment treaty obligations concerning the peaceful settlement of disputes. Admittedly, in the *Corfu Channel* case[9] and the *Case concerning the Temple of Preah Vihear*[10] the States concerned had not been in diplomatic relations with each other, but that fact had not prevented the International Court from exercising jurisdiction after the preliminary objections had been carefully examined. In neither case could its decision be regarded as an enunciation of any general principle. On that point he agreed with the Special Rapporteur, that much would depend on the circumstances.[11] To frame a general rule on the effect of severance of diplomatic relations on treaty obligations of that special category would be inadvisable and untimely. He even doubted whether it pertained to the law of treaties at all.

48. He had no objection to amplifying article 64 so as to cover the interesting but difficult point made by the Hungarian Government, but should that be done, the provision would need to be very strictly worded. If the Drafting Committee failed to find suitable phraseology, the point could be covered in the commentary.

49. Although the question of the proper place for the article could be left aside for the time being, he would just indicate that it ought to appear in part II, before the articles on the effects of suspension, as a kind of reservation, and if necessary it could be brought within the scope of application of articles 49, 50 and possibly 51. That kind of arrangement would obviate the concern felt by some governments that in certain circumstances suspension resulting from the severance of diplomatic relations might lead to a disguised form of termination. At the fifteenth session, when the matter had first been discussed in connexion with the Special Rapporteur's second report,[12] the Commission had agreed that, if it were to be covered at all, the proper context would be in the articles on the application of treaties.[13] Now that all the articles were before the Commission as well as the comments of governments and delegations, that view could be reconsidered.

50. Mr. VERDROSS said that he was in general agreement with the Special Rapporteur and, in particular, endorsed his suggestion that the wording of paragraph 2 should be made more stringent and that the place of the article should be changed.

51. It seemed to him, however, that there was some inconsistency, first, between the title and paragraph 1 and, secondly, between paragraphs 1 and 2. The title referred to the effect of severance " on the application of treaties ", whereas paragraph 1 stated that it did not affect " legal relations " in general; even though the text referred specifically to " the legal relations between them established by the treaty ", it was going a little beyond the scope of the law of treaties, since there might be legal relations based on regional or local customs.

52. Further, while paragraph 1 stated that severance did not affect the legal relations between the parties, paragraph 2 admitted that the severance of diplomatic relations might have some effect, since the parties could invoke it as a ground for suspension. It would, therefore, be preferable for paragraph 1 to state, not that severance had no effect on relations between the parties, but that it did not alter the legal relations arising out of the treaties.

53. Mr. CASTRÉN said he agreed with the Special Rapporteur that the comments of governments all pointed to the fact that article 64 needed extensive redrafting. That was particularly true of paragraph 2 which, in its existing form, might give rise to serious abuses and nullify the fundamental principles stated in paragraph 1. He could accept the revised wording for paragraph 2 suggested by the Special Rapporteur, as well as his suggested amendment to article 43, as revised at the last session.

54. Paragraph 3 could be dropped, as the Netherlands Government and the Special Rapporteur had suggested, for the reasons given by the Special Rapporteur in paragraph 5 of his observations.

55. He saw no need for the proposals by various governments and the Special Rapporteur for the insertion of new paragraphs in article 64 and for the further amplification of article 43, since it seemed quite clear that the severance of diplomatic relations between parties to a treaty could not be considered as resulting in an impossibility of performing any obligation undertaken by them in the treaty with respect to the peaceful settlement of disputes. On the other hand, if, for safety's sake, the Commission did decide to adopt a provision of that kind, the text proposed by the Special Rapporteur would have to be amended by replacing the words " any obligation " by something less categorical such as the word " obligations ", since the obligations in question might also include the obligation to enter into diplomatic negotiations, which were, of course, excluded from the situation referred to in article 64.

56. The addition of the words " while the impossibility exists " to the second sentence of article 43 was also unnecessary. That proviso was self-evident, since it followed from the temporary nature of the impossibility in the case concerned.

57. The Hungarian Government's proposal that the severance of consular relations should also be covered in the draft should be rejected, for the reasons given by the Special Rapporteur in his observations.

58. Mr. AGO said that, generally speaking, he was not in favour of making too many changes in article 64,

[9] *I.C.J.Reports, 1949*, p. 4.

[10] *I.C.J. Reports, 1962*, p. 6.

[11] *Yearbook of the International Law Commission, 1964*, vol. I, 747th meeting, para. 54.

[12] *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/156.

[13] *Op. cit.*, vol. I, 697th meeting, para. 56.

which had been reasonably well drafted at the first reading.

59. The rule the Commission was stating was, admittedly, rather categorical. Some treaties—such as treaties of alliance—might, in fact, be affected by the severance of diplomatic relations. On the other hand, it might be dangerous to make any exception, as that might encourage States looking for an unlawful means of extricating themselves from such a treaty to resort to the severance of diplomatic relations for that purpose. As governments had made no comments on the rule, it would be better to leave paragraph 1 as it was.

60. He was not in favour of including a cross-reference to article 43 in paragraph 2, since that article related to an entirely different possibility, that of the destruction of an object indispensable for the execution of the treaty. Ideas which might have the effect of obscuring the purpose of article 43 should not be introduced into the draft articles.

61. A problem was presented by a number of treaties relating to the peaceful settlement of disputes, which contained frequent references to the diplomatic channel. Treaties concerning conciliation, arbitration or peaceful settlement usually stipulated that the first duty of States was to attempt to settle disputes through the normal diplomatic channel. But such a provision obviously involved a considerable risk. On the one hand, there might be an objective difficulty, but on the other hand, it was necessary to prevent a State faced by the necessity of exhausting the possibilities of diplomatic negotiation or of appointing a conciliation commission or a court of arbitration from frustrating the purposes of the treaty by invoking the severance of diplomatic relations. Consequently, it might perhaps be advisable to insert in the text a safeguard of the type suggested by the Special Rapporteur, although the wording could be improved. Whatever solution was adopted, the question merited attention, since severance might result in material difficulty in performing certain provisions of certain treaties.

62. He was not at all in favour of dropping paragraph 3. In fact, to revert to the types of treaties he had just mentioned, he wondered if it was not essential to say that they would continue to exist even though one of their provisions could no longer be applied.

63. On the whole, he thought that the existing text should be retained, subject to any redrafting which might appear necessary.

64. Mr. BRIGGS said that the provisions of article 64 could be limited to the contents of paragraph 1, which appeared to have the unanimous support of governments, as indicated by the Special Rapporteur in his observations. Strictly speaking, paragraph 1 stated all that was necessary in the matter.

65. If paragraph 2 were retained, he was not in favour of including a cross-reference to article 43. It would be sufficient to deal with the time-factor in article 43 by amending the text of that article in the manner indicated at the end of paragraph 8 of the Special Rapporteur's observations on article 64 (A/CN.4/186).

66. Though he supported the principle, to which attention had been drawn by the United Kingdom Government, that severance of diplomatic relations should have no effect on clauses relating to the peaceful settlement of disputes, he saw no necessity to include an additional paragraph on the point in article 64.

67. The question of the effect on the application of treaties of the severance of consular relations should be dealt with in the commentary.

68. Mr. REUTER said that he was impressed by the Special Rapporteur's lucid arguments. From the logical standpoint, article 64 was not absolutely indispensable; there remained the question whether it was of any value, but he would have no objection to its being retained.

69. On the other hand Mr. Ago had just raised a rather important point and, if his argument were accepted, the whole of article 43 would have to be reconsidered. In his own view, the title of article 43 had a much broader meaning than that just attributed to it by Mr. Ago, since it related to " supervening impossibility of performance ". Further, the actual text of article 43 referred to the permanent destruction, not of " the object ", but of " an object ", in other words, to a condition indispensable for the execution of the treaty. The Commission should decide exactly what it had intended to say in article 43. If it was referring to a particular object, it should say so and leave it at that. If, on the other hand, what it had in mind was any situation resulting in impossibility of performance, it should reach agreement on that point and thereby confirm the observations of the Special Rapporteur.

70. Mr. TUNKIN said that it would be dangerous to introduce into article 64 a cross-reference to article 43. Under the general title of " Supervening impossibility of performance ", that article laid down the limits within which such impossibility could be invoked and he for one would oppose any proposal to amend article 43 so as to broaden its provisions. The question of the effect of the severance of diplomatic relations on the application of treaties should be treated as a separate subject in the draft articles.

71. Article 64 was not essential but he could agree to its retention in the form adopted in 1964, with drafting improvements.

72. The CHAIRMAN, speaking as a member of the Commission, said that in 1964[14] he had put forward the view that some treaties were undeniably affected by the severance of diplomatic relations; for instance, treaties of alliance, whose execution was incompatible with severance. Since, however, that question had not been raised by governments in their comments, and in view of the difficulty of drafting an exception based on the nature of treaties, he would have no objection to that possibility being omitted from the text. He was still convinced however, that certain treaties, by their very nature, were suspended by the severance of diplomatic relations.

73. On the question of a cross-reference to article 43, he agreed with the views expressed by Mr. Ago and Mr. Tunkin. It was clear that the title of article 43 did not correspond to its text, which was the more important. A party could not invoke any impossibility whatsoever,

[14] *Yearbook of the International Law Commission, 1964*, vol. I, 748th meeting, paras. 2-5.

it could only invoke an impossibility resulting from the permanent destruction of an object indispensable for the execution of the treaty. Article 43 did not therefore refer to all impossibilities but only to one particular impossibility. Paragraph 2 of article 64 referred to the impossibility resulting from the permanent disappearance of an object indispensable to the execution of the treaty; and it would therefore be preferable not to include a cross-reference to article 43 but to retain the existing text of article 64, subject to drafting changes.

74. With regard to the United Kingdom Government's comment, he did not agree that an exception should be made to cover certain treaties which were affected by the severance of diplomatic relations, since it would be difficult to formulate an exhaustive definition. It would be equally difficult to separate particular categories of treaties, such as those relating to the peaceful settlement of disputes between States. The severance of diplomatic relations might affect some provisions of such treaties but not the treaty as a whole. For instance, although it would not be possible to use methods of peaceful settlement which called for the existence of diplomatic missions, the treaties might provide for other methods which would not be affected by the severance of diplomatic relations.

75. On the whole, he was in favour of retaining the article. It might not be indispensable but it could have some value, particularly if the Commission endorsed the Special Rapporteur's ingenious warning against the belief that, because treaties were a product of diplomacy, they could be considered as having lapsed with the severance of diplomatic relations.

76. Mr. BARTOŠ said that a clear distinction must be drawn between substantive rules and means or methods of execution. In many cases, diplomatic relations were unquestionably the regular means of executing treaties, and the Commission had rightly taken the view, as stated in paragraph 1 of article 64, that the severance of diplomatic relations between parties to a treaty did not affect the legal relations between them established by the treaty. The grounds for severance might preclude some relations between the States concerned, but that was an entirely exceptional situation, and it was incorrect to maintain even in that situation that contractual relations between States terminated with the severance of diplomatic relations. Paragraph 1 should therefore be retained as it was.

77. On the question whether the disappearance of the necessary means might be invoked as a ground of suspension, it should be remembered that, even if the treaty itself provided that it should be executed by " diplomatic means ", that term did not necessarily denote the direct diplomatic channel. In the event of the severance of diplomatic relations, the States concerned requested other States to undertake the protection of their interests, and it was not unusual for highly important notes to be exchanged through the embassies of protecting States. As diplomatic protocol was irrelevant, the result was precisely the same, so far as the application of treaties was concerned, as if such communications had been transmitted through the direct diplomatic channel. He therefore placed a very restrictive interpretation on the expression " disappearance of the means necessary " in paragraph 2; all possible means must be used, even indirect means.

78. The case of Yugoslavia and Spain provided a telling example; those two States had not resumed diplomatic relations after the war, and had not even designated protecting States. That had not prevented them from regulating administrative and political matters relating, for instance, to customs tariffs and the most-favoured-nation clause, or even from applying trade and navigation treaties dating from before the war.

79. The severance of consular relations, a situation to which the Hungarian Government had referred, created a situation almost identical with that created by the severance of diplomatic relations, so far as the application of treaties was concerned. For reasons that were sometimes inexplicable, it happened that some States severed their consular relations while maintaining their diplomatic relations.

80. Thought should also be given to the precise meaning of the term " severance of diplomatic relations ". Some States used it to mean the mere withdrawal of diplomatic missions, whereas others considered that the missions could be recalled without the severance of diplomatic relations. The severance of diplomatic relations was a form of sanction in relations between States; it was a negative attitude taken by one government towards another. The expression " disappearance of the necessary means ", interpreted in the sense he had indicated, accordingly seemed to him preferable to the expression " severance of diplomatic relations ".

81. He favoured the solution contemplated even by the Special Rapporteur whereby the suspension of a treaty would be limited to the period of time during which the impossibility of performance existed. Moreover, no termination or suspension of contractual relations could be admitted on the ground of severance of diplomatic relations unless that step had the extreme gravity that it had possessed in the past, when it had been a prelude to war. In that case, the severance of diplomatic relations with a State was tantamount to denying the duty to apply the treaties with that State, except for treaties whose character required their continued application, such as humanitarian treaties or treaties regulating the transport of State papers, repatriation or other similar matters.

82. Article 64 dealt with a serious question, and it was incumbent upon the Commission to ensure that international treaties remained in force so far as possible.

83. Mr. TUNKIN said he agreed with Mr. Bartoš that it was undesirable to broaden the scope of article 64; indeed, its provisions should be made more rigid.

84. The commentary should stress the very exceptional character of the instances mentioned in paragraph 2, and the fact that the severance of diplomatic relations did not mean the disappearance of all official relations between the two States concerned. The situation had changed considerably since the nineteenth century: it was now quite common for direct official communications to take place between States which did not maintain diplomatic relations, and even where one of the two States did not recognize the other. A frequent practice was for States to use their permanent missions to the United Nations in New York for that purpose.

85. Mr. JIMÉNEZ de ARÉCHAGA said that the provisions of article 64 should be kept stringent so as to prevent abuse, and that could be done by either of two methods. One was that suggested by the Special Rapporteur, namely to insert in paragraph 2 of article 64 a cross-reference to article 43. That method, as indicated by Mr. Tunkin, was dangerous in that it would involve widening the scope of article 43, an article which was even more open to abuse than article 64 itself. Article 43 covered *force majeure*, which normally could not be invoked by a party when that party had brought about the alleged *force majeure* by its own act. The introduction into article 64 of a cross-reference to article 43 would have the effect of creating a broad exception to that principle.

86. He therefore preferred the second method, which was to amend paragraph 2 of article 64 so as to specify that severance of diplomatic relations could be invoked as a ground for suspending the operation of the treaty only if it had become impossible to perform the treaty while diplomatic relations were interrupted. The use of the terminology employed in article 43, namely " impossibility of performance " would achieve the desired restrictive effect.

87. Mr. TSURUOKA said it was regrettable that the decision to sever diplomatic relations too often seemed to be taken lightly. Severance undoubtedly vitiated relations between the two States concerned, but it could also have a detrimental effect on practical international life as a whole. He had, therefore, thought of suggesting a radical change—the drafting of a very stringent article, which would result in the almost complete isolation of any State that took the initiative of severance. On thinking it over, however, he had decided to adhere to the main trend of opinion in the Commission.

88. The rule set out in article 64 corresponded to existing practice and was conducive to the security and stability of legal relations among States. It deserved to be respected, like many of the rules of international law which were based on the collective wisdom of mankind.

89. As Mr. Bartoš and Mr. Tunkin had observed, instances of a material impossibility of performing the obligations of a treaty because of the severance of diplomatic relations were very rare. If possible, he would like to see article 64 formulated in terms which would make it quite clear that any State which severed its diplomatic relations with another State would not thereby get itself out of difficulties, but on the contrary would impair international relations in general and incur a moral responsibility.

90. Mr. EL-ERIAN said that article 64 was not indispensable since it enunciated a principle covering a situation which had given rise to no problems or controversies in international practice.

91. The fears expressed by certain governments in their comments were perhaps exaggerated. To the United Kingdom Government's comment on clauses for the peaceful settlement of disputes, the Special Rapporteur had replied very lucidly in his report that it was " unthinkable that the obligations in regard to the peaceful settlement of disputes, which are set out in Article 2, paragraph 3 and in Article 33 of the Charter of the United Nations, should be capable of being suspended by the severance of diplomatic relations " (A/CN.4/186).

92. Actually, even the outbreak of armed conflict did not have the effect of putting an end to all treaty relations. The traditional concept of the absolute effect of war on treaties had long been abandoned and the accepted modern theory drew a distinction between different categories of treaties. Certain treaties were *ipso facto* terminated by the outbreak of hostilities; others, like those which regulated the conduct of hostilities, actually came into operation with the outbreak of war; and there were still other treaties the operation of which was merely suspended by war.

93. The question of the effect of the severance of diplomatic relations on the application of treaties could only be decided by reference to each specific case; it could certainly have the effect of suspending temporarily the operation of certain types of treaties.

94. Article 43 as adopted at the second part of the seventeenth session referred to the " permanent disappearance or destruction of an object indispensable for the execution of the treaty ". The provision thus covered cases of absolute impossibility of execution. The suspension of the application of a treaty as a result of a severance of diplomatic relations, however, covered a wider range of cases. The causes of such severance could vary considerably, as could the status of the relations between the two States concerned after the severance. It would therefore be inadvisable to make the terms of the article too rigid.

95. The possibility of abuse had been exaggerated. Severance of diplomatic relations was an extremely serious step and one which a country did not take lightly; it was hard to believe that any State would use severance merely as a manœuvre in order to avoid having to execute the provisions of a treaty.

96. In conformity with his position that the cases envisaged in article 64 were different from those contemplated in article 43, he suggested that the words " if it results in the disappearance of the means necessary for the application of the treaty " be replaced by a less rigid formula, reading: " if it frustrates the means necessary for the application of the treaty or makes the continued implementation of the treaty incompatible with the severance of diplomatic relations ". The purpose of the concluding words was to emphasize the fact that, in certain cases, the means necessary for the application of the treaty might be present, but the very nature of the treaty was such that its continued application could not be reconciled with the break in diplomatic relations. Certain treaties, by their very character, presupposed normal relations between the States parties to them. It was for that reason that the emphasis in article 64 should be on the question of incompatibility, whereas in article 43 the emphasis was on the disappearance of an object indispensable for the performance of the treaty.

97. Mr. AGO said the discussion had shown that there was fairly broad agreement on the need to make article 64 as strict as possible. The idea that a State might resort to the severance of diplomatic relations to evade

the obligation of observing a treaty was unfortunately not as far-fetched as Mr. El-Erian would like to think. At all events, whatever the grounds for severance, the important point was to avoid giving States any loophole and to ensure that treaties continued to be applied.

98. The expression " means necessary " in paragraph 2 should undoubtedly be altered, as it was dangerous. As Mr. Tunkin had observed, there were now all sorts of means by which States could negotiate, even if they did not maintain normal diplomatic relations. Great care must therefore be taken to avoid giving the impression that the severance of diplomatic relations might lead to the disappearance of the means necessary for the performance of treaties.

99. Careful reflection led to the inescapable conclusion that there were virtually no examples of the situations covered by paragraphs 2 and 3, and it was questionable whether those paragraphs were necessary. If the Commission decided to retain them, it would have to draft them very precisely so as to make it clear that the reference was to an absolute, objective, material impossibility of performing a treaty; and, as Mr. Tunkin had suggested, it would also have to include in the commentary all the necessary material to ensure that its thinking was fully understood.

100. Mr. AMADO said he whole-heartedly supported Mr. Ago's remarks; he would be glad to see article 64 reduced to paragraph 1. No one was required to do the impossible, but, as Mr. Tunkin had emphasized, it was necessary to be sure that the impossibility was genuine.

101. He would never concede the possibility of a link between article 64 and article 43; on that point he agreed with Mr. El-Erian.

102. He welcomed Mr. Tunkin's suggestion that the severance of diplomatic relations should cease to be regarded as having the disastrous significance it had had in the past.

103. Although he did not share Mr. Tsuruoka's confidence in the wisdom of mankind, he hoped that the article, which was of minor importance, would not be unnecessarily magnified.

104. Mr. BARTOŠ, referring to Mr. Tunkin's remarks on the part played by permanent missions to the United Nations, said that, in the course of his study of the functions of permanent representatives to the United Nations in New York, he had found more than thirty cases in which a State wishing to invite other States with which it did not have diplomatic relations to an international meeting had issued that invitation in the form of a note addressed by its permanent representative to their permanent missions; usually such notes included a reminder of the contractual rules and the decisions of the International Court of Justice on the conditions on which delegations attended meetings of that sort. That was a practice, indeed almost a custom. At the time of the severance of diplomatic relations between Chile and Yugoslavia, the permanent representatives of those two States had entered into contact with a view to re-establishing those relations. Again, although there were no diplomatic relations between the Philippines and Yugoslavia, those two States were applying a treaty on navigation, and all communications relating to the application of that treaty were channelled through the permanent missions in New York. It was, therefore, a fact that all States Members of the United Nations had an appropriate means for applying treaties, apart from the normal diplomatic channel.

105. Sir Humphrey WALDOCK, Special Rapporteur, summing up the discussion, said that there was fairly general agreement that the rule in article 64 should be strictly stated. He himself was certain that paragraph 2, as adopted in 1964, was much too loose in its provisions and that governments were therefore justified in their objections. In fact, paragraph 1 might well be all that was necessary; it stated that in principle the severance of diplomatic relations did not affect treaty relations.

106. Any attempt to investigate individual cases of severance of diplomatic relations would lead to an inquiry into the special circumstances which had led to that severance. In some cases, the severance of diplomatic relations could be a form of sanction against an illegal act; in other cases, it might be a gesture of protest against some act which was considered unfriendly.

107. If a thorough examination were made of the underlying circumstances, it would be difficult to see whether there could exist any true case of impossibility of performance as a result of a severance of diplomatic relations. In 1964 the Commission had been much impressed by the possibility that severance of diplomatic relations might result in the disappearance of all formal channels of communication and the emphasis had been placed on that possibility in the commentary. It had been rightly pointed out in the present discussion, however, that when the need for communication arose, other channels were soon found.

108. In paragraph (3) of the 1964 commentary, it was pointed out that " a State does not appear to be under any obligation to accept the good offices of another State, or to recognize the nomination of a protecting State in the event of a severance of diplomatic relations; and articles 45 and 46 of the Vienna Convention on Diplomatic Relations of 1961 expressly require the consent of the receiving State in either case ".[15] As a result of the present discussion, that commentary would have to be altered. Personally, he had felt uneasy at the suggestion that severance of diplomatic relations could put an end to the possibility of channels of communication between the States concerned. The question largely depended on the will of those States; where the will to establish communications existed, a channel was always found.

109. The Drafting Committee would have to consider carefully whether it was necessary to retain paragraph 2. In the event of its retention, the paragraph would have to be reworded so as to limit it explicitly to cases of absolute impossibility of performance on the lines indicated in paragraph 4 of his observations (A/CN.4/186).

110. He suggested that article 64 be referred to the Drafting Committee for consideration in the light of the discussion.

[15] *Yearbook of the International Law Commission, 1964*, vol. II, p. 192.

111. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 64 to the Drafting Committee as suggested by the Special Rapporteur.

It was so agreed.[16]

The meeting rose at 12.55 p.m.

[16] For resumption of discussion, see 875th meeting, paras. 9-28.

859th MEETING

Thursday, 26 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. de Luna, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, 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 65 (Procedure for amending treaties) [35]

[35]

Article 65

Procedure for amending treaties

A treaty may be amended by agreement between the parties. If it is in writing, the rules laid down in part I apply to such agreement except in so far as the treaty or the established rules of an international organization may otherwise provide.

1. The CHAIRMAN invited the Commission to consider article 65, for which the Special Rapporteur had proposed the following rewording:

" A treaty may be amended by agreement between the parties. The rules laid down in part I apply to such agreement except in so far as the treaty may otherwise provide. "

2. Sir Humphrey WALDOCK, Special Rapporteur, said that, of the four articles forming section II, on the modification of treaties, article 68, on the modification of a treaty by a subsequent treaty, by subsequent practice or by customary law, dealt with a somewhat different aspect of modification. The remaining three articles formed a group and, in discussing article 65, it was useful to bear in mind also the provisions of articles 66[1] and 67[2].

[1] For the text of article 66, see below, preceding para. 51.

[2] See 860th meeting, preceding para. 33.

3. Article 65 was in the nature of an introductory article and set forth the two general rules on the procedure for modification. The first rule, that a treaty could be amended by agreement between the parties, had been couched in general terms because the Commission had not wished to lay down too rigid a rule as to the conditions under which an amending agreement might be binding.

4. The second sentence of article 65, which made provision for the application to the amending agreement of the rules laid down in part I, had been criticized by some governments, the main objection being to the opening words " If it is in writing ", which the Commission had introduced in order not to exclude the possibility of amending a treaty by tacit agreement. He was quite agreeable to dropping those words, since the legal force of international agreements not in written form was safeguarded by the provisions of article 2(*b*), already adopted by the Commission, and article 65 made explicit reference to part I, in which article 2 was placed. For the actual wording, he had adopted the Netherlands Government's proposal in preference to that put forward by the Israel Government.

5. A number of governments had also criticized the concluding proviso relating to " the established rules of an international organization ". That criticism applied also to article 66, and the United States Government had pointed out that it affected certain other articles as well. As he had indicated in paragraph 2 of his own observations (A/CN.4/186), the Commission had anticipated that point. The Commission had never contemplated giving overriding effect to the established rules of an international organization, thereby creating a kind of concept of a law-making competence in international organizations which would automatically impinge on the law of treaties; it had merely wished to reserve the special procedures of certain organizations, such as that for the amendment of international labour conventions which was governed by the rules of the ILO. In any case, the point had already been disposed of by the Commission's adoption at the first part of its seventeenth session of article 3 (*bis*) (A/CN.4/L.115) which would automatically require the deletion from article 65 of the reference to the " established rules of an international organization ". It only remained for the Drafting Committee to examine article 3 (*bis*) carefully in the light of the government comments on article 65 in order to ensure that the reservation in article 3 (*bis*) had been expressed in sufficiently narrow terms to confine it to constituent instruments of international organizations and to treaties drawn up as part of the actual functions of an organization.

6. Mr. CASTRÉN said that he could accept the new wording suggested by the Special Rapporteur; it seemed likely to allay most of the misgivings of governments and was an improvement on the text adopted in 1964. It would certainly be better not to specify that the article referred only to agreements in writing, since article 2(*b*) already contained a general reservation, which was applicable to all the articles and which left the problems connected with oral agreements open.

7. Similarly, since article 3 (*bis*) contained a general reservation concerning treaties which were constituent