Document:-
A/CN.4/SR.862

Summary record of the 862nd meeting

Topic:
Law of Treaties

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

mittee, as the Special Rapporteur had already proposed, for reconsideration in the light of the discussion.

It was so agreed.[9]

The meeting rose at 5.5. p.m.

[9] For resumption of discussion, see 876th meeting, paras. 90-94 and 103-119.

862nd MEETING

Thursday, 2 June 1966, at 11 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. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

Law of Treaties

(A/CN.4/183, A/CN.4/186 and Addenda; A/CN.4/L.107, L.115)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

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

ARTICLE 29 (*bis*) (Notifications and communications) [73]

2. Mr. BRIGGS, Chairman of the Drafting Committee, after drawing the Commission's attention to the text of article 29 (*bis*) as provisionally adopted at the first part of the seventeenth session,[1] said the Special Rapporteur would explain the reasons for the changes now being proposed by the Drafting Committee. The changes would be seen from a comparison of the two texts, which read:

Article 29 (bis)

Text provisionally adopted at the first part of the seventeenth session

Communications and notifications to contracting States

Whenever it is provided by the present articles that a communication or notification shall be made to contracting States, such communication or notification shall be made:

(*a*) In cases where there is no depositary, directly to each of the States in question;

(*b*) In cases where there is a depositary, to the depositary for communication to the States in question.

Drafting Committee's text

Notifications and communications

Unless the treaty otherwise provides, any notification or communication required to be made to any State under the terms of the treaty or of the present articles shall:

(*a*) be transmitted to the depositary or, in the absence of a depositary, directly to the State in question;

(*b*) be considered as having been made to a State upon its receipt by the depositary or, in the absence of a depositary, upon its receipt by that State.

3. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee's text had been prepared during the examination of article 50 and the whole problem of the manner in which notifications and communications become effective. The Drafting Committee's view was that a satisfactory presentation of the various related provisions had not yet been achieved. There were three stages to consider: the transmission of notifications or communications: their receipt, and finally the time in law at which they were to be regarded as having been made. The problem was a familiar one in private contract law. As treaties often laid down time-limits for notifications or their expiry, it was clearly important to establish at what moment they could be considered as having been made. The Drafting Committee had reviewed the text provisionally adopted at the previous session and had introduced a new element to cover that last point.

4. Much thought had been given to the problems arising when the parties to a multilateral treaty provided for a depositary to act as their agent. The Drafting Committee had considered whether allowance should be made for the time required for the administrative processes of transmitting the notice or communication from the depositary to the State concerned. The kind of difficulties that could arise when a period was specified had been brought to light during the preliminary objections to the Court's jurisdiction in the *Case concerning Right of Passage over Indian Territory*.[2]

5. The Committee had concluded that it was undesirable to frame a provision as to when the notice or communication took effect since that would depend on the provisions of the treaty or of the instrument being communicated itself.

6. Mr. VERDROSS, referring to paragraph (*b*), asked what the Drafting Committee thought the legal position would be if the depositary or the State to which the notification was addressed refused to accept it. It seemed to him that the crucial moment was not when the notification or communication was made, but when it was delivered to the depositary or the State which received it directly.

7. Sir Humphrey WALDOCK, Special Rapporteur, said that if a State refused to receive a notification or communication, that would be a new element to be taken into account in establishing the facts of a case, but the possibility had no relevance to article 29 (*bis*). If the

[1] *Yearbook of the International Law Commission, 1965*, vol. I, 815th meeting, paras. 61 and 62.

[2] *I.C.J. Reports, 1957*, p. 125.

procedure specified there had been complied with and the notification or communication had been received by the depositary or State concerned, there could be no doubt that the notice had been given. Whether or not a rejection was legitimate was another matter that should not be examined at that juncture.

8. The CHAIRMAN, speaking as a member of the Commission, said that it was not possible to provide for every eventuality in a text; the question should be left to international practice and enlightened jurisprudence.

9. Mr. BARTOŠ said he was not very satisfied with paragraph (*b*), as he wondered whether or not the presumption it contained was rebuttable. The purpose of notification was to ensure that the State concerned was made acquainted with a certain fact. But, under existing practice, if a State wished its notification to be transmitted rapidly to another State, it had to make several representations to the United Nations Secretariat—in cases where the Secretariat was the depositary—to ensure that the notification was brought to the cognizance of governments by a *note verbale* or signed note from United Nations, and it often happened that six months elapsed between the notification and its transmission to States parties. What was the position in the interval between the date of receipt by the depositary and the date when the depositary transmitted the notification? Was there, or was there not, a presumption that States had had cognizance of the notification? Depositary States sometimes filed the notification in their archives without transmitting it to the other parties.

10. He would be prepared to accept paragraph (*b*) if the presumption was rebuttable since it must always be assumed that the depositary's obligation to transmit the notification to the other parties would be discharged in good faith and immediately. But if it were proved that the notification had not been made, it would be very difficult to be bound by a presumption which was not rebuttable. The phrase " shall be considered as " could be interpreted in two ways: either the notification would be considered as having been made, or it would be so considered until there was proof to the contrary. It was not clear from the proposed text exactly what the Drafting Committee had in mind.

11. Mr. AGO said he understood Mr. Bartoš' concern, but thought that in the present instance the Commission was not concerned with the objective problem—as it might be described—of the time when the notification reached the State or States to which it had to be made, but with defining the obligations of the notifying State. That State was under a duty to transmit the notification either to the depositary, if there was one, or directly to the States in question. In either case, the intention was to say that the notifying State's obligation could not be held to have been carried out and completed until the moment of receipt, which was the moment when the notification was received by the depositary or the recipient State. But at that point every obligation ceased for the State which had transmitted the notification. The question which would then arise was what were the obligations of the depositary, and not what was the duty of the State which had transmitted the notification.

12. The Commission should take Mr. Bartoš' misgiving into account when it came to deal with the obligations of the depositary, but not when it was dealing with the obligations of the notifying State, because once that State transmitted its notification and the latter had reached the depositary, it could do no more. What the article was concerned with was the obligations of the notifying State, not what would happen after the receipt of the notification by the depositary.

13. Mr. BARTOŠ said that, from the moment of notification, the treaty, or the acts linked to its effects, were applicable as against the other parties. The question in the present case, therefore, was whether an act was applicable as against the other parties even if it had not been brought to their cognizance.

14. It would therefore be as well if the Special Rapporteur were to incorporate in the commentary the idea, so clearly expressed by Mr. Ago, that the purpose of the text was simply to determine the duty of the State which was required to make the notification or communication; that that State's obligation was discharged as soon as it had transmitted the notification or communication to the depositary, or in the absence of a depositary, directly to the other State in question; and that the text did not settle the question of the effects of notification on the States concerned.

15. Mr. TUNKIN said that he was inclined to agree with Mr. Bartoš. The Drafting Committee's text dealt not only with the transmission of notifications or communications but also with the moment from which they might be regarded as having been received. Clearly the new sub-paragraph (*b*) would have legal consequences. The other State might not be aware of the notification for some time, yet under sub-paragraph (*b*) it would already have become bound by certain obligations.

16. He consequently had serious doubts about the new text and considered it would be more consistent to delete the phrase " . . . upon its receipt by the depositary or, in the absence of a depositary . . . "

17. Sir Humphrey WALDOCK, Special Rapporteur, said that if the course proposed by Mr. Bartoš were followed, the rule proposed by the Drafting Committee would be completely reversed. The Commission must decide what it was aiming to achieve: obviously there was an inherent difficulty in the problem because the interests of two sides were involved.

18. The Drafting Committee's standpoint had been that, when the parties to a multilateral treaty provided in the treaty for a depositary as a channel of communication, all notifications would have to be transmitted through it. The notifications might be of different kinds, for example instruments of ratification that would initiate a legal relationship, or communications about reservations or other matters provided for in the treaty. The problem was to fix the moment at which a legal nexus was established.

19. There could be no question that, according to existing practice, in cases when there was a depositary the instrument, whatever it might be, became operative from the moment of its receipt by the depositary. That had been the view taken by the International Court of Justice in the *Case concerning Right of Passage over Indian Territory*.[3] He himself, as agent for the Republic

[3] *I.C.J. Reports, 1957*, p. 146.

of India in that case, had put forward the contrary view, but it had been rejected.

20. The alternative approach was to consider the problem from the standpoint of the other States and the obligations resulting for them. It could be argued that until they had received the notification themselves, and not merely what in English legal parlance was known as constructive notice, in other words, the receipt of the notification by an agent of the parties, those States would not be bound in any way by an act of another State which had done precisely what it was required to do under the provisions of the Commission's draft relating to the functions of a depositary. As he understood it, Mr. Bartoš was not suggesting that the fundamental proposition in sub-paragraph (*b*) should be radically altered, but that the presumption should be rendered rebuttable. The difficulty of following that course was that it would immediately throw doubt on the firmness of the legal nexus and at what exact moment it was established.

21. The choice lay between a somewhat arbitrary system, but one that offered some certainty in application, and a more flexible one that could result in doubts about the moment when the instrument became effective. He had understood the Drafting Committee to have chosen the former alternative.

22. Mr. TUNKIN said that a distinction should be drawn between the legal effect of different notifications. Sub-paragraph (*b*) should be so worded as to make it clear that a notification or communication would be considered as having been made to a depositary upon its receipt by the depositary, and would be considered to have been made to a State upon its receipt by that State. Thus, if a State notified to the depositary its withdrawal from a treaty, the other State party would have to conform with that new situation only after having received from the depositary notification of the withdrawal of the first State.

23. Mr. de LUNA said that what the Commission was in fact dealing with was the functions of the depositary. In theory—a theory which practice had disproved—the depositary had first been regarded as a kind of letter-box. Later, in practice, as the number of States and the number of multilateral treaties had increased, the depositary had become an organ in the full sense of the term.

24. He fully understood the anxiety expressed by Mr. Bartoš and Mr. Tunkin. What was meant by the words " receipt by that State " ? Did they imply receipt by the ambassador of the State concerned, considered as an organ of the State equally with the depositary, or did they imply receipt by the central government? In either case there would be delay, because some time always elapsed between the receipt of the notification by the ambassador and its transmission by him to his government.

25. He saw no reason why a distinction should not be made, provided that no essential changes were introduced in the functions of the depositary as defined in article 29, paragraph 1 (*e*)—" informing the contracting States of acts, communications and notifications relating to the treaty ".

26. He agreed with the Special Rapporteur's view that, at the present time, the depositary was an agent of the contracting State no less than if he were its ambassador. But it was important to neglect neither the functions of the depositary as the agent of all the States which had appointed him as depositary in the treaty, nor the security which the international community must have with regard to the date of notification. Without that security, everything would depend on the speed of transmission of communications and notifications made on the same day to all States, and which might produce their effects at different dates, whereas the function of the depositary was precisely to ensure uniformity and certainty. So long as those two principles were safeguarded, he had no objection to the Commission's accepting the suggestions made by Mr. Bartoš and Mr. Tunkin.

27. The CHAIRMAN, speaking as a member of the Commission, said that paragraph (*b*) raised a very delicate problem which affected the legal status of the depositary. If he had understood the draft article correctly, the depositary's status was not that of a representative. The depositary was an organ entrusted with certain functions; but it would be going too far to say that he represented all the States which had appointed him, and to draw from that the inevitable conlusion that notification to the depositary was deemed to be notification to the parties. He did not believe that the draft had established the concept of the depositary-representative in that sense.

28. It was necessary to be realistic, particularly in cases which raised practical problems, as when the purpose of notification was to bring to the cognizance of certain States information which might call for some action or decision on their part.

29. It was difficult to accept the absolute presumption in paragraph (*b*). It was in his view quite impossible to relate the presumption contained in the phrase " shall be considered as having been made to a State upon its receipt by the depositary " to the facts. Communication of the notification by the depositary required time. Even as a presumption, it was to be rejected because it was completely unrealistic.

30. In cases which raised delicate problems, the Commission should not be led astray by fictions, presumptions or theoretical interpretations, but should construct, on the basis of reality, a rule which would be of service to the real interests of States.

31. Mr. BRIGGS said that the purpose of sub-paragraph (*b*) was to set forth the circumstances in which a notification was to be considered as having been made, not as having been received. It laid down that, where a State had an obligation to make a notification, it would be considered as having discharged that obligation when the notification was received by the depositary, or in the absence of a depositary, by the other State concerned. That rule was fully consistent with State practice and with the ruling of the International Court of Justice in the *Right of Passage* case. It would be flying in the face of existing State practice to modify that rule so as to state that notification would be considered as having been made only upon its actual receipt by the other State, either directly or through the depositary.

32. As he saw it, the Commission had no other choice than to adopt either the rule proposed by the Drafting Committee, or a formulation which would deprive the institution of the depositary of much of its usefulness.

33. Sir Humphrey WALDOCK, Special Rapporteur, said that a simple illustration was provided by the provisions of article 77, paragraph 1, of the 1963 Vienna Convention on Consular Relations, which read: " The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations. " That provision established in an absolute manner the date on which the Convention would enter into force for all the parties.

34. Article 78 of the same Convention dealt with notifications by the Secretary-General and its sub-paragraph (*b*) called on the Secretary-General to notify all the States concerned of the date " on which the present Convention will enter into force, in accordance with article 77 ". The Convention thus recognized that all the States entitled to become parties to the Convention had a right to know of its entry into force. However, the Convention entered into force for all the parties on one and the same date, namely, that determined in absolute terms by the provisions of article 77, paragraph 1.

35. In the discussion, there had been some confusion between two questions which were to some extent connected but were nonetheless separate. The first was that of the legal effectiveness of an act; the second was a question of State responsibility in the case of a State which was unaware of the entry into force of a treaty.

36. Article 29 (*bis*), as proposed by the Drafting Committee, reflected an established practice and if the Commission were to change the rule embodied in that article, it would in effect be modifying the final clauses of a large number of treaties.

37. Mr. BARTOŠ said that although the provisions of the Vienna Convention on Consular Relations, to which the Special Rapporteur had referred, were perhaps badly drafted, it had by no means been the intention of the Conference that notification of the last instrument of ratification should be sufficient for the Convention to enter into force. The notification made by the State to the Secretary-General when depositing the instrument should not be confused with the notification in which the Secretary-General stated that the necessary conditions for the Convention's entry into force had been fulfilled. In his opinion, it was the latter notification which determined the date on which the Convention entered into force.

38. Mr. ROSENNE said that article 29 (*bis*) expressed a residuary rule, since it was qualified by the opening proviso: " Unless the treaty otherwise provides. " In fact, an increasing number of treaties made provision for the eventuality under discussion. At the same time, it was essential to retain in the draft articles a residuary rule which gave a clear indication of the date on which the notification was considered as having been made, even if there might be an element of arbitrariness in the choice of that date.

39. He had always sympathized with those who had hesitated to accept the automatic and immediate effect for the parties of a notification made to the depositary. At the seventeenth session, he had made a proposal[4] which would have allowed an arbitrary period of ninety days to elapse before a notification actually became operative. The purpose of that proposal had been to allow time for the completion of administrative procedures and to try and avoid the recurrence of a situation such as that which had arisen in the *Right of Passage* case. There, however, the Court's decision had been based on a strict reading of the relevant provisions of the Statute of the Court and was therefore covered by the initial proviso of article 29 (*bis*), " Unless the treaty otherwise provides ".

40. In the light of the discussion, he thought that article 29 (*bis*) should be accepted as proposed by the Drafting Committee but that careful consideration should be given to the wording of the substantive articles on the subject of entry into force and termination, to see whether the date that would result from the provisions of article 29 (*bis*) was appropriate for purposes of entry into force and termination respectively. In the case of the articles on reservations,[5] the Commission, at its seventeenth session, had already adopted a system different from that provided for in article 29 (*bis*).

41. In particular, the Drafting Committee should consider the wording of article 29 (Functions of depositaries). In paragraph 1 (*f*) of that article as adopted at the seventeenth session, the adverb " promptly " which had appeared in the text adopted at the fourteenth session in the corresponding paragraph 7 (*a*)[6], had been omitted before the words " Informing the contracting States when the number of signatures or of instruments of ratification, accession, acceptance or approval required for the entry into force of the treaty had been received or deposited ". It might be desirable to restore that qualification, in order to lay greater emphasis on the duties of the depositary.

42. Mr. AGO said he was still convinced that the Commission would run into difficulties if it sought to deal in article 29 (*bis*) with any question other than that of the obligation of the State which was required to make the notification.

43. It might be better to delete the words " to any State " in the main paragraph, since it was those words that caused many of the difficulties to which attention had been drawn. Moreover, in some cases, notification was required to be made, not to a State, but, for example, to an organ of an international organization.

44. Mr. LACHS said that, with regard to the effects of notification, a very real problem could arise: in the event of the entry into force of a treaty as a result of a notification to the depositary of which State X was unaware, that State might find itself unknowingly acting in disregard of the treaty. Would such a State be held responsible for thus departing from the provisions of a treaty of whose entry into force it had no knowledge? The opening proviso of article 29 (*bis*) " Unless the treaty otherwise provides " was of no assistance in cases

[4] See *Yearbook of the International Law Commission, 1965* vol. II, document A/CN.4/L.108.

[5] Articles 18-22.

[6] *Yearbook of the International Law Commission, 1962*, vol. II, p. 185.

of that type. The discussion had revealed a loophole in the draft, which the Commission ought to fill, at least in the commentary.

45. Mr. TSURUOKA said he agreed with Mr. Lachs and several other speakers that there were two aspects to the question of notification. Practically speaking, the problems raised were not so difficult, but it would probably be necessary to change the wording of the article in order to arrive at a satisfactory draft from the theoretical standpoint.

46. He would like to make one suggestion, though it might seem a little paradoxical in relation to the general arrangement of the draft, with regard to the functions of the depositary. The Commission might lay down the rule that, even when there was a depositary, a State which had to make a notification concerning a treaty must also notify the other States concerned that it had made its notification to the depositary. If that rule were added, the rest of the article could remain as it stood, and there would no longer be too great a discrepancy between the rule and the reality. The obligation would not impose a very heavy burden on States: it would become a routine duty of embassies.

47. Mr. TUNKIN said that the situation being discussed resulted in large measure from the deletion by the Drafting Committee of the reference originally contained in a number of other articles to the moment when a notification became operative for the State receiving it. So far as the State making the notification was concerned, the provisions of sub-paragraph (*b*) of article 29 (*bis*) were satisfactory, but those provisions would undoubtedly be construed as dealing with the separate problem of the moment from which notification became operative for the State receiving it. The Drafting Committee should consider inserting in the article an additional paragraph to the effect that a communication or notification became operative for a State from the moment when it had been received by that State.

48. Mr. AMADO said that the important thing was that the State in question should receive the notification, either directly or through the depositary. An addition to the article to make that quite clear would avoid difficulties of the kind to which attention had been drawn by Mr. Lachs, since it would be apparent that the notification was not valid unless it had actually been received by the State concerned.

49. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the operation of notification comprised two stages. He had no objection to article 29 (*bis*) if it related only to the first stage, at which a State was obliged to make a notification of something. The rule proposed was satisfactory in so far as, in the conditions stated, the State which was obliged to make a notification could be deemed to have made it.

50. The effect of notification with respect to the State to which it was addressed, however, constituted another stage concerning which the present wording of the article left some doubts, for it might be understood that, as soon as the depositary had received the notification, the operation of notification was deemed to have been carried out in its entirety. It was therefore essential that the Drafting Committee should revise the article so as to distinguish clearly between the two stages of the operation.

51. The Vienna Convention on Consular Relations provided that the Convention should enter into force, not upon the deposit of the last instrument of ratification but on the thirtieth day after such deposit; the fact that a period had been laid down clearly showed that a problem existed, and that an attempt had been made to take a realistic view.

52. Sir Humphrey WALDOCK, Special Rapporteur, said that the text of article 29 (*bis*) as proposed by the Drafting Committee was perfectly clear: it was intended to state the rule that notification was legally made to a State upon its receipt by the depositary. The depositary might not be the agent of the parties but was nevertheless the channel of communication chosen by the States concerned and designated as such.

53. Reference had been made to the duty that a State might have to make a notification; in practice, it was still more common for a State to have the right to make a notification with certain legal effects. For example, when notice of termination was given, it would have its effects as from the making of the communication giving such notice.

54. The purpose of the thirty-day period laid down in article 77, paragraph 1, of the Vienna Convention on Consular Relations was to allow for the possibility of administrative delay in communicating the entry into force and also to enable the parties concerned to adjust themselves to the new situation arising from the entry into force of the treaty. Paragraph 2 of the same article specified that, for each State ratifying or acceding to the Convention after its entry into force, the Convention would be in force " on the thirtieth day after deposit by such State of its instrument of ratification or accession ". Those provisions reflected a fairly common practice.

55. The Drafting Committee should, perhaps, consider the suggestion by Mr. Tunkin for the introduction of an additional paragraph to deal with the somewhat absurd situation of a State which might have obligations under a treaty while being unaware of the action on which those obligations were based. The provisions of such a paragraph should be drafted with the utmost care, so as to avoid creating a very delicate situation in the relations between the parties to a multilateral treaty.

56. In his communications to States, the Secretary-General of the United Nations followed the practice of the governments concerned; his communications to some were sent by air mail and those to others by different means. The choice of method of communication might thus affect the date on which the communication would become effective, if any change were made to article 29 (*bis*) on the lines proposed by some members.

57. With the exception of the *Right of Passage* case, he fortunately had heard of no example in practice which had given rise to the problem the Commission was now discussing.

58. Mr. AGO said that there was one point about which there was no doubt: the article clearly stated at what moment the notification could be considered to have been made by the State which had to make it. There was still some doubt, however, about the moment

at which the notification began to produce its effect, so far as the rights and obligations of the recipient States were concerned.

59. Mr. Rosenne had pointed out that the article stated a residual rule, because normally the treaty or the notification itself made appropriate provision. The Commission should decide whether, in the residual rule which it was stating, it was trying to establish one particular arbitrary system which had certain disadvantages, or another system, equally arbitrary, which had other disadvantages.

60. Mr. Lachs had raised a practical problem: what happened if, where the treaty itself provided that notification produced its effect at the moment it was received by the depositary, a State which had not been informed acted in a way which might then be considered a violation of the treaty? Such a case could actually occur, and the Commission's rule would do nothing to change it. If, for example, the treaty itself provided that it would enter into force at the moment when the twentieth instrument of ratification was deposited with the depositary, there was no doubt that the treaty would indeed enter into force at that moment and that the obligations for which it provided would come into effect. In the case envisaged by Mr. Lachs, the safeguard for the State which had not been informed was the theory of responsibility: ignorance of the ratification and of the resultant entry into force of the treaty was indubitably a circumstance which excluded any fault on the part of the State in question. The case envisaged by Mr. Lachs therefore fell into a different category.

61. The article should be referred back to the Drafting Committee so that it could try to find a formula which would be more acceptable to the Commission as a whole.

62. Mr. BRIGGS, said that there would be no difficulty in formulating the text of sub-paragraph (*b*) if the Commission took a decision as to what its contents should be. If some of the suggestions that had been made were accepted, the sub-paragraph would state that a notification would be considered as having been made upon its receipt by a State either directly or through the depositary. The adoption of such a formula would mean, however, the reversal of the rule originally adopted by the Commission.

63. Mr AMADO said he could hardly agree to the Commission's laying down a rule concerning the effects of notification, because that would only too obviously mean creating a new rule of international law. The important thing was that the notification should reach the State for which it was intended; the practical difficulties involved, or the circuitousness of the route followed, were no concern of the Commission.

64. The CHAIRMAN, speaking as a member of the Commission, said that it could be made clear that the article dealt with notification considered from the point of view of the State which had to make it, and not the effect of such notification in relation to another State.

65. Sir Humphrey WALDOCK, Special Rapporteur, said that, if Mr. Amado's suggestion were adopted, a notification—concerning, for example, an instrument of ratification—would have no effect in relation to a State until it had reached that State. That proposition would open the door to a State claiming, for example, that a notification from the depositary had never reached it because it had gone astray in the post.

66. If the rule contained in sub-paragraph (*b*) were dropped, there would be a conspicuous gap in the draft articles. The rule should be retained and the Drafting Committee should consider carefully the possibility of introducing into article 29 (*bis*) an additional paragraph to deal with the problem of a State which was unaware of its obligations under a treaty and, as a result, took some action which it would not otherwise have taken.

67. Mr. AGO said he agreed that an attempt should be made to find a formula which would dispel all misgivings, but there was certainly no cause for the slightest misgiving on that point. Either the treaty was in force or it was not; the position of a State which acted without knowing that the treaty was in force did not concern the law of treaties.

68. Sir Humphrey WALDOCK, Special Rapporteur, said that it was not possible to divorce the question of responsibility from that of the existence of rights and obligations under the treaty as a result of a notification. Responsibility arose because of the existence of such rights and obligations and the problem was how to make an exception for the case of a State which was unaware of its obligations.

69. Mr. TUNKIN proposed that article 29 (*bis*) be referred back to the Drafting Committee for reconsideration; all members would then have time for further reflection.

70. Mr. BARTOŠ said that he supported Mr. Tunkin's suggestion. The discussion would otherwise proceed to no purpose, because of the words " to any State ", which might create the legal fiction that any notification to the depositary was a notification to the State, and therefore produced its effects. He could not approve or accept such a fiction.

71. The Drafting Committee should try to find a formula which would satisfy both those who favoured that fiction and those who, like the Chairman and himself, considered it necessary to separate the two aspects of the matter.

72. He personally thought that a notification to the depositary produced no immediate direct effect unless the treaty so provided.

73. Mr. TSURUOKA said that the difficulty was to decide when and how a notification produced its effects and what those effects were vis-à-vis the State for which it was intended. Since international custom was not clear on the point, the Commission ought not to hesitate to introduce a minor innovation to deal with it.

74. The CHAIRMAN suggested that the Commission refer article 29 (*bis*) to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[7]

[7] For resumption of discussion, see 885th meeting, paras. 2-54.

ARTICLE 30 (Validity and continuance in force of treaties) [39]

[39]

Article 30

Validity and continuance in force of treaties

1. The invalidity of a treaty may be established only as a result of the application of the present articles.

2. A treaty may be terminated or denounced or withdrawn from by a party only as a result of the application of the terms of the treaty or of the present articles. The same rule applies to suspension of the operation of a treaty.

75. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee proposed a new text for paragraph 1 of article 30 which read:

" 1. The validity of a treaty may be impeached only through the application of the present articles. A treaty the invalidity of which is established under the present articles is void. "

Paragraph 2 remained as adopted at the second part of the seventeenth session.

76. Paragraph 1 had gone through three stages. The first had been the single paragraph of article 30, on the presumption as to the validity, continuance in force and operation of a treaty, adopted by the Commission at its fifteenth session in 1963.[8] When the article was discussed at the second part of the seventeenth session, there had been some objection to its formulation in the form of a presumption and, as a result, the Commission had adopted article 30, on the validity and continuance in force of treaties, in two paragraphs.[9]

77. At the present session, during the discussion on article 52 at the 845th and 846th meetings, there had been difficulty in finding a formulation which would cover both the case in which a treaty was void and that in which it was voidable. The Drafting Committee had therefore, on the instructions of the Commission, redrafted paragraph 1. The reference to the establishment of the invalidity of a treaty had been replaced by a reference to the validity of a treaty being " impeached " and a second sentence had been added reading: " A treaty the invalidity of which is established under the present articles is void ".

78. Mr. BARTOŠ asked for a separate vote on paragraph 1.

79. The CHAIRMAN, speaking as a member of the Commission, said that he would abstain from voting on paragraph 1 for the reasons given by him at the second part of the seventeenth session.[10] Speaking as Chairman, he would now put paragraph 1 to the vote.

Paragraph 1 was adopted by 17 votes to none, with 1 abstention.

80. The CHAIRMAN said that as the Commission had already adopted paragraph 2 at the second part of the seventeenth session, he would now put article 30 as a whole to the vote.

Article 30 as a whole was adopted by 18 votes to none.[11]

ARTICLE 35 (Coercion of a representative of the State) [48]

81. Mr. BRIGGS, Chairman of the Drafting Committee, said that the Drafting Committee had proposed a new text for article 35 which read:

" 1. The expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him personally shall be without any legal effect.

" 2. The same rule applies if the expression of a State's consent to be bound has been procured through the corruption of its representative ".

Paragraph 1 was the single paragraph adopted by the Commission at the second part of the seventeenth session as article 35.[12]

82. Paragraph 2 had been prepared by the Special Rapporteur and submitted to the Drafting Committee at the Commission's request to cover the case of corruption of a representative. The Drafting Committee had been evenly divided on the desirability of including paragraph 2 and had decided to refer the matter to the Commission for decision.

83. Sir Humphrey WALDOCK, Special Rapporteur, said that paragraph 2 did not represent his own proposal; he had prepared it on the Commission's instructions. At the last session, some members had pointed out that corruption could be as material as fraud in the context of invalidity. Some members had felt that the matter was already covered by the notion of fraud but others had felt that cases of corruption came closer to those of coercion of a representative.

84. Mr. JIMÉNEZ de ARÉCHAGA said that if paragraph 2 were accepted, the Commission would be introducing on second reading, without any suggestion from a government or any other source, the entirely novel idea of a new defect of consent, that of corruption, which would thus be added to the three traditional defects of consent: fraud, error and coercion. Moreover, under paragraph 2, corruption would render the treaty void *ab initio* instead of making it merely voidable, as in the cases of fraud and error.

85. He had been unable to find any precedent at all in State practice which admitted the invalidity of a treaty on grounds of corruption. That absence of State practice was not due to any lack of examples of corruption. On the contrary, the biographies of many prominent nineteenth century statesman and diplomats proved conclusively that the practice was widespread. However, there had never been an instance of a treaty being regarded as void, or even voidable, on grounds of corruption. It was even more significant that not a single writer on the law of treaties had referred to that supposed additional defect of consent.

86. Attention had been drawn to certain precedents of nullity of arbitral awards on grounds of corruption, but

[8] *Yearbook of the International Law Commission, 1963*, vol. II, p. 189.

[9] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 841st meeting, paras. 21-41.

[10] *Ibid.*, 840th meeting, paras. 85-88, and 841st meeting, paras. 26 and 27.

[11] For further discussion of article 30, see 888th meeting, paras. 28-61, and 889th meeting, paras. 1-37. See also 890th meeting, paras. 1-17.

[12] *Yearbook of the International Law Commission, 1966*, vol. I, part I, 840th meeting, paras. 45-83.

there was a wide difference between the situation of an umpire or third arbitrator and that of a state representative; an umpire was selected jointly by both States parties to the dispute, while a State representative was selected, appointed and instructed exclusively by his own government. If the representative allowed himself to be corrupted, there was always on the part of his own State a *culpa in eligendo* or a *culpa in vigilando*.

87. The proposed paragraph 2 was also very loose as to the content of the rule. Corruption would naturally cover bribery, but there were many other ways of obtaining the goodwill of a representative. How would the dividing line be drawn between corruption and admissible courtesy? It might be suggested, on the analogy of private law, that the deciding factor was whether there had been sufficiently strong inducement to procure consent to a treaty which would not otherwise have been given. But although the objective fact of inducement might be proved, it was very difficult to establish the subjective element of whether the inducement actually procured a consent which would not otherwise have been given. A party interested in getting rid of treaty obligations could allege that certain courtesies and favours extended to its representative were the factors which determined his consent and the representative might, out of patriotism or for other reasons, be prepared to support that allegation with his own testimony. It would endeanger the stability and security of international relations to open the door to that type of allegation. If the statement of the representative himself was not to be regarded as decisive in the matter, how would a court or arbitrator determine whether the inducements received had been strong enough to procure consent? That point could not be decided by reference to the treaty itself, because to do so would introduce the concept of *lésion* as vitiating consent, a concept which the Commission had very properly set aside in 1964.

88. He failed to see the relationship between coercion and corruption that could justify covering the two in a single article. Coercion suppressed the freedom of consent, while corruption, like error and fraud, affected the basis of fact which determined a freely given consent.

89. Corruption itself naturally deserved condemnation but he was concerned at the damaging effect which paragraph 2 might have with respect to the draft articles, which had already been criticized as affecting to some extent the security and stability of international transactions because of the very detailed enumeration they contained of the grounds of invalidity and termination.

90. The most serious defect in the proposed paragraph 2, however, resulted from adding it to the article concerning coercion, instead of leaving the matter to be regulated by the provisions of article 33 on the subject of fraud. All legal systems considered that, while an agreement obtained by coercion was void regardless of the agent who had employed the coercion, an agreement obtained by fraud was voidable when, and only when, the other contracting party was responsible for the fraud. By linking corruption with coercion, the Commission would be departing from that time-honoured principle of law; under paragraph 2, the question of the agent of corruption was immaterial.

91. In fact, there was a very important reason for confining invalidity to those cases in which the agent responsible for the fraud or the corruption was the other contracting party. Whereas violence was a notorious and obvious fact, that was not true of fraud, or of corruption which was one form of fraud. Under the proposed paragraph 2, even if a contracting State was entirely innocent and in fact unaware of the corruption, the treaty into which it had entered might become void as soon as it was revealed that there had been some action by an independent source which was alleged to constitute a form of corruption; that source might be a private company interested in a particular provision of the treaty, or even a third State which might have an interest in the treaty becoming void.

92. The most serious forms of corruption, namely, those in which the other contracting State had itself been guilty of corrupting the representative, were already covered by article 33. Under that article, a State which had been induced to conclude a treaty by the fraudulent conduct of the other contracting State could invoke the fraud as invalidating its consent, and the corruption or bribery of a foreign representative undoubtedly constituted most serious fraudulent conduct. If the matter were left to be governed by article 33, the treaty would not be void *ab initio* but would be voidable at the option of the State which had been the victim of the fraudulent conduct on the part of the other contracting State, and not merely of some third party.

93. The term of article 46 on the separability of treaty provisions also made it advisable to deal with the problem of corruption through the article on fraud, and not by means of a new paragraph in article 35. Separability was admitted in cases of fraud but not in the case of coercion. If paragraph 2 were left in article 35, there would be no separability in cases of corruption, with the absurd result that a long and important treaty negotiated in good faith could become void *ab initio* and be deprived of all legal effect merely because one of the representatives of a State had been induced to accept a minor provision of the treaty by a gift received from a private company interested in that particular provision. It was easy to see all the dangers of abuse that such a possibility could create.

The meeting rose at 1.5 p.m.

863rd MEETING

Friday, 3 June 1966, at 10 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: 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. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock

---